Mohammad Shafique vs The State on 9 September, 1955

Equivalent citations: AIR1956ALL108, 1956CRILJ176, AIR 1956 ALLAHABAD 108

JUDGMENT

Desai, J

1. This is an application in revision by one Mohammad Shafiq from judgments of the Courts below convicting him under Section 5 of the Influx from Pakistan (Control) Act (No. XXIII), 1949. The trial Court sentenced him to rigorous imprisonment for 9 months and the appellate Court reduced the sentence to 6 months. We may point out that this reduction was a misuse of the power of the appellate Court to interfere with sentences.

The disparity between the sentence inflicted by the trial Court and that inflicted by the appellate Court was not so great that the appellate Court would be justified in interfering with the sentence, which was at the discretion of the trial Court and which could not be interfered with unless the appellate Court held that the discretion had been exercised arbitrarily or erroneously.

2. There is no controversy about the facts. Sometime in June 1948, the applicant went from India to West Pakistan. On 19-7-1948 the Influx from the West Pakistan (Control) Ordinance (No. XVII), 1948 (to be referred as Ordinance No. XVII was enacted by the Central Government. Section 3 of it prohibited any person from entering into India from West Pakistan without being in possession of a permit and authorized the Central Government by a notification published in the official gazette to make rules prescribing the authorities by whom permits may be issued, the conditions to be satisfied by the applicants for such permits, the forms and classes of such permits and for any other matters ancillary or incidental to the carrying out of the purpose of the Ordinance.

Section 4 of it was to the effect that, "any person who contravenes the provisions of Section 3, or of any rule made thereunder, shall be punishable with imprisonment which may extend to one year, or with fine which may extend to one thousand rupees, or with both such imprisonment and fine".

On 23-7-1948 the applicant was granted a permit, styled as "temporary permit" by the High Commissioner for India in Pakistan authorizing him to stay in India from 25-7-1948 to 25-9-1948. There are certain columns in the permit which were filled in by the applicant himself. In the column of 'duration of visit' he had put down "2 months". The operative portion of the permit is to the effect that the applicant was allowed to stay in India from 25-7-1948 to 25-9-1948.

On 29-7-1948 the Central Government made what is known as 'Permit System Rules' and published them in the Gazette of India on 7-8-1948. The rules did not purport to have been made under any authority; there was no reference in them to Ordinance No. XVII. Rule 4 laid down that from the date the permit system was brought into force, no person, who was not in possession of a valid permit, would be allowed to enter into the Indian Dominion. Rule 11 provided that any person

wishing to obtain a permit should state the station he wishes to visit in India and his address in India and should fill up the permit accordingly.

There was no rule regarding temporary permits or the duration or availability of permits or return of a permit-holder on expiry of the period of the permit to Pakistan. These rules were cancelled on 6-9-1948. On 7-9-1948 fresh rules were made under Section 3 of Ordinance No. XVII in place of the rules made on 29-7-1948 and cancelled on 6-9-1048. They were published in the Gazette of India on 14-9-1948. Rule 3 provided for four kinds of permits including a permit for temporary visit, and a permit for resettlement or permanent return. Rule 12 was to the effect that, "no person holding a temporary permit shall stay in India after date of the expiry of such permit. There was also a provision for extension of the period of a temporary permit.

On 25-9-1948 the period of 2 months for which the applicant was allowed to enter into India expired but he continued to stay on. On 10-11-48 the Influx from Pakistan (Control) Ordinance (No. XXXIV), 1948 (to be referred to as Ordinance (No XXXIV) was made; Section 2 of it defined 'permit' to mean a permit issued in accordance with the rules made under the Ordinance. Section 3 prohibited every person from entering into India from any place in Pakistan without being in possession of a permit.

Section 4 authorized the Central Government to make rules prescribing the authorities by which, and the conditions subject to which, permits may be issued, the conditions to be satisfied by the applicants for such permits, the forms and classes of such permits and generally for any other matter ancillary or incidental to the carrying out of the purpose of the Ordinance. Section 5 was to the effect that, "Whoever enters India, in contravention of the provisions of Section 3, or having entered India contravenes the provision of any rule made under Section 4, or commits a breach of any of the conditions of his permit, shall be punishable with imprisonment....."

Section 9 repealed Ordinance No. XVII and laid down that:

> "notwithstanding such repeal, any rule made, action taken, or thing done in the exercise of any power conferred by the Influx from West Pakistan (Control) Ordinance, 1948, shall for all purposes, be deemed to have been made, taken, or done in the exercise of the powers conferred by this Ordinance, as if this Ordinance had commenced on the day such order was made, or such action was taken, or such thing was done."

