Madhaorao Phalke vs The State Of Madhya Bharat on 3 October, 1960

Equivalent citations: 1961 AIR 298, 1961 SCR (1) 957, AIR 1961 SUPREME COURT 298

Author: P.B. Gajendragadkar

Bench: P.B. Gajendragadkar, Bhuvneshwar P. Sinha, J.L. Kapur, K.N. Wanchoo

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           PETITIONER:
MADHAORAO PHALKE

        Vs.

RESPONDENT:
THE STATE OF MADHYA BHARAT

DATE OF JUDGMENT:
03/10/1960

BENCH:
GAJENDRAGADKAR, P.B.
BENCH:
GAJENDRAGADKAR, P.B.
SINHA, BHUVNESHWAR P.(CJ)
KAPUR, J.L.
SUBBARAO, K.
WANCHOO, K.N.

CITATION:
 1961 AIR  298            1961 SCR  (1) 957
 CITATOR INFO :
 R          1962 SC 141  (7)
 R          1962 SC1288  (8,23)
 RF         1963 SC 332  (11)
 D          1963 SC 953  (12)
 R          1963 SC1638  (32)
 D          1964 SC 888  (5)
 R          1964 SC1043  (56,96,130,132,160)
 R          1964 SC1793  (11,12,13)
 R          1964 SC1903  (18)
 R          1966 SC 704  (4)
 RF         1968 SC1053  (2)
 R          1971 SC 530  (54,329)
 RF         1975 SC2299  (581)
 RF         1977 SC1361  (192)
 D          1987 SC  82  (11)
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ACT:
Hereditary Military Pension--Bachat--Right to receive guaranteed by Kalambandis issued by Rulers of Gwalior--If can be terminated by executive order--Kalambandis: if existing law--Kalambandis of 1912 and 1935 (Gwalior)--Constitution of India, Art. 372.

HEADNOTE:
The appellant was the recipient of a hereditary military pension called Bachat granted by the Rulers of Gwalior to his ancestors in recognition of military service. The right to receive the said pension was recognised by the Kalambandis of 1912 and 1935 issued by the said Rulers. When Gwalior integrated with Indore and Malwa in 1948 to form a union, s. 4 Of
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Act No. 1 of 1948 provided for the continuance of all laws, ordinances, rules and regulations having the force of law in the covenanting states. After the formation of the State of Madhya Bharat under the Constitution, the Government of that State, which remained liable to pay the said pension, by an executive order, terminated the right. The appellant moved the High Court against the said order under Art. 226 of the Constitution. and his case was that the right to receive the said pension, having been statutorily recognised by the State of Gwalior, could not be extinguished by an executive order. The Full Bench of the High Court held against him. The question was whether the Kalambandis of 1912 and 1935, on which the appellant rested his case, were existing law within the meaning of Art. 372 Of the Constitution.
Held, that the question must be answered in the affirmative, No distinction could be made between an executive order and a legislative command made by an absolute monarch, such as the Rulers of the Indian State of Gwalior were, since they have the same force of law, passed in whichever capacity they may be, and govern the rights of the subjects.
Ameer-un-Nissa Begum v. Mahboob Begum, A.I.R. 955 S.C. 352 and Director of Endowments, Government of Hyderabad v. Akram Ali, A.I.R. 1956 S.C. 6o, referred to.
Consequently, even supposing that the Kalambandis did not amount to a quanun or law technically so called, they would nevertheless be orders or regulations having the force of law in the State at the material time and would be existing law within the meaning of Art. 372 Of the Constitution.
Edward Mills Co., Ltd., Beawar v. State of Ajmer, [1955] 1 S.C.R. 735, referred to.
The contents of the two Kalambandis and the character of their provisions clearly show that they could not be mere

administrative orders, and if not statutes, must, in any event, be rules and regulations having the force of law.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 84 of 1954. Appeal from the judgment and order dated September 1, 1954, of the former Madhya Bharat High Court in Civil Misc. Case No. 11 of 1952.

