Smt. Bimla Devi vs Chaturvedi And Ors. on 12 March, 1953

Equivalent citations: AIR1953ALL613, AIR 1953 ALLAHABAD 613

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Agarwala, J.

1. Shrimati Simla Devi, aged 27 years, wife of Bagh Shah, caste Khatri, resident of Deoband Town, District Saharanpur applies under Article 226 of the Constitution of India and prays that a writ in the nature of Habeas Corpus be issued directing the police authorities, arrayed as respondents 1 to 3 to remove the police guard from the petitioner's house and not to interfere with her liberty and to prevent them from arresting or removing the petitioner to any camp or in any way interfere in her liberty of movement.

2. The facts of the case are few. The petitioner is a citizen of India. She was formerly a Mohammedan and Known as Razia Khatoon: She was married to one Bidayatullah Butt, Assistant Station Master Nagal, District Saharanpur, who migrated to Pakistan in the disturbances of 1947. The applicant was left behind in India. According to her even before her husband left for Pakistan, he had divorced her and married another lady and in those circumstances, she had sought the protection of one Bagh Shah Khatri, a cane contractor at Nagal station and after embracing the Arya Samajist faith had married him on 15-7-1947 and has since then been living with him. The case for the opposite parties is that the applicant was abducted from Miss Brow's Medical College at Ludhiana in June 1947. The applicant had two issues by her former husband -- a daughter aged 4 years and a son aged 10 months. The son died on December 1947. Some time later Hidayatulla Butt put forward a claim for her recovery but by compromise gave up his claim against the applicant on condition that the daughter was restored to him. Accordingly the daughter was restored to him sometime in December 1950. This was all done through private negotiations. Then, though Hidayat Ullah was satisfied with the position, the applicant's other relatives pressed for her restoration to them.

3. A year later in December 1951, Sri Chaturvedi Sub-Inspector D. I. S. (Opp. party no. 1) arrested the applicant at her house & wanted to remove her to a detention camp, but as she was in a highly advanced state of pregnancy she was allowed to remain at her house but a police guard was posted at her house und she was not allowed to move out. The District Magistrate (opp. party 2) refused her application for bail. She then moved the present application under Article 226 of the Constitution for the reliefs already stated.

4. The applicant's detention in her house & the restraint upon her liberty are sought to be justified on behalf of the opposite parties under the provisions of the Abducted Persons (Recovery and Restoration) Act, 1949. The applicant's case is that the Act is 'ultra vires' and has become void.

5. In the year 1947 when the British Government decided to transfer power to Indian hands and to create two Dominions to be named as Pakistan and India, there were in the area which was to form the Dominion of Pakistan and in East Punjab and certain districts of Uttar Pradesh wide spread communal riots in which arson and murders were committed, property was looted and females and children belonging to one community were abducted by the members of the other community. After the two Dominions were set up an agreement was arrived at between them for the restoration, of abducted persons to their former guardians. To give effect to this agreement between Pakistan and India the Abducted Persons (Recovery and Restoration) Act was enacted. This would be clear from the Preamble which recites:

> "Whereas an agreement has been reached between the Government of India and the Government of Pakistan for the recovery and restoration of abducted persons:
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> And whereas it is expedient to provide, in pursuance of the said agreement, for the recovery of abducted persons and for their temporary detention in camps pending restoration to their relatives."

The object of the Act was, therefore, to recover and restore abducted persons to their relatives and to provide for their temporary detention in camps pending restoration. An abducted person is defined in the Act as meaning "a male child under the age of sixteen years or a female of whatever age who is, or immediately before the 1st day of March, 1947, was, a Muslim and who, on or after that day and before the 1st day of January, 1949 has become separated from his or her family and is found to be living with or under the control of any other individual or family, and in the latter case includes a child born to any such female after the said date."

