BOMBAY HIGH COURT

State

Vs.

Narayandas Mangilal Dayame

Criminal Appeal No. 1104 of 1956

(Chagla, C.J. and S.T. Desai and K.T. Desai, JJ.)

03.07.1957

JUDGMENT

Chagla C.J.

1. This Full Bench was constituted to consider the constitutionality of certain provisions of the Bombay Prevention of Hindu Bigamous Marriages Act, which is Act 25 of 1946 and the question arises in the following circumstances. The accused in this case was married in Bombay in 1948. On 16th of May, 1955 he married a second wife at Bikaner. On 5th July 1955 his first wife lodged a complaint with the First Class Judicial Magistrate at Sholapur. The learned Magistrate held that inasmuch as the prosecution was launched after the Act 25 of 1946 was repealed by the Central Act 25 of 1955 which came into force on 18th May 1955, the accused was entitled to an order of acquittal. Against the order of acquittal, the State of Bombay came in appeal in this Court and the matter came before Mr. Justice Shah and Mr. Justice Palnitkar and these learned Judges felt considerable doubt as to whether *Radhabai Mohandas v. Bombay State*[1], had been correctly decided, and therefore, they referred the question as to the validity of the Act to the extent that it applies to marriages contracted outside the State of Bombay to a Full Bench.

2. Now, turning to the provisions of the Act with which we are concerned, Section 3 defines a bigamous marriage and the definition is the ordinary definition of what a bigamous marriage is. Section 4 provides :

> "Notwithstanding any law, custom or usage to the contrary, a bigamous marriage shall be void,
> (a) if it is contracted in this State after the coming into force of this Act,
> (b) if it is contracted beyond the limits of this State after the coming into force of this Act and either or both the contracting parties to such marriage are domiciled in this State".
> Section 5 which is the penal section provides : "Notwithstanding any law, custom or usage to the contrary, whoever not being a minor contracts a bigamous marriage which is void under Section 4 shall, on conviction, be punishable with imprisonment for a term

which may extend to seven years and shall also be liable

[1]57 Bom LR 827: (AIR 1955 Bom 439)

to fine."

And Section 8 which has also a bearing in this case is a section dealing with jurisdiction which provides:

> "Notwithstanding anything contained in the Code of Criminal Procedure, 5 of 1898, an offence under Section 5 may be tried by any Court of a Presidency Magistrate or a Magistrate of the First Class."

3. Now, before we go to the substantial matter which has necessitated this Full Bench, we might dispose of one or two matters which are not of substance or importance. We are in entire agreement with the view taken by the learned Judges who decided 57 Bom LR 827: (AIR 1955 Bombay 439), that Section 8 is intra vires the State Legislature and it is competent to the State Legislature notwithstanding the provisions of the Code of Criminal Procedure to direct that any offence can be tried by any Court in the State of Bombay. We are also in agreement with the view taken by Mr. Justice Shah and Mr. Justice Palnitkar that the learned Magistrate was obviously in error when he held that although the alleged offence was committed when the Bombay Act was in force, the mere fact that the complaint was filed after the repeal of the Act precluded the State from prosecuting the accused. If the accused is guilty and if he has committed an offence, then the mere fact that prosecution is launched after the repeal of the Act which constituted the offence cannot possibly affect the guilt of the accused or the right of the State to prosecute him or the jurisdiction of the Court to convict him. But the real question that we have to consider is whether in the first place by Section 4 the State Legislature can declare a marriage void which has been contracted outside the State of Bombay and the second question is, which is connected with the first, whether the State Legislature can constitute the contracting of a bigamous marriage outside the State an offence punishable by the Courts set up in the State. Now, it is always desirable, if it is possible, to consider any question in the first instance apart from authority and on principle. Now, in order to decide whether the State Legislature can declare a marriage contracted outside its territorial limits void and constitute it an offence, we must consider what is the competence of the State Legislature under the Constitution. The Act was passed in 1946, and, therefore, we must look to the provisions of the Government of India Act. The competence of the State Legislature is to be found in Section 99 and that provided that a provincial legislature may make laws for the province or any part thereof. In order to decide what laws a provincial Legislature could make, one had to turn to the 7th Schedule of the Act and the topics on which a provincial Legislature could legislate were set out in List 2 which was the provincial Legislative list and in List 3 which was the concurrent list. List III contained subjects which could be legislated upon both by the Central and the Provincial Legislature. Now, the subjects with which we are concerned in this piece of legislation are criminal law and marriage. Criminal law is Entry No. 1 in the Concurrent List and Marriage is Entry No. 6 in the same list. Therefore with regard to Criminal Law and Marriage, both the Provincial and the Central Legislature had concurrent power to legislate. But what is important to note and which is underlying the scheme of the Constitution is that the Central Legislature had overriding powers with regard to subjects in the concurrent list. It may also be pointed out what is well-known to any student of constitutional law, that the device of the concurrent list was peculiar to our

