

Allahabad High Court

Mohan Agarwal vs Union Of India (Uoi) And Ors. on 22 April, 1978

Equivalent citations: AIR 1979 All 170

Author: H Swarup

Bench: H Swarup, T Misra, P Prakash

JUDGMENT Hari Swarup, J.

1. The following question of law was referred by a Division Bench for the opinion of the larger Bench.

"Whether the Bengal Army Regulation Governor General Order No. 179 dated September 12, 1836 continues to be law in force in India even after the enforcement of the British Statutes (Application to India) Repeal Act, 1960 (Act No. LVII of 1960)?

The question had arisen in the writ petitions filed to challenge the notices of resumption issued by the Union of India exercising the right of resumption under the grants on the basis of which the petitioners, according to the respondents, were holding the lands.

2. The action is being taken in exercise of the power under the Governor General Order No. 179 dated September 12, 1836. The Order does not indicate the source of power. The source of power can, however, be traced to the Government of India Act, 1833. Section 43 of this Act provided that the said Governor-General in Council shall have the power to make Laws and regulations for repealing, amending or altering any laws and regulations whatever now in force. The Preamble of Order No. 179 of September 12, 1836 provides that by rescinding the various Orders in force, Regulations were being promulgated thereunder. The proviso to Section 45 of the 1833 Act reads as under :--

"Provided also that all laws and regulations made as aforesaid, so long as they shall remain unrepealed, shall be the same force and effect within and throughout the said territories as any Act of Parliament would or ought to be within the same territories and shall be taken notice of by all courts of justice whatsoever within the same territories, in the same manner as any public Act of Parliament would and ought to be taken notice of; and it shall not be necessary to register or publish in any court of justice any laws or regulations made by the said Governor-General in Council."

This Act continued till the Government of India Act, 1915 repealed it. Section 130 of the Government of India Act, 1915 provides:

3. The Acts specified in the Fourth Schedule to this Act are hereby repealed to the extent mentioned in the third column of that Schedule :

Provided that this repeal shall not affect--

(a) the validity of any law, charter, letters patent, Order in Council warrant, proclamation, notification, rule, resolution, order, regulation, direction or contract made, or form prescribed, or

table settled under any enactment hereby repealed and in force at the commencement of this Act, or

(b) the validity of any appointment, or any grant or appropriation of money or property made under any enactment hereby repealed, or

(c) the tenure of office, conditions of service, terms of remuneration or right to pension of any officer appointed before the commencement of this Act.

.....

In the Fourth Schedule occurs the following entry:

"Session & Chapter Short Title Extent of Repeal 3 & 4 Will 4, c. 85.

The Government of India Act, 1833.

The whole Act, except section one hundred and twelve.

The effect of this repeal was that the Government of India Act, 1833 was repealed in its entirety except Section 112 which ran as under :--

"The island of Saint Helena, and all forts, factories, public edifices, and hereditaments whatsoever in the said island, and all stores and property thereon fit or used for the service of the government thereof, shall be vested in His Majesty, and the said island shall be governed by such orders as his Majesty in council shall from time to time issue in that behalf.

The next provision dealing with this Statute is contained in the British Statutes (Application to India) Repeal Act 1960."

4. Section 2 of this Act provides:

"The British Statutes specified in the Schedule, in so far as they extend to, and operate as part of the law of India or any part thereof, are hereby repealed." The effect of the repealing Act could only be the repeal of the remnants of the Government of India Act, 1833, viz., Section 112 thereof.

5. The question referred to us has to be answered in the light of these aforesaid enactments.

6. The argument advanced on behalf of the petitioners is that once the Act of 1833 was repealed, all laws made thereunder including the Order No. 179 of 1836 stood repealed and lost their legal enforceability. There is a flaw in this argument as the general rule of repeal: that when a parent Act is repealed all laws made thereunder stand repealed, does not apply to laws made under a Constitution Act. Such a law has to be expressly repealed if it has to be effaced. In the case of subordinate legislation the emanating law dies unless saved, but a law made under a Constitution Act survives till expressly repealed.

7. A Constitution Act stands on a higher footing than a law made by a legislative authority created under a Constitution Act and the law so created stands on a footing higher than that of the law made under authority of that law. The distinction between a law made under a Constitution Act and an ordinary legislation was pointed out by the Supreme Court in *Rahman Shagoo v. State of J and K* (AIR 1960 SC 1) in the following terms (at p. 6):

"..... A law enactment 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 so 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."

