

CASE COMMENTARY: PORTUGAL V INDIA¹ (RIGHT TO PASSAGE CASE)

Written by *Tarun Ghai*

3rd Year B.A LLB Student, National Law University, Odisha

OVERVIEW

This case explained as to what is Right to innocent passage, it was a landmark case in which several issues were discussed including the issue that can customary law be established only between two states.

FACTS OF THE CASE

Portugal claimed its right subject to which it will be allowed to move from Daman to and its enclaves and that won't be counted as interference with the territory of India. It also claimed that India has the right to hold its territory subject to the duty that it will respect the integrity and sovereignty of Portuguese government. India contended that the admission by Portuguese government in itself suggests that it understands that the territory it is demanding is under the control of Indian Government and there is no immunity whatsoever to the Portuguese Government. Portugal contention was also based on two treaties mainly the Treaty of Poona which was signed in 1779 and the decrees which were issued by the then Maratha king in the period of 1783 and 1785. India was however of a different view, it said that the Treaty of 1779 was not of conclusive in nature and was never obligated as a law by the Marathas. It said that the question which really in discussion was whether the armed forces of Portuguese be allowed to move to be its enclaves while risking the territory of India. It stated that even if the treaty took effect it can't be obligated as the practice or the custom to move started after a long time after the treaty actually took place.

¹ [1960] ICJ Rep 6

CONTENTION BY BOTH THE PARTIES

Portugal contended that the Maratha obligated themselves with the treaty of 1779, they had a free will while entering into this treaty and were never forced to obligate themselves with the conditions of the treaty.

India contended that Treaty of Poona and the two decrees which were signed by the Maratha ruler did not confer the right of transfer of the territory in favour of Portuguese government, the basic motto behind the treaty was just the revenue grant up to rupees 12000 and it was never meant to transfer its sovereignty over the assigned village to the Portuguese government.

Against this Portugal contended that Article 17 of the Treaty was explicit in its opinion that there is a transfer of immunity in favour of the Portuguese government, They said there were lot of instances where the words used in the treaty were as “perpetuity” and “in perpetual sovereignty” which means indirectly means that the power was conferred on Portuguese government. The court however came to a conclusion that the sovereignty has not passed to the Portuguese just by the sake of a treaty. However the court also looked at the fact that the position of Portuguese right changed between pre and post British times. As successors of the Marathas they never gave express immunity or exercised any control over that part, as a conclusion the territory was under the rule of the Portuguese government even after the British left India. It has been contended by the Portugal that over the period of time they have formed a local custom between the two nation and India should follow the principle of International Law that “customary international law prevails over general law” but the court founded no merit in this regard and concluded that just because there has a long prevailing practice , the thing needs to be converted into a customary law which obligates both the parties and creates mutual rights and liabilities over the states .

JUDGEMENT

While considering the question of law the court expressly directed that no local custom can obligate any party if it never wished to create it, now discussing the question that whether Portugal could actually claim the right over the territory of India and can it be said that the Portuguese government had control over the territory of India the court had a brief looking at

the claims of both the parties and discussion were held as to right with respect to armed forces, police officials, other governmental and non-governmental functionaries civil servants and goods in general. The court came to a decisive conclusion which was more balanced one. It laid that the territory was used by both the parties and was mutually used by both the countries without any kind of restriction. As regards to the perishable goods the court said that there was regular passage of goods with any hindrance by the Indian Government over that period of time except on some occasion where they were subject to certain customary revenue taxes. The court said that the occasion where certain restriction were put at the time of Second World War and the stoppage of transit of salt were reasonable in nature and were not something to be varied. No special taxes were imposed on the transit which could signify that there was restriction from the beginning and which could justify this unreasonable restriction put by Indian Government. The court concluded by saying that with regard to individuals, other civil bodies and adopted methods specially during the time of British are to remain same and any restriction imposed on it will be regarded as unreasonable and unjustified. The court viewed all this as a practice which has been established as a law between countries and have bind the parties together. It laid that the Portugal's right to passage of Indian territory exists however the question related to armed forces and personals along with the police were discussed separately and while looking at the instances of various tensions that grew over the period of 1954, the court said that though there were instances where such armed forces were allowed, but that was a period when India was not ruled by its own government and by looking at the present situations the court concludes that India subject to its powers and under reasonable behaviour applied these restriction and it is justified according to the law to do so as the right of prevention of one's own territory is provided to all the countries around the world and India is no exception to it.

CONCLUSION

The case is a landmark case as it explained the principle of Right of Innocent Passage and the right of protection of one's territory.