State of Assam

Vs

Jilkadar Ali

Criminal Appeal No. 176 of 1969

(J. M. Shelat, H. R. Khanna JJ)

18.07.1972

JUDGMENT

SHELAT, J. -

1. Prior to August 15, 1947, the respondent was in the service of the Government of Assam as an unarmed Police Constable bearing No. 407, serial No. 29. On partition, he opted for service in Pakistan. Consequent on his exercising such option, the Assam Government passed on order No. 2155, dated December 31, 1947, releasing him from service and directing him to report to the Inspector-General of Police, Dacca for service there. The respondent thereafter went to the then East Pakistan and joined Pakistan Government service as a peon in the sub-registrar's office at Fenchuganj, District Sylhet.

2. He entered India on December 23, 1953, on the strength of a Pakistani passport, dated September 10, 1953, and an Indian visa, dated November 11, 1953. He appears to have returned to Pakistan on April 25, 1954. On January 27, 1955, he again applied for and obtained an Indian visa which was valid up to January 26, 1955. On the strength of that visa, he entered India on April 4, 1955. Instead of returning to Pakistan, he overstayed beyond January 26, 1955, until he was detected on October 9, 1964, in the village Niargram, Silchar Sub-Division in the house of one Tozamul Ali Majumdar. He had at that time no permit as required by Clause 7 of the Foreigners Order, 1948, as amended in 1959. He was consequently arrested and prosecuted under Section 14 of the Foreigners Act, 1946, read with Clause 7 of the Foreigners Order, 1948.

3. The Additional District Magistrate, Silchar, convicted him under Clause 7 of the Foreigners Order, read with Section 14 of the Foreigners Act, 1946 and sentenced him to rigorous imprisonment for a period of six months and directed that he should be deported from India after he had served out the sentence. On appeal by the respondent against the said order of conviction and sentence, the Sessions Judge, Silchar upheld the said order of conviction and sentence.

4. In the revision application filed by him in the High Court of Assam and Nagaland, the High Court, relying on Fida Hussain v. U.P. ((1962) 1 SCR 776 : AIR 1961 SC 1522.), reversed the said order of conviction and sentence and accepting the revision acquitted him. The reasoning adopted by the High Court was that as in the case of Fida Hussain case (supra), the respondent was a natural born British subject, that being so he was at the date of his entry in India in April, 1955 a citizen of India under Article 5 of the Constitution and that he was governed by the definition of a foreigner in the Foreigners Act before that Act was amended in 1957. Before the said amendment, a foreigner as defined by Section 2(a) meant a person who -

(i) is not a 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 High Court felt that the respondent fell under clause (i) of the said definition and therefore was not a foreigner when he entered India in April, 1955 (i.e. before the definition was amended in 1957) and was not, therefore, required to obtain a permit under Clause 7 of the Foreigners Order, 1948. According to the High Court, if he amended definition applied to the respondent it would be the Central Government and not a court of law which could under the Citizenship Act, 1955 be the appropriate authority to deal with such questions.

5. In our view the reasoning adopted by the High Court, of which the basis was the decision in Fida Hussain's case (supra), was not valid as the High Court omitted to take into account the fact of the respondent having left India for Pakistan in August, 1947 after he had opted for service in Pakistan.

6. The defence of the respondent was that he was born in India, that he owned a house and lands in India and was therefore a citizen of India within the meaning of Article 5 of the Constitution. There is, however, the fact established by the record in this case that in 1947 he opted for Pakistani service, and the he left India for Pakistan where he obtained service as a peon and that he lived there from 1947 to 1953 when he came to India on a short visit on the strength of a Pakistani passport and a visa and then returned to Pakistan.

7. Under Article 7, notwithstanding anything in Article 5, a person, who has after the first day of March, 1947, migrated from the territory of India to the territory included in Pakistan shall not be deemed to be a citizen of India. If Article 7 applied to this case, the respondent would not be deemed to be a citizen of India notwithstanding his complying with the conditions of Article 5. It is quite clear from M.P. v. Peer Mohammed (1963 Supp 1 SCR 429 : AIR 1963 SC 645.), that it would be Article 7 and not the Citizenship Act, 1955 which would apply to a case where a person has migrated to Pakistan between March 1, 1947 and January 26, 1950, when the Constitution came into force. If Article 7 were to apply it is clear that the court and not the Central Government or its delegate which would have jurisdiction to deal with the question whether the person concerned is a foreigner to be dealt with under the Foreigners Act.