constitution and it was incorporated in order to bring about uniformity with regard to certain laws all over the country. Laws dealing with crime, laws dealing with marriage and divorce and other subjects mentioned in List III could be passed by the different State Legislatures, but it was always open to the Central Legislature to step in and to put on the statute book a law bringing about uniformity all over the country. Now, it is true that when you are dealing with a Legislature and its competence, you must give the widest connotation to the words used conferring jurisdiction and competence upon a Legislature, and we are in agreement with the Government Pleader that when the Government of India Act uses the expression "make laws for the province or any part thereof" these words must receive at our hands the widest connotation. Within the ambit of the lists, in 7th Schedule, the Provincial Legislature was sovereign and it had the widest powers of Legislation. But it is important to bear in mind that the State Legislature had no extra territorial powers. The Central Legislature was given certain extra territorial powers as is apparent from Section 99 (2). Now, under our present Constitution Parliament has been given absolute territorial powers. Therefore, to-day Parliament may enact any extra territorial law. The only limitation on its power is the practicability of the law. If an extra territorial law cannot be enforced, then it is useless to enact it but no one can suggest to-day that a law is void or ultra vires which is passed by the Parliament on the ground of its extra territoriality. But even under the Government of India Act. although limited power of extra territorial Legislation was given to the Central Legislature, as far as the provincial legislature was concerned, it had no extra territorial power at all. Therefore the jurisdiction and the competence of the provincial legislature is circumscribed to this extent that although it can legislate with all the amplitude of power with regard to the subjects mentioned in the lists, annexed to the 7th Schedule, the territorial extent of its jurisdiction is circumscribed by the boundaries of the province. It cannot extend a law beyond those boundaries.

4. Now, the question as to what is the territorial jurisdiction of a legislature has come up very often for consideration by various Courts and the test which has been ordinarily laid down is that there must be a territorial nexus between the subject matter and the State. If the Legislature is dealing with a subject matter, that subject matter must have some connection or relation to the territory with regard to which the legislature can legislate. In the absence of such a territorial nexus, a legislation dealing with a subject matter which is outside the boundaries of the province would be ultra vires the legislature. Now, in this case the subject matter of the legislation is firstly marriage and secondly crime. With regard to marriage, the legislature has attempted to legislate with regard to marriages contracted beyond the limits of the province or the State. If, therefore, the subject matter is marriage, it can only legislate with regard to that marriage which is contracted within the limits of the province or the State. If it legislates with regard to marriages contracted beyond those limits, a territorial nexus has got to be discovered between the State and the marriage contracted outside the limits with regard to which the legislature is attempting to legislate. Now, it is difficult to understand what territorial connection there is between a marriage contracted in Bikaner and the State of Bombay. The legislature solemnly purports to declare a marriage contracted in Bikaner as void. Admittedly this marriage was valid according to the law prevalent in Bikaner. The marriage took place according to that law and the Bombay Legislature by Section 4 declares that that marriage is void with all the consequences of a marriage being void. Now, what is suggested as the territorial nexus is that the law does not apply to all marriages which took place outside the State of Bombay but it only applies to those marriages where one of the contracting parties to the marriage is domiciled in Bombay and the nexus or connection relied upon is the domicile of one of the contracting parties in the State of Bombay.

Before we deal with this nexus, we think it is very necessary to say a few words about the expression "domiciled" used in this Act. Domicile is an expression which has certain implications in International Law. Domicile means residence by choice with the intention of the residence being permanent in a particular country and as Halsbury states in VOL. 6, page 198, Article 242 :"A person's domicile is that country in which he either has or is deemed by law to have his permanent home." Later on in that paragraph :

> "All those persons who have, or whom the law deems to have, their permanent home within the territorial limits of a single system of law are domiciled in the country over which the system extends; and they are domiciled in the whole of that country, although their home may be fixed at a particular spot within it."

