

ALLAHABAD HIGH COURT

Sharafat Ali Khan

Vs.

State of U.P

Civil Misc. Writ No. 2385 of 1957

(W. Broome, J.)

12.04.1960

ORDER

W. Broome, J.

1. This is an application by one Sharafat Ali Khan under Article 226 of the Constitution for the issue of a writ of mandamus to compel the State of Uttar Pradesh and the District Magistrate and the Superintendent of Police of Rampur to refrain from restricting or interfering with his right as an Indian citizen to move freely throughout the territory of India by arresting or deporting him.

2. The facts of the case are as follows. The petitioner was born on 15th January 1938 in a village in the district of Rampur. In 1955, when he was still a minor, he went with his maternal uncle to Karachi, but his parents all along remained in India and have never set foot in Pakistan. In March 1956, only a couple of months after the petitioner had attained majority, his father was murdered in Rampur, and he naturally felt impelled to return to India at once to take care of his widowed mother and his younger brother and sisters.

With this object in view he secured a Pakistan passport on 16-3-1956. obtained a visa there-on from the Indian High Commissioner in Karachi 22-3-1956 and returned to India by rail on 27-3-1956. On 31-8-1957 he was served with a notice (dated 23-8-1957) from the Superintendent of Police. Rampur, asking him to leave India within 30 days or to face prosecution under Section 14 of the Foreigners Act.

3. These basic facts are not denied in the counter-affidavit filed on behalf of the State, with this modification that according to the opposite parties the petitioner went to Pakistan in 1948 (when he was 10 years old) instead of 1955, as he alleges. This variation, however, is immaterial and does not affect the merits of the case, for whether the petitioner went to Pakistan in 1948 or in 1955, in either case he was a minor at the time when he went. His guardian (his father) remained

in India and retained his Indian domicile and nationality; and during minority the petitioner had no legal capacity to acquire a domicile different from that of the guardian and could not in law migrate as has been held by this Court in a similar case, *Mst. Allah Bandi v. Govt. of Union of India*¹,

¹ AIR 1954 All 456

4. It is clear therefore that the petitioner could not lose or abandon his Indian citizenship or acquire Pakistan nationality so long as he remained a minor, i. e., up to 15-1-1956, in the absence of any action on the part of his guardian. On behalf of the State, however, it is contended that after attaining majority the petitioner must be deemed to have acquired Pakistan nationality by his own voluntary act in applying for a Pakistan passport in March 1956, and that consequently he has forfeited his Indian citizenship under Section 9(1) of the Citizenship Act. In this connection reliance is placed on the provisions of clause 3 of Sch. III of the Citizenship Rules, 1956, which runs as follows :

"The fact that a citizen has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired the citizenship of that country before that date."

Mere acquisition of a foreign passport would normally be considered sufficient only to raise a rebuttable presumption of voluntary acquisition of foreign citizenship, but under clause 3 of Sch. III must be taken as conclusive irrebuttable proof. This abnormal rule of evidence however can be considered to be binding only on the Central Government, as is clear from the wording of rule 30(2) of the aforesaid Rules; and in my opinion this Court is in no way bound to decide questions of voluntary acquisition of foreign citizenship in this arbitrary fashion. A similar view has been expressed by Mathur J. in *Ali Sher v. The State*²,

5. Furthermore clause 3 of Sch. III of the Citizenship Rules appears to give rise to an arbitrary and unreasonable abridgment of the fundamental rights guaranteed to all Indian citizens and is therefore by virtue of Article 13(2) of the Constitution null and void. This view finds approval in the decision in *Mohd. Khan v. Govt. of Andhra Pradesh*³, with which I respectfully concur. As pointed out by the learned Judges in that case :

"There may also be cases where a passport is obtained by fraud or mistake..... In all such cases, though there was no voluntary acquisition of citizenship of a foreign country, the rule deprives a citizen of his citizenship.