The effect of a repeal is to dry up the source of power. Repeal of an enactment only means that the power to create new law thereunder is abolished and no further law in exercise of that power can be made. If something has emerged in exercise of the power the source of which has been dried, it can continue to remain as an independent unit or may be with the parent Act depending on the nature of the source of power. If the source of power is a Constitution Act the law survives as an independent unit; and if the source of power is a legislative power other than that contained in the Constitution Act the law ends with the drying out of its power source subject to such savings as the law may provide.

8. The answer to the question referred to us will therefore depend on our answer to the relative, ancillary or preliminary questions, because all laws do not die with the repeal of the parent Act Such questions will be:

(a) Whether the Order No. 179 had been made under a Constitution Act or under an ordinary legislative enactment?

(b) Whether the law in question was a subordinate or delegated legislation, or was independent and primary law?

(c) Whether the law in question (the Bengal Army Regulation Governor General Order No. 179 Pated Sept 12, 1836) was expressly saved by the Government of India Act, 1915 and was never thereafter specifically repealed? The Government of India Act, 1833 was in the nature of a constitutional enactment as it was made for the purpose of the governance of the territory of India. This is apparent not only from the various provisions of the Act which create legislation making instrumentalities, but also from its heading which reads as under:

"An Act for effecting an arrangement with the East India Company, and for the better Government of His Majesty's Indian Territories, till the Thirtieth Day of April One thousand eight hundred and fifty four."

9. Section 43 of the Government of India Act, 1833 gave independent legislative powers to the Governor General. It did not contemplate subordinate legislative power. It expressly stated:

That the said Governor-General in Council shall have power to make Regulations for repealing, amending, or altering any Laws and Regulations whatever now in force."

In the case of *Raj Singh v. Union of India* (AIR 1973 Delhi 169) the same provisions were considered and it was held that the language of the 1833 Act and of the 1915 Act indicated "that the orders which were rescinded and also the regulations which were promulgated were both of a statutory nature."

10. The law made in exercise of the powers under Section 43 of the Government of India Act, 1833, viz. the Order No. 179 of 1836 was thus a statutory law made under a Constitution Act and could not therefore come to an end by mere repeal of the Government of India Act, 1833 particularly when that law was specifically saved by the repealing Act. The Government of India Act, 1915 being itself a Constitution Act saved the law made in exercise of the legislative powers given by the Constitution Act of 1833. That law will therefore continue to remain in force even though the source of power may dry out by the process of repeal. It had secured an independent existence and that existence cannot be wiped off except by a specific law to that effect. It cannot get extinct simply by the repeal of the source of its power.

11. The law made under the 1833 Act was continued in force by Section 65 of the Government of India Act, 1858 which continued "all Acts and provisions now (then) in force" Section 130 of the Government of India Act, 1915 expressly saved the Order No. 179 of 1836 and it continued to remain law. Section 321 of the Government of India Act, 1935, repealed the earlier Government of India Act, 1915, but Section 292 thereof saved the existing law by providing:

"Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority." The Regulations contained in Order No. 179 of 1836, therefore, continued to remain law even thereafter. Section 18 of the Indian Independence Act, 1947 again continued the law contained in this Order No. 179 of 1836. Section 18 runs as under :

"(1) .....

(2) .....

(3) Save as otherwise expressly provided in this Act the law of British India and of the several parts thereof existing "immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.

The Order No. 179 of 1836 was thus an existing law on the date of the enforcement of the Constitution of India. Article 372 of the Constitution saved all existing law by providing:

"(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

....."

Explanation 1 defines the 'law in force' as:

"The expression 'law in force' in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed notwithstanding that it or parts of it may not be then in operation either at all or in particular areas."

The order No. 179 of 1836 being the law in force would, therefore, continue or remain in force till repealed. No law has yet been made to repeal that Order. The British Statutes (Application of India Repeal Act, 1960) had repealed only those British Statutes which were specified in the Schedule. In the Schedule the entry of serial No. 25 is :

"Serial No. year Short title or subject ..... .."

25 1833 The Government of India Act, 1933 (3 and 4 Will, 4, C. 85)"

The effect of the repeal was the repeal of whatever had remained subsisting of the Government of India Act, 1833. It was only Section 112 of that Act which had continued to remain as part of the Statute. That alone can be deemed repealed by the British: Statutes (Application to India) Repeal Act, 1960. It did not repeal the law which had been- born out of the parent Act and had obtained an independent existence as subsisting law. We are therefore of the opinion that the Bengal Army Regulations, Governor General Order No. 179 dated September 12, 1836 continued to be the law in force in India even after the enforcement of the British Statutes (Application to India) Repeal Act, 1960 (Act No. LVII of 1960).

12. The question referred to us is answered in the affirmative.