

DELHI HIGH COURT

Rabinder Nath

Vs.

Regnl. Passport Officer (Delhi)

Civil Writ No. 867-D of 1966

(I. D. Dua, Ag. C.J., H. R. Khanna and S. K. Kapur, J.)

23.12.1966

JUDGEMENT

Dua, Actg. C. J.

1. This petition under Articles 226 and 227 of the Constitution has been placed before us in pursuance of the referring order dated 4-11-1966 made by my learned brother S. K. Kapur, J. considering the matter to be important and, therefore, deserving of consideration by a larger Bench.

2. The petitioner claiming to be a citizen of India and a regular Travel Agent and Adviser of Messrs. Lufthansa Airlines and other International Airlines working in Delhi for the last more than three years, made an application to the Regional Passport Officer, New Delhi, respondent No. 1, on 5-7-1966 along with the requisite guarantee bond and original character certificate signed by the Competent Authority. This application had been made by the petitioner in anticipation of an invitation of Messrs. Lufthansa a German Airlines who had decided to introduce a flight between Hamburg and Oslo and are to operate an inaugural flight on 12-11-1966. The petitioner was to leave on 11-11-1966. By means of a letter dated 11-10-1966, the petitioner received an invitation from the Airlines mentioned above. According to this invitation, all expenses of this trip were to be borne by the head office of the said Airlines in Germany. This invitation was brought to the notice of respondent No. 1 and the Chief Passport Officer, New Delhi, respondent No. 3 in the course of interviews. Indeed the petitioner had personally explained the nature of his visit to respondent No. 3 in July and October, 1966 and had also offered to produce any guarantee which may be required but respondent No. 3 had verbally informed the petitioner that the same was unnecessary.

The petitioner, according to his averments, has steadily built up reputation as a leading Travel Agent and Adviser and has a lucrative business and is also an income-tax payee. On 17-10-1966, respondent No. 3 verbally informed the petitioner that the passport could not be granted to him without assigning any reasons, though the petitioner did ask for the same. The petitioner has asserted in his writ petition that there is no case pending against him in any Court of law and it has been pleaded that under the administrative instructions as well, a passport to an Indian citizen can only be refused if he is anti-Government, hot Communist, established smuggler, trying to jump the bail granted in a criminal case or being involved in a murder case or is trying to run away. The petitioner, so proceeds the averment, does not fall in any one of the above categories. Refusal to issue a passport by the respondents is thus described to be arbitrary, mala fide, illegal, without jurisdiction and *ultra vires* the Constitution. Articles 21 and 14 of the Constitution have been specifically relied upon in support of the fundamental right possessed by the petitioner to go abroad.

In the writ petition, the following three decided cases have also been relied upon in support of the claim. *A. G. Kazi v. C. V. Jethwani*,¹ *Francis Manjeeran v. Govt. of India*,³ and *Dr. S. S. Sadashiva Rao v. Union of India*,² It is also added in the writ petition that the refusal to pass an order on the petitioner's application is *mala fide* and arbitrary and the delay is being caused simply to defeat the right of the petitioner to approach this Court.

3. In the affidavit in opposition sworn by Shri R. D. Chakravarty, Under Secretary to the Government of India, Ministry of External Affairs, it is affirmed that the petitioner was employed as a lower division clerk in the Ministry of External Affairs during the years 1960-68 and certain cases were instituted against him by the Special Police Establishment, Delhi, under Sections 380, 411 and 420, Indian Penal Code, which resulted in his conviction under Section 120-B read with Section 420, Indian Penal Code. He was dismissed from Government service with effect from 28-5-1963. After dismissal from Government service, the petitioner applied to the Regional Passport Officer for passport facilities for United Kingdom on the basis of the employment voucher obtained by him from the British Ministry of Labor. On good material and for valid reasons, these facilities were refused to him. The petitioner preferred an appeal from this refusal to the Chief Passport Officer praying for reconsideration of his case and in this memorandum of appeal he prayed that he should either be given an employment by the Government or should be granted passport facilities for the United Kingdom to take up employment there on the basis of the employment voucher. This

appeal, after a careful consideration of all the facts and circumstances, was rejected as far back as July, 1964.

