ALLAHABAD HIGH COURT

Shabbir Husain

Vs

The State of U.P

Criminal Misc. No. 1519 of 1950

(Raghubar Dayal and P.L. Bhargava, JJ.)

26.09.1951

JUDGMENT

Raghubar Dayal, J.

1. This is an application under Section 491, Criminal Procedure Code, and Article 226 of the Constitution praying for a writ in the nature of habeas corpus to be issued against the State of Uttar Pradesh and the Superintendent, District Jail, Bijnor, ordering them to produce the applicant before the Court and release him from wrongful custody in which he is detained and for a writ in the nature of Mandamus against the State of Uttar Pradesh directing it to set aside its order for the removal of the applicant from India.

2. The affidavit filed along with the application states that the applicant is a resident of village Kalyanpur, police station Nagina, district Bijnor in the state of Uttar Pradesh from his birth, that he went to Lahore in 1948 in connection with his business, that permit rules happened to be introduced during his stay there and that when he wanted a permit for permanent return to India the authorities just issued a temporary permit which was valid upto 1.1.1949. The affidavit proceeds to state that the applicant, however, overstayed and was convicted of the offence under Section 5, Influx from Pakistan (Control) Ordinance No. XXXIV of 1948.

3. The applicant represented his case to the U.P. Government for permanent resettlement in India. He was given to understand that his case had been rejected by the State of Uttar Pradesh and that the State had passed an order that he be removed from India and sent back to Pakistan under Section 7, Influx from Pakistan Control Act, XXIII of 1949. In furtherance of this order he has been confined in the District Jail, Bijnor since 21.7.1950.

4. The applicant submits that the order of his removal from India was beyond the competence of the State Government and that such an order could not be passed by either the State or the Central Government against the applicant as he is a citizen of India within the meaning of that word in the Constitution and he never migrated to Pakistan and never became a citizen of that State.

5. No counter affidavit has been filed on behalf of the State.

6. The learned Government Advocate filed the application presented by the applicant to the Deputy High Commissioner of India at Lahore for the issue of a permit for permanent return to India and the applicant's affidavit which was filed with that application.

7. The affidavit sworn by Shabbir Husain on 21.7.1948 at Bombay mentioned that he was an Indian subject residing then in Bombay and that he was going to Lahore (Pakistan) for business purposes and that he would return to India after disposing of his goods in two months. He, however, stated that he was making the affidavit to enable him to go to Pakistan and that he be permitted to return to India from Pakistan. The application that he made to the Deputy High Commissioner in Pakistan mentioned.the same thing. The officer dealing with the application noted :

> "Although the attached document is only an affidavit and given before a Bombay Magistrate and not of his own district. It seems that he was in Bombay on business and decided to leave direct to West Pakistan. Seems a fairly genuine case and if you agree I propose to give him two months permit and verify in the meantime. At this stage I would like him to carry no objection certificate from Pakistan in case we do not want him there."

His superior officer approved of the suggestion of issuing two months permit and remarked that if he was prima facie an Indian national the suggested certificate from Pakistan cannot be called for. It would appear from the applicant's affidavit sworn at Bombay, from his representation in the application for permit to return to India and from the affidavit filed along with the petition that he never intended to give up his abode in this country and to settle in Pakistan.

8. Before I deal with the questions of law and fact to be decided in this application I may briefly refer to the law and rules concerning the entry into India of persons from West Pakistan.

9. On 19.7.1948 the first Ordinance was passed in this connection. It was the Influx from Pakistan (Control) Ordinance XVII of 1948. The rules framed under it were published in the Gazette of India dated 7.8.1948 Pt. I at page 976. This Ordinance and rules just require that a person entering from West Pakistan should possess a permit unless exempted from possessing one. We are not really concerned with these rules which were replaced by Permit System Rules of 1948 on 7.9.1948. Rule 3, Permit System Rules, 1948 provided for three kinds of permits, viz. (1) permits for temporary visits; (2) permits for resettlement or permanent return and (3) Permanent permits. Rule 12 provided that no person holding a temporary permit would stay in India after the date of expiry of such permit.

Rules 6 and 7 specifically dealt with the issue of permanent permits to persons who had to cross the frontier frequently. Rule 16 dealt with the issue of a permit for resettlement or return. These rules made no distinction between persons of Indian domicile and those who did not have Indian domicile. In Appendix II of these Rules Form B is a form of permit for resettlement or permanent return and makes a reference to the permission granted by the Government of India or the State as contemplated in Rule 16 sub clause (2). On 4.10.1948, Rule 16-A was added to these rules. It dealt with the application from a person who claimed to be domiciled in India and was staying in Pakistan on a temporary visit, this rule is :

> "16 A (1) A person who claims to be domiciled in India and is staying in Pakistan on a

temporary visit may apply to the High Commissioner or the Deputy High Commissioner for a permit to return to India in the forms specified in Appendix III with such proof to establish his claim as may be in his power or possession.

(2) The High Commissioner or the Deputy High Commissioner may, if he is satisfied that the statements made in the application are correct, issue permit for return to India in the form specified in Appendix IV. In case of any difficulty or doubt, he may make a reference to the Provincial Government of the Province or the Government of the State concerned.

(3) If the Provincial or the State Government reports in favour of the claim of the applicant the High Commissioner or the Deputy High Commissioner may grant the necessary permit. If the report is unfavourable, the application shall be refused.

(4) Pending inquiry from the Provincial or the State Government concerned, the High Commissioner or the Deputy High Commissioner may grant a temporary permit, if the applicant wishes to visit India on some urgent business like the death or severe illness of a close relation, or any other important domestic or business matter. The period of such temporary permit shall be long enough for the report to be received from the Provincial or the State Government concerned, If necessary permit can be extended from time to time.

(5) On receipt of the report, if the application for permanent return to India is rejected under Sub-Rule (3), the High Commissioner, or the Deputy High Commissioner as the ease may be, shall intimate to the Superintendent of Police of the District where the applicant is, for the time being, staying that his application has been refused and that the applicant should return to Pakistan on the expiry of the period of the temporary permit held by him."

It would appear from these rules that a person who could prove his claim to be domiciled in India was to be issued a permit for permanent return and that in case of doubt such person was at first to be issued a temporary permit and after due verification he was to be issued a permanent permit if the High Commissioner or the Deputy High Commissioner, as the case may be, was satisfied that he had his domicile in India. The application was to be rejected if he was not so satisfied. It appears that the applicant was issued a temporary permit in view of Rule 16-A mentioned above.

10. The Influx from West Pakistan (Control) Ordinance XVII of 1948 was repealed by the Influx from Pakistan (Control) Ordinance XXXIV of 1948 on 10.11.1948. Section 9 of this Ordinance is :

"(9) Repeal of Ordinance XVII of 1948 (1) The Influx from West Pakistan (Control) Ordinance, 1948 (XVII of 1948), is hereby repealed.

(2) Notwithstanding such repeal, any rules made action taken or thing done in the exercise of any power conferred by the Influx from West Pakistan (Control) Ordinance, 1948, shall for all purposes be deemed to have been made, taken or done in the exercise of the

> powers conferred by this Ordinance, as if this Ordinance had commenced, on the day such order was made or such action was taken or such thing done."