Now, in our opinion, it is a total misapprehension of the position in law in our country to talk of a person being domiciled in a province or in a State. A person can only be domiciled in India as a whole. That is the only country that can be considered in the context of the expression "domicile" and the only system of law by which a person is governed in India is the system of law which prevails in the whole country and not any system of law which prevails in any province or State. It is hardly necessary to emphasize that unlike the United States of America, India has a single citizenship. It has a single system of Courts of law and a single judiciary and we do not have in India the problem of duality that often arises in the American Law, the problem which arises because of a federal citizenship and a State citizenship. Therefore, in India we have one citizenship, the citizenship of India. We have one domicile - the domicile in India and we have one legal system - the system that prevails in the whole country. The most that one can say about a person in a State is that he is permanently resident in a particular State. But as Halsbury points out, to which we have just made reference, the mere fact that a man's home may be fixed at a particular spot within the country does not make him domiciled in that spot but makes him domiciled in the whole country, and therefore, whether a man permanently resides in Bombay or Madras or Bengal or anywhere does not make him domiciled in Bombay, Madras or Bengal but makes him domiciled in India; Bombay, Madras and Bengal being particular spots in India as a country.

5. It has been suggested by the Government Pleader that every state can have its own laws and people in the State are subject to those laws, and therefore just as in the United State of America, it can be said in India that a person is domiciled in a particular State because he is governed by the laws of that State. Now, that argument is based upon a complete fallacy. In India the personal law which applies to a Hindu or a Muslim is not based upon domicile. His personal law is not the result of a particular part of India in which he happens to reside. He carries his personal law with him wherever he goes and that personal law is not affected by his residence in any particular part of the country. The personal law is the result of certain precepts in his religion or in his sacred books which apply to him by reason of the fact that he follows a particular religion. It is true, as the Government Pleader points out, that the personal law can be affected or modified by legislation passed by the State Legislature under its powers under the Constitution, for instance, the personal law with regard to marriage can be modified by the State Legislature. But the power to modify the personal law or to pass other laws within its competence does not depend upon the persons being domiciled in the State. The competence of the Legislature is not limited to passing of laws which would only apply to persons domiciled within the State. Any law passed by a State

Legislature can be applied to any person within the State, and therefore the expression 'domicile' has no relevancy whatever in construing the competency of the State Legislature. If the State Legislature is legislating on a topic within its competence , that law can be made applicable to anyone in the State of Bombay whether he is a resident or not or even if he is a foreigner passing through the State of Bombay. Therefore, it is fallacious to suggest that the doctrine of domicile is introduced in our law by reason of the fact that the State or the Provincial Legislature has been given the power to legislate with regard to certain subject-matters within its territorial ambit. It, therefore, seems to us that the expression 'domicile' used in any State or Provincial law is a misnomer and it does not carry with the implications which that expression has when used in the context of International law. It has no more importance or significance than the expression 'permanently resident' and we are glad to know, as pointed out by the Government Pleader, that as far as he is aware the only other Act which contained this expression was the Beggars' Act which now has been amended so as to remove that inappropriate expression and even the Act which we are considering has now been repealed by the Central Act. Therefore, fortunately today there is no law on the Statute book of the Bombay Legislature which has this expression which seems to suggest that the various States in India are independent countries where people may settle down and acquire a domicile. If we are right in what we have just said, then it is clear that the mere fact that the Legislature should seek to apply its law to those whom it chose to call domiciled in the State but which means permanently residents in the State, cannot enlarge the jurisdiction of the Legislature, If the Legislature could bring within its ambit marriages contracted outside the State of Bombay, then there is no reason why it should have confined its application merely to permanent residents. It could equally have applied that law to every person in Bombay who contracted a bigamous marriage outside the State of Bombay. It is said that Section 4(b) applies the Act to persons domiciled in the State who have contracted marriages outside the State in order to constitute a nexus between the State and the person domiciled. Now, it is difficult to understand how when the Legislature is dealing with the subject of marriage, the fact that the person who contracts the marriage is resident in Bombay can constitute a nexus necessary in law to confer jurisdiction or competence upon the Legislature.