B. Sen, P. V. Sahasrabudhe, B. K. B. Naidu and I. N. Shroff, for the appellant.

M. Adhikari, Advocate-General for the State of Madhya Pradesh, H. J. Umrigar and R. H. Dhebar, for the respondents.

1960. October 3. The following Judgment of the Court was delivered by GAJENDERGADKAR. J.-The question of law which arises for our decision in this appeal is whether the Kalambandis under which the appellant's right to receive Rs. 21/8/- per month by way of Bachat (balance) is guaranteed constitute an existing law within the meaning of Art. 372 of the Constitution. This question arises in this way. The appellant Madhaorao Phalke describes himself as an Ekkan and claims that as such Ekkan he and his ancestors have been receiving the monthly payment of Rs. 21/8/-from the State of Madhya Bharat. It appears that the appellant's ancestors had accompanied the Scindias to Gwalior from Maharashtra about 200 years ago, and had rendered military service in conquering the territory of Gwalior. In recognition of this service the appellant's ancestors were granted a fixed amount of money per month, and this amount has been received by the appellant's family for several generations past. The right to receive this amount has been' recognised by the Rulers of Gwalior in several statutes, orders, rules or regulations having the force of statutes; amongst them are the Kalambandis of 1912 and 1935. On April 18, 1952, the Government of Madhya Bharat issued an executive order terminating the said payment to the appellant; that is why the appellant had to file the present petition in the High Court of Madhya Bharat against the State of Madhya Bharat and the Government of Madhya Bharat, Revenue Department, respondents 1 and 2 respectively under Art. 226 of the Constitution. In this petition the appellant bad prayed for an order that a writ in the nature of mandamus, or in the alternative an appropriate direction or order be issued calling upon the respondents to forbear from giving effect to the said executive order. In his petition the appellant challenged the said order on two grounds. It was urged that since the appellant's right to receive the specified amount had been statutorily recognised by the State of Gwalior it was not open to respondent 1 to extinguish that right merely by an executive order. In the alternative it was contended that the right to receive the said amount from month to month was property to which the appellant was entitled, and he could not be divested of that property without the payment of compensation under Art. 31 of the Constitution.

These pleas were denied by the respondents. The respondents' case was that the payment made to the appellant's ancestors and to him was by way of emoluments for military service and did not constitute property, and that the Kalambandis on which the appellant relied did not constitute an

existing law under Art. 372. It appears that along with the appellant ten other persons had filed similar petitions making prayers for similar writs or orders against the respondents and their pleas were similarly challenged by the respondents. All the eleven petitions were accordingly tried together.

These petitions were heard by a Full Bench of the Madhya Bharat High Court consisting of Shinde, C.J. and Dixit and Newaskar, JJ. All the three learned judges agreed in holding that the Kalambandis on which the petitioners had rested their case were orders issued by the Ruler for the purpose of reorganising the scheme of administration and that they did not amount to law or regulation having the force of law. Dixit, J., gave a specific reason in support of his conclusion that the Kalambandis did not amount to a statute. He held that in Gwalior there was a well recognised law-making machinery or custom, and since the Kalambandis in question did not satisfy the requirements of the forms and solemnities specified in that behalf they could not claim the status of a statute. In the result all the petitions were dismissed. The appellant then applied for and obtained a certificate from the High Court under Art. 133(1)(c) of the Constitution, and it is with the said certificate that he has come to this Court in the present appeal.

When this appeal was heard by this Court on March 31, 1958, it was conceded by both the parties that it would be better that they should be allowed to adduce additional evidence before the question of law which was undoubtedly one of general importance, was decided by this Court. In fact an application' bad been made by the appellant before this Court for leave to adduce additional evidence and no serious objection was raised to the additional evidence by the respondents. Therefore, by consent the matter was sent back to the High Court with a direction that parties should be allowed to adduce additional evidence and the High Court should record its finding on the issue remitted to it in the light of the said additional evidence. The issue remitted to the High Court was whether the Kalambandis in question were statutes or regulations having the force of statutes in the State of Gwalior at the material time or were they merely administrative orders.

After remand parties have led evidence before the' High Court, and the High Court has recorded its finding on the issue remitted to it. Abdul Hakim Khan and Newaskar, JJ., have found in favour of the appellant and have held that the Kalambandis in question were regulations having the force of law in the State of Gwalior at the material time; Krishnan, J., has taken a contrary view. After the finding of the High Court was thus recorded papers in the case have been submitted to this Court, and the appeal has now come before us for final disposal; and so we are called upon to decide the short question of law set out by us at the commencement of this judgment.

At the outset it may be relevant to refer very briefly to the historical background of the claim made by the appellant and the other petitioners in all these matters. We have already stated that the appellant claims to be an Ekkan. These Ekkans, it appears, were a class of horsemen who formed part of the Peshwa's Cavalry along with Silledars. They were single volunteers and they brought with them their own horses and accoutrements. The other petitioners claimed to be Silledars whose ancestors formed part of the Maharatta Cavalry. These Silledars were troopers who brought in their own horses and weapons. They brought bodies of troops armed and equipped at their own expense. They were also known as Paigadars. It also appears that later on an account was made as to the

expenses which the Ekkan may have to bear for the maintenance of his horse, and from the total amount payable to him the amount of expenses thus determined was deducted, and that presumably left the balance Rs. 21/8/- which was paid to him as Bachat or balance. Broadly stated this appears to be the position on the pleadings of the parties in the present proceedings. The question which calls for our decision is whether the right to receive this amount is a statutory right; in other words, whether the Kalambandis on which the right is based were rules or regulations having the force of law in the St-ate of Gwalior?

