State of Andhra Pradesh

Vs

Abdul Khader

Criminal Appeal No. 192 of 1959

(CJI B. P. Sinha, K. C. Das Gupta, S. K. Das, N. Rajgopala Ayyangar, A. K. Sarkar JJ)

04.04.1961

JUDGMENT

SARKAR, J. –

The respondent was convicted by the Judicial Magistrate of Adoni in the State of Andhra Pradesh, under s. 14 of the Foreigners Act, 1946. His appeal to the Sessions Judge of Kurnool was dismissed. He then moved the High Court of Andhra Pradesh in revision and the revision petition was allowed. Hence the present appeal by the State of Andhra Pradesh.

The facts found were these : On January 20, 1955, the respondent had come to Adoni on a passport granted by the Government of Pakistan which bore the date January 10, 1955. The passport had endorsed on it a visa granted by the Indian authorities which permitted the respondent to stay in India up to April 14, 1955. The respondent continued to stay on in India after that date. On some date, not precisely ascertainable from the record, he appears to have made a representation to the Government of India for extension of his visa till September 2, 1957, on grounds of health. The records do not however show what order, if any, was made on this representation. On September 3, 1957, an order dated August 9, 1957, made by the Government of Andhra Pradesh requiring him to leave India, was served on the respondent. As the respondent did not leave India as directed by this order, he was prosecuted with the result earlier stated.

The passport showed that the respondent was born at Adoni in 1924. The respondent appears to have produced an extract from the municipal birth register, which is not on the record, but presumably showed that he was so born. The only evidence on the record of the date when he left India, shows that that must have been at the end of 1954 or early in 1955. There is evidence to show that he had been paying rent for his shop at Adoni for about ten years prior to 1958 and his parents, brothers, wife and children were and had always been in India.

The respondent was charged with the breach of the order to leave India which had been made under s. 3(2)(c) of the Foreigners Act. Now the order could not be made on him, neither could he be convicted for breach of it, if he was not a foreigner. That was the defence of the respondent, namely, that he was not a foreigner. The question is, was he a foreigner ?

The learned Judicial Magistrate found that by obtaining the passport from the Pakistan authorities, "he has disowned Indian nationality and he has ceased to be an Indian National." He also held that s. 9 of the Foreigners Act did not apply to the case but s. 8 of that Act did and that under that section a decision made by the Government that a person is a foreigner is final and such a decision had been made in this case regarding the respondent as the Government had decided not to grant him an

extension of his visa. On these grounds he found that the respondent was a foreigner.

It seems to us that both these grounds are untenable. Section 8 applies to a case where "a foreigner is recognised as a national by the law of more than one foreign country or where for any reason, it is uncertain what nationality if any is to be ascribed to a foreigner." The section provides that in such cases the prescribed authority has power to decide of which country the foreigner is to be treated as the national and such decision shall be final. The section, therefore, applies to a person who is a foreigner and the question is of which foreign country he is a national. In the case of the respondent no such question arose and not decision could be or was made by any prescribed authority of such question. The learned Magistrate therefore clearly went wrong in relying on s. 8.

As regards the passport, the learned Magistrate did not come to the finding that it proved the respondent to have been a Pakistani national all along. What he did was to think that the respondent who had earlier been an Indian national, had by obtaining it, disowned Indian nationality and ceased to be an Indian national.

Now, s. 9(2) of the Citizenship Act, 1955, provides that if any question arises as to whether an Indian citizen has acquired the citizenship of another country, it shall be determined by such authority and in such manner as may be prescribed. Under r. 30 of the rules framed under that Act, the authority to dedide that question is the Central Government. So the question whether the respondent, an Indian citizen, had acquired Pakistani citizenship cannot be decided by courts. The learned Magistrate had no jurisdiction therefore to come to the finding on the strength of the passport that the respondent, an Indian citizen, had acquired Pakistani citizenship. Nor was there anything before the learned Magistrate to show that the Central Government had decided that the respondent had renounced Indian citizenship and acquired that of Pakistan. The learned Magistrate thought that the fact that the Central Government had refused to extend the respondent's visa proved that it had decided that he had acquired Pakistani nationality. This view again was not warranted. There is nothing to show that the Central Government had refused to extend the respondent's visa. Even if it had, that would not amount to a decision by it that the respondent, an Indian citizen, had acquired subsequently Pakistani nationality for there may be such refusal when an applicant for the extension had all along been a Pakistan national. Furthermore, in order that there may be a decision by the Central Government that an Indian citizen has acquired foreign nationality, an enquiry as laid down in r. 30 of the rules framed under the Citizenship Act has to be made an no such enquiry had to all been made. That being so, it cannot be said that the Central Government had decided that the respondent, an Indian citizen, had acquired the citizenship of Pakistan.