Section 4 authorises certain police officers mentioned in that section to take into custody any person whom he believes to be an abducted person and also authorises him to search without warrant any place where such abducted person, he has reason to believe, resides or is to be found. He is then to deliver or cause such person to be delivered to the custody of the officer in charge of the nearest camp which is established by the Provincial Government for the reception and detention of abducted persons under Section 3. Section 5 empowers the Provincial Government to make regulations for the transfer of abducted persons from one camp to another. Section 7 provides that any officer in charge of such a camp may deliver any abducted person detained in the camp to such other officer or authority as is provided for by the Provincial Government and such officer in his turn may either restore such person to his or her relatives or 'convey such person out of India'. Section 6 provides for the constitution of a tribunal by the Central Government for the purpose of deciding (a) whether a person detained in a camp is or is not an abducted person, (b) whether such person may be restored io his or her relatives or handed over to any other person, (c) whether such a person may be conveyed out of India and (d) whether such a person may be allowed to leave the camp. Section 8 provides that the decision of the tribunal is to be final and the detention order shall

not be called in question in any Court. This provision of course, does not affect the High Court's power to issue writs or orders or directions to the tribunal under Art 226 or 227 of the constitution.

6. The grounds on which the Act has been challenged are:

> (1) that the Dominion Legislature which enacted the Act had no legislative competence to do so, and (2) that the Act has become void because it contravenes Clauses (d), (e) and (g) of Article 19(1) of the Constitution.

7. The impugned Act was passed by the Dominion Parliament under the Government of India Act, 1935. The Dominion Legislature had power to make laws "with respect to" any of the matters enumerated in List I in Schedule 7 Government of India Act and entry 3 of List I mentions "External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India".

As the Preamble of the impugned Act recites, the Act was enacted in order to give effect to an agreement with Pakistan relating to the recovery and restoration of abducted persons. Apparently the subject-matter of the Act falls within the heading "implementing of treaties and agreements with other countries."

But Mr. Shanti Bhushan, learned counsel for the applicant, who has argued the case with great ability, urged that entry No. 3 dealing with the implementing of treaties and agreements with other countries does not refer to an enactment dealing with the subject-matter of a treaty or agreement between India and another country or countries, but deals with the mode or method in which treaties and agreements with other countries shall be implemented. In this connection learned counsel relied upon the words "with respect to" in Section 100 and upon the decision of the Judicial Committee in -- 'Attorney General of Saskatchewan v. Attorney General of Canada', AIR 1949 P. C. 190 (A). In our opinion, this argument has no force.

8. It is well settled that the entries are construed in their broadest sense subject only to the limitation imposed by a similar construction of the entries in the other Lists. It is only when there is a conflict between entries in different Lists and a need arises to attempt a reconciliation between apparently conflicting jurisdictions that an entry in one List may be read as having been used in a modified sense. No question here arises of conflicting jurisdictions. The phrase "implementing of treaties and agreements with other countries" has, therefore, to be read in its broadest senss which the words of the Entry are capable of. Read in this light it appears that the Legislature has power not merely to make rules as to the mode in which treaties and agreements with foreign countries should be regulated but also to make laws on the subject-matters of the treaties and agreements so that they may be given effect to in India. It is obvious that, if such powers were not reserved to the Indian Legislature, then either such treaties or agreements would remain dead letters or in some cases they could only be given effect to after a cumbersome procedure had been gone through, viz. by having all the Provincial Legislatures pass the necessary enactments in cases in which the subject-matter of the treaties and agreements fell within the jurisdiction of the Provincial Legislature, or by having the enactments passed by the Central Legislature as well as the Provincial Legislatures where the

subject-matter fell within the jurisdictions of both. But lest the Central Legislature may unduly affect the Provincial autonomy of the Province or of an Acceding State, Section 106, Government of India Act provided that "The Dominion Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to make any law for any Province except with the previous consent of the Governor, or for an Acceding state except with the previous consent of the Ruler thereof".

A mere reading of this section would show that what was intended by entry 3 in List I was not merely the power to make rules as to how treaties and agreements with foreign countries shall be implemented but also the power to give effect to the subject-matter of such treaties and agreements by making laws in respect thereof.

It will be interesting to notice that under the present Constitution Article 253 does away "with the consent of the Governor or the Ruler of an Acceding state" as was provided for in Section 106, Government of India Act. The Article reads:

> "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body".

