

State of U. P.

Vs

Rehmatullah

Criminal Appeal No. 167 of 1968

(CJI S. M. Sikri, P. Jagmohan Reddy, I. D. Dua JJ)

23.04.1971

JUDGMENT

DUA, J. -

The State of U.P. has appealed to this Court on certificate of fitness granted by the Allahabad High Court from that Court's order, dated January 18, 1968, acquitting the respondent of an offence punishable under Section 14 of the Foreigners Act (Act No. 31 of 1946). This appeal was originally heard by us on January 11 and 14, 1971, when it was considered desirable to send for the original records of the case from the courts below and also to call for the file relating to the inquiry held by the Central Government under Section 9(2) of the Citizenship Act (Act No. 57 of 1955) into the question of the acquisition of citizenship of Pakistan by the respondent.

2. On July 11, 1963, the respondent was arrested for overstaying in India as a foreigner and on March 6, 1965, he was charged by the City Magistrate, Varanasi, with the commission of an offence punishable under Section 14 of the Foreigners Act (Act No. 31 of 1946). The charge reads :

"I, D. S. Sharma, city Magistrate, Varanasi, hereby charge you Rahmatullah as follows :

That you being a Pakistani Citizen entered into India on April 1, 1955 on Pakistani Passport No. 283772, dated March 15, 1955 and Indian Visa No. 16326, Category C, dated March 22, 1955 and got your extension to stay in India up to May 25, 1956 after which date you are overstaying in India illegally without any passport and visa :

and thereby committed an offence punishable under Section 14 of Foreigners Act within my cognizance,

and hereby I direct you to be tried on the said charge by me."

3. According to the prosecution case against the respondent as put in the Trial Court, he was a Pakistani national and had on April 1, 1965, entered India on a Pakistani Passport, dated March 15, 1955, and an Indian Visa, dated March 22, 1955, obtained by him as a Pakistani national, but even after the expiry of the permitted period he was overstaying in India without a valid passport or visa. The original visa, it is not disputed, expired on June 21, 1955, but it was entered thrice, the last extension being valid only up to May 25, 1956. Thereafter the respondent went underground and has since been residing in India illegally. He was traced after several years and was arrested on July 11, 1963. The respondent pleaded in defence that though he had entered India on a Pakistani

passport he was not a Pakistani national. On the contrary he claimed to be an Indian citizen and therefore rightfully living in India. According to him he had been born in India of Indian parents in 1932 and was an Indian citizen under the Constitution.

4. During the pendency of the present criminal proceedings an inquiry was made by the Central Government under Section 9(2) of the Citizenship Act, read with Rule 30 of the Citizenship Rules, 1956, and by means of an order, dated November 5, 1964, it was determined that the respondent had acquired citizenship of Pakistan after January 26, 1950, and before March 15, 1955. March 15, 1955 was apparently fixed because on that date the respondent had secured his Pakistani passport. In that inquiry the respondent was given full opportunity of adducing proof in support of his plea. The respondent was informed of the determination of the Central Government on March 29, 1965 in the Trial Court.

5. The City Magistrate, Varanasi, trying the case came to the conclusion that the respondent had voluntarily gone to Pakistan and had stayed there for eight or nine months. The fact that he had obtained a Pakistani passport was in the opinion of that Court an indication of his intention to have gone to that country with the object of becoming a Pakistani national. The argument that the determination in regard to the respondent's citizenship was made by the Central Government after the commencement of the present proceedings was considered by the Trial Court to be irrelevant because the determination by the Central Government was immune from challenge and whether it was made before or after the framing of the charge was immaterial. The respondent was held to be a Pakistani national and as it was not denied that he had entered India on a Pakistani passport and also that on the expiry of the period for which he had been permitted to stay in India including the excluded period, he had stayed in this country without obtaining valid permit, he was convicted of an offence under Section 14 of the Foreigners Act. He was sentenced to rigorous imprisonment for 18 months and to pay a fine of Rs. 200/- and in default of payment of fine to rigorous imprisonment for a further period of three months.

6. The Sessions Judge dismissed the respondent's appeal holding that the charge had been framed against him several months after the determination by the Central Government that he was a Pakistani national. According to that Court the order of the Central Government was dated November 5, 1964, and it was communicated by the Sahayak Sachiv, U.P. to the Senior superintendent of Police, Varanasi, on December 28, 1964.

7. On revision the High Court disagreed with the view of the courts below. According to the High Court the respondent was not a foreigner when he entered India though he had obtained a Pakistani passport. Having not entered as a foreigner the respondent's case was held to be outside Para 7 of the Foreigners Order, 1948, made under Section 3 of the Foreigners Act. The High Court held the respondent to be a foreigner when he was prosecuted for an offence under Section 14 of the Foreigners Act. But in its opinion that fact could not attract Para 7 of the Foreigners Order, 1948, made under Section 3 of the Foreigners Act. On this reasoning the respondent's conviction was set aside and he was acquitted.