Section 6 of the Influx from Pakistan (Control) Ordinance XVII of 1948 authorised the Central Government by general or special order to direct the removal from India of any person who in contravention of the provisions of Section 3 had entered India. It would appear, therefore, that the only person who can be removed from India is one who entered without a proper permit and not one who had entered with a proper permit and had contravened any conditions laid down in that permit. Section 7 of the later Ordinance No. XXXIV of 1948 authorised the Central Government by general or special order to direct the removal from India of any person who had committed or against whom reasonable suspicion existed that he had committed an offence under this Ordinance.

11. It would appear, therefore, that in view of Section 9 of Ordinance XXXIV the permit issued to the applicant in October 1948 would be deemed to be a permit issued under Ordinance XXXIV of 1948. Section 5 not only made entry into India without a permit an offence but also made offence the contravention of the provisions of any rule made under Section 4 or the commission of breach of any conditions of the permit. The applicant could therefore be removed from India if he had committed a breach of the conditions of the permit or contravened the provisions of any rule framed under Section 4.

12. On 8th February, the Central Government issued Notification No. II (55-E) 49 N and I which is printed in the Government of India Gazette, Extraordinary dated 13.2.1949. By this order the Central Government directed removal from India of any person :

> "(a) Who has entered India from West Pakistan in contravention of Section 3 of the said Ordinance;
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> (b) Who, having lawfully entered India, contravenes the provisions of any rule made under Section 4 of the said Ordinance, or commits a breach of any of the conditions of his permit, or
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> (c) Who has obtained his permit On the strength of a statement made by him, which is false and which he either knew or believed to be false or did not believe to be true."

13. On 22.4.1949, the Influx from Pakistan (Control) Act, XXIII [23] of 1949 came into force and it repealed Ordinance 34 of 1948. Its provisions were practically the same as of the repealed Ordinance.

14. The Permit System Rules of 1948 were repealed by the Permit System Rules of 1949 which were published on 20.5.1949. These rules did not repeat (sic) Rule 16-A of the Permit System Rules of 1948. These Rules provided five kinds of permits by Rule 3, viz.- (i) permits for temporary visits, (ii) permits for permanent return to India, (iii) permits for repeated journeys, (iv) transit permits, and (v) permit for permanent resettlement. Rule 4 provided that an application for permit would be submitted in the relevant form specified in Appendix I of the Rules. Rule 5 sub-rr. (1) and (2) deal with the applications of persons domiciled in Pakistan and Sub-Rule (3) deals with persons domiciled in India and who intend to proceed temporarily to

Pakistan. Such persons were to obtain from the Collector of the district where they resided a certificate of identity given in Appendix II and directs that such visit from a person of Indian domicile shall not be for a period exceeding two months from the date of one's entry into Pakistan unless such period is extended by the High Commissioner or the Deputy High Commissioner for India in Pakistan to whom an application should be made before the expiry of the said period of two months.

15. The forms of applications specified in Appendix I and referred to in Rule 4 show that Form A is for temporary permits to be filled in by persons not previously permanent residents of territories now comprised in the Dominion of India. Forms B and C are for temporary and permanent permits respectively to be filled in by Pakistan residents who have migrated from India on or after 1.3.1947. Forms F and G are to be filled in by persons domiciled in Pakistan for permits for repeated journeys or for transit permit for journeys through India.

16. Application forms for persons domiciled in India are Forms D and E. Form D is for a permit of permanent return to be filled in by a person domiciled in India who had come to Pakistan on a temporary visit and Form E is for a permit for repeated journeys by persons domiciled in India. It would appear, therefore, that in these Permit System Rules of 1949 a person domiciled in India had to apply for permit for permanent return and was to get it. I do not find anything in the Rules which would justify refusal of a permit for permanent return to a person domiciled in India who had gone to Pakistan on a temporary visit. Rules 12 and 13 refer to circumstances in which a person domiciled in India does not require a permit.

17. Rules 19, 20, 25 and 26 deal with temporary permits.

18. In view of what I have said above these rules were meant to apply to persons who were not of Indian domicile but were domiciled in Pakistan, as temporary permits were contemplated to be issued to such persons only.

19. I repeat that these rules, to my mind, indicate that a person who is domiciled in India has for the sake of checking at the frontier to provide himself with a permit for permanent return or a permit for repeated journeys and that the other restriction placed on such a person is by Rule 5, Sub-Rule (3) that his stay in Pakistan is not to exceed two months unless the period be extended by the High Commissioner or the Deputy High Commissioner there.

20. The affidavit filed along with the application of the applicant says that he was granted a temporary permit valid for two months and that that permit was to expire on 1.1.1949. It is also stated in the same affidavit that he was convicted under Section 5 of ordinance XXXIV [34] of 1948. We do not know the date of his conviction.

21. It may appear from the above that the applicant, who was issued a temporary permit which was to expire on 1.1.1949, committed a contravention of a condition of that permit by overstaying in this country, and, therefore, contravened Rule 12 of the Permit System Rules of 1948 or Rule 19 of the Permit System Rules of 1949. He was accordingly convicted. I am, however, of opinion that he cannot be said to have really contravened the conditions of his permit when considered with Rule 16-A of Permit System Rules, 1948.

22. I have already mentioned the circumstances in which he was issued a temporary permit. The

temporary permit was issued on 27.10.1948 when the Permit System Rules, 1948 were in force. His application was for a permit for return to this country. It was in view of Rule 16-A, Clause 4 that he was given a temporary permit. The issue of a temporary permit does not dispose of his application finally. It was incumbent on the Deputy High Commissioner at Lahore to pass final orders on his application after the receipt of the report from the Uttar Pradesh Government, if the report satisfied that he was domiciled in India. He was to be issued a permit for return to India if the State Government reported in favour of his claim and was to reject it otherwise. We do not know whether the Deputy High Commissioner who granted the temporary permit ever rejected the application after receiving any unfavourable report from the State Government. If he did not, it was his duty under Rule 16-A, Sub-Rule (4) to extend the period of temporary permit from time to time till the receipt of such a report. We also do not know whether the Deputy High Commissioner had granted the application. In the absence of any definite information on the point, it should be deemed that the Deputy High Commissioner had at least extended the period of the temporary permit till he was to be in a position to pass any final orders.

23. In these circumstances it cannot be said that the period of temporary permit had come to an end and that Shabbir Husain had contravened the conditions of his permit by staying on in this country. It was necessary, in my opinion, for the State to establish that his application had been finally rejected by the Deputy High Commissioner. His stay after the rejection of his application will really be in contravention of the conditions of the permit and would then make him liable to removal from this country.

24. The first ground mentioned in the application about the incompetency of the State Government to order his removal from India was not pressed. In fact it appears that it is not the State Government which ordered his removal. An order of removal is really contained in the Notification of the Central Government dated 8.2.1949 which directed the removal of any person who having lawfully entered India contravened the provisions of any rule or committed the breach of any of the conditions of his permit. Section 7 of Ordinance XXXIV [34] of 1948 and Section 7 of Act XXIII [23] of 1948 further provided that when a general order about the removal of any person has been made, any officer of Government shall have all reasonable powers necessary to enforce such direction. It appears that it was in pursuance of these provisions that the District Magistrate, Bijnor, issued the necessary orders for enforcing the removal of the applicant from India.

