Abdus Samad

Vs

State of West Bengal

Criminal Appeal No. 216 of 1969

(A. N. Ray, I. D. Dua JJ)

12.09.1972

JUDGMENT

RAY, J. -

1. This is an appeal by special leave from the judgment, dated July 18, 1969 of the High Court at Calcutta convicting the appellant under Section 14 of the Foreigners Act and sentencing him to simple imprisonment for one month.

2. The appellant was served with a notice on February 21, 1962, requiring him to leave India within thirty days. He did not do so. He was arrested on May 7, 1962. He was prosecuted under Section 14 of the Foreigners Act for violation of the notice to leave India. The defence of the appellant was that he was not a foreigner but was an Indian citizen. The Magistrate found that the prosecution failed to prove that the appellant was a foreigner and acquitted the appellant. The High Court reversed the acquittal.

3. Counsel for the appellant contended that the appellant was an Indian citizen.

4. The appellant was born at Sylhet which on the partition of India in 1947 became part of Pakistan. He came to Calcutta in 1914. He obtained a Pakistani passport in 1952.

5. It was said on behalf of the appellant that he came to Calcutta in 1914 and therefore at the commencement of the Constitution he became a citizen under Article 5(c) of the Constitution.

6. In the present case the domicile of origin communicated by operation of law to the appellant at birth at Sylhet could not on partition of India be called Indian. The domicile of choice is that every person of full age is free to acquire in substitution for that which he possession at the time of choice. By domicile is meant a permanent home. Domicile means the place which a person has fixed as a habitation of himself and his family not for a mere special and temporary purpose, but with a present intention of making it his permanent home. Domicile of choice is thus the result of a voluntary choice.

7. Every person must have domicile. A person cannot have two simultaneous domiciles. Domicile denotes connection with the territorial system of law. The burden of proving a change in domicile is on those who allege that a change has occurred.

8. The High Court found that there were no materials to show that the appellant was not a resident of India for five years before the commencement of the Constitution. But in order to attract Article

5(c) of the Constitution the appellant must have Indian domicile. Mere residence is not domicile. There must have been the intention of the appellant on the partition of India to remain in India permanently. The intention of mind of the appellant is indicated by two principal facts. First, the appellant had a Pakistani passport in 1952. Second, the appellant made an application under Section 5 of the Indian Citizenship Act for registration as an Indian citizen after the appellant had been given notice under the Foreigners Act to leave India.

9. The High Court found that when the appellant came to Calcutta in 1914, he must have come over for a limited purpose or for some limited period. After the partition of India in 1947 the members of the appellant's family specially his wife and son lived in Pakistan. When the system of passport and visa was introduced the appellant obtained Pakistani passport and he stayed in India on visas granted by the State of West Bengal. The High Court was therefore correct in coming to the conclusion that the appellant did not have Indian domicile and the appellant was not an Indian citizen.

10. Counsel for the appellant contended that there was no consideration by and answer from the Government of India on the representation, dated March 16, 1962, made by the appellant. It was said that the representation was one under Section 9(2) of the Indian Citizenship Act, 1952, for the determination of his citizenship. Therefore the contention was that until there was a determination by the Government the appellant could not be asked to leave India. That is not a representation under Section 9 of the Indian Citizenship Act. This was a request to the Government by the appellant not to be "pushed out of India". The appellant then made an application under Section 5(1)(a) of the Citizenship Act on May 4, 1962, to be registered as a citizen of India. It was never the plea of the appellant that he was an Indian citizen. An application for registration as an Indian citizen totally repeals any plea of Indian citizenship of the appellant.

11. In the High Court it was contended on behalf of the appellant that he came to India before July 19, 1948, and, therefore, he had migrated from Pakistan to India. It is the view of this Court since the decision in Kulathil Mammu v. The State of Kerala, ((1966) 3 SCR 706 : AIR 1966 SC 1614 : (1967) 2 SCJ 653) that migration in its wider connotation means going from one place to another whether or not with the intention of permanent residence in that place. There was no question of migration to India in 1914 for the simple reason that Sylhet and Calcutta both formed part of India at that time. The submission that the appellant migrated to India is repelled by his Pakistani passport, his visa granted by the State of West Bengal and the members of his family staying in Pakistan at the relevant time. As the appellant was not registered as an Indian citizen, the appellant's application for registration was rejected on May 6, 1963. The representation of the appellant of March 16, 1962, did not merit any further answer after the rejection of the appellant's application for registration as an Indian citizen.

12. For these reasons, the appeal fails and is dismissed. The appellant will surrender to his bail and to serve out the sentence.

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