The question whether a person is an Indian citizen or a foreigner, as distinct from the question whether a person having once been an Indian citizen has renounced that citizenship and acquired a foreign nationality, is not one which is within the exclusive jurisdiction of the Central Government to decide. The courts can decide it and, therefore, the learned Magistrate could have done so. He, however, did not decide that question, that is, find that the respondent had been a Pakistani national all along. On the evidence on the record such a finding would not have been warranted. For all these reasons we think that the conviction of the respondent by the learned Magistrate was not well founded.

Coming now to the decision of the learned Sessions Judge, he seems to have based himself on the reasoning that the "conduct of the appellantb that is, the respondent before us, "in applying for extension of time shows that he is not a citizen of India and that he has acquired citizenship of Pakistan. If he were a citizen of India, he could have raised this plea and this question could have

been decided by the Central Government as envisaged by Rule 30, sub-Rule 1 of the Rules made under the Citizenship Act and there was no necessity to apply for extension." Quite plainly, the learned Sessions Judge was proceeding on the basis that the respondent had renounced his Indian citizenship and acquired Pakistani citizenship. As we have said earlier, that is not a question which is open to a court to decide and there is no evidence to show that it has been decided by the Central Government who alone has the power to decide it. The learned Sessions Judge did not direct himself to the question which he could decide, namely, whether the respondent had from the beginning been a Pakistani citizen. His decision, therefore, cannot also be sustained.

We have examined the evidence on the record ourselves and are unable to say that a conviction can be based on it. There can be no conviction unless it can be held on the evidence that the respondent is a foreigner, that is to say, a person who is not an Indian citizen : see s. 2(a) of the Foreigners Act as amended by Act II of 1957.

The evidence shows that the respondent did go to Pakistan, but the only evidence with regard to that is that he went there about the end of 1954 or the beginning of 1955. This evidence also indicates that he stayed there for a short time. He was all along paying the rent for his shop in Adoni. His family had always been there. Therefore it can be said that he had never migrated to Pakistan. Clearly, a short visit to Pakistan would not amount to migrating to that country. The passport obtained by him from Pakistan would no doubt be evidence that he was a Pakistani national. As on the facts of this case he must be held to have been an Indian citizen on the promulgation of the Constitution, the passport can shows no more than that he renounced Indian citizenship and acquired Pakistani nationality. Such evidence would be of no use in the present case for, in view of s. 9(2) of the Citizenship Act, a Court cannot decide whether an Indian citizen has acquired the citizenship of another country.

The position then is this. The respondent has clearly discharged the onus that lay on him under s. 9 of the Foreigners Act to prove that he was not a foreigner, by proving that he was born and domiciled in India prior to January 26, 1950, when the Constitution came into force and thereby had become an Indian citizen under Art. 5(a) of the Constitution. He has further proved that he had never migrated to Pakistan. It has not been shown that the Central Government had made any decision with regard to him under s. 9 of the Citizenship Act that he has acquired a foreign nationality. Therefore, it cannot be held by any court that the respondent who was an Indian citizen has ceased to be such and become a foreigner. That being so, it must be held for the purpose of this case that the respondent was not a foreigner and no order could be made against him under s. 3(1)(c) of the Foreigners Act. Conviction for breach of such an order by the respondent would be wholly illegal.

Though we are upholding the decision of the High Court, we wish to observe that we do not do so for the reasons mentioned by it. It is unnecessary to discuss those reasons but we would like to point out one thing, namely, that the High Court seems to have been of the opinion that Art. 7 of the Constitution contemplates migration from India to Pakistan even after January 26, 1950. We desire to make it clear that we should not be taken to have accepted or endorsed the correctness of this interpretation of Art. 7. The reference in the opening words of Art. 7 to Arts. 5 and 6 taken in conjunction with the fact that both Arts. 5 and 6 are concerned with citizenship (at the commencement of the Constitution) apart from various other considerations would appear to point to the conclusion that the migration referred to in Art. 7 is one before January 26, 1950, and that the contrary construction which the learned Judge has put upon Art. 7 is not justified, but in the view that we have taken of the facts of this case, namely, that the respondent had never migrated to

Pakistan, we do not consider it necessary to go into this question more fully or finally pronounce upon it.

In the result we dismiss the appeal.

Appeal dismissed.

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