The affidavit then proceeds on to state that communications have been received in official confidence and for reasons which should not be disclosed in public interest, it would not be proper to give passport facilities to the petitioner. This is followed by the averment that the matter is still under examination and a decision will be taken after the material is processed. The petitioner, according to this affidavit, "has no right, much less vested right, to enforce the grant of a passport to him". On the merits, it is admitted that the petitioner had forwarded a copy of the letter from Lufthansa German Airlines addressed to him but the authenticity of that letter and the contents thereof were not admitted.

In the application dated 6-7-1966, the petitioner had described himself as a businessman seeking passport for all countries in Europe, all Commonwealth countries, Middle East countries, U. S. A. and Canada and mentioned the purpose as "business-cum-pleasure trip". The receipt of the application dated 5-7-1966 has been admitted. According to this affidavit, the petitioner was informed in the Ministry of External Affairs' letter dated 26-10-1966 that his application was under consideration. Indeed, according to the return, the application of the petitioner is still under consideration and he has not been refused passport. It is denied that there is any fundamental right vesting in the petitioner or that he possesses any vested right or any other right to enforce the issuance of a passport to him.

Violation of any personal liberty or of the provisions of Article 21 of the Constitution has also been denied. The grant of a passport is pleaded to be within the absolute discretion of the Central Government and when granted, it is in the nature of a request to another State to give certain facilities and protection while the passport-holder is in the territory of that State. There is neither any right in the petitioner to have a passport issued to him nor is there any statutory obligation on the respondents to issue a passport to the petitioner on his application. The passport is really issued at the pleasure of the President of India and refusal to grant it is a non-statutory administrative act which is not subject to a judicial review. It is in the end added that there are very good and valid reasons for the passport being not granted to the petitioner.

4. During the course of arguments, at one stage, suggestions were thrown that the matter was still under consideration but we are proceeding on the assumption that the

passport has for all practical purposes been refused and it is on this basis that we propose to deal with the questions raised in this petition.

5. On behalf of the petitioner, reliance has principally been placed on Article 21 of the Constitution which may appropriately be reproduced :

"Protection of life and liberty.	21. No person shall be deprived of his life or personal liberty except according to procedure established by law."
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6. It is argued that the expression "personal liberty" includes liberty to travel both within and outside the confines of the territory of the Republic of India and unless there is a statutory provision depriving the petitioner of this freedom, he is entitled as of right to a passport so as to be able to go outside India and also to come back without any hindrance or obstruction. An argument has also been raised that refusal to issue a passport to the petitioner is hit by the rule of equality before law contained in Article 14 of the Constitution because he says persons similarly placed like the petitioner have been granted passports whereas the same has been refused to the petitioner which is discriminatory.

7. Developing the first challenge based on Article 21 of the Constitution, our attention has been drawn to the Indian Passport Act XXXIV of 1920, the preamble of which shows that this Act was made for the purpose of taking power to require passports of persons entering India. Section 3 of this Act empowers the Central Government to make rules requiring that persons entering India must be in possession of passports and for all matters ancillary or incidental to that purpose. By way of illustration in sub-section (2) of this section, the rules may:-

- (a) Prohibit the entry into India or any part thereof of any person who has not in his possession a passport issued to him;
- (b) Prescribe the authorities by whom passports must be issued or renewed and the conditions with which they must comply for the purposes of the Act; and
- (c) Provide for the exemption, either absolutely or on any condition, of any person or class of persons from any provision of such rule.

The rules made under this provision after publication in the Official Gazette are to have effect as if enacted in the Act. The Rules under this Act were originally framed in 1921 but in supersession of those Rules, the current Rules were made on 25-4-1950.