9. In -- 'A. I. R. 1949 P. C. 190 (A)', the validity of an enactment known as the Farm Security Act 1944, enacted by the Legislature of the Province of Saskatchewan, was in question. The. Act provided for relief to farmers in respect of mortgages or agreements of sale effected by them. It was contended that the Act was within the competence of the Provincial Legislature because it was "in relation to" agriculture in the Province within the meaning of Section 95, British North America Act. Viscount Simon, delivering the opinion of the Judicial Committee, observed:

> "There is a distinction between legislation 'in relation, to' agriculture and legislation which may produce a favourable effect upon the strength and stability of that industry. Consequential effects are not the same thing as legislative subject-matter. It is 'the true nature and character of the legislation' not its ultimate economic results -- that matters -- 'Russell v. Queen', (1882) 7 A. C. 829 at p. 840 (B). Here, what is sought to be statutorily modified is a contract between two parties one of which is an agriculturist but the other of which is a lender of money. However broadly the phrase 'agriculture in the province' may be construed, and whatever advantages to farmers the reshaping of their mortgages or agreements for sale might confer, their Lordships are unable to take the view that this legislation can be regarded as valid on the ground that it is enacted in relation to agriculture",

10. In the present case the true nature and character of the legislation (The Abducted Persons Recovery and Restoration Act) is the implementing of an agreement with Pakistan. The Act does not merely deal with any consequential result of the subject-matter of the agreement between India and

Pakistan but it deals with the subject-matter itself.

11. Entry 17 of List I was also relied upon on behalf of the opposite parties at one stage but later on that reliance was abandoned. We need not, therefore, express any opinion as to whether the impugned Act Jails within the purview of Entry 17.

11a. The next ground of attack on the validity of the impugned Act was that it contravenes the provisions of Clauses (d), (e) and (g) of Article 19 of the Constitution. The precise question that is now raised before us was also raised before the Punjab High Court, in -- 'Ajaib Singh v. State of Punjab', AIR 1952 Punj. 309 (F. B.) (C). The majority of the Judges (Khosla and Harnam Singh, JJ.) held that the impugned Act did not conflict with Clauses (d) & (e) of Article 19. Bhandari J. agreed with the decision of the majority in so far as Clauses (d) and (e) were concerned but he held that the Act did infringe the freedom guaranteed in Clause (g) of Article 19, i. e. the right to practise any profession, or to carry on any occupation, trade or business. The Full Bench unanimously, however, held that Section 4(1) of the Act was in conflict with Article 22(2) and that the Tribunal constituted under the impugned Act in that particular case had not been properly constituted and ordered the release of the applicant.

The state of Punjab appealed to the Supreme Court against the decision of the Full Bench of the High Court. The Solicitor General on behalf of the state of Punjab admitted that he could not contend that the tribunal was properly constituted under Section 6 of the Act and conceded that in the circumstances the order of the High Court directing the girl to be released could not be questioned. He, however, pressed the Supreme Court to pronounce upon the constitutional questions raised in the case. The main judgment of the Supreme Court concerns itself with the validity of Section 4 of the impugned Act with reference to Article 22 of the Constitution. The Supreme Court held that the arrest and detention contemplated in the impugned Act did not fall within the protection of Article 22. It also held that the Act was not inconsistent with Article 14. Lastly in a short paragraph the Supreme Court dealt with Article 19(1)(d)(e) and (g). The paragrapn runs as follows:

> "The learned counsel for the respondent Ajaib Singh contended that the Act was inconsistent With the protons of Articles 19(1)(d) and (e) and Article 21. This matter is concluded by the majority decision of this Court in -- 'A.K. Gopalan v. State of Madras', AIR 1950 S- C. 27 (D) and the High Court quite correctly negatived this contention. Sri Dadachanji has not sought to support the views of Bhandari J. regarding the Act being inconsistent with Article 19(1)(g). Nor has learned counsel seriously pressed the objection of unconstitutionality based on Article 15, which, in our view, was rightly rejected by the High Court".

Learned counsel for the applicant strenuously urged that the opinion of the Supreme Court is merely an 'obiter dictum' and not binding on us, because, after deciding that the appeal must be dismissed it was not necessary for the Court to pronounce upon the validity or invalidity of the impugned Act. We are unable to accept this contention. As already stated, the Solicitor General specially pressed the learned Judges of the Supreme Court to pronounce upon the constitutional question raised in

the case. The matter was argued on both the sides (it is immaterial that a counsel for Ajaib Singh was merely an 'amicus curiae' appointed by the Court'). Article 141 mentions that "the law declared by the Supreme Court shall be binding on all Courts within the territory of India", where the Supreme Court deliberately with the intention of settling the law pronounces upon a question, the pronouncement is the law declared by the Supreme Court within the meaning of Article 141 and is binding on all courts in India. It cannot be treated as a mere 'obiter dictum'. Our attention was drawn to a passage in Willoughby, on the Constitution of the United States, Vol. I, Edn. 2, p. 28 where the learned author discusses the binding nature of advisory opinions delivered by the American Supreme Court, and opines that "The weight of precedent, as well as the better reason and wisdom, is in favour of holding such opinions merely advisory. Such decisions do not arise out of or relate to any particular facts or particular purpose which might explain or limit the generality of their statements. The judges have not necessarily had the benefit of the hearing of counsel, and there has been no argument before them".