Therefore, by framing this rule a pass-port, which is not legal evidence of citizenship, is made the basis of irrebuttable presumption of the voluntary acquisition of citizenship of a foreign country. Under the section, a citizen of India ceases to be a citizen of India, by voluntary acquisition of

citizenship of another country, while under the rule he is deemed to have voluntarily acquired foreign citizenship, even though he acquired the foreign citizenship otherwise than by voluntary acquisitionThe rule, therefore, enlarges the scope of Section 9 and is therefore void. The same result would flow even if the question is approached from the stand point of the infringement of the appellants' fundamental right under Article 19 of the Constitution. Admittedly, all the appellants were citizens of India on the date when the Constitution came into force and they continued to be so by reason of Article 10 of the Constitution of India. The Act deprived them of such right, if they voluntarily acquired the citizenship of a foreign country. The rule, by the device adopted, completely bars the appellants from establishing that they have not acquired the

²1959 All LJ 833 : AIR 1960 All 431

³ AIR 1957 And Pra 1047

citizenship of Pakistan. The irrebuttable presumption from the fact, which is not legal evidence of the fact of citizenship, much less of the fact of citizenship obtained otherwise than by voluntary acquisition, has certainly the effect of depriving the appellants' right without the inquiry guaranteed by the section, and therefore, amounts to an unreasonable restriction on the fundamental rights of the appellants under Article 19 of the Constitution of India." Applying the same reasoning to the facts of the present case, I find that the petitioner was an Indian citizen by birth and that the circumstances show that he did not voluntarily relinquish that citizenship or acquire Pakistan nationality; yet he is debarred by the arbitrary rule of evidence laid down in el. 3 of Sch. III from establishing that he has not acquired the citizenship of Pakistan. This undoubtedly has the effect of unreasonably depriving him of the fundamental rights under Article 19 of the Constitution to which as an Indian citizen he is entitled; and the rule must therefore be struck down.

6. Ignoring the arbitrary rule laid down by clause 3 of Sch. III and judging the matter in the light of the ordinary canons of evidence, I have no hesitation in the circumstances of the present case in coming to the conclusion that the petitioner has not voluntarily acquired the citizenship of Pakistan, and that consequently his Indian citizenship should not be deemed to have terminated under Section 9 of the Citizenship Act. He went to Pakistan when he was only a minor unaccompanied by his guardian, and returned to India within about two months of his attaining majority. He could not change his domicile or nationality during the period of his minority, and there is nothing whatsoever to suggest that he showed any intention of changing his domicile or nationality after attaining majority, apart from the bare fact that he applied for and obtained a Pakistan passport. Mere applying for such a passport, as has been held by Desai J. in Criminal Revn. No. 631 of 1959, D/d. 7-3-1960. is no proof of the acquisition of Pakistan citizenship. Presumably the petitioner must have declared himself to be a Pakistani in his application for the passport, but this at best was nothing more than an admission which is capable of being explained away. And in the circumstances of the present case, there is ample explanation for the admission presumed to have been made by the petitioner when applying for a Pakistan passport. His father had been murdered on 8-3-1956, and it was essential for him to return to India with the utmost speed; and the only way in which he could accomplish this end was by making a false

declaration and obtaining a Pakistan passport. It is idle to suggest that he should have sent an application to the Indian authorities for the grant of an Indian passport, for with the best will in the world those authorities could not possibly have sent the application through the various 'proper channels,' made all the necessary enquiries in Rampur and elsewhere and completed the essential formalities in less than a year or so (even assuming that they were ready and willing to treat the petitioner as an Indian national and to grant him a passport accordingly). Indeed, those who have had occasion to deal with Government departments in such matters would probably consider one year to be a gross underestimate of the time required for the purpose. The result was that the petitioner, if he wanted to reach India in time to be of any service to his bereaved mother and younger brother and sisters, had no alternative but to apply for a Pakistan passport, (which could of course be bad for the asking). My conclusion therefore, is that the mere fact that the petitioner obtained a Pakistan passport is in the circumstances of the present case no justification for holding that he ever voluntarily acquired Pakistan citizenship. From this it follows that he has not forfeited his Indian citizenship under Section 9 of the Citizenship Act and he is still entitled to the rights of residence and free movement in India guaranteed by Article 19 of the Constitution.

