Masud Khan

Vs

State of Uttar Pradesh

Writ Petition No. 117 of 1973

(H. R.Khanna, A. Alagiriswami JJ)

26.09.1973

JUDGMENT

ALAGIRISWAMI, J. –

1. Petitioner Masud Khan prays for his release on the ground that he, an Indian citizen has been illegally arrested and confined to jail under paragraph 5 of the Foreigners (Internment) Order, 1962. He had come to India from Pakistan on the basis of a Pakistani Passport dated July 13, 1954 and Indian visa dated April 9, 1956. In his application for visa he had stated that he had migrated to Pakistan in 1948 and was in Government service in Pakistan in P.W.D. as a Darogha and had given his permanent address as Hyderabad (Sind). If these statements were correct the petitioner would clearly be a Pakistani national. When this fact was brought out in the counter affidavit filed on behalf of the respondent, the petitioner filed a further affidavit stating that he was appointed as a Police Constable in Hasanganj Police station, District Fatehpur, U.P. in February, 1947 and continued as a Police Constable till the middle of 1950 when he was dismissed from service, and that he went to Pakistan in the year 1951. In the reply affidavit filed on behalf of the respondent it is stated that one Md. Masood Khan son of Zahoor Khan was enrolled as Police Constable on September 16, 1947 and he was discharged from service on May 20, 1949. It is fairly clear that this information culled from the English Order Book from October 1, 1947 to December 27, 1951 refers to the petitioner. While, therefore, it is established that the petitioner did not go to Pakistan in 1948, it cannot be said that it has been established that the petitioner went to Pakistan only in 1951. When he went to Pakistan is a matter peculiarly within his knowledge and he has produced no evidence in support of that statement. Considering the frequent change of ground which the petitioner has resorted to, a mere statement from him cannot be accepted as true. Nor can we accept his contention that it is for the respondent to establish that he did not go to Pakistan in 1951 but that he went on some other date. The petitioner has also alleged that he was married in U.P. on December 25, 1969. Even assuming that this statement is correct, the petitioner cannot establish that he is a citizen of India unless he succeeds in establishing that he was in India on January 26, 1950. If he had been in India on January, 26, 1950 but had gone to Pakistan in 1951 it would be for the Central Government to decide whether he is a Pakistani national or an Indian citizen even though he may have come to India on a Pakistani Passport in 1956 [See AIR 1963 SC 645 : 1963 Supp 1 SCR 429 : (1963) 1 Cri. LJ. 617; AIR 1962 SC 1052 : 1962 Supp 3 SCR 235 : (1962) 2 Cri LJ 215; AIR 1962 SC 1778 : 1962 Supp 3 SCR 288 : (1963) 2 SCJ 178; AIR 1961 SC 1467 : (1962) 1 SCR 737 : (1961) 2 Cri LJ 573]. That question does not arise here.

2. We are not prepared assume that the petitioner should be deemed to have been present in India on January 26, 1950 as was urged on behalf of the petitioner. There is no room for any such presumption. Under Section 9 of the Foreigners Act whenever a question arises whether a person is

or is not a foreigner the onus of proving that he is not a foreigner lies upon him. The burden is therefore upon the petitioner to establish that he is a citizen of India in the manner claimed by him and therefore he is not a foreigner [See (1962) 1 SCR 744 : AIR 1961 SC 1526 : (1961) 2 Cri LJ 703; 1963 Supp 2 SCR 560 : AIR 1963 SC 1035 : (1963) 2 Cri LJ 55]. This burden not having been discharged by the petitioner it should be held that he is a foreigner and his claim that he is an Indian citizen and cannot be dealt with under the Foreigners (Internment) Order, 1962 must be rejected.

3. It appears, however, that in 1960 he had been prosecuted before the Sub-Divisional Magistrate, Fatehpur under Section 14 of the Foreigners Act and was acquitted on the ground that he was not a foreigner. It was therefore contended that the question whether the petitioner is a foreigner or not is a matter of issue-estoppel. The decision that he was not a foreigner seems to have been based on the decision of the Allahabad High Court in Mohd. Hanif Khan v. State. (AIR 1960 All 434 : 1959 ALJ 895 1960 Cri LJ 878) It was held there that a Pakistani national who entered into India before the amendment to the Foreigners Act in 1957, when he could not be considered to be a foreigner, could not be so held because of that amendment. That decision was that of a learned Single Judge. On the point at issue he differed from an earlier decision of a learned Single Judge of the same court in Ali Sher v. The State. (AIR 1960 All 431 : 1959 ALJ 833 : 1960 Cri LJ 875) But he decided the case before him on a different point and did not think it necessary to refer the case before him to a Bench for considering which of the two decisions was correct on the question regarding the nationality of a person who came to India on a Pakistani passport before 1957. There are thus two conflicting decisions of the same court on the same point and the Magistrate who decided the petitioners case followed one of them.

4. But that apart, this matter could be decided on another point. The question of issue-estoppel has been considered by this Court in Pritam Singh v. State of Punjab,(AIR 1956 SC 415 : 1956 Cri LJ 805) Manipur Administration v. Thokchom, Bira Singh ((1964) 7 SCR 123 : AIR 1965 SC 87 : (1965) 1 Cri LJ 120) and Piara Singh v. State of Punjab. ((1969) 1 SCC 379). Issue-estoppel arises only if the earlier as well as the subsequent proceedings were criminal prosecutions. In the present case while the earlier one was a criminal prosecution the present is merely an action taken under the Foreigners (Internment) Order for the purpose of deporting the petitioner out of India. It is not a criminal prosecutions. The principle of the Issue-estoppel is simply this : that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trail and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law. Pritam Singh's case (supra) was based on the decision of the Privy Council is Sambasivam v. Public Prosecutor, Federation of Malaya. ((1950) AC 458) In that case Lord MacDermott speaking for the Board said :

> "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication."

It should be kept clearly in mind that the proceeding referred to herein is a criminal prosecution. The plea of Issue-estoppel is not the same as the plea of double jeopardy or autrefois acquit. In the King v. Wilkes, (77 CLR 511) Dixon, J., referring to the question of Issue-estoppel said :

> ".... It appears to me that there is nothing wrong in the view that there is an Issue-estoppel, if it appears by record of itself or as explained by proper evidence, if it appears by record of itself or as explained prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner ..... There must be a prior proceeding determined against the Crown necessarily involving an Issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself by inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of Issue-estoppel should not apply ..... Issue-estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation."

The emphasis here again would be seen to be on the determination of criminal liability. In Marz v. The Queen, (96 CLR 62) the High Court of Australia said :

> "The Crown is as much precluded by an estoppel by judgment in criminal proceedings as is a subject in civil proceedings .... The law which gives effect to issue-estoppel is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the process of reasoning by which the finding was reached in fact ..... It is enough that an issue or issues have been distinctly raised or found. Once that is done, the, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding, may be made by one of them against the other."

Here again it is to be remembered that the principle applies to two criminal proceedings and the proceeding with which we are now concerned is not a criminal proceeding. We therefore hold that there is no substance in this contention.

5. The petition is dismissed.

</html