12. It is obvious that the above view cannot hold good where the opinion is given in a particular judicial proceeding, as in the case before us, where the Judges have had the benefit of the hearing of counsel and there has been argument before them.

13. It is true that where a point has not been argued and certain general observations have been made which may seem to cover points not argued before the Court, they may not be considered to be binding, and in such cases the binding nature of the observation of the Court may be limited to the points specifically raised and decided by the Court. It is also true that pronouncements made on concessions of counsel, when a point is not argued, are not binding -- 'Venkanna v. Laxmi Sannappa', AIR 1951 Bom. 57 at p. 63 (E) but otherwise even what is generally called an 'obiter dictum', provided it is upon a point raised and argued, is binding upon the Courts in India. In re -- 'Banaras Bank Ltd., A. I. R. 1940 All 544 at p. 550 (F.B.) (F); --'Kishori Lal v. Debi Frasad', AIR 1950 Pat. 50 at p. 61 (P B) (G). In this view of the matter, the decision of the Supreme Court that the impugned Act was not inconsistent with the provisions of Article 19(1)(d) and (e) is inding on us. As the question whether the impugned Act is inconsistent with Article 19(1)(g) was not pressed before the Supreme Court by the counsel concerned, we are prepared to hold that the Supreme Court has expressed no opinion on the same. But in our judgment -- AIR 1950 S. C. 27 (D)', covers not only the points arising in relation to Clauses (d) and (e) of Article 19 but also the point arising in relation to Clause (g) of Article 19. It is enough to state that the principle laid down in --'Gopalan's case (D)' seems to be that when a person has been deprived of personal liberty according to the procedure laid down by law, he cannot complain of the consequential curtailment of the various freedoms mentioned in Article 19. We, therefore, hold that the Act in question is not inconsistent with the provisions of Clauses (d), (e) or (g) of Article 19(1).

14. It was urged that the Act was bad because it empowers the Executive Government to deport a citizen of India out of India against his wishes, and thus to deprive him of all citizenship rights, and as such is a direct attack on the rights conferred by Article 19, that -- 'AIR 1950 S. C. 27 (D)', does not cover this aspect of the case and since this aspect of the matter was not considered by the Supreme Court, its decision is not binding on this Court. Reliance was placed on a decision of this Court -- 'Shabbir Hussain v. State of U. P.', AIR 1952 All 257 (H). That was a case in which the

validity of the Influx Prom Pakistan (Control) Act, 1949, was in question and it was held that a law allowing the removal from the territory of India of any citizen would be in contravention of Article 19(1) Clauses (d) and (e) of the Constitution and will, therefore, be void in view of Article 13(1) of the Constitution. In our opinion there is no question of deportation of an Indian citizen under the Abducted Persons (Recovery and Restoration) Act. The object of the Act is to restore abducted persons to their relatives whether in India or in Pakistan. The tribunal will decide in every case whether an abducted person is to be so restored and be conveyed out of India for the purpose. It is inconceivable that the tribunal will order the restoration and removal out of India of an Indian-citizen against his or her true wishes. In these circumstances it can hardly be maintained that the Act authorizes the Executive Government to deport Indian citizens against their wishes.

15. Further, there is nothing in the Act which prevents a person restored to his relatives in Pakistan to return to India and enjoy all the rights which the Constitution guarantees to a citizen. By his or her restoration to his or her family in Pakistan, an Indian citizen does not cease to be an Indian citizen, unless he or she of his or her free will wishes to give up that status. He or she is conveyed out of India, not on account of a prohibition to reside in India but only for the purpose of restoring him or her to his or her relations. 'Conveyance out of India' in the Act is, therefore, not at all tantamount to 'deportations'. The ruling in -- 'Shabbir Husain's case (H)', is not applicable to cases arising under the impugned Act.

16. There is no force in this application and we dismiss it. Certified that this case involves a substantial question of law as to the interpretation of the Constitution under Article 132.