25. The main contention for the applicant is that as a citizen of India be cannot be ordered to be removed from India. It is contended that under Article 19, Clause (1), sub-clauses (d) and (e) he had the right to move freely throughout the territory of India and to stay and settle in any part of such territory. He is deprived of such right by order of removal. It is further contended that such orders of removal of a citizen are in contravention of such right and that such provisions in the Influx from Pakistan (Control) Act XXIII [23] of 1949 as have the effect of infringing these rights are void. The determination of this question takes us to the relevant provisions in the Constitution of India. The two relevant provisions are Articles 5 and 7 in Pt. II of the Constitution. Article 5 is :

> "5. At the commencement of this Constitution, every person who has his domicile in the territory of India and :

(a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India."

Article 7 is :

"7. Notwithstanding anything in Articles 5 and 6, a person who has after the first day of March 1947 migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India :

Providing that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July 1948."

It is not disputed for the State that the applicant was born in the territory of India. It is not disputed that his domicile was in the territory of India at the commencement of the Constitution. It would follow, therefore, that primarily there should not be any difficulty in considering the applicant to be a citizen of India by virtue of the provisions of Article 5. The contention for the State, however, is that he is not to be considered a citizen of India by virtue of the provisions of Article 7 because he had migrated from the territory of India to the territory now included in Pakistan after 1.3.1947 and he did not return to the territory of India under a permit for resettlement or permanent return as contemplated in the proviso to Article 7. It is contended that anyone who went from the territory of India to the territory now included in Pakistan after 1.3.1947 migrated from the territory of India to that territory. I am not prepared to accept this interpretation of the word "migrated" in Article 7.

26. The word "migrate" is given the following meanings in the Shorter Oxford English Dictionary : "(i) To pass from one place to another. (2) To move from one place of abode to another; esp. to leave one's country, to settle in another; to remove to another country, town, college, university etc." The first meaning contemplates, to my mind a movement associated with transit and does not exactly contemplate merely an act of going from one place to another. I think that the second meaning, i.e., "To move from one place of abode to another, specially to leave one's country to settle in another" is the meaning to be approximately associated with this word in Article 7 of the Constitution. The main provision of the Article therefore means that if a person had gone from the territory of India to the territory now included in Pakistan after 1.3.1947 with the intention of shifting his permanent residence from India to Pakistan he will lose all his citizenship which could have accrued to him by his coming within the terms of Art, 5. Such an interpretation finds support from the terms of the proviso to Article 7. The proviso says that :

"Nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for

resettlement or permanent return."

27. A permit for resettlement presumes that the person to whom it is issued was first settled in this country before he migrated to Pakistan, that he abandoned his abode etc. in this country and now desires to return to India to again settle there. It may also imply that such a person had settled down in Pakistan and adopted its domicile. The Permit System Rules of 1949 which were in force at the time of the Constitution contemplated a permit for resettlement for persons who were Pakistan residents and who bad migrated from India on or after 1.3.1947. The permit for permanent return is in these rules meant for a person who had his domicile in India and who had gone to Pakistan on a temporary visit. But the Permit System Rules of 1948 which remained in force till 20.5.1949 contemplated a permit for resettlement or permanent return for persons who had migrated to Pakistan. Rule 16 of these Rules was :

> "A permit for resettlement or return may be granted by the High Commissioner or Deputy High Commissioner only :
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> (i) after personal scrutiny of the application, and
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> (ii) after securing agreement of the State or the Province where the applicant intends to resettle."

Form B of Appendix II of these Rules was heade :

> "Form of Permit for Resettlement or permanent return."

A permit for permanent return according to these Rules could have been issued to a person who had adopted the domicile of Pakistan and when he could not have said as to where in this country he wanted to resettle. If he did not know where he wanted to resettle the High Commissioner could not have applied Section 16, Clause (2) and could not consult the State or the Province where he intended to resettle and in such a case a permit for permanent return was to be issued to him. It was Rule 16-A which applied to persons who claimed to be domiciled in India and provided for the issue of a permit in the Form given in Appendix IV. This permit just mentions that the applicant was permitted to return to India under Rule 16-A. It is clear therefore that a permit for permanent return referred to in Article 7 of the Constitution had a reference to the permanent permit in Form B of Appendix II, Permit System Rules 1948 and issued under Rule 16 of those Rules. I am, therefore of opinion that the conditions mentioned in the proviso support the aforesaid interpretation of the word "migrated."

28. Further I consider it very unlikely that the word "migrated" would have been used for a simpler word "gone." I also visualise the existence of a very large number of people, specially in East Punjab and West Bengal, who might have gone from the territories in India to the territories now included in Pakistan after the 1st day of March 1947 and returned to this country even before 19th July 1948 when the system of the issue of permit for resettlement or for permanent return was introduced. I cannot imagine that such persons who were residents of territories which formed part of the territories of India and who had, due to the conditions then prevailing, visited the territories now included in Pakistan and who had no intention at any time whatsoever of giving up residence or citizenship of this country were meant to be deprived of the right of

citizenship by this provision of Article 7. The country was divided into the Dominions of India and Pakistan on 15th August 1947. The mere visits of persons residing in the territories of India to those now included in Pakistan between the 1st March and 15th August 1947 could not have been considered sufficient to take away citizenship right.

29. The view I have expressed finds support from *Badruzzaman v. The State*[1], Misra, J., observed as follows :

> "Budruzzaman had admittedly gone to Pakistan after the date specified in Article 7 but the question which has been raised for determination on behalf of the applicant is whether his act amounted to migration within the meaning of that Article. The expression embraces, in its scope two conceptions :
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> (1) Going from one place to another and (2) The intention to make the destination a place of abode or residence in future. In the context of the Constitution, it has the notion of transference of allegiance from the country of departure to the country of adoption."

On the facts of the case Misra, J., held Budruzzaman not to be a citizen of this country. But that does not in any way take away the weight of his view that migration in Article 7 contemplates transference of allegiance from the country of departure to the country of adoption. It will be noticed that this view is more restricted than the one expressed by me.

30. Learned Government Advocate referred to three cases on this point. Two of them are (1) *Jakab Khalak Dana v. Kutch Government*[2], and (2) *Mohammad v. High Commr. for India in Pakistan*[3], In the former case the applicants had gone to Pakistan in September 1948 and were arrested by the police in September 1950 while coming into Kutch from West Pakistan. They were entering India without a permit. They had gone to Pakistan on account of famine conditions in Kutch. It was observed by Baxi, J.C. :

> "Migration within Article 7 has no reference to domicile. It simply means departure from India to Pakistan for the purpose of residence, employment or labour. The applicant themselves admit that they went to Pakistan for a living. They had, therefore, migrated into Pakistan within the meaning of Article 7."

The case is distinguishable on facts as the applicants in that case had resided in Pakistan for about two years and had gone there for a living in view of famine conditions in the place of the original residence. Even the definition of migration given in this case does not mean just going to Pakistan on a temporary visit for a particular purpose. According to this definition, one should go to Pakistan for the purpose of residence, employment or labour each of which may imply a sort of permanent or semi-permanent residence for the time being.

31. The later case does not throw any light on the interpretation of the word "migration," as the applicant was held to have migrated to Pakistan, I may also say that that was a case of clear migration.