6. What we have said about marriage applies even more strongly to the question of crime because in Section 5 after declaring a bigamous marriage void, the Legislature goes on to constitute it an offence. Now, it is well settled and we shall presently refer to the most important authority on the subject that crimes is local and that it is difficult to conceive of a territorial nexus in the case of crime. The fact that the offender lives in a particular territory does not constitute a nexus between the crime and the State. One has only to state the pro-position to realise how untenable it is, namely, that the Bombay State Legislature should legislate and declare that a particular act done outside the State should be a crime and the person committing it should be punished if he resides in the State of Bombay. It is true that there are authorities which go to show that sovereign Legislatures have punished citizens of a country for committing offences outside if. But these are cases which deal with Legislatures which have got extra territorial powers. No one suggests that the Parliament in India cannot punish an Indian citizen who contracts a bigamous marriage outside India, but to suggest that the power which Parliament possesses; is also possessed by the State Legislature and the State Legislature can punish a resident for contracting a bigamous marriage outside its boundaries is to elevate the State Legislature to the same stature as Parliament possesses under the Constitution, because the Government Pleader had to concede that if he was right in his contention, the State Legislature had the power to punish a resident in the State of Bombay for contracting a bigamous marriage

not only in India outside the State boundaries but any where in the world.

7. Now, turning to the decision of Mr. Justice Chainani and Mr. Justice Gokhale, reported in 57 Bom LR 827: (AIR 1955 Bombay 439) with great respect, the whole of that decision is colored by the view taken by the learned Judges that there can be domicile in a State or Province in India and the territorial nexus which has been suggested by these two learned Judges is also based on the fact that domicile in a State in India confers the same powers upon the State Legislature as domicile in an independent country confers upon its Legislature.

8. At p. 833 (of Bom LR): (at p. 443 of AIR), Mr. Justice Chainani, who delivered the Judgment of the Court points out:

> "The Provincial Legislature had power to enact a law with respect of marriage for the whole Province. It could make such laws applicable to all persons residing within its jurisdiction. It could prohibit them from performing a bigamous marriage within the Province. It could also say that no Court or authority in the Province shall recognize such marriage, whether performed within or outside the Province."

So far we might say so with respect, the propositions enunciated are unexceptional. Then the learned Judge goes on to say:

> "It is difficult to see why it could not also require persons domiciled, i.e., having a permanent home in the Province, to obey the law even when they went outside the Province temporarily for the consequences of their actions were likely to arise within the Province." The question that has to be considered is what is the law which the residents of the Province are called upon to obey. If it is a law, the subject-matter of which is constituted outside the Province, then it is not a law which a Province can make. To proceed with the judgment:
> "The object of Section 4(b) is to compel permanent residents of the Province to obey the Provincial law with regard to marriage and to prevent its evasion by the commission of bigamy outside the Province. It is legislation for the welfare and benefit of persons residing in the Province, and consequently a law for the Province within the legislative competence of the Provincial Legislature. The wide powers conferred by the Constitution on a State Legislature should not be interpreted so as to allow its laws to be defeated by the simple expedient of crossing the State boundary and doing the prohibited act on the other side of the border."

9. With respect, it is the constant headache of the State of Bombay in enforcing the prohibition law to find that the residents of Bombay cross the border, have a drink and return to Bombay, without it being possible to take any action against them. If this proposition with respect, was sound, then there would be nothing to prevent the State of Bombay in enforcing the prohibition law against its residents even when they have committed a breach of it outside the State. The answer to the difficulty raised by the learned Judge with regard to enforcing social legislation is simple. It is not open under our Constitution to a State to enforce social legislation outside its

boundaries and if social legislation has to be enforced all over the country, then the proper method of doing it is to approach the Central Government to pass a law if the subject-matter is within the concurrent list. This is exactly what has been done in the case of bigamous marriages. The Bombay law has now been replaced by the Central law and by it to contract a bigamous marriage has become an offence. To suggest, as the learned Judges suggest, that social leislation can be embarked upon by a Provincial Legislature not only within , its own boundaries but outside its boundaries is to confer a jurisdiction and competence upon the Legislature which it certainly does not possess under the Constitution. The fallacy with very great respect, underlying this observation is that the Provincial Legislature has jurisdiction to legislate with regard to its residents although the subject-matter of the legislation is not situated within the Province. In other words, what is suggested, is that although marriage is the subject-matter of the legislation and although marriage is contracted outside the State, the Provincial Legislature can legislate with regard to marriage merely because those who contract the marriages are residents of the State of Bombay. This is a proposition to which we find it very difficult to subscribe.