It is pointed out that this Act does not concern itself with the persons who want to go out of India, with the result that there is at present no procedure established by law within the contemplation of Article 21 in accordance with which the petitioner can be deprived of his personal liberty to go out of the country. It is on the basis of this submission that the principal argument in support of the claim to a passport is founded and forcefully pressed before us. Our attention has been drawn to the three decisions of the Bombay, Mysore and Kerala High Courts relied upon in the writ petition and also to the Single Bench decision of the Bombay High Court in Jethwani's case, (1966) 68 Bom LR 529 which was affirmed on Letters Patent Appeal. The decisions of the Supreme Court of America for direct support to the petitioner's claim have also been cited. Some passages from certain decisions of the Supreme Court of India have in addition been pressed into service for seeking support for the submission that personal liberty as contemplated by Article 21 extends to liberty to go out of India and to come back at one's sweet will. The Bench decision in Jethwani's case, (1966) 68 Bom LR 529 is an authority for the view that the expression "personal liberty" occurring in Article 21 of the Constitution includes the right to travel abroad and return to India. The decision in the case of Dr. Sadashiva Rao 1965-2 Mys LJ 605 is also an authority for the same view holding, as it does, that a citizen has a fundamental right under Article 21 of the Constitution to go abroad and also a fundamental right to come back to this country. The Single Bench decision of the Bombay High Court in Jethwani's case, (1966) 68 Bom LR 529 was approved in this case by the Mysore High Court. In the Full Bench decision of the Kerala High Court in the case of F. Manjooran, AIR 1966 Kerala 20 (FB) it is observed that the right to travel except to the extent provided in Article 19 (1) (d) of the Constitution is within the ambit of the expression "personal liberty" as used in Article 21 of the Constitution and a passport being essential for the enjoyment of that right, the denial of a passport amounts to a deprivation of the said right. In the absence of any procedure prescribed by the law of this country sustaining the refusal of a passport to a person, its refusal, according to this decision, amounts to an unauthorised deprivation of the personal liberty guaranteed by Article 21.

A Bench decision of the Madras High Court by Rajamannar, C. J. and Venkatarama Ayyar, J. in *V. G. Row v. State of Madras* ⁴ holding that no person has any legal right to obtain a passport to any particular country and that issuing of a passport is part of the State departments Foreign affairs function and with which Courts generally refuse to interfere, was dissented from in the decisions cited above. The decisions of the U. S. Supreme Court on which reliance has been placed are *Kent v. Dulles*, ⁵ and

Aptheker v. Secretary of State,⁶ . The judgments of our Supreme Court from which some passages have been relied upon for support are reported as *A. K. Gopalan v. State of Madras*,⁸ and *Kharak Singh v. State of U. P.*⁷

8. On behalf of the respondents, the learned Solicitor General has started with the submission that there is no positive obligation on the Government to grant a passport even if exit from the country is guaranteed, nor says he is there a ground for a mandamus. He has emphasized that in the present proceedings, the vires of the Indian Passport Act have not been challenged by the petitioner. He has then concentrated on the submission that the expression "personal liberty" as used in Article 21 of the Constitution does not include the right to go out of the country or to travel abroad. According to him, the decisions of the Bombay, Mysore and Kerala High Courts relied upon in support of the petitioner's claim erroneously read in the expression "personal liberty" right to travel outside the country, obligation to issue a passport and a further obligation to facilitate return, for it is only on this premise that it can be held that refusal to issue a passport would mean creating an unlawful obstruction in the way of the petitioner to go out of the country. The learned Solicitor General has in his inimitable manner also suggested that if prohibition to enter the country necessarily means prohibition to go out then such a prohibition has been lawfully provided by the Indian Passport Act and, therefore, the petitioner has been deprived of this element of personal liberty according to the procedure established by law. The challenge on the ground of violation of Article 21 would, on this view, not be available to the petitioner.

The counsel has argued that the concept of liberty as upheld in the two American decisions cannot serve as a safe guide in this country and he has distinguished the decisions of the Supreme Court of India relied upon by Shri Yugeshwar Dayal, the learned counsel for the petitioner. A certain amount of emphasis has been laid by Shri Gupte on the fact that by Article 21, the framers of our Constitution have extended protection of life and personal liberty to every person whether or not he is a citizen of India. This according to the submission is suggestive of restrictive intendment. Our attention has also been drawn to the characteristics of a passport as stated in 40 American Jurisprudence p. 523, where a passport is described to be a formal document issued by a competent officer of a sovereign State to a citizen or subject of the State certifying his citizenship or allegiance addressed to foreign powers and requesting that the bearer of it pass freely and safely. This document, according to the passage relied upon, is essentially in character a political document by which the bearer is recognized in foreign countries as a citizen of the country which issued the

passport. In so far as the petitioner's argument based on Article 14 of the Constitution is concerned, reference has been made to the affidavit in reply wherein it is averred that the petitioner is an ex-convict and a dismissed Government servant. This, according to the learned Solicitor General, would rule out the applicability of Article 14, for it is not shown that persons similarly placed as the petitioner is, were given passports.