On 23-4-1949 the Influx from Pakistan (Control) Act (No. XXIII) 1949 was enacted.

It provided for five classes of permit including a permit for temporary visit, prohibited entry into India from Pakistan without being in possession of a permit, authorized the Central Government to make rules on the same lines as Ordinance No. XXXIV, punished entry into India without a permit or in contravention of the provision of any rule made under the authority of the Act or a breach of any of the conditions of the permit and repealed Ordinance No. XXXIV and contained a saving clause like the one contained in Ordinance No. XXXIV.

3. The applicant admitted that he had obtained a temporary permit for return to India, that on 14-8-1948 he applied to the High Commissioner for India in Pakistan for permission to reside permanently in India and that he stayed on in India even after the expiry of the temporary permit. The learned Magistrate charged him with committing an offence punishable under Section 4 of Ordinance XVII read with Rule 12 of the Permit System Rules of 1948, Section 9(2) of Ordinance No. XXXIV and Section 9(2) of Act No. XXIII of 1949 by not returning to Pakistan on or before 26-9-1948. He convicted him under Section 5 of the Act of 1949. The appeal of the applicant was dismissed by the Sessions Judge.

4. When the applicant obtained the temporary permit, Ordinance No. XVII was in force but the permit was not granted in exercise of any of the powers conferred by it. The Permit itself does not mention the authority under which it was granted by the High Commissioner. The Central Government made rules in exercise of the power conferred by Section 3 of the Ordinance for the first time on 7-9-1948; before that date there were no rules framed under the Ordinance prescribing the authorities by whom permits could be issued, the condition to be satisfied by applicants for such permits and the forms and classes of such permits. Therefore, the permit granted on 23-7-1948 could not have been granted under the Ordinance or in exercise of any powers conferred by it.

The Permit System Rules of 29-7-1948 did not purport to have been made by the Central Government in exercise of the power conferred by Section 3 of the Ordinance. It cannot be assumed by the Court that they were made in exercise of that power. The Permit System Rules of 7-9-1948 do mention that they were made in exercise of the powers conferred by the Ordinance. Had the Permit System Rules of 23-7-1948 also been enacted in exercise of the power conferred by Ordinance No. XVII, they would have been repealed by the subsequent rules of 7-9-1948; but that was not the case and instead they were repealed on 6-9-1943 by a simple notification, which again mentioned no authority either for the enactment of the rules or for their repeal.

The rules of 7-9-1948 contained no saving clause such as is to be found in later enactments; had the rules of 29-7-1948 been made under the Ordinance, the effect of anything done under them would have been saved by a saving clause in the subsequent rules of 7-9-1948, It is, therefore, clear that the rules of 29-7-1948 were not made in exercise of the power conferred by Ordinance No. XVII. Therefore, those rules cannot be taken into consideration. Even otherwise, those rules not having contained any provision about temporary permits, or duration of permits, or return of visitors on expiry of the period of the permit to Pakistan imposed no liability upon the applicant, even if they governed the permit issued to him.

5. The temporary permit granted to the applicant was also not governed by the subsequent Permit System Rules of 7-9-1948 which had no retrospective effect. They could not govern permits already issued. They contained rules regarding the future issue of permits. They provided for the issue of a temporary permit and the mere fact that the permit issued to the applicant was described as a temporary permit could not, and did not mean that it had been issued under their authority.

Rule 12 prohibited the Overstay by a person holding a temporary permit; since there was nothing to suggest that the rules had any retrospective effect, since a provision for temporary permits was

made for the first time in those rules and since there was absolutely no reference to any permits issued prior to the enforcement of the rules, we have not the slightest doubt in our minds that the rules governed the holders of temporary permits granted under the rules themselves and not the holders of temporary permits granted before the rules came into force.

We are supported in our view that the rules had no retrospective effect by -- 'Mohammad Shafi v. State', AIR 1952 All 921 (A). Therefore, Rule 12 did not apply to the applicant and by overstaying he did not infringe it. On 25-9-1.948 Ordinance No. XVII and the rules of 7-9-1948 were in force. The Ordinance did not apply for the reasons already stated; even if it did, the applicant committed no offence against it. The Ordinance simply dealt with the entry into India and not with what the person did in India after the entry. There was nothing illegal in the applicant's entering into India; what is said to be illegal is his continuing to stay here after 25-9-1948.