8. In this Court, to begin with, it was argued on behalf of the State that Section 2(a) of the Foreigners Act defines a "foreigner" to mean a person who is not a citizen of India. If, therefore, the respondent is not a citizen of India, then being a foreigner his prosecution and conviction under Section 14 of the Foreigners Act was unassailable, contended Shri Rana. The order of the High Court acquitting the respondent was, therefore, contrary to law, he added. This submission is misconceived. The definition of the word "foreigner" relied upon by the counsel was substituted for

the earlier one by the Foreigners Law (Amendment Act 11 of 1957) with effect from January 19, 1957. Quite clearly the new definition is of no assistance in determining the status of the respondent at the time of his entry into India in 1955. The word "foreigner" according to the definition as in force in 1955 meant, a person who (i) is not natural born British subject as defined in sub-sections (1) and (2) of Section 1 of the British Nationality and Status of Aliens Act, 1914, or (ii) has not been granted a certificate of naturalization as a British subject under any law, for the time being in force in India, or (iii) is not a citizen of India. The Citizenship Act, 1955 having been published in the Gazette of India on December 30, 1955, was also not in force at the time when the respondent entered India. We may, therefore, turn to the Constitution to see if the respondent was a citizen of India at the time of the commencement of the Constitution. Clause (a) of Article 5 clearly covers the case of the respondent who was born in the territory of India and had his domicile in this territory at the commencement of the Constitution. Being a citizen of India at the commencement of the Constitution in 1950, unless he lost his citizenship under some law between the commencement of the Constitution and has under some law between the commencement of the Constitution and his entry into India in 1955, the respondent would continue to be an Indian citizen till such entry. Even on behalf of the appellant no serious attempt was made to show that the respondent had lost his Indian citizenship in any other manner except on the basis of his having obtained a Pakistan passport and on the basis of the determination of the question of his citizenship by the Central Government on November 5, 1964. Indeed after some faint argument the appellant's learned counsel based his case exclusively on the determination by the Central Government, and in our opinion on the existing record rightly so. According to his submission the determination made by the Central Government under Section 9(2) of the Citizenship Act is final and since the respondent has been held to have acquired citizenship of Pakistan before March 15, 1955, his entry into India after that date and his subsequent continued stay in this country, after the expiry of the extended period on May 22, 1955, would, amount to an offence punishable under Section 14 of the Foreigners Act.

9. As will presently be shown the real question which arises for our decision lies in a short compass and the relevant facts essential for the decision are no longer in dispute. When the respondent entered India on April 1, 1955, he was in possession of a Pakistani passport and a visa to which no objection was taken by the Indian authorities. He did not enter India clandestinely, and he is not being tried for having entered India in violation of any law. Indeed his visa was admittedly extended by the appropriate authority up to May 22, 1965. As he was clearly a citizen of India at the commencement of the Constitution and the question arose whether he had lost Indian citizenship thereafter, the Central Government had to determine under Section 9 of the Citizenship Act the question of the acquisition of Pakistan nationality by the respondent. This Court in *Government of Andhra Pradesh v. Syed Mohd. Khan* ((1962) Supp 3 SCR 288 : AIR 1962 SC 1778 : 64 Punj LR 889) after referring to its earlier decision in *Izhar Ahmad Khan v. Union of India* ((1962) Supp 3 SCR 235 : AIR 1962 SC 1052) made the following observation :

"Indeed, it is clear that in the course of the judgment, this Court has emphasised the fact that the question as to whether a person has lost his citizenship of this country and has acquired the citizenship of a foreign country has to be tried by the Central Government and it is only after the Central Government has decided the point that the State Government can deal with the person as a foreigner. It may be that if a passport from a foreign Government is obtained by a citizen and the case falls under the impugned Rule, the conclusion may follow that he has acquired the citizenship of the foreign country; but that conclusion can be drawn only by the appropriate authority authorised under the Act to enquire into the question. Therefore, there is no doubt that in all cases where action is proposed to be taken against persons residing in this country on the ground that they have acquired the citizenship of a foreign State and have lost in consequence the citizenship of this

country, it is essential that that question should be first considered by the Central Government. In dealing with the question, the Central Government would undoubtedly be entitled to give effect to the impugned Rule 3 in Schedule III and deal with the matter in accordance with the other relevant Rules framed under the Act. The decision of the Central Government about the status of the person is the basis on which any further action can be taken against him."

In that case an argument was raised on the authority of Izhar Ahmad Khan's case (supra) that as soon as a person acquired a passport from a foreign Government his citizenship of India automatically came to an end, but it was repelled.