9. I should like first to deal with the controversy raised before us on the language of the Constitution and the relevant statutory provisions uninfluenced by the decisions cited in support of one view or the other. As the Preamble of our Constitution shows, a sovereign democratic Republic was set up in this country in November, 1949 to secure to all its citizens justice, liberty, equality and fraternity and with that end in view, the people of India adopted, enacted and gave to themselves the present Constitution, Part III of the Constitution dealing with the fundamental rights consists of Articles 12 to 35, Articles 12 and 13 fall under the heading "General". Article 13 enjoins the "State", which expression includes the Government and Parliament of India and the Government and Legislature of each State, not to make any law which takes away or abridges the rights conferred by this Part and declares laws made in contravention of this clause to be void to the extent of such contravention. All laws in force immediately before the commencement of this Constitution are also declared to be void to the extent of inconsistency with the provisions of this Part. Right of equality is contained in Articles 14 to 18, the State being enjoined by Article 14 not to deny equality before the law to any person. Article 15 prohibits the State from discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth etc. Article 16 guarantees equality of opportunity for all citizens in matters relating to employment. Abolition of untouchability and abolition of titles by virtue of Articles 17 and 18 also seem to be universal in their application.

Articles 19 to 22 fall under the heading "Right to Freedom". Article 19 guarantees to all citizens protection of certain rights including "the right to move freely throughout the territory of India", subject to the exceptions contained in sub-articles (2) to (6), Articles 20 to 22 respectively guarantee to all persons protection in respect of conviction for offences, protection of life and personal liberty and protection against arrest and detention in certain cases. Article 21 which directly concerns us has already been reproduced verbatim. Under the heading "Right against exploitation", Article 23 prohibits traffic in human beings and forced labor, this prohibition being again of universal application. Similarly, Article 24 taboos employment of children below the

age of 14 years in factories or mines or any other hazardous employments. Right to freedom of religion is also guaranteed to all persons by virtue of Articles 25 to 28. Cultural and educational rights are secured to the citizens under Articles 29 and 30, Article 31 which guarantees "Right to properly" also embraces within its fold all persons. Similarly, the right to constitutional remedies in enforcement of the right conferred by Part III is secured to everyone and is not restricted to citizens alone. This is natural because everyone to whom the right is guaranteed must be secured the remedy to enforce such a right. Articles 33 to 35 do not concern us for the purposes of this case. It would be noticed that certain fundamental rights have been guaranteed only to Indian citizens whereas certain other rights extend to all persons.

So far as the right claimed by the petitioner in the case in hand is concerned, it is conceded that Article 19 (1) (d) guaranteeing to all citizens the right of freedom to move freely throughout the territory of India does not clothe them with the fundamental right to go out of the country which can be enforced in the Courts of law. The petitioner's reliance for the fundamental right claimed by him is thus exclusively confined to the provisions of Article 21, and his learned counsel argues that the expression "personal liberty" in this Article embraces within its fold all forms and kinds of liberties which a human being in a democratic set-up can conceive of and the liberty of going out of the country for a travel abroad and of returning back could not have been denied to the citizens of India by the framers of our Constitution. The submission appears *prima facie* to be somewhat attractive to a democratic mind but on the plain reading of Article 21, in the background of the scheme of the Constitution, construed in the light of the recognized rules of construction, I am unable to persuade myself to sustain it. Normally, no country would like to guarantee by the Constitution of its governmental set-up to a non-citizen the right of free entry within its territory to be enforceable in its own municipal Courts. Such a right does not seem to me to inhere in a non-citizen and no recognized principle has been cited to the contrary. The result, therefore, is that unless Article 21 clearly clothes every person - which expression includes non-citizens - with such a right, it would be difficult to infer the existence of such a right by the rule of necessary intendment.

But then it is argued that the expression "personal liberty" in Article 21 must be held to include within its fold the right to go out of the country. This argument is developed by comparing the language of Article 19 (1) (d) with that of Article 21, the submission being that these two provisions could not have been intended to overlap, with the result that whatever is left of liberty of movement after excluding the liberty

