

## ALLAHABAD HIGH COURT

Ali Sher

Vs.

State (Allahabad)

Criminal Revn. No. 347 of 1958, connected with Crl. Revn. No. 348 of 1958. against judgment of Dist. and S.J. Sultanpur

(D.S. Mathur, J.)

24.01.1958. 26.06.1959

### ORDER

**D.S. Mathur, J.**

1. This order governs Criminal Revisions Nos. 347 and 348 of 1958 by Ali Sher and Wali Mohammad, respectively, against their conviction of an offence punishable under Section 14 of the Foreigner's Act.
2. As the facts of these two cases are the same and similar questions are involved in both, they are being disposed of by one judgment.
3. Both Ali Sher and Wali Mohammad had entered India with a Pakistan passport after obtaining visa which permitted them to stay in India for periods mentioned therein. They overstayed in India and did not leave the country within the period mentioned in notices served upon them under the signature of the Superintendent of Police. They were, therefore, prosecuted and have been convicted under Section 14 of the Foreigners Act. Each of them has been sentenced to two year's R. I. and a fine of Rs. 200/- in case of default, another three month's R. I.
4. Both the applicants admitted the allegations made against them. They admitted that they were Pakistani nationals, had entered India after obtaining passport and visa and not only overstayed in India but did not leave the country even after the expiry of the period mentioned in the notices. They, however, expressed their desire to stay in India as their family was living here. Ali Sher added that for this purpose he had surrendered his passport to the Pakistan High Commissioner. Wali Mohammad, however, indicated his willingness to return to Pakistan if he was not allowed to live in India.

5. In the above circumstances the finding recorded by the lower courts namely, that the applicants were Foreigners and had contravened the order cannot be said to be improper.

6. The learned counsel for the applicants, however, challenged the conviction of the accused on many legal grounds to which I shall make a reference one by one.

7. It was first of all contended that the notices served upon the applicants under the signature of the Superintendent of Police were not valid as he had no authority to direct the applicants to leave the country, and for this reason the conviction is bad. Ordinarily, overstay in India beyond the expiry of the period of the visa is not an offence as under Section 14 of the Foreigners Act, 1946 it is the contravention of the provision of the Act or of any order made there under or any direction in pursuance of the Act, which is an offence. Consequently, if there was no general order or direction of the Central Government or of the prescribed authority, a foreigner overstaying in India could not be convicted under Section 14 of the Act, unless he was called upon to leave the country and he failed to carry out the order. But it will be found that the Central Government has passed a general order contained in the Foreigners Order, 1948. Para 7 of the Order lays down that a foreigner who enters India on the authority of a visa issued in pursuance of the Indian Passport Act, 1920 (XXXIV of 1920) shall, unless the period indicated in the permit is extended by the Central Government, depart from India before the expiry of the said period. On entering India every foreigner has to obtain from the Registration Officer having jurisdiction either at the place at which the said foreigner entered India or at the place at which he presents a registration report in accordance with Rule 6 of the Registration of Foreigners Rules, 1939 a permit indicating the period for which he is authorized to remain in India. The period to be entered in the permit shall not be beyond the period for which the visa was issued. Consequently under this general order of the Central Government every foreigner must leave the territory of India before the expiry of the period of visa.

8. Section 3 of the Foreigners Act, 1946 gives power to the Central Government to make provision by order, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefore or their presence or continued presence therein. It was under the powers conferred under Section 3 that the Central Government passed the Foreigners Order, 1948. The Central Government has the power to prohibit, regulate or restrict the departure of foreigners from the country. A direction to leave the territory of India before the expiry of the period of the permit would be an order to regulate the departure of foreigners. Para 7 of the Foreigner's Order, 1948 is thus a valid order which every foreigner must comply. It is an order made under the Foreigners Act 1946, and in any case is a direction given in pursuance of the Act.