7. A number of objections have been raised on behalf of the State. In the first place, it is asserted that on a writ petition this Court cannot give a declaration; and in this connection reliance is placed on certain observations in *Maqbulunissa v. Union of India*⁴, in which it was held that –

"the powers of issuing writs, orders or directions should not be utilised for giving what is in essence a declaratory relief, for it is well known that writ proceedings are in the nature of summary proceedings where issues are decided on affidavits. All that amounts to, however, is that when exercising its writ jurisdiction this Court should not attempt to grant a declaration on the basis of a decision arrived at on a consideration of disputed facts. But where, as in the present case, the basic facts are unchallenged and the inferences to be drawn from them are obvious. I see no reason why the Court should be debarred from giving a declaration, if it appears necessary in order to meet the ends of justice. I may also point out that declarations have definitely been given in the past on writ petitions, as for example by Mootham J. in Civil Misc. Writ Appln. No. 534 of 1952, D/d. 3-12-1954.

8. Another line of argument pursued on behalf of the State is that Section 9(2) of the Citizenship Act, 1955 completely ousts the jurisdiction of all ordinary Courts of law in matters relating to the acquisition of the citizenship of a foreign country. Section 9(2) runs as follows :

"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."

In this connection my attention has been drawn to an unpublished decision of Nigam J. in Civil Misc. Appln. (O.J.) No. 6 of 1957, D/d. 27-3-1955, in which the contention now made on behalf

of the State was upheld in its extremest form, the learned Judge holding that even in cases where in law it is not possible for citizenship to be relinquished (for example by a minor), it is for the Central Government and the Central Government alone to determine under Section 9(2) of the Citizenship Act whether in actual fact it has been relinquished. With respect, I find myself unable to subscribe to this view. Even if it be conceded that this section, by declaring a special forum for the consideration of the said questions, must be deemed by implication to preclude the ordinary Courts from considering them, I am not prepared to agree that it can operate to debar this Court from dealing and not there such questions in the exercise of its special jurisdiction under Article 226 of the Constitution. The powers conferred by Article 226 for the enforcement of the fundamental rights incorporated in Part III of the Constitution are as sacrosanct as the fundamental rights themselves, for rights without the necessary machinery for enforcing them would clearly be of little value; and. it is not possible for any law short of an amendment of the Constitution itself to abridge or fetter those powers.

³ AIR 1953 All 477

9. A further argument put forward on behalf the State is that no writ should issue in the present case because the petitioner has alternative remedies, firstly, by way of an ordinary civil suit for a declaration of his rights, and, secondly, by way of a petition to the Central Government for a declaration of his status. It is obvious, however, that a suit would not be a convenient and efficacious alternative remedy, for even if not held barred by the provisions of Section 9(2) of the Citizenship Act, it would involve a slow and lengthy procedure and unless a temporary injunction were granted, would not prevent the petitioner from being deported from the territory of India while it was being tried. As regards the second suggestion, learned counsel for the State has drawn my attention to the decision of Mukerji J. in *Abdul Rahman v. State*⁴, and to an unpublished decision of Chaturvedi, J. in Civil Misc. Writ No. 1920 of 1957, D/d. 31-7-1957. In both of these cases it was held that the petitioner must avail himself of the remedy provided by the statute itself viz. an application to the Central Government for a decision under Section 9(2) of the Act read with R. 30, on the question of whether he had acquired the citizenship of Pakistan or not; and that consequently he could not ask for a writ to be issued in his favor. But with profound respect I beg to dissent from this view. The first objection that presents itself to my mind is that I can see no provision in the Citizenship Act for any petition to be made to the Central Government in such cases. Section 9(2) of the Act read with R. 30 of the Citizenship Rules no doubt provides that questions of acquisition of Citizenship of another country shall be determined by the Central Government in accordance with the rates of evidence specified in Sch. III; but it does not provide for any application being made to the Central Government for this purpose by a person who claims to be an Indian national but who finds that his status is disputed by the Indian authorities. Clause 1 of Sch. III suggests that in such matters it is open to the Central Government to initiate proceedings by serving a person with a notice requiring him to prove within such period as may be fixed that he has not voluntarily acquired the citizenship of another country; but there is no clause under which the person whose Indian citizenship is being impugned under Section 9 of the Citizenship Act can move the Central Government and demand

