

**IN THE HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

Reserved on: 25.02.2021
Pronounced on: 05.03.2021

Cr. Ref. No.08/2012

State of J&K ...Petitioner(s)

Through: - Ms. Saba Gulzar, Assisting Counsel.

Vs.

Mohammad Ashraf Hajam & others ...Respondent(s)

Through: - Mr. Waseem, Advocate, Mr. Bilal, Advocate

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The instant Reference has been made by learned Judicial Magistrate, 1st Class, Tangmarg, whereby the learned Magistrate has expressed doubts about the validity of Egress and Internal Movement (Control) Ordinance, 2005 Svt. (for short E&IMCO). According to the learned Magistrate, the Ordinance in question is inoperative but has not been declared so by the High Court of J&K or by the Supreme Court, hence the reference.

2) The Reference has arisen out of a challan stated to have been filed by Police Station, Tangmarg, against the accused persons (the respondents herein), comprising two male accused who had crossed over to Pakistan for receiving arms training and thereafter returned with their wives of foreign origin. In the challan, it was stated that the two male accused persons had entered into wedlock with the two female

accused at Muzaffarabad, Pakistan occupied Kashmir. The police arrested all the four persons i.e. two male members and their foreign origin wives and produced a charge sheet against them for offences under Section 3 E&IMCO and Section 14 Foreigners Act.

3) The learned Magistrate after applying his mind to the material placed before him by the prosecuting agency expressed his opinion that the Ordinance had outlived its life because it was issued under repealed Jammu and Kashmir Constitution Act, 1996, where after, prior to coming into force of the Jammu and Kashmir Constitution on 17.11.1956, the aforesaid Ordinance had already lapsed. According to the learned Magistrate, the E&IMCO Ordinance was issued under Section 38 of the J&K Constitution Act, 1996, Svt. and its life was only six months from the date of its issuance. Thus, the aforesaid Ordinance, which was issued in Poh 2005 Svt. corresponding to January, 1948 (AD) had lapsed after six months i.e. in July, 1948 (AD) well before the coming into force of the Constitution of J&K, 1957. Thus, Section 157(2) of the Constitution of J&K, which saves the laws in force immediately before the commencement of the said Constitution would not save the aforesaid Ordinance as it had outlived its life way back in July, 1948.

4) I have perused the order of reference framed by the learned Magistrate and I have also gone through the material on record.

5) It appears that the learned Magistrate has not appreciated the whole issue in its right perspective, inasmuch as he has proceeded on

the premise that the Ordinance in question was issued by the Ruler of the then Princely State of J&K on the submission of the Council in terms of Section 38 of the J&K Constitution Act, 1996, whereas the fact of the matter is that the said Ordinance has been issued by the then Ruler of the Princely State of Jammu and Kashmir in exercise of his powers under Section 5 of the J&K Constitution Act, 1996 and not on the submission of the Council. Section 5 of the aforesaid Act gave wide powers to the Ruler to make laws etc. It reads as under:

“5. His Highness’ Inherent powers.—Notwithstanding anything contained in this or any other act, all powers, legislative, executive and judicial, in relation to the State and its government are hereby declared to be and to have always been inherent in and possessed and retaining by His Highness and nothing contained in this or any other Act shall affect or be deemed to have affected the right and prerogative of His Highness to make laws, and issue proclamations, orders and ordinances by virtue of his inherent authority.”

From the above quoted provision, it is clear that the Ruler of the then Princely State of J&K had unfettered powers to make laws, issue proclamations, orders and ordinances. All laws, ordinances etc. that were issued by the Ruler are recognized as duly enacted/promulgated by the competent authority and these stand saved by Section 157 of the Constitution of J&K, 1957, which reads as under:

“157. Repeal and saving of laws and rules.—(1) The Jammu and Kashmir Constitution Act, 1996 BR(XIV of 1996 BR) is hereby repealed.

(2) Notwithstanding the repeal of the said act but subject to the other provisions of this Constitution, all the laws in force in the State immediately before the commencement of this Constitution shall continue in

force until altered or repealed or amended by competent authority.

(3) All notifications published, proclamations issued, powers conferred, jurisdiction vested, forms prescribed, local limits defined, and orders, rules and appointments made under any regulation, order, law or rule in force immediately before the coming into operation of this Constitution and which are not inconsistent with any of the provisions of this Constitution, shall be deemed to have been respectively published, issued conferred, vested, prescribed, defined and made under this Constitution and shall remain in force until repealed or modified either expressly or by implication by competent authority.”