guaranteed under Article 19 (1) (d), must, by necessary intendment, be deemed to have been guaranteed by Article 21. The residue of personal liberty, according to the submission, must include the right of movement in going out of the country and coming back. I may now examine this argument. The fact that Article 21 extends the right guaranteed by the Constitution to all persons, including non-citizens, would *prima facie* seem to me to exclude such a construction. This Article protects "life and personal liberty" of all persons by prohibiting their deprivation except according to the procedure established by law. The bracketing together of "life" and "personal liberty" and "prohibiting their deprivation except according to the procedure established by law", would seem to me to suggest that these rights are guaranteed only within the territory of India. The right to free movement throughout the country is only guaranteed to citizens and not to aliens or non-citizens under Article 19 (1) (d) of the Constitution. If Article 21 is intended to operate outside the field covered by Article 19 (1) (d), as appears to be the scheme of the Constitution, then this would mean that non-citizens or aliens who are included in the word "persons", though not guaranteed free movement throughout the territory of India, have been guaranteed the fundamental right of going out of this country and coming in, which right would obviously be enforceable in the Courts of law in this country. This construction seems to me to lead to an intendment which. I must confess with all respect, I find it somewhat difficult to impute to the framers of the Constitution. Interests of national security at least, leave alone other important considerations; quite clearly argue against imputing such an intendment to the Constitution-makers.

The attempt made at the bar to confine the right to go out of the country and to come in as guaranteed by Article 21 to citizens alone, excluding aliens or foreigners from this guarantee, would also seem to be unsupportable because I find it difficult on the language of Article 21 to split it into two parts granting protection of life within the territory to all persons but "personal liberty" of going out of the country and coming in only to citizens. The construction of this Article suggested in this attempt is not easy to sustain on the plain reading of its language without straining it to an extent which virtually means re-writing the Article and indeed except for the bald submission that citizens could not have been intended to be deprived of such a valuable right, no legal and rationally compelling reason has been suggested for adopting the construction canvassed. I am accordingly unable on the plain language of the Constitution and its scheme to hold that personal liberty guaranteed by Article 21 is intended to extend to the liberty of going out of India and coming back, as claimed on behalf of the petitioner.

10. I may now turn to the decided cases to see if there is any binding precedent to the contrary or if the ratio of the decisions cited militate against this view and commends acceptance. It is appropriate to examine the Supreme Court decisions first. In A. K. Gopalan's case, AIR 1960 Supreme Court 27 the Supreme Court was approached by the petitioner A. K. Gopalan under Article 32 of the Constitution for a writ of habeas corpus against his detention under the Preventive Detention Act IV of 1950. The validity of the said Act was challenged on the plea of contravention of the provisions of Articles 13, 19, 21 and 22. As a matter of fact, that was the first case in which different Articles of the Constitution contained in the Chapter of Fundamental Rights came up for discussion before the Supreme Court. It is unnecessary to refer in detail to the various passages from the separate judgments of the eminent Judges constituting the Bench to which our attention has been drawn by the learned counsel at the bar in support of their respective submissions. Isolated passages taken out of the context from these separate judgments may not serve as a safe guide for understanding the ratio decidendi of the decision. The judgments must be read as a whole to follow the channel in which judicial thinking has proceeded, for it is only by doing so that one can have a proper helpful grasp placed on Article 19 (1) (d) for the protection of personal liberty as a substantive right and Article 21 was suggested as giving an additional protection by prescribing the procedure according to which alone that right may be taken away. This contention was not sustained and the Court considered it improper to read Article 19 as dealing with the same subject-matter as Article 21.

No doubt S. R. Das, J. (as he then was) while contrasting the language of Article 19 with that of Article 21 observed that the words "personal liberty" used in Article 21 have a definite connotation and it does not mean only liberty of person but it means liberty or the rights attached to the person (*jus personarum*) and he also added that the expression "personal liberty" has been used in Article 21 as a compendious term including within its meaning all the varieties of rights which go to make up the personal liberties of man. Chief Justice Kania in his separate judgment observed that deprivation or total loss of personal liberty which *inter alia* includes the right to eat or sleep when one likes to work or not to work as and when one pleases and several such rights sought to be protected by the expression "personal liberty" in Article 21 is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by Article 19 (1) (d). Deprivation of personal liberty according to the learned Chief Justice, has not the same meaning as restriction on free movement in the territory of India. The learned Chief Justice, it may be noted, has also observed that the concept of the right to move

freely throughout the territory of India is an entirely different concept from the right to "personal liberty" contemplated by Article 21 for "personal liberty" covers many more rights in one sense and has a restricted meaning in another. The contents and subject-matters of these two Articles, it is added, are not the same and they proceed to deal with the rights covered by their respective words from totally different angles.