The two Kalambandis in question were issued in 1912 A. D. and 1935 A. D. respectively. The first Kalambandi was issued by the Ruler Sir Madhavrao himself, whereas the second was issued by the Council which was then in charge of the administration of the State subsequent to the death of Sir Madhavrao which took place in 1925. It is well-known that the States of Gwalior, Indore and Malwa integrated and formed a Union in 1948. After the Union was thus formed Act No. 1 of 1948 was passed for the purpose of taking over the administration of the covenanting States. Section 4 of this Act provided for the application of local laws, and as a result all laws, ordinances, rules, regulations, etc., having the force of law in any of the covenanting States were to continue to remain in force until they were repealed or amended according to law. Thus the existing laws which were in force in the State of Gwalior continued even after the union ; and according to the appellant the operation of the Kalambandis continued under s. 4.

On September 19, 1950, a notification was issued by the Commissioner, Jagir Inams, Court of Wards, Madhya Bharat, declaring that in the case of army personnel described in paragraph 1, question of mutation, adoption. etc., arising in regard to the said personnel would be dealt with by the office of the Commissioner, and Bachat and other amounts payable to the said personnel would be distributed by the same office. Members of the said army, personnel were accordingly asked to claim payment in respect of their Nemnook from the office of the Commissioner. Subsequently, under the new set up which came into existence after the formation of Madhya Bharat the armies of the covenanting States were amalgamated and reorganised by the Government of India so as to fit them into the overall plans of the defence of the country. The report of the general administration of Madhya Bharat shows how this reorganisation was carried out. As a result of this reorganisation the expenditure on account of hereditary military pensions of Bachat to Silledars and Ekkans was agreed to be charged to the Muafi department of the Madhya Bharat Government; that is how the Madhya Bharat Government continued to be liable to pay the amount to the appellant from mouth to month.

Then followed the impugned order passed by respondent 1 on April 18, 1952. Clauses 1 to 4 of this order made provision for the continued payment to the persons specified thereunder. Clause 5, however, declared that the distribution of amounts to Silledars and Ekkans not covered by cls. 1 to 4 would be absolutely stopped from May 1, 1952. It is this order which has given rise to the present proceedings.

Before dealing with the question as to whether the Kalambandis constitute an existing law or not it may be useful to refer very briefly to the constitutional position in regard to the Government of Gwalior at the material time. It appears that in 1905 Sir Madhavrao Scindia set up an advisory

council known as Majlis Khas. He was himself the President of this Council and assumed the title of Mir Majlis. This Council was constituted as a sort of law- making body, but in s. 5 of the Quaid Majlis Khas it was expressly provided that the acceptance or rejection of any recommendations made by the majority of the Council would depend entirely on the discretion of the President. This was followed in 1916 by the establishment of Majlis Quanun for the purpose of making laws for the State. With this body were associated some nominated public citizens. Section 4(a) of the Quaid Majlis Quanun, however, made it clear that its function was merely to advise His Highness on such matters as would be placed before it, and s. 4(b) left it to the absolute discretion of His Highness either to accept or not the recommendations of the body. In 1918 the Constitutional Manual describing the functions of the members of the Ruler's Cabinet was pub- lished and Majlis Am which was the House of the People was established. It consisted mainly of nominated members though some members elected from recognised public bodies also were associated with it. According to s. 31(6) of the relevant law creating this body, deliberations of the body were ultimately to be submitted to His Highness for his final orders, and it was his orders which alone could be executed. It would thus be seen that though Sir Madhavrao was gradually taking steps to associate the public with the government of the State and with that object he was establishing institutions consistent with the democratic form of rule, he had maintained all his powers as a sovereign with himself and had not delegated any of his powers in favour of any of the said bodies. In other words, despite the creation of these bodies the Maharaja continued to be an absolute monarch in whom were vested the supreme power of the legislature, the executive and the judiciary. In dealing with the question as to whether the orders issued by such an absolute monarch amount to a law or regulation having the force of law, or whether they constitute merely administrative orders, it is important to bear in mind that the distinction between executive orders and legislative commands is likely to be merely academic where the Ruler is the source of all power. There was no constitutional limi- tation upon the authority of the Ruler to act in any capacity he liked; he would be the supreme legislature, the supreme judiciary and the supreme head of the executive, and all his orders, however issued, would have the force of law and would govern and regulate the affairs of the State including the rights of its citizens. In Ameer-un-Nissa Begum v. Mahboob Begum (1), this Court had to deal with the effect of a Firman issued by the Nizam, and it observed that so long as the particular Firman issued by the Nizam held the field that alone would govern and regulate the rights of the parties concerned though it would be annulled or modified by a later Firman at any time that the Nizam willed. What was held about the Firman issued by the Nizam would be equally true about all effective orders issued by the Ruler of Gwalior (Vide also:

Director of Endowments, Government of Hyderabad v. Akram Ali (2)).

It is also clear that an order issued by an absolute monarch in an Indian State which had the force of law would amount to an existing law under Art. 372 of the Constitution. Article 372 provides for the continuance in force of the existing laws which were in force in the territories of India immediately before the commencement of the Constitution, and Art. 366(10) defines an existing law, inter alia, as meaning any law, ordinance, order, rule or regulation passed or made before the commencement of the Constitution by any person having a power to make such law, ordinance, order, rule or regulation. In Edward Mills Co., Ltd., Beawar v. State of Ajmer (3), this Court has held that " there is not any material difference between the expressions 'existing law.' and the 'law in force'. The

definition of an, existing law in Art. 366(10) as well as the definition of an Indian law contained in s. 3(29) of the General Clauses Act make this position clear ". Therefore, even if it is held that the Kalambandis in question did not amount to a quanun or law technically so called, they would nevertheless be orders or regulations which had the force of law in the State of Gwalior at the material time, and would be saved under Art. 372. The question which then arises is whether these Kalambandis were regulations having the force of law at the material time.

In support of the conclusion that they are merely administrative orders it is urged by the learned (1) A.I.R. 1955 S.C. 352. (2) A.I.R. 1956 S.C. 60. (3) [1955] 1 S.C.R. 735.

Advocate-General of Madhya Pradesh that Sir Madhavrao was an enlightened Ruler and was fully conscious of the distinction between executive orders and statutory provisions, and so if the Kalambandis in question did not take the form of a quanun or a statute it would be safe to infer that they were intended to operate merely as executive orders. In support of this argument reliance has been placed on the obser- vations made by Sir Madhavrao, in Volume 7 which deals with Durbar Policy. " Broadly speaking says Sir Madhavrao, " all orders and directions issued by the Ruler may be regarded as laws. In the technical sense, however, the latter term signified only commands whose fulfilment is accompanied by the conferment of a particular concession and whose con- travention spells punishment or the extinguishment of a right. Orders issued for the purpose of regulating the working of a department generally take the form of Rules, Manual or Kalambandi and are superscribed as such ". It may be conceded that this statement does make a distinction between laws technically socalled and Rules, Manual or Kalambandi; but it is significant that the very statement on which this argument is founded ends with the observation that the differentiation in the Dames is merely intended to indicate the group to which a given set of orders be. longs. In other words, the name given to the order would not be decisive; its character, its content and its purpose must be independently considered.

Then it is urged that the Kalambandis in question were not published in the Government Gazette as other laws are; they were published only in the military gazette, and it is argued that they are not called quanun or laws as they would have been, if they were intended to operate as laws. In this connection our attention was also drawn to certain acts passed in the State of Gwalior which are described as acts or laws. On the other hand, it is clear that the distinction between Kalambandi and quanun was not always strictly observed. In regard to the jurisdiction of the High Court and the functioning of the Civil and Criminal Courts rules were issued and yet they were described as a Manual. There can be no doubt that the rules contained in this Manual which govern the jurisdiction, powers and authority of Courts in the State of Gwalior had the force of law, and yet they were included in a Manual which, judging merely by the description of the document, can be distinguished from a quanun. Similarly it appears from circulars collected in a book called Majmua Circulars (1971 to 1993 Samvat) that the notification issued under the said Circular had the effect of modifying the provisions of the Customs Law. There is also another instance that amendment of statutory provisions was made by Sir Madhavrao by giving directions in that behalf though such directions did not take the form of a quanun. In fact in s. 39 of the Durbar Policy, Volume 3, Sir Madhavrao has described the Kalambandi of Samvat 1969 as quayada. To the same effect is the Durbar Order No. 5 dated April 14, 1923. It would thus be clear that the decision of the question