The Ordinance did not prohibit overstay and did not require the person entering into India for a certain period to return to Pakistan on expiry of that period. Therefore, the overstay was not against any provision of the Ordinance. The mere statement in the permit that it was temporary for a certain duration did not bind him and did not require him, as a matter of law, to return to Pakistan on expiry of it. That the permit was in force for a certain period could not be deemed to be a condition on which the permit was issued to him. The conditions which the Ordinance were required to be satisfied were the conditions to be satisfied by applicants at the time of, or before, applying for permits.

No authority was conferred to impose conditions to be satisfied by the applicants after their entry into India; therefore, the provision in Section 3(2)(a) referred to satisfaction of the conditions at the time of applying for permits. The applicant did not infringe any provision of the rules of 7-9-1948 also as explained earlier. They governed the holders of permits granted under their authority and not the holders of permits granted earlier under some other authority. There was no other law in force on 25-9-1948 and we hold that the applicant committed no offence by not returning to Pakistan on 25-9-1948.

6. Ordinance No. XXXIV enacted some time later, could not possibly convert the applicant's act of continuing to stay in India into an offence with retrospective effect. If the act was not an offence at the time when it was done, it was not open to the legislature to convert it into an offence by a post facto law; Article 20 would render such legislation unconstitutional. We find that Ordinance No. XXXIV did not even convert the applicant's act into an offence.

It was also prospective, there being nothing to suggest that it had any retrospective effect. It dealt with, entry into India and with the person's movements in India taut it did not require him to leave India in certain circumstances. It contained no provision about his leaving India. Therefore, the applicant did not infringe its provisions by overstaying. He could not be guilty of contravening the provision of any rule made under the Ordinance because the rules could not have retrospective effect. He could not be said to have committed a breach of any of the conditions of his permit because the permit was not issued under the Ordinance and describing the permit as a temporary permit or mentioning the period of its availability could not be said to be a condition subject to

which the permit was issued.

The saving clause of the Ordinance only saved the effect of any rule made or action taken in exercise of any power conferred by Ordinance No. XVII. Nothing had been done with regard to the applicant under Ordinance No. XVII. The applicant had not infringed any provision of it or of any rule made under it. Further there is a distinction between "made" and "deemed to have been made". Section 5 punished contravention of the provision of any rule "made under Section 4". Therefore, Section 5 did not punish contravention of the provision of any rule deemed to have been made by virtue of the saving clause.

7. The Act of 1949 simply took the place of Ordinance No. XXXIV. If the applicant committed no offence against Ordinance No. XXXIV, he committed no offence against the Act also. The provisions of the Act are similar to those of Ordinance No. XXXIV. On 3-6-1949 new Permit System Rules were made in exercise of the power conferred by the Act of 1949; they also do not affect the liability of the applicant.

8. It was argued that the act of overstaying was a continuous act, that the applicant committed the offence at every moment of the overstay and that consequently even if he committed no offence from 25-9-1948 to 9-11-1948, he committed an offence on 10-11-1948 when Ordinance No. XXXIV was enacted. There is no substance in this argument. Ordinance No. XXXIV did not allow any time to holders of permits issued under the previous Ordinance to return to Pakistan. Therefore, if the argument were accepted, it would mean that though the applicant committed no offence upto the moment of the enactment of Ordinance No. XXXIV, he committed an offence at the very moment of its enactment even though it was impossible for him during the moment to return from India to Pakistan.

Had the legislature intended to punish him for the act of "continuing to stay in India after its enactment, it must have given him some time within which to leave India. It could not have punished him for not doing an act that was not possible. Moreover, as we have shown above, no offence was committed by the applicant against the provisions of the Ordinance at all; so on 10-11-1948 He committed no offence even if the act of overstaying could be said to be a continuous act. The view taken here was taken by one of us in 'Mahboob Husain v. State', Criminal Revn. No. 1312 of 1951, D/- 27-5-53 (All) (B). It was held there that a person overstaying in India did not commit an offence against Ordinance No. 17, that Ordinance No. 34 was prospective and not retrospective and applied to persons who entered into India after its enactment, that the act of overstaying is not a continuous act, that if a person did not commit an offence on 28-10-1948, he did not commit an offence on 10-11-1948, that Article 20 of the Constitution prevented retrospective effect being given to Clause (5) of Ordinance No. 34 and that the position was not altered by the Influx from Pakistan (Control) Act, 1949.

9. We find that the applicant is not guilty. In view of this finding it is not necessary for us to go into the other question whether the provisions of the Act of 1949 or the Ordinances are unconstitutional.

10. We allow the application, set aside the applicant's conviction and sentence and acquit him. His bail bonds are discharged.