a decision. So much for the objection on the point of procedure. But there is another and more vital objection that goes to the very root of the matter. To me it appears that this so called alternative remedy that has been suggested is quite illusory in the case of a person who, like the present petitioner, has obtained a Pakistan passport, for in his case the result would be a foregone conclusion. Even if the Central Government were to entertain the petition made by him, they would be bound to hold that he had voluntarily acquired Pakistan citizenship by virtue of clause 3 of Sch. III which lays down that obtaining the passport of another country shall be conclusive proof of voluntary acquisition of the citizenship of that country. In the circumstances, to suggest to the petitioner that he has the alternative remedy of making an application to the Central Government would be no more reasonable than to tell him that he has the alternative remedy of committing suicide. I am satisfied therefore that there is no other equally efficacious and convenient remedy available to the petitioner and conclude that there is no bar to the issue of a writ in his favor.

10. Finally, learned counsel for the State has cited certain rulings in which the correctness of the decision of the Andhra Pradesh High Court in Mohammad Khan's case, AIR 1957 Andhra Pradesh 1047, has been questioned. First we have *Ghaurul Hasan v. State of Rajasthan*⁵, That however was a case in which the petitioners

⁴ AIR 1958 All 165 ⁵ AIR 1958 Raj 172

had migrated from India to Pakistan after 1-3-1947 and thus could not claim to be citizens of India, by reason of Article 7. No question of infringement of their fundamental rights could therefore arise; and the only point in the Andhra Pradesh ruling that was dissented from was the suggestion that clause 3 of Sch. III of the Citizenship Rules went beyond the scope of Section 9(1) of the Citizenship Act. Next there is *State v. Sharifbhai Jamalbhai*⁶, but that too was a case of a totally different nature, since the respondent was held to have migrated to Pakistan. I may also point out that he was found to have offered no explanation whatsoever for failing to apply for an Indian passport when he made up his mind to come back to India, in contradistinction to the present case, where the petitioner's failure to apply for an Indian passport is fully explained by his urgent need to return to India speedily in March 1956 when he learnt of his father's murder. The third ruling relied upon by the State is *Syed Shah Mohammad Abdali v. State of Bihar*⁷, In this it has been held that the provisions of Section 9 of the Citizenship Act and the Rules framed there under do not confer an arbitrary power on the Central Government for depriving persons of their citizenship rights, the argument being that the power that has been delegated to the Central Government in these matters is circumscribed by safeguards. No definite ruling was however given as to whether clause 3 of Sch. III was unconstitutional and the chief point raised by the Andhra Pradesh decision thus remains unanswered. What the learned Judges of the Patna Court have done is to reject the application for grant of a writ on the ground that the mere obtaining of a Pakistan passport constituted, in the circumstances of that case, prima facie evidence of the fact that the petitioners had acquired Pakistan citizenship and were therefore foreigners. The present case is clearly distinguishable, for, as already pointed out by me, the facts

admitted here lead to the irresistible conclusion that the petitioner never voluntarily acquired Pakistan nationality. All that he did was to make a false declaration or admission of nationality in order to secure a passport speedily; and that by itself could not amount to acquisition of the citizenship of Pakistan.

11. This application is accordingly allowed with costs. A writ of mandamus shall issue directing the opposite parties to forbear from enforcing the orders requiring the petitioner to leave the territory of India.

Petition allowed.

⁶ AIR 1959 Bom 192

⁷ AIR 1960 Pat 98