10. Then the learned Judge refers to the case of *Macleod v. Attorney-General for New South Wales*[2], In our opinion that is the only decision referred to in the judgment which is practically on all fours with the case that we are considering and which has correctly enunciated the proposition of law which should find acceptance at our hands. In that case Macleod had been convicted in the colony of New South Wales for bigamy for having married in the United States while his first wife by legal marriage was living and his conviction was challenged, and in construing the Act, the learned Law Lords pointed out:

> "Their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law."
> and the Lord Chancellor in his judgment observed:
> "All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects Her Majesty and the Imperial Legislature have no power whatever." But the manner in which this decision has been sought to be distinguished is that the record of the case shows that Macleod was not domiciled in the Colony of New South Wales. Now with respect, this distinction has no bearing when we are considering the case of a Provincial or State Legislature. In the international sense, the residents in the State of Bombay are also not domiciled in the State of Bombay and if Macleod was not domiciled in the New South Wales in order to attract the application of the law to him when he committed an offence outside the colony, similarly the residents of Bombay are not domiciled in the State of Bombay so as to attract the application of the law of bigamy when bigamy is committed outside the State of Bombay. There are observations in this judgment to show that although crime is local, the

[2] 1891 AC 455

> Legislature has jurisdiction over her own subjects and that the Legislature can legislate with regard to her subjects. But again the expression 'subjects' is used in relationship to an independent sovereign country. These observations would apply if India were to legislate about Indian citizens committing an offence outside the boundaries of the Indian Union. But they have no application whatsoever when we are dealing with a State or Provincial

Legislature and the Indian citizens residing in that State.

11. The learned Judge then called attention to the case of *Wallace Bros. and Co. Ltd. v. Commr. of Income-tax, Bombay*[3], and also the case of *Broken Hill South Ltd. v. Commissioner of Taxation*[4], Now, these are cases dealing with the law of taxation and the principle of territorial nexus that applies to the law of taxation can have no application when you are dealing with the law of marriage or law of crime. Also when the learned Judge deals with the case of the *State of Bombay v. Chamarbaugwala*[5], he is summoning to his assistance principle of territorial nexus which apply to cases of business which again are very different from the principles that have to be considered when dealing with a case of marriage or crime. Therefore, in our opinion with very great respect, this judgment was erroneously decided because it came to the conclusion that the impugned Act was valid when in Section 4(b) it dealt with marriages contracted beyond the limits of the Province or the Slate.

12. The other case to which our attention has been called by the Government Pleader is the decision of House of Lords. *Brook v. Brook*[6]. In that case A and B British subjects inter-married; B died; A and C being both at the time lawfully domiciled British subjects, went abroad to Denmark, where, by the law, the marriage of a man with the sister of his deceased wife is valid, and were there duly, according to the laws of Denmark, married and the English Court held that the marriage in Denmark was void. Now, under the English law as obtaining at that time, no valid marriage could be contracted between a man and the sister of his deceased wife. This decision is nothing more than an enunciation of the well-known principle of international law that as far as the validity of the marriage is concerned, the law that must be applied is the law domicilis and as far as the form of the marriage is concerned, the law that must be applied is lex loci contract us. It is clear that this principle of international law cannot be applied to our national polity and what must not be forgotten or overlooked is that a Province or a State in India is not an international personality. It is only when we are dealing with two international personalities that the question of conflict of laws arises and the principle of international law has to be applied.

13. Our attention was drawn by the Government Pleader to the observations in the judgment at pp. 212, 213, where various decisions have been referred to where the same principle was applied as between England and Scotland. Now, in order to understand these decisions, one must look to the background of the history of England and Scotland. Although there was union between England and Scotland far back in history, England and Scotland have always maintained separate systems of law and therefore from that point of view it may be possible to look upon England and Scotland as constituting independent countries for the purpose of divorce, and Scotland by its own system of law has

[3]50 Bom LR 482: (AIR 1948 PC 118)

[4](1936-37) 56 CLR 337

[5]57 Bom LR 288: (AIR 1956 Bom1)

[6](1861) 9 HLC 193

recognized marriages, which England has not and vice versa and there has been the same difference with regard to the system of divorce. But it would be entirely incorrect to suggest that the relationship between the different States in India or relationship between the States and the Union is the same as the relationship between Scotland and England. There is neither that historical background in India nor does our Constitution recognize any separate system of law as far as the different States are concerned.

14. In our opinion, therefore, the accused could not be prosecuted under the provisions of Section

4(b) inasmuch as we are of opinion that that sub-section is ultra vires of the Bombay Legislature. The learned Magistrate was, therefore, right in acquitting him though not for the reasons stated by him. In the result the appeal preferred by the State will be dismissed.
Appeal dismissed.