32. The third case referred to is an unreported judgment of the High Court of Bombay in *Abbas Shaikh Tyaballi v. The State of Bombay*[4], in the ordinary civil jurisdiction. The contention for the

applicant in that case was that he left India in October 1947 to prosecute his studies and that he desired to return to India. Shah, J., observed :

> "The expression 'migrated from the territory of India does not, in my opinion, mean leaving India only with the intention either of not returning to India or of settling down permanently outside India. In my view the expression "migrated from the territory of India" must in its context mean voluntary departure from the territory of India, the departure not being casual or fortuitous but with the intention of carrying on the normal avocation outside India."

Even this definition does not accept that migration in Article 7 means simply going from one territory to another. According to Shah, J., the departure should not be casual or fortuitous but should be with the intention of carrying on normal avocation outside India. Whoever would go outside the country to another country would ordinarily go in connection with some work and such work will ordinarily be connected with normal avocation in the country. Persons who are not on such business and go merely for pleasure would be few. With respect I do not agree with the interpretation that whenever a person goes there in connection with his business he will be deemed to have migrated from this country to the other country.

33. In view of the application filed by Shabbir Husain to the High Commissioner for a permit for return to India the affidavit accompanying it, the present affidavit filed along with the application in this Court and in the absence of any counter affidavit on behalf of the State I hold that Shabbir Husain was a resident of district Bijnor in Uttar Pradesh, that he was born there and that he did not migrate to Pakistan from the territories of India after the first day of March 1947, he having gone there merely for a temporary visit in connection with his business. I further hold that he is a citizen of India.

34. It was further contended by the learned Government Advocate that even if the applicant is a citizen of India he is liable to be removed from this country as he had come to India on a temporary permit and committed a breach of the conditions of the permit. It is contended that it was quite lawful to require entry with permit, that the rules issued about a permit for entry in India were not invalid and that therefore he was liable to the penalties for the breach of the conditions imposed in the permit. I find it difficult to accept this contention. I am not concerned as to what would have been the position in law if the applicant had been deported prior to 26th January 1950 when the Constitution came into force and when he became a citizen of this country. As a citizen of India, the applicant has the rights given to a citizen under the Constitution. Article 19, sub-sections (1), clauses (d) and (e) give to all citizens the right to move freely throughout the territory of India and reside and settle in any part of the territory of India. This should mean that a citizen of India cannot be denied such rights. An order of deportation or removal of a person from the territory means that the person against whom the order is passed is denied the right of residence and settling in any part of the territory of India. It should follow that a law allowing the removal from the territory of India of any citizen would be in contravention of Article 19, sub-sections (1), clauses (d) and (e) of the Constitution and will therefore be void in view of Article 13, sub-sections (1) of the Constitution.

35. It is contended by the learned Government Advocate that sub-sections 5, Article 19 allows imposition of reasonable restrictions on the exercise of any of the rights conferred by sub-clauses

(d) and (e) of Clause (1) of Article 19 in the interest of the general public and that the provision requiring a person entering the territory of India from Pakistan to have a proper permit with him is a reasonable restriction on the exercise of such rights. I agree that the condition to require a permit on entering the territory of India is a reasonable restriction on such rights. But I am not satisfied that the condition that after entering the territory of India he has to move in a certain manner and should leave the country after the period mentioned in the permit can be said to be a reasonable restriction on the exercise of the aforesaid rights of the citizen. I consider these conditions an infringement of the rights given to a citizen in Article 19, clause (1), sub-clauses (d) and (e) as his free movement is controlled and he is deprived of his right to settle anywhere. The necessity of having a check on the entry of a person from Pakistan can justify the entrant's having a permit but does not justify the imposition of the other conditions after his entry in the country. Such provisions of Influx from Pakistan (Control) Act, XXIII [23] of 1949 and the rules framed thereunder as lead to the infringement of these rights would be void in view of Article 13 of the Constitution in their application to the citizens of India. In fact, I should make it clear that in view of my interpretation of the Permit System Rules, 1949, a person domiciled in India, as every citizen of India must be, is not to be given a conditional permit under these Rules and that therefore none of those rules or the provisions of the Influx from Pakistan (Control) Act, XXIII [23] of 1949 is void.

36. In this connection it may be mentioned that Ordinance XVII [17] of 1948 and the rules framed thereunder on 20th July dealt with the control of admission into India of persons from West Pakistan but did not deal with the future movements of such persons. The Permit System Rules of 1948 mentions that it was an Ordinance to control admission into and regulate movements in India of persons from Pakistan and States in the preamble :

> "Whereas emergency has arisen which makes it necessary to control admission into and regulate movement in India of persons from Pakistan."

Section 4, clause (a) authorised framing of rules by the Central Government prescribing conditions subject to which permits could be issued and its sub clause (b) authorised framing of rules regarding movement in India of a person who was in possession of a permit. Act XXIII [23] of 1949 repeated the aforesaid expressions of the provisions of Ordinance XXXIV [34] of 1948. It is clear therefore that Act XXIII [23] of 1948 aims at and does regulate movements of persons holding permits in the territory of India. Such a provision in application to the citizens of India would be in contravention of Article 19, Clause (1), sub-clauses (d) and (e) and void in view of Article 13. But as mentioned above, rules do not provide for regulating the movements of persons of Indian domicile.

37. Learned Government Advocate has referred to certain cases. *Jakob Khalak Dana v. The Kutch Govt., AIR 1951 Kutch 38(Supra)* which has been referred to above in another connection does not really deal with the question of the validity of the conditions in the permit to be issued to a citizen of India. In that case the persons concerned had entered without a permit and the question to decide was whether they as citizens of the country could have been asked to have a permit before entering. Baxi, J., observed :

> "The Influx from West Pakistan (Control) Act does not absolutely bar the right of freedom of movement. It merely imposes a restriction on that right which is both

> reasonable and in the interest of the public generally consequent upon the partition of the country."

A mere restriction on entry by requiring a person to have a permit, is, as I have said above, a reasonable restriction.

38. In *Mohammad Hanif v. State of Madhya Pradesh*[5] the applicant had gone to Karachi in June 1948 and returned to India on 14th November 1948 on temporary permit valid for two months. He tried unsuccessfully to get a certificate for permanent residence in India. He was asked to leave India and he voluntarily left his home at Nagpur on 19th January 1949 for Bombay and from there he went to Karachi landing there on 30th January 1949. He again entered the Indian Union from East Pakistan and returned to Nagpur in March 1949. He was prosecuted and convicted for contravening Rule 12 of Permit System Rules, 1948. It was in December 1949 that he was arrested for the purpose of being removed out of India under Section 7 of the Influx from Pakistan (Control) Act of 1949. It was held that the provisions of Section 7 of the Influx from Pakistan (Control) Act of 1949 were not ultra vires of the powers of the legislature in so far as persons of Indian domicile were concerned and that the applicant was liable to be deported. It is then remarked in para. 7 at p. 187 :

> "The introduction of the permit system amounts to imposition of restrictions on the exercise of rights conferred by sub clause (d) of Art. (19) (1). This restriction was imposed in the interests of the general public consequent on the partition of the country. On the face of it, they are reasonable restrictions, and therefore the Ordinance which has now been replaced by the Act cannot be regarded as inconsistent with Article 19 (1).

39. The learned Judges do not appear to have considered whether the law authorising the authorities issuing permits to lay down conditions with respect to movements and residence of a citizen of India after he had entered the country was valid or not.