10. In *State of Andhra Pradesh v. Abdul Khader* ((1962) 1 SCR 737 : AIR 1961 SC 1467 : (1961) (2) Cri LJ 573 : 63 Punj LR 751) the respondent there was born in India in 1924 and had lived in this country all along till about the end of 1954. At the end of 1954 or the beginning of 1955 he went to Pakistan from where he returned on January 20, 1955 on a passport granted by the Pakistan Government which had a visa endorsed on it by the Indian authorities permitting him to stay in this country up to April 1955. He applied to the Central Government for extension of the time allowed by the visa, but there was no material to show what orders, if any, were made on it. The respondent having stayed in this country beyond the time specified in the visa, on September 3, 1957 he was served with an order under Section 3(2)(c) of the Foreigners Act, requiring him to leave India. On his failure to comply with this order he was prosecuted under Section 14 of the Foreigners Act. His defence was that he was an Indian national. The Magistrate trying him rejected his defence and convicted him holding that he had disowned Indian nationality by obtaining a Pakistan passport and that by refusing to extend the time fixed by the visa the Central Government had decided that the respondent was a foreigner under Section 8 of the Foreigners Act and that such a decision was final. He was convicted by the Trial Court and the conviction was upheld by the Sessions Judge. The High Court in revision set aside his conviction. On appeal this Court held that neither the Magistrate nor the Sessions Judge was competent to come to a finding of his own that the respondent, an Indian national, had disowned his nationality and acquired Pakistan nationality for under Section 9(2) of the Citizenship Act that decision could only be made by the prescribed authority. The respondent in that case, according to this Court, had become an Indian citizen under Article 5(a) of the Constitution when it came into force and there being no determination by the Central Government that he had lost his nationality thereafter, the order of the High Court acquitting him was upheld.

11. In *Shuja-Ud-Din v. The Union of India and Another* (C.A. No. 294 of 1962, decided on October 30, 1962) this Court speaking through Gajendragadkar, J., as he then was said :

"It is now well settled that the question as to whether a person who was a citizen of this country on January 26, 1950, has lost his citizenship thereafter, has to be determined under the provisions of Section 9 of the Citizenship Act, 1955 (No. LVII of 1955). There is also no doubt that this question has to be decided by the Central Government as provided by Rule 30 of the Rules framed under the Citizenship Act in 1956. The validity of Section 9 as well as of Rule 30 has been upheld by this Court in the case of *Izhar Ahmad Khan and Others v. Union of India and Others*. It has also been held by this Court in *The State of Madhya Pradesh v. Peer Mohd. and Another* (Cri. Appeal No. 12 of 1961 decided on September 28, 1962) that this question has to be determined by the Central Government before a person who was a citizen of India on January 26, 1950, could be deported on the ground that he has lost his citizenship rights thereafter under Section 9 of the Citizenship Act. Unless the Central Government decides this question, such a person cannot be treated as a foreigner and

cannot be deported from the territories of India."

12. In *Abdul Sattar Haji Ibrahim Patel v. The State of Gujarat*, (Cr. A. No. 153 of 1961, decided on February 17, 1964 : AIR 1965 SC 810 : (1964) 2 SCJ 461 : (1965) Cr LJ 759) Gajendragadkar, C.J., speaking for a bench of five Judges approved the decisions in the cases of *Izhar Ahmad Khan* (supra) and *Syed Mohd. Khan* (supra), it being emphasized that the decision of the Government of India is a condition precedent to the prosecution by the State of any person on the basis that he has lost his citizenship of India and has acquired that of a foreign country. That an inquiry under Section 9 of the Citizenship Act can only be held by the Central Government was again reaffirmed by this Court in *Mohd. Ayub Khan v. Commissioner of Police, Madras* ((1965) 2 SCR 884).

13. In view of these decisions it seems to us to be obvious that till the Central Government determined the question of the respondent having acquired Pakistan nationality and had thereby lost Indian nationality, he could not be treated as a foreigner and no penal action could be taken against him on the basis of his status as a foreigner, being national of Pakistan. It is not the appellant's case before us that any directions under the law governing foreigners were given to the respondent after November 5, 1964, which were disobeyed entailing his prosecution, and indeed it is admitted that he was not even informed of the decision of the Central Government till March 29, 1965. It is also noteworthy that at the time when the Central Government determined his nationality he was being tried in this country by the criminal court after having been arrested and bailed out, and he was not free to leave this country for proceeding to Pakistan. In the back-ground of these facts it appears to us that the wide charge as framed against him was misconceived and he could not be convicted of overstaying in this country at least till he was duly found to be a Pakistani national and to have ceased to be an Indian citizen. The order of the Central Government is clearly final, and it has remained unchallenged by the respondent even after he was informed of this order on March 29, 1965. We have seen the proceedings of the Central Government and we find that the respondent had been given full opportunity of putting forth his case. The binding nature of that order was not, and indeed it could not be, questioned before us. The determination by the Central Government in this case would not have the effect of retrospectively rendering a penal offence an act which was not so at the time of its commission. The respondent even though held to be a Pakistani, and therefore a foreigner, before the charge was framed against him is entitled to the protection of our laws.

14. As a result of the foregoing discussion, the High Court was in our opinion right in setting aside the respondent's conviction on the charge framed. It will of course be open to the Central Government to take such suitable action against the respondent under the Foreigners Act or under any other provision of the law which may be applicable to him, for the purpose of either deporting him or otherwise dealing with him as is thought fit. This appeal, however, must fail.

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