with which we are concerned cannot rest merely on the description of the order. It would not be possible to accept the argument urged by the learned Advocate-General that because the Kalambandi is not described as a quanun or was not published in the government gazette therefore it should be treated as an executive order. The words used in describing the several orders issued by the Ruler can afford no material assistance in determining their character. In this connection it is necessary to recall that all orders issued by the absolute monarch had the force of law. Therefore it would be necessary to consider the character of the orders contained in these Kalambandis. The first Kalambandi which was issued in 1912 consists of 54 clauses. No doubt it begins by saying that it has been issued for the purpose of arranging for the administration of the department of irregular unit of Shiledari, but the nature of the provisions contained in this document unambiguouly impresses upon it the character of a statute or a regulation having the force of a statute. It recognises and confers hereditary rights, it provides for the adoption of a son by the widow of a deceased silledar subject to the approval of the State; it also provides for the maintenance of widows out of funds specially set apart for that purpose; it contemplates the offering of a substitute when a Silledar has become old or has other. Wise become unfit to render service; it makes detailed provisions as to mutation of names after the death of a Silledar, and it also directs that the Asami being for the Shiledari service it cannot be mortgaged for a debt of any banker, and it further provides that if a decree is passed against a Silledar and the decreeholder seeks to proceed against the amount payable to him the execution has to be carried out in accordance with the manner and subject to the limitations prescribed in that behalf. It would thus be seen that the detailed provisions made by this Kalambandi deal with several aspects of the amount payable to the recipient, and considered as a whole it cannot be treated as an administrative order issued merely for the purpose of regulating the working of the administration of the department of irregular forces. The second order which was issued by the Council is substantially on the same lines as the first order. It consists of 39 clauses. Its preamble shows that as per orders of the Durbar the department of irregulars was governed by the regulations issued in that behalf in 1912 A.D., and it adds that " because the aforesaid Bedas have now been amalgamated with the regular army and are made subject to all the laws that are in force in the Gwalior army, the Regulations of 1912 are repealed and orders are issued as under ". This clearly reads like a statutory provision whereby the earlier relevant statute is repealed. The scheme of this order follows the pattern of the earlier order. It provides for succession, for the regulation of adoption, for the mutation and heirship enquiry, for a substitute being given in case the Silledar is unable to work himself, prescribes a disqualification from service where the Ismdar is convicted, and imposes a similar limitation on execution against the amount of the Asami. Clause 22 of this order says that in case there is no legal heir or the widow of the deceased Ismdar his name will be struck off and the Asami will at once be given to other person. In no case will the Asami be abolished. In our opinion,. having regard to the contents of the two orders and the character of the provisions made by them in such a detailed manner it is difficult to distinguish them from statutes or laws; in any event they must be treated as rules or regulations having the force of(law. That is the finding recorded by Abdul Hakim Khan and Newaskar, JJ., and we think that the said finding is correct.

After the finding was recorded and submitted to this Court the appellant has made one more application for permission to lead another piece of additional evidence. This evidence consists of a book named " Guide Book Kalambandi " of October 1, 1899. It has been printed, published and

issued under the signature of the Ruler, and it relates among other things to the administration of the Revenue Department of the State of Gwalior; it is written in Hindi. It contains a preface and introduction. According to the appellant the relevant portions of this document would clearly show that Kalambandi was treated as indistinguishable from quanun or law. This position in not seriously disputed by the respondents; but they contend that the appellant should not be allowed any further opportunity to lead additional evidence because by the order of remand he was given such an opportunity and he should have produced all the evidence on which he wanted to rely before the High Court. There is some force in this contention ; on the other hand it is clear that publications like the one on which the appellant now seeks to rely would be primarily within the knowledge of respondent I and respondent I should have produced all relevant and material documents to assist the High Court in determaining the issue sent to it after remand. However, in view of the conclusion which we have reached on the material that has already been adduced on the record we do not think it necessary to consider whether the additional evidence should be allowed to be adduced.

It is not disputed that if the Kalambandis on which the appellant's right is based are rules or regulations having the force of law the impugned executive order issued by respondent 1 would be invalid. The right guaranteed to the appellant by an existing law cannot be extinguished by the issue of an executive order. In fact on this point there has never been a dispute between the parties in the present proceedings. That is why the only point Of controversy between the parties was whether the Kalambandis in question amount to an existing law or not. Since we have answered this question in favour of the appellant we must allow the appeal, set aside the order passed by the High Court and direct that a proper writ or order should be issued in favour of the appellant as prayed for by him. The appellant would be entitled to his costs throughout.

Appeal allowed.