B. K. Mukherjee, J. (as he then was) has in his separate judgment observed that Article 19 gives a list of individual liberties and prescribes, in the various clauses the restraints that may be placed on them by law so that they may not conflict with public welfare or general morality whereas Articles 20, 21 and 22 on the other hand are primarily concerned with penal enactments or other laws under which personal safety or liberty of persons could be taken away in the interests of the society and they set down the limits within which the State control should be exercised. That eminent Judge points out the use of the word "freedom" in Article 19 which is not used in the three succeeding Articles which merely lay down the restrictions that are to be placed on State control where an individual is sought to be deprived of his life or personal liberty. As I have said earlier, these passages taken in isolation out of the context are not conclusive in determining the true ratio of the judgment. But be that as it may, I am unable to discover even from the isolated observations selected by the counsel for the parties from the separate judgments of the eminent Judges constituting the Bench any support for the submission that Article 21 embraces within its fold the fundamental right of personal liberty to go out of the territory of India and to return. Reference to Black stones Commentaries on the laws of England or to the Magna Carta or to the 5th and 14th amendments of the Constitution of the United States in the Supreme Court decision in Gopalan's case, AIR 1950 Supreme Court 27 also does not lend any support to the petitioner's submission.

In Kharak Singh's case, AIR 1968 Supreme Court 1295 in proceedings under Article 32 of the Constitution, the constitutional validity of Chapter XX of the U. P. Police Regulations and the powers conferred upon police officials by its various provisions was challenged as violative of the right guaranteed to citizens by Articles 19 (1) (d) and 21. In that context, it was held by majority that the words "personal liberty" in Article 21 have been used in a compendious sense so as to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19 (1). It is noteworthy that the Bench was really dealing with a case in which the constitutionality of Chapter XX of the U. P. Police Regulations was questioned and the attention was concentrated on the content

of Article 21 as affecting the vires of that Chapter. This would be obvious from the following observations of Ayyangar, J.:

"Is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to 'assure dignity of the individual' and, therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as 'personal liberty' having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories."

Clause (B) of Regulation 236 was on this basis held plainly violative of Article 21 and as there was no law on which the same could be justified, it was struck down as unconstitutional. It is unnecessary to refer to the minority view, according to which the entire regulation was held unconstitutional being violative of both Article 19 (1) (d) and Article 21.

I may, however, point out that even the minority judgment does not support the petitioner's contention because here again the question to which the learned Judges had directed their attention was merely to see whether the regulation in question was violative of Article 21 of the Constitution. In the course of the judgment, Subba Rao, J (as he then was), speaking for the minority view, defined the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments were directly imposed or indirectly brought about by calculated measures. On this view, all the acts of surveillance under Regulation 236, with which alone the Court was concerned, were held to infringe the fundamental right under Article 21 of the Constitution. I am unable to find anything in this judgment which can lend support to the petitioner's claim to go out of India and return as a fundamental right guaranteed by this Article.

11. It is necessary now to turn to the American decisions on which great emphasis has been laid on behalf of the petitioner. In (1958) 2 Law Ed (2d) 1204, the U. S. Supreme Court was directly concerned with the question whether the Immigration and

Nationality Act, 1952 and the Act of Congress of July 3, 1926, authorized the Secretary of State to withhold a passport because of the refusal of the applicants to file an affidavit concerning their membership of the Communist party. This authority in the Secretary of State was negated by the majority on the ground that being a Communist was immaterial for the purpose of the issuance of a passport. It is true that in the course of the judgment it has been observed that the right to travel is a part of the "liberty", of which a citizen of the United States cannot be deprived without due process of law of the Fifth Amendment, was conceded by the Solicitor General and travel abroad has been equated with travel within the country as being necessary for a livelihood. Freedom of movement across the frontiers in either direction and inside the frontier has also been described by Douglas, J., speaking for the majority view, as a part of the heritage of the citizens of the United States, considering it to be as close to the heart of the individual as the choice of what he eats or wears or reads.

It is indeed this approach which has been strongly relied upon by the petitioner's counsel. I am, however, unable to import these considerations in the construction of Article 21 of our Constitution on which alone the petitioner has founded his claim. The fact that Article 21 embraces within its fold all persons - including non-citizens or aliens - seems to me to negative any such intendment on the part of the framers of our Constitution. It is unnecessary to emphasize the danger of construing Article 21 by reference to the provisions of the Constitutions of other countries, the language of which is not exactly similar, as also of relying too much on the observations in the judgments of American, or indeed of any foreign Courts, which may be influenced and inspired by factors inappropriate to Indian conditions and circumstances. Fifth Amendment of the United States Constitution which is differently worded or at least which is not shown to be similarly worded may, even otherwise, not serve as a close analogy helpful for construing Article 21 of our Constitution. In so far as the characteristic of a passport is concerned, the decision in (1958) 2 Law Ed (2d) 1204, it is noteworthy, described a passport as an aid in establishing citizenship for purposes of re-entry into the country; of course according to this decision, the crucial function of the issuance of a passport in the United States these days is also described to be control over exit, intention to extend diplomatic protection to its bearer being a subordinate function.