8. The crucial point in the case, therefore, was whether the respondent had migrated to Pakistan between March 1, 1947 and January 26, 1950. If he did, then notwithstanding his complying with the requirements of Article 5, his case would fall under Article 7 and he would be deemed not to be a citizen even on the date of his entry in India on April 4, 1955. What then is the connotation of the word 'migrated' within the meaning of Article 7 ? In Kulathil Mammu v. Kerala ((1966) 3 SCR 706 : AIR 1966 SC 1614.), this Court interpreted Article 7 and held that the word 'migrated' was capable of two meanings. In its narrower connotation it meant going from one place to another with the intention of residing permanently in the latter place; in its wider connotation it simply meant going from one place to another whether or not with the intention of permanent residence in the latter place. In Article 7 the word was use in its wider sense though it did not take in movement which was involuntary or for a specific purpose and for a short and limited period. Considering the facts of the present case, viz., the option exercised by the respondent for Pakistan service, his secured

release from Indian service as a constable, his going to Pakistan and obtaining service there as a peon in the sub-registrar's office, his staying there thereafter for a long period, his obtaining Pakistani passport and visas declaring therein that he had acquired Pakistani citizenship and domicile, there can be no doubt that he had gone to Pakistan permanently. His movement to Pakistan thus was neither involuntary nor for a short or limited period, but was clearly with the definite intention of having a permanent place of abode there. His case thus fell within Article 7 and therefore on his entry in India on April 4, 1955, he was a person who was deemed not to be a citizen of India.

9. In Fida Hussain v. U.P. (supra), the question of the applicability of Article 7 did not arise and was not considered presumably because it was not contended that Fida Hussain had migrated to the territory which fell within Pakistan between March 1, 1947 and January 26, 1950. The Court, therefore, considered only clause (1) of Section 2(1) of the Foreigners Act, 1945 and not its clause (3) as it stood before its amendment in 1957. It appears that the only date available there was the date of his entry in 1953, when the unamended definition prevailed. It could not, therefore, be said there that he had migrated from India between March 1, 1947 and January 26, 1950, and that, therefore, he would be deemed not to be a citizen of India under Article 7. In our view, the High Court could not have relied on Fida Hussain's case (supra), for its conclusion that the respondent was not a foreigner in April, 1955, and that, therefore, Clause 7 of the Foreigners' Order could not apply to him.

10. Clause 7 of the Foreigners Order, 1948 by its sub-clause (1) requires every foreigner who enters India on the authority of a visa to obtain a permit from the relevant authority indicating the period during which he is authorised to remain in India. The visa obtained by the respondent permitted him to stay in India till January 26, 1956. If he wanted to stay beyond that period, it was incumbent on him as provided by sub-clause (3) of Clause 7 to obtain from the relevant authority thereunder an extension of the period mentioned in the visa. In the absence of such an extension he was bound to depart from India on January 26, 1955. Admittedly he did not, but on the contrary continued to remain in India until he was detected in 1964.

11. Dr. Mahmood, however, relied on the Registration of Foreigners (Exemption) Order, 1957. But whether the respondent was exempted under that order or not is entirely irrelevant for the purposes of Clause 7 of the Foreigners Order, 1948, whose purpose clearly is to see that a foreigner entering India under a visa does not overstay beyond the period for which the visa permits him to stay in this country. By overstaying here without the required extension the respondent clearly violated the provisions of Clause 7(1) and (3) of the Foreigners Order, 1948, in view of our conclusion that he was a person who was deemed not to be a citizen of this country, and therefore, a foreigner even under the definition of a foreigner in Section 2 of the Foreigners Act before it was amended in 1957.

12. The decision in State v. Ibrahim Nahiji (AIR 1959 Bom 526.), referred to by counsel also does not assist as it did not have to deal with the point arising in the present appeal, that is with regard to a person who, notwithstanding Article 5, is to be deemed not to be a citizen under Article 7, and therefore, a foreigner within the meaning of Section 2(a) of the Foreigners Act as it stood in 1955. The State v. Akub (AIR 1961 All 428.), another decision relied on by Dr. Mahmood, merely laid down that persons who are sought to be brought within the scope and ambit of Clause 7 of the Foreigners Order, 1948 are persons who are not citizens of India, and that clause did not apply to those who were not foreigners at the date of their entry although they may become foreigners after their entry by reason of the amendment of the definition in 1957. This decision again cannot assist

the respondent in view of our conclusion with regard to Article 7 by reason of which the respondent even at the date of his entry in 1955 was deemed not to be a citizen of India.

13. In our view the respondent was a foreigner when he entered India in April, 1955 as the definition of foreigner then stood, and by overstaying beyond the period permissible under the visa on the strength of which he had entered India he clearly committed breach of Clause 7 of the Foreigners Order, 1948 and was liable to be punished under Section 14 of the Foreigners Act, 1946. He was, therefore, rightly convicted and sentenced by the Trial Magistrate. The High Court, in our view, erred in setting aside that order of conviction and sentence. The appeal by the State is, therefore, allowed an the order of the Trial Court is restored.

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