Sub-section (2), quoted above, read with Section 6(b) of the J&K General Clauses Act, 1977, Svt. provides that all laws in force immediately prior to commencement of the Repealing Constitution shall continue to be in force unless repealed or altered by the competent authority. E&IMCO, which, as already noted was issued under Section 5 of the J&K Constitution Act, 1996, has not been altered/repealed so far and as such it continues to be in force.

6) The question about constitutionality of Enemy Agents Ordinance, 2005 (Ordinance No.VIII of 2005) that was also issued by the then Ruler in exercise of his powers under Section 5 of the J&K Constitution Act, 1996, was a subject matter of discussion before the Supreme Court in the case of **Rehman Shagoo and others v. State of Jammu and Kashmir**, AIR 1960 SC 1. The Supreme Court while determining the merits of the contention that the said Ordinance had come to an end with the repeal of the Jammu and Kashmir Constitution Act, 1996 on 17.11.1951, observed as under:

“The contention is that as S. 5 of the Constitution-Act was repealed on November 17, 1951, the Ordinance which is stated to have been passed under that section also came to an end. It is enough to say that there is no force in this argument. Clause (b) of S. 6 of the Jammu and Kashmir General Clauses Act No.XX of S. 1977, clearly saves the Ordinance. It is as follows:-

“ Where this Act, or any Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder;”

It will be clear that the promulgation of the Ordinance was a "thing duly done" under S. 5 of the Constitution Act and the repeal of S. 5 of the Constitution-Act would thus leave the Ordinance which was promulgated thereunder entirely unaffected. The repeal of S. 5 can only mean the withdrawal of that legislative power on and from the date of repeal. Anything done while the power subsisted cannot be affected by such repeal. A law enacted under a Constitution-Act does not lose its vitality and would continue even though there may be repeal of parts of the Constitution-Act under which it was enacted as long as the law is not inconsistent with the Constitution-Act as it emerges after the amendment and repeal of certain provisions thereof. It derives its binding force from the fact that it was within the competence of the legislature when it was passed and being permanent would continue till amended or repealed under the amended Constitution-Act. We are, therefore, of opinion that the Ordinance did not come to an end on the repeal of S. 5 of the Constitution-Act and remained a valid piece of legislation in view of S. 6 (b) of the Jammu and Kashmir General Clauses Act.”

7) Again this Court in the case of **Harsh Dev Singh, MLA (J&K) v. State of J&K, 2000 S.L.J 360**, while relying on the judgment of the

Supreme Court in Rehman Shagoo's case (supra) has upheld the validity of the Jammu and Kashmir Essential Services Maintenance Ordinance, that was also promulgated by the then Ruler of Princely State of Jammu and Kashmir in exercise of his powers under Section 5 of the Jammu & Kashmir Constitution Act, 1996.

8) Thus, the validity of the Ordinances issued by the Ruler of Princely State of Jammu and Kashmir in exercise of his powers under Section 5 of the Jammu and Kashmir Constitution Act, 1996, is no longer *res integra*. The E&IMCO Ordinance, regarding the validity of which the learned Magistrate has expressed his doubts, has also been issued by the Ruler of the Princely State of Jammu and Kashmir in exercise of his powers under Section 5 of the Jammu and Kashmir Constitution Act, 1996. Therefore, the said law being a duly promulgated law, has remained a valid piece of legislation in view of Section 6(b) of the Jammu and Kashmir General Clauses Act. Thus, no doubt can be expressed about the validity and operation of the aforesaid Ordinance.

9) From the foregoing discussion of law on the subject, the doubt expressed by the learned Magistrate about validity of the E&IMCO is without any basis and the Reference made by the learned Magistrate in this regard is uncalled for.

10) The learned Magistrate has also, on the basis that two lady accused belong to Pakistan occupied Kashmir and, as such, cannot be booked under Section 14 of the Foreigners Act, expressed a view that

no offence is made out against them. The questions whether the two ladies belong to POK or to main land Pakistan, whether they are holding valid passports and if so, of which Country, whether or not they had adopted the citizenship of Pakistan and similar other matters are required to be determined before making a comment about the applicability or otherwise of the provisions contained in Section 14 of the Foreigners Act. These are the issues which can be determined either by ordering further investigation in the case or otherwise during trial of the case. The matter needs to be considered by the learned Magistrate in accordance with law but the case cannot be thrown out at the threshold as has been sought to be done by the learned Magistrate

11) For the foregoing reasons, the Reference is declined and the order dated 19.09.2012, whereby Reference has been made by the learned Magistrate, is set aside, with a direction to the learned trial Magistrate to proceed further in the matter in accordance with the law.

12) The trial court record along with a copy of this order be sent back forthwith.

(Sanjay Dhar)
Judge

Srinagar
05 .03.2021
"Bhat Altaf, PS"

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No