40. In *Atau Raheman v. The State of Madhya Pradesh*[6], it was held that :

> "The provisions of the Influx from Pakistan (Control) Act would apply to the citizens of India equally with those who are not citizens of India. So wide and extensive a power as given by Article 11 includes the lesser power to place restrictions even on citizens in the matter of entering the territory of India. Thus Parliament has the power to place restrictions on the rights of a citizen to enter India after having left it and having entered India, to observe the conditions subject to which he was allowed to enter. The provisions of Section 7, Influx from Pakistan (Control) Act cannot be regarded as unconstitutional or as having become void after the inauguration of the Constitution."

The applicant in that case was arrested under Section 1 of the Act with a view to being deported from India after he was convicted under Section 5 of the Act. The Influx from Pakistan (Control) Act of 1949 was passed by the Legislature and came into force on 22.4.1949. It was not passed by the Parliament and I do not see how its validity can be determined with respect to the provisions of Article 11 of the Constitution. Article 10 of the Constitution proves that citizenship continues till it ends under an Act of Parliament. Act XXIII [23] of 1949 is not such an Act and

Section 7 of the Act is not an enactment terminating citizenship. It certainly provides for removal from India but it does not say that the person concerned forfeits his citizenship.

41. In view of the above I am of opinion that a citizen of India cannot be ordered to be removed from the territory of India and that the orders for the removal of Shabbir Husain, a citizen of India, are illegal. It follows, therefore, that his arrest and detention for removing him from this country are illegal.

42. I would therefore, order that he be released from custody if not required to be detained under any other process of law.

P. L. Bhargava, J.

43. I find myself in general agreement with the views expressed by my learned brother, Dayal, J., except the view that the applicant "cannot be said to have really contravened the conditions of his permit." I would, however, like to state my own views on the two questions which arise for determination in this case, viz., (1) Whether the applicant, Shabbir Husain, still continues to be the citizen of India; and (2) whether any of the provisions contained in the Influx from Pakistan Act, 1949, or the Ordinance XXXIV [34] of 1948 which it replaced and in the rules framed thereunder, contravenes any fundamental right guaranteed to the citizens of India, and has as such, become void, after the Constitution of India came into force.

44. Point No. (1). Every person who had, on 26.1.1950, his domicile in the territory of India and : (a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory of India for no less than five years immediately preceding such commencement; shall be a citizen of India (vide Article 5 of the Constitution of India).

45. We have, therefore, to determine first whether the applicant had his domicile in the territory of India on 26.1.1950. A person has his domicile in a country where he has got his permanent home. The idea of a permanent home in any country connotes two things; Permanent residence and an intention to reside permanently or for an indefinite period in that country. The country in which a person, in fact, resides with the intention of permanent residence, or which, having so resided in it, he has not abandoned will be regarded as his permanent home. The original domicile is acquired by birth; but the domicile so acquired may subsequently be changed by some voluntary act, involving a change of residence and an intention to reside in another country permanently or for an indefinite period. If the intention of permanently residing in a particular place exists, a residence in pursuance of that intention, however short, will establish a domicile :

> "The domicile of origin is retained until a domicile of choice is in fact acquired. A domicile of choice is retained until it is abandoned, whereupon either :
>
> (i) a new domicile of choice is acquired; or
>
> (ii) the domicile of origin is resumed." (Vide Dicey's Conflict of Laws, Edn. 6, p. 97).

46. According to the averments in the affidavit filed by him, the applicant, Shabbir Husain, was born and brought up in village Kalyanpur, p.s. Nagina, in the district of Bijnor in Uttar Pradesh;

within the territory of India, which he has described as his ancestral home. This allegation has not been controverted by means of any counter- affidavit on behalf of the opposite parties, the State of Uttar Pradesh and the Superintendent of the District Jail, Bijnor. On the other hand, it is supported by another affidavit, which the applicant had sworn before a Magistrate in Bombay on 21.8.1948, before he proceeded to Lahore in Pakistan. In that affidavit, the applicant had, on solemn affirmation, stated that he was an Indian subject and was born in Kalyanpur tahsil Nagina, district Bijnor in U. P. The applicant had, therefore, acquired the domicile of origin in India, that is, the Indian Domicile, by birth.

47. Now the question arises whether the applicant ever abandoned the Indian Domicile and acquired a domicile of any other country. In August 1948, the applicant had temporarily gone to Lahore in Pakistan; and it has to be seen whether he acquired domicile in Pakistan. Before proceeding to Pakistan the applicant had solemnly affirmed before a Magistrate in Bombay that he was

> "going to Lahore (Pakistan) for business purposes of Belling hand-loom products sent by me to Pakistan and will stay in Pakistan for two months and will return to India from Pakistan after disposing of my said goods."

In the application which the applicant filed for a permit before the Deputy High Commissioner for India in Pakistan he again solemnly declared :

> "I came to Pakistan in connection, with my business and now I wish to go back to my residence."

These averments made by the applicant clearly show that he never intended to abandon Indian domicile; nor do they show that he had any intention of abandoning his residence in India and taking up permanent residence in Pakistan and thereby to acquire the domicile of that country. The applicant has still got his ancestral home in India; and he was residing there on 26.1.1950, and was arrested there on 21.7.1950. The temporary visit to Pakistan could have no effect on the applicants domicile of origin which he never abandoned; nor did he ever acquire any new domicile of choice. In Dicey's Conflict of Laws, Edn. 6, at p. 112, the following rule has been quoted :

> "When a person is known to have had a domicile in a given country he is presumed, in absence of proof of a change, to retain such domicile."

48. There is no proof of change of domicile by the applicant. It must, therefore, be held that the applicant had his domicile in India on 26th January 1950, and he still retains it.

49. The fact that the applicant was born and brought up in India is not disputed. It follows, therefore, that the applicant was a "citizen of India" within the meaning of that expression as defined in Art, 5 of the Constitution. On behalf of the opposite-parties, learned Government Advocate has, however, contended that, in view of the provisions of Article 7 of the Constitution, as the applicant had migrated to Pakistan after the first day of March 1947, he could not be deemed to be a citizen of India.

50. Article 1 of the Constitution of India is in these terms :

> "7. Notwithstanding anything in Articles 5 and 6 a person who has after the first day of March 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India.
>
> Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of "India under and permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July 1948."

51. The question, therefore, arises whether after 1st March 1947, the applicant had "migrated from the territory of India to the territory now inducted in Pakistan". As already stated, the applicant had in August, 1948, left India and gone to Pakistan. He left his home district (Bijnor) U. P. and went to Bombay, and from there he proceeded to Lahore in connection with his business for a period of two months. Before leaving India for Pakistan, he had clearly stated the purpose of his visit to Pakistan and also the fact that his visit to that country was temporary and for a specified period; and that be intended to return home after finishing his business, viz., the sale of goods which had already been sent there.

52. On 16th October 1948-within two months of his arrival in Lahore (Pakistan)-as stated in his affidavit, the applicant wanted to return to India. In the meantime, the Influx from the West Pakistan (Control) Ordinance No. XVII 1948 was promulgated on 19th July 1948, and the Permits System was introduced. In exercise of the powers conferred by Section 3 of the said Ordinance, the Central Government made certain rules which were called the Permit System Rules, 1948. Rule 3 of these Rules prescribed three kinds of permit, namely, (i) permits for temporary visits, (ii) permits for resettlement or permanent return, and (iii) permanent permits. Rule 12 of the said Rules was to this effect: "No person holding a temporary permit shall stay in India after the date of expiry of such permit."

53. Under Rule 16 of the said Rules a permit for resettlement or permanent return was to be granted by the High Commissioner or the Deputy High Commissioner for India in Pakistan, (i) after personal scrutiny of the application, and; (ii) after securing agreement of the State or the Province where the applicant intends to resettle.

54. By a subsequent amendment of the Rules, Rule 16-A was added which prescribed the procedure to be followed by the High Commissioner or the Deputy High Commissioner in dealing with the applications for permits to return to India.

55. On 16th October 1948, the applicant made an application for a permit for "permanent return" to India in the prescribed form. In this application, the applicant solemnly declared that he was born in Kalyanpur in the district of Bijnor in U. P. where he had been residing for 40 years; that he carried on business in cloth and had gone to Pakistan in connection with his business; and that he wished to go back home. This application had to be dealt with in the manner laid down in Rule 16-A, which was as follows :

> "16-A. (1) A person who claims to be domiciled in India and is staying in Pakistan on a temporary visit may apply to the High Commissioner or the Deputy High Commissioner for a permit to return to India in the forms specified in Appendix III with such proof to establish his claim as may be in his power or possession.
>
> (2) The High Commissioner or the Deputy High Commissioner may, if he is satisfied that the statements made in the application are correct, issue permit for return to India in the form specified in Appendix IV. In case of any difficulty or doubt, he may make a reference to the Provincial Government of the Province or the Government of the State concerned.
>
> (3) If the Provincial or the State Government reports in favour of the claim of the applicant the High Commissioner or the Deputy High Commissioner may grant the necessary permit. If the report is unfavourable, the application shall be refused.
>
> (4) Pending inquiry from the Provincial or the State Government concerned, the High Commissioner or the Deputy High Commissioner may grant a temporary permit, if the applicant wishes to visit India on some urgent business, like the death or severe illness of a close relation, or any other important domestic or business matter. The period of such temporary permit shall be long enough for the report to be received from the Provincial or the State Government concerned. If necessary permit can be extended from time to time.
>
> (5) On receipt of the report, if the application for permanent return to India is rejected under Sub-Rule (3), the High Commissioner, or the Deputy High Commissioner as the case may be, shall intimate to the Superintendent of Police of the District where the applicant is, for the time being, staying that his application has been refused and that the applicant should return to Pakistan on the expiry of the period of the temporary permit held by him."

The applicant claimed to be domiciled in India and stated that he had been staying in Pakistan on temporary visit. He had applied to the Deputy High Commissioner for India in Pakistan at Lahore in the prescribed form, and in support of his claim and the statement in the application he attached to the application the affidavit which he had sworn before the Magistrate in Bombay on 21.8.1948.

56. The office report on this application filed by the applicant is very significant. It says :

> "Although the attached document is only an affidavit and given before a Bombay Magistrate, it seems that he was in Bombay on business and decided to leave direct to West Pakistan. Seems a fairly genuine case and if you agree I propose to give him 2 months permit and verify in the meantime. At this stage I would like him to carry no objection certificate from Pakistan in case we do not want him there.

57. The order of the sanctioning authority on the office report is still more significant. It is in these words :

> "As at X. If he is, prima facie, an Indian National certificate as at Y cannot be called for. Interim permit to issue."

It would thus appear that the applicant's case was considered "fairly genuine" and his claim that he was an Indian National was found prima facie correct. This means that the Deputy High Commissioner was evidently satisfied that the statements made in the application were correct; and that there was no difficulty or doubt of any kind which made it absolutely necessary to make a reference to the Government of the State concerned. That is also made clear by the fact that no steps appear to have been taken to "verify" the claim of and the statement made by the applicant.

Consequently, the Deputy High Commissioner, in view of the provisions contained in Clause (2) of Rule 16A of the Rules then in force, ought to have issued a permit for permanent return to India ; but he directed the issue of a temporary permit apparently under Clause (4) of the said rule, even though no inquiry appears to have been directed to be made from the State Government concerned and the applicant did not wish to visit India on any urgent business, like the death or severe illness of a close relation, or any other important domestic or business matter and the period of the permit was only two months, which was not extended from time to time. The application for a permit for permanent return was never refused. It follows, therefore, that a temporary permit was issued to the applicant when he was obviously entitled to a permit for permanent return to India.

58. The fact, however, remains that the applicant was granted a temporary permit, valid for two months only, and he returned to India with such a permit. We, therefore, find that the applicant had gone to Pakistan on a temporary visit in order to sell his goods, which had already been sent there, that he intended to return to India within a specified period, and that he did return home after finishing his business. No counter-affidavit has been filed to rebut these facts and circumstances. Can it be paid, in the circumstances mentioned above, that the applicant had "migrated from the territory of India to the territory now included in Pakistan"? For the reasons to be stated. I have no hesitation in answering this question in the negative.

59. The proper interpretation to be placed upon the expression "migrated from the territory of India to the territory now included in Pakistan" occurring in Article 7 of the Constitution has been the subject-matter of much controversy in this case. Learned counsel for the applicant has contended that the expression means leaving India and renouncing the domicile of origin with the idea of acquiring a domicile of choice and settling in Pakistan. On the other hand, the learned Government Advocate has urged that the expression merely means going from one place of abode to another; but I can find no justification for putting such a narrow interpretation on the expression.

60. "Migration", no doubt; means to pass from one place to another or to move from one place to another; but when we speak of migration from one country to another, it conveys the idea of leaving one country for good to settle in another and also implies change of domicile. So often people go from their home country to a foreign country for some purpose or the other, or on one mission or the other, and they come back to their home country. It cannot be said in such cases that they have migrated from their home country. An important clue to the interpretation of the expression "migrated from the territory of India to the territory now included in Pakistan," occurring in Article 7 of the Constitution, is provided by the proviso to that Article. If a person

has so migrated to Pakistan and wants to return to India, he can do so only under a permit for resettlement or permanent return. The expression "resettlement or permanent return" clearly implies that the person concerned was once settled in India and had gone over to Pakistan and settled there, and he wants to return for resettlement or permanent stay.

61. In support of his contention, the learned Government Advocate invited our attention to an unreported decision of the Bombay High Court in *Abbas Shaikh Tyabali v. State of Bombay*[7], In that case, the applicant had left India in October 1947, and gone to Pakistan to prosecute his studies there. When the applicant desired to return to India, an objection was raised on behalf of the State on the ground that he was no longer a citizen of India, as he had migrated from the territory of India to the territory which is now comprised in Pakistan. It was contended on behalf of the applicant, that the departure of the applicant from India for Pakistan was motivated by an intention to stay in Pakistan for his education and that it did not amount to migration. In his judgment Shah, J., observed :

> "The expression migrated from the territory of India does not, in my opinion, mean leaving India only with the intention either of not returning to India or settling down permanently outside India. In my view the expression 'migrated from the territory of India' must in its context mean voluntary departure from the territory of India, the departure not being casual or fortuitous but with the intention of carrying on the normal avocation outside India."

62. Inasmuch as the casual or fortuitous departure from home country to another country was not considered migration, the case does not support the Government Advocate's contention that the expression means only going from one place to another. If a person starts carrying on his normal avocations in another country, it means he has settled down there, because unless he settles down at any particular place, he cannot carry on his "normal" avocations there. The intention will have to be gathered from the surrounding circumstances, especially those connected with his departure and return. With due deference, I find it difficult to accept the view that the expression 'migrated from the territory of India' does not mean leaving India only with the intention either of not returning to India or settling down permanently outside India. In my opinion, that is implied when we talk of migration from one country to another.

63. Learned Government Advocate has invited our attention to certain other decisions, hut they also do not support the narrow interpretation put upon the expression by him.

64. (1) *Badruzzaman v. The State, AIR 1951 Allahabad 16(Supra)*. This is a decision by a learned Single Judge of the Lucknow Bench of this Court. In that case the facts proved indicated that when the applicant of that case left India in May, 1948, he did so in order to settle down in Pakistan and to adopt it as his home country. The learned Judge was not prepared to give the narrow meaning to the expression which the learned Government Advocate asks us to give to it. On the other hand, the learned Judge observed at page 17 :

> "The expression embraces in its scope two conceptions : (1) going from one place to another and (2) the intention to make the destination a place of abode or residence in future. In the context of the Constitution, it has the notion of transference of allegiance

from the country of departure to the country of adoption."

If I may say so with respect, I entirely agree with this interpretation of the expression.

65. (2) *Mohammad v. High Commr. for India in Pakistan, AIR 1951 Nagpur 38(Supra)*. The applicants in that case had left India and gone to Pakistan during the general exodus of Muslims. They had disposed of their property in India which showed their intention to renounce the domicile in this country and to settle in Pakistan. They stayed in Pakistan for seven months and described themselves as nationals of Pakistan in their application. It was decided in that case that the applicants had migrated to Pakistan with animus manendi, so they were Pakistan nationals and not nationals of India. There is nothing in this case to support the narrow interpretation placed upon the expression by the learned Government Advocate.

66. (3) *Jakab Khalak Dana v. The Kutch Government. AIR 1951 Kutch 38(Suupra)*. That case also does not support the contention of the learned Government Advocate, as the word "migration" was taken to mean as 'going from one country to another for the purpose of residence, employment, or labour.' In that case it was further admitted that the applicants had gone to Pakistan for a "living."

67. In my opinion, therefore, the expression "migrated from the territory of India to the territory now included in Pakistan" seems to have been used in Article 7 of the Constitution in the sense of departure from one country to another with the intention of residence or settlement in the other country. A temporary visit to another country on business or otherwise cannot amount to migration.

68. Whether a person had migrated from one country to another or has gone there on a temporary visit is a question of fact, which will have to be decided on the circumstances of each case. The circumstances of this case have been clearly set out above. They may be summed up here : The applicant was born and brought up in the District of Bijnor in the Uttar Pradesh within the territory of India. He was carrying on cloth business. He is Sheikh Ansari, who were formerly known as Julahas. He sent some of his goods to Lahore (Pakistan) and in order to dispose of them, he went to Lahore for two months. Before his departure from Bombay to Pakistan and within the period of his temporary visit to Pakistan, he expressed his intention that he was going there on a temporary visit and would return home after finishing his business. After finishing his business, he did return to India.

69. In the circumstances stated above, it is not possible to hold that a temporary visit to Pakistan of the kind undertaken by the applicant amounts to migration from India to Pakistan. In this view of the matter, the applicant cannot be deemed to have lost the citizenship of India. As the applicant at the time of the commencement of the Constitution of India had his domicile in India and he was born within the territory of India, the applicant shall be treated as a citizen of India in spite of his temporary visit to Pakistan in the year 1948.

70. Point No. (2).

> "Whether any of the provisions contained in the Influx from Pakistan Act, 1949, or the Ordinance XXXIV of 1948 which it replaced and in the rules framed thereunder, contravenes any fundamental right guaranteed to the citizens of India, and has, as such,

become void, after the Constitution of India came into force."

71. The Influx from West Pakistan (Control) Ordinance (XVIl [17] of 1948) was repealed by the Influx from West Pakistan (Control) Ordinance (XXXIV [34] of 1948), which was promulgated on 10.11.1949. In view of the repeal of the Ordinance (XVII [17] of 1948), under clause (2) of Section 9 of the Ordinance (XXXIV [34] of 1949),

> ".....any rules made, action taken or thing done in the exercise of any power conferred by the Influx from West Pakistan (Control) Ordinance 1948, shall for all purposes be deemed to have been made, taken or done in the exercise of the powers conferred by this Ordinance, as if this Ordinance had commenced on the day such order wag made or such action was taken or such thing was done."

72. Consequently, the temporary permit issued to the applicant will be deemed to have been issued under the Ordinance No. XXXIV [34] of 1948. Section 7 of the Ordinance just mentioned empowered the Central Government by general or special order to direct the removal from India of any person who had committed or against whom reasonable suspicion existed that he had committed an offence under the Ordinance. The Central Government did make an order-to quote its relevant portion only- directing the removal from India of any person who, having lawfully entered India, contravened the provisions of any rule made under Section 4 of the said Ordinance (that is Ordinance No. XXXIV [34] of 1948) or commits a breach of any of the conditions of his permit.

73. The temporary permit, on the authority of which the applicant returned to India in October 1948, allowed him to stay in India upto 1.1.1949. As the applicant stayed on in India after the said date, he committed a breaoh of one of the conditions of the permit and thereby rendered himself liable to punishment under Section 6 of Ordinance XXXIV [34] of 1948; and he was actually prosecuted, convicted and sentenced under the said section. He also rendered himself liable to removal from India in view of the order mentioned above.

74. Before the applicant could be removed from India, on 22-4 1949, the Influx from Pakistan (Control) Act XXIII [23] of 1949, came into force and it repealed the Ordinance XXXIV [84] of 1948. But, in Section 9 of the Act, it was provided :

> "9. (1) The Influx from Pakistan (Control) Ordinance, 1948, is hereby repealed.
>
> (2) Notwithstanding such repeal, any rules made, action taken or thing done in the exercise of any power conferred by the Influx from Pakistan (Control) Ordinance, 1948, shall for all purposes be deemed to have been made, taken or done in the exercise of the powers conferred by this Act, as if this Act had commenced on the day such order was made or such action was taken or such thing was done."

Section 7 of the Act XXIII [23] of 1949 is in these terms :

> "Without prejudice to the provisions contained in Section 5, the Central Government may, by general or special order, direct the removal from India of any person who had

> committed, or against whom a reasonable suspicion exists that he has committed, an offence under this Act, and thereupon any officer of Government shall have "all reasonable powers necessary to enforce such direction."

By virtue of the provisions of Section 9 of the Act, XXIII [23] of 1949, the order made by the Central Government, in exercise of the powers conferred under Section 7 of Ordinance, XXXIV [34] of 1948, continued to be in force as if it had been made under the Act. That order, as already stated, directed the removal from India of any person who, having lawfully entered India, contravened the provision of any rule made under Section 4 of Ordinance, XXXIV [34] of 1948, or committed breach of any of the conditions of the permit. A reference has already been made to Rule 12 of the Permit System Rules 1948, which provided that no person holding a temporary permit shall stay in India after the date of the expiry of such permit. In exercise of the powers conferred under Section 4 of the Act, XXIII [23] of 1949, the Central Government made the Permit System Rules, 1949, Rule 19 whereof also provides that

> "No person holding a temporary permit shall stay in India after the date of expiry of such permit."

75. The applicant had by his stay in India after 1.1.1949, not only contravened the provisions of Rule 19 of the Permit System Rules, 1949, bat he had also committed breach of conditions of the permit, under which he returned to India. The appellant, therefore, continued liable to be removed from India, until the date of his arrest on 21.7.1950. The arrest and subsequent detention in jail was for the purpose of his removal from India under Section 7 of the Act XXIII [23] of 1949 and in pursuance of the order of the Central Government made thereunder.

76. It has been contended on behalf of the applicant that as a citizen of India he had the right to move freely throughout and to reside and settle in any part of the territory of India as provided for in clause (1), sub-clauses (d) and (e) of Article 19 of the Constitution of India : that Rule 19 aforesaid made by the Central Government in exercise of the powers conferred by Section 4, Influx from Pakistan (Control) Act, 1949, and the provisions contained in Section 7 of the Act and the order of the Central Government made thereunder so far as they are inconsistent with the provisions of Section 19 (1) (d) and (e) of the Constitution became void after the commencement of the Constitution on 26.1.1950, and as such, they are no longer operative or effective; and that the arrest and subsequent detention in jail of the applicant for removal from India in pursuance of the said provisions was consequently illegal and he cannot be removed from India.

77. As a citizen of India, the applicant has, no doubt, got the right to move freely through out and to reside in any part of the territory of India, and particularly in his ancestral home in village Kalyanpur in the district of Bijnor in U. P. At the present moment, the applicant is in India and although he had gone to Pakistan, he returned from there under a valid permit. Rule 19 of the Permit System Rules, 1949, imposes a restriction upon the applicant's stay in India, that is to say, he cannot even reside in his ancestral home; as such the rule directly infringes the applicant's right to reside in India and is inconsistent with the provisions of Article 19 (1) (e) of the Constitution. Same is the effect of Section 7 of the Act, XXIII [23] of 1949, and the order issued by the Central Government thereunder. Rule 19 of the Permit System Rules, 1949, and Section 7 of the Act and the order of the Central Government issued thereunder, in so far as they are applicable to the citizens of India and are inconsistent with the fundamental rights guaranteed to

them under Article 19 (1) (d) and (e) of the Constitution have, after the commencement of the Constitution, become void in view of the provisions contained in Article 13 (1) of the Constitution.

78. Learned Government Advocate has attempted to justify the said rule, provision and order of the Central Government in view of the provisions contained in Clause (5) of Article 19 of the constitution, which provides :

> "(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interest of the general public or for the protection of the interests of any Scheduled Tribe."

79. Consequently, we have to see whether the rule, provision and order aforesaid impose reasonable restrictions in the interests of the general public on the exercise of the right of free movement and to reside in any part of the territory of India. They prohibit even a citizen of India to stay in his ancestral home within the territory of India for the simple reason that he had gone to Pakistan on a temporary visit and returned from there on a temporary permit. Such a prohibition, so far as the citizens of India are concerned, cannot be considered reasonable. If the restrictions were confined to the Pakistan nationals or to the persons of doubtful antecedents, it might have been considered reasonable; but the impugned provisions of law as they stand could not be so considered.

80. Learned Government-Advocate has invited our attention to the following cases wherein the restrictions imposed under the Influx from West Pakistan (Control) Act were held to be reasonable. *Jakab Khalak Dana v. The Kutch Govt. AIR 1951 Kutch 38(Suupra)*; *Mohammad Hanif v. State of Madhya Pradesh, AIR 1951 Nagpur 185(Supra)* and *Atau Raheman v. The State of Madhya Pradesh, AIR 1951 Nagpur 43(Supra)*.

81. In the first two cases the restrictions were held to be reasonable in the interests of general public in view of the partition of the country. In the second ease the learned Judges observed :

> "The introduction of the permit system amounts to imposition of restrictions on the exercise of the rights conferred by sub clause (d) of Article 19 (1). This restriction was imposed in the interests of the general public consequent on the partition of the country. On the face of it, they are reasonable restrictions, and therefore the Ordinance which has now been replaced by the Act cannot be regarded as inconsistent with Article 19 (1)."

82. A provision of law which lays down that a citizen of India on account of his temporary visit to Pakistan shall be deported from the country of bis domicile without taking into consideration the circumstances in which he had left the country or returned to it cannot, in my opinion, on the face of it, be considered a reasonable restriction in the interests of the general public. How is the authority concerned to find out whether the presence of a particular person is undesirable in the interests of the general public? There is no provision in the Act or in the Rules made thereunder for the guidance of the authority concerned. The case before us affords a typical instance where

the restrictions will react in a most unreasonable manner. We do not find any exception in the Act or the Rules for such oases. The rule provides for deportation from their home country of persons who have overstayed beyond the period fixed in the permit, and the Act and the order passed thereunder provides punishment of removal from home country of persons who committed a breach of the said rule or any of the conditions of the permit.

83. In the third case, the learned Judges observed :

> "The restrictions placed upon persons returning from Pakistan to India by the Influx from Pakistan (Control) Act were intended to prevent emigrants to Pakistan from returning to India. It is for that reason that every person, whether of Indian domicile or not, returning from Pakistan to India is required to have a permit. To ensure the enforcement of the Act, penalties have been imposed for the infringement of a provision of the Act or of the rules made or permits issued thereunder. The placing of these restrictions is, therefore, nothing but the exercise of a lesser power by the Legislature than the one possessed by it, that is, the power of complete termination of citizenship of an individual who has gone to Pakistan or, for that matter, to any other country."

84. They had in their minds Article 11, Constitution as they further observed :

> "Further more, as we have already observed, Article 11 empowers Parliament even to terminate citizenship."

But the Influx from West Pakistan (Control) Act, 1949 had been passed before the Constitution of India came into force.

85. The restrictions might have been considered reasonable if they were to apply only to emigrants to Pakistan or other persons of doubtful antecedents; but it cannot justify imposition of restrictions indiscriminately upon everybody including the citizens of India so as to prevent them from staying or moving about freely in the country of their domicile. As the Influx from West Pakistan (Control) Act, 1949, was passed before the commencement of the Constitution, the aid of Article 11 of the Constitution cannot be invoked to validate the impugned provisions of law and the order made thereunder.

86. I, therefore, agree that the order for the removal of Shabbir Hussain, the applicant, from India is illegal inasmuch as it has been made under a void provision of law and that the arrest or detention of the applicant in pursuance of the said order is wrongful and illegal.

87. Accordingly, I agree that an order be made for the release of the applicant from custody, unless be is required to be detained in some other connection.

88. BY THE COURT. - We hold that the order for the removal of Shabbir Husain, a citizen of India, from India is illegal and that, therefore, his arrest and detention for the purpose of removal are also illegal. We, therefore, order that he be released from custody forthwith, if not required to be detained under any other process of law.

Application allowed.

Cases Referred.

1AIR 1951 All 16
2AIR 1951 Kut 38
3AIR 1951 Nag 38
4Misc. Appln. No. 143 of 1950, D/-24.7.1950
5AIR 1951 Nag 185
6(AIR 1951 Nag 43)
7Misc. Appln. No. 143 of 1950