Turning now to the majority decision of the U. S. Supreme Court in (1964) 12 Law Ed (2d) 992, the Court there was concerned with the question of the constitutionality of the Subversive Activities Control Act. Douglas, J. has in his separate judgment after

referring to the earlier decision in (1958) 2 Law Ed (2d) 1204 observed, inter alia, that free movement at home and abroad is important for job and business opportunities, and in the absence of war, a citizen cannot be kept from travelling within or without the United States unless there is power to detain him. I must confess my complete inability to adopt this approach in construing Article 21 of our Constitution. I need say nothing more about these decisions of the U. S. Supreme Court except that perhaps even in the United States this extreme approach appears to be somewhat recent.

12. This brings me to the decisions of the other High Courts in India. In Jethwani's case, (1966) 68 Bom LR 529, the learned single Judge construed the expression "personal liberty" in Article 21 as including in its ambit the right to go abroad by relying on the two decisions of the Supreme Court mentioned above and on the decisions of the U. S. Supreme Court in *Kent v. Dullas*. I have already observed that in my view these decisions do not support this construction and with respect I find myself unable to endorse the opinion expressed by the learned Single Judge in Jelhwani's case, (1966) 68 Bom LR 529. I may, however, point out that in this judgment a passport within the contemplation of Passport Act of 1920 has been described to be an official document issued to traveller by the Government of his own country in the name of the head of a State for his safe passage to and protection in foreign country and it is intended to be presented to a foreign Government for this purpose. In support of this view, reliance has apparently been placed on *R. v. Brailsford*,⁹ and reference has also been made to the form of a passport in this country and to Basu's Commentary on the Constitution of India. 4th Edition, Vol. V, p. 371. The decision was affirmed on Letters Patent Appeal and the Appellate Bench, in addition to the decisions of the Supreme Court and the American decisions, referred to four more decisions of the High Courts, including the decisions in the cases of F. Manjeeran, AIR 1966 Kerala 20 (FB) and Sadashiva Rao, 1965-2 Mys LJ 605.

The decision of the Madras High Court in the case of V. G. Row, AIR 1954 Madras 240 dissented from the learned Single Judge was distinguished by the Division Bench on appeal. The Full Bench decision of the Kerala High Court in the case of Manjeeran, AIR 1966 Kerala 20 (FB) and the Bench decision of the Mysore High Court in Sadashiva Rao's case, 1965-2 Mys LJ 605 also seem to proceed on the same reasoning and the view taken by the Madras High Court has been expressly held in these decisions to be no longer good law in view of the decision of the Supreme Court in *Abdul Rahim v. State of Bombay*¹⁰

In Abdul Rahim's case, AIR 1959 Supreme Court 1315 it has been held that to require

an Indian citizen to produce a passport before he can be allowed to enter India, may be regarded as a proper restriction upon entering India. Section 3 of the Passport Act, 1920, and Rule 3 of the Passport Rules, 1950, have been held not to offend Article 19 (1) (d) and (e) of the Constitution on the basis of the majority view of an earlier decision of the Supreme Court in *Ebrahim v. State of Bombay* ¹¹.

13. As the foregoing discussion shows, the decisions relied upon on behalf of the petitioner while interpreting Article 21 of the Constitution largely proceed on the lines of reasoning adopted by the U. S. Supreme Court in (1958) 2 Law Ed (2d) 1204 and (1964) 12 Law Ed (2d) 992 and by construing the decisions of our Supreme Court in the cases of A. K. Gopalan, AIR 1950 Supreme Court 27 and Kharak Singh, AIR 1963 Supreme Court 1295 to mean that "personal liberty" as used in Article 21 extends to the liberty of going out and returning to India as a fundamental right. For my part, speaking with the utmost respect, I find it somewhat difficult to persuade myself to agree with the said line of thinking. The observations in the decisions of our Supreme Court in the aforesaid two cases should, in my view, be confined to the facts and the controversy with which the Court was concerned and I find little justification in unduly enlarging or broadening the scope of those observations beyond the controversy requiring adjudication and solution by the Court.