9. Where the Central Government has issued a general order directing every foreigner, who entered India on the authority of a visa to leave the country before the expiry of the period of

permit, namely of visa, contravention of such direction would be an offence punishable under Section 14 of the Foreigners Act. Admittedly, both the applicants had entered India with a Pakistan passport and on the authority of a visa issued by the Central Government. It was, therefore necessary for them to leave the country before the expiry of this period.

10. The Foreigners Act, 1946, and the Foreigners Order 1948, applied to Pakistan nationals after the passing of the Foreigners Laws (Amendment) Act, 1957 when the definition of foreigner as contained in Section 2(a) of the principal Act was amended to include all persons who were not citizens of India. In other words after the commencement of the Amending Act, both the Foreigners Act and the Rules made hereunder become applicable to Pakistan nationals who entered under the authority of visa issued by the Central Government, irrespective of whether they entered India before or after such date. Ignorance of law can be no excuse, and it was necessary for foreigners including Pakistan nationals to leave the territory of India on the commencement of the Amending Act in case the period of the visa expired before that date otherwise they were to leave the country on the expiry of the period of visa. Therefore, the present applicants could have been prosecuted and successfully convicted under Section 14 of the Foreigners Act when they did not leave the country on the date of the commencement of the above Amending Act.

11. In the present case, the applicants were shown leniency by their attention being drawn to the law in force in the country when the Superintendent of Police served a notice upon them to leave the country within 30 days of the service of the notice. Even if the Superintendent of Police was not a competent authority to issue the notices, the applicants could be convicted under Section 14 for the reasons already mentioned above. It will, however, be found that under Notification No. 5103 PP VIII-1, (11)48 dated July 29, 1950 of U. P. Government Home Department (Police) Superintendents of Police were appointed civil authority as contemplated under the Foreigners Order, 1948. The Superintendent of Police could therefore call upon foreigners to leave the country within the period to be mentioned in the notice. For this reason also both the applicants could be convicted under Section 14 for not leaving India within the period mentioned in the notices served upon them.

12. The next point urged was that the applicants were not foreigners but were citizens of India and Courts had no jurisdiction to determine the question of nationality, that is, whether the applicants were foreigners or citizens of India. In this connection, it was also suggested that Rule 3 of Schedule III of the Citizenship Rules, 1956 was ultra vires to the extent that it laid down that mere obtaining a passport of another (foreign) country shall be a conclusive proof of the person having voluntarily acquired the citizenship of that country before that date. Rule 30 of the Citizenship Rules, 1956 lays down that if any question arises as to whether, when or how any person has acquired the citizenship of another country, the authority to determine such question shall, for the purpose of Section 9 (2) of the Citizenship Act, 1955, be the Central Government and the Central Government shall determine the question with due regard to the rules of evidence specified in Schedule III of the Citizenship Rules, 1956. The rules contained in Schedule III are

thus for the guidance of the Central Government and are not binding on Courts.

In the circumstances Rule 3 of Schedule III could be disregarded by courts of law, it being a rule not binding on them. In this connection it may be observed that the law as laid down by the Courts not only in this country but also in others is that mere acquisition of a foreign passport is not conclusive evidence of the citizenship or nationality of that person though from the fact that he possesses a foreign passport, it can be presumed that he is a foreigner and the burden shall lie upon him to prove that he is not a foreigner.

This is in substance what is contained in Section 9 of the Foreigners Act. It is laid down therein that if in any case not falling under Section 8 of the Foreigners Act, any question arises with reference to this Act or any order made or direction given there under, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description the onus of proof that such person is not a foreigner shall, notwithstanding anything contained in the Indian Evidence Act, lie upon such person. The legislature is competent to pass any procedural law. They can lay down that in particular cases; burden of proof shall lie upon the accused and not upon the prosecution. Even if Courts of law take a liberal attitude in interpreting this Rule, it would mean that prosecution should merely adduce prima facie evidence of a person being a foreigner and thereafter the burden would shift upon that person to show that he is not a foreigner. Obtaining a passport from a foreign country and also mentioning in the application for visa that he is a foreigner and national of a foreign country would be prima facie evidence of that person being a foreigner. Both the applicants possessed Pakistan passports at the time they entered India, and while applying for visa they admitted being Pakistan nationals. Consequently, the initial burden which may have rested upon the prosecution was discharged and the burden lay upon the applicants to prove that they were not foreigners. In the present case, the applicants did not adduce any evidence and they went rightly held to be foreigners. Further Rule 3 of Schedule III of the Citizenship Rules, 1956, in so far as it is inconsistent with the observations made above cannot be considered as a good rule of evidence as far as Courts are concerned.

13. Courts of Law shall be presumed to have unlimited jurisdiction unless it is taken away by some valid enactment. The learned counsel for the applicants placed reliance upon Rule 30 of the Citizenship Rules, 1956 and also upon Section 8 of the Foreigners Act, 1946 in support of her contention that the question of nationality could be decided only by the Central Government. This contention has no force. Rule 30 has already been reproduced above. It may here simply be mentioned that the Central Government is the competent authority to determine the question of acquisition of citizenship of another country for the purposes of Section 9 (2) of the Citizenship Act, 1955, and for no other purpose. The courts, therefore, can determine the question of nationality unless the jurisdiction is in one way barred by Section 9 (2) of this Act. Sub-Section (2) of Section 9 shall be read along with sub-section (1). Section 9 runs as below :

"9. Termination of citizenship.- (1) Any citizen of India who by naturalization, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950, and the commencement of this Act voluntarily acquired, the citizenship of

another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India :

Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf".

14. The important ingredients of this section are that the person concerned should be at one time a citizen of India and voluntarily acquire or has voluntarily acquired the citizenship of another country between the 26th January, 1950 and the commencement of the Act. Before the commencement of the Constitution of India the citizens of India were termed as British subjects and it was from the 26th January 1950 that there was in the eye of law, Indian citizenship. Consequently, a person who had migrated to Pakistan before 26th of January, 1950 was not a citizen of India, and will not be governed by the provisions of Section 9 of the Citizenship Act. Even if it be assumed that the term 'citizens of India' includes all those who live in India, whether before or after the 15th August 1947, Section 9 will not be applicable to those who migrated to Pakistani before 26-1-1950. The first part of the sub-section (1) of Section 9 applies to citizens of India voluntarily acquiring the citizenship of another country. This will have reference to the acquisition of citizenship of another country after the commencement of the Citizenship Act, 1955 and not before this Act came into force. The other part is not general, its scope has been restricted to the case of those citizens of India who voluntarily acquired the citizenship of another country between 26th January, 1950 and the commencement of the Act. In other words, Section 9 applies to only those citizens of India who acquired citizenship of other country on or after the 26th of January 1950, and not before that date. The present applicants had migrated to Pakistan long before the 26th of January, 1950 and consequently the question whether they are Indian citizens or Pakistan nationals can be determined by the courts of law and not necessarily by only the Central Government.

15. Section 8 of the Foreigners Act, 1946 is applicable to foreigners and not to citizens of India and consequently it can be of no help to the applicants in having themselves declared as citizens of India. It may further be observed that the power given to the Central Government under this section is to lay down to which foreign country the nationality of a foreigner may be ascribed. A foreigner will remain a foreigner and cannot be declared an Indian Citizen under the provisions of this section.

16. To sum up, both the applicants were rightly held to be foreigners and as they did not leave the territory of India within the period of the visa or the period mentioned in the notices served upon them, they were rightly convicted under Section 14 of the Foreigners Act.

17. Beyond the above, no other point was raised before me.

18. Both the revision applications are hereby dismissed. The applicants are on bail and they should surrender forthwith to serve out the sentence awarded to them.

Applications dismissed.