14. I may also at this stage point out that in so far as the right of entry by a citizen into the territory of India is concerned, it has been held by the Supreme Court in the case of Abdul Rahim, AIR 1959 Supreme Court 1315 that the restriction imposed on this right by the Passport Act and the Rules made there under is reasonable. Though in that case the decision proceeds on the basis of Article 19, nevertheless assuming, without holding, that Article 21 takes within its ambit the liberty of entering the territory of India, that right can legitimately be held to be regulated and controlled according to the procedure established by law, thereby excluding challenge to its constitutionality on the basis of Article 21. Nothing cogent has been urged at the bar to persuade me to hold to the contrary.

15. Dealing now directly with the question of the right to get a passport claimed by the petitioner, our attention has not been drawn to any provision of law in terms conferring this right on the petitioner. Assuming, the petitioner has a fundamental right to go out of the territory of India, it is apparent that the respondents have not done anything in violation of any provision of law which can be said to have infringed any such right. There is no law which obliges the respondents to issue a passport to the petitioner. The plain reading of Article 21 does not seem to me to impose any obligation on the

respondents to take positive steps for facilitating egress or exit of persons from the territory of India. All that this Article does is to prohibit deprivation of life and personal liberty of every person except according to the procedure established by law, in other words, in accordance with the provisions of a valid law. Obviously, the respondents are doing nothing contrary to any provision of law. Nor has any law been made by the Legislature of this country which takes away or abridges any right conferred by Article 21. The use of the word "protection" in the margin of this Article does not seem to me, as at present advised, to suggest any constitutional obligation on the respondents to take active or positive steps to facilitate every person's exit from India.

It is, however, argued that since the petitioner cannot re-enter India on return after his travel abroad without a passport, refusal to issue a passport to him would amount to deprivation of his right to enter the territory of India. Here again, one infirmity in this line of argument lies in assuming that Article 21 imposes an obligation on the respondents to take positive and active steps to facilitate entry into India by all persons. That obviously does not seem to me to be so. And then entry into India is controlled and regulated by a valid law and, therefore, this right, if at all it is assumed to be covered by Article 21 on which alone reliance has been placed, is the subject-matter of a procedure established by law within the contemplation of Article 21. It is noteworthy that the virus or the constitutional validity of the Indian Passport Act and the Rules made there under have not been questioned before us. This submission as broadly put, is thus difficult to sustain on the language of Article 21.

16. Adverting for a moment to the characteristics of a passport, this word has been defined in Section 2 of the Indian Passport Act to mean a passport for the time being in force issued or renewed by the prescribed authority and satisfying the conditions prescribed relating to the class of passports to which it belongs. Rule 3 made under this Act prohibits entry into India by water, land or air of all persons from any place outside India save as is provided in Rule 4 which exempts certain classes of persons from the provisions of Rule 3. This Act thus does not deal with passports for going out of India. As popularly understood, however, a passport, when issued to a citizen who goes out of his country to a foreign land, is a political document by which the bearer is recognised in foreign countries as a citizen of the country which issued the passport. The citizenship or allegiance of the bearer is certified and the foreign powers are requested that the bearer may be allowed to pass freely and safely. No right vesting in the petitioner has been brought to our notice which would entitle him to

approach this Court with a prayer to call upon the respondents to issue such a document to the petitioner.

17. As a last resort Shri Yogeshwar Dayal has laid stress on the argument that failure on the part of the respondents to grant passport to the petitioner is *mala fide* because no reasons have been assigned for this failure. The submission is devoid of merits. In the writ petition what is pleaded is "the refusal to pass an order is *mala fide* and arbitrary. The delay is being caused simply to reject the right of the petitioner to approach this Hon'ble Court. The delay in passing orders amounts to *mala fide* refusal to issue passport and infringes fundamental rights guaranteed to the petitioner". In the affidavit in reply, this allegation is denied. It has also been averred therein that communications have been received in official confidence and for reasons which should not be disclosed in public interest, it would not be proper to give passport facilities to the petitioner. The matter, however, is stated to be still under examination and a decision, according to the reply, would be taken after the material is processed. On this state of pleadings, it is not possible to sustain the challenge on the basis of mala fides. There is no cogent and sufficient material to hold that the respondents are influenced by any extraneous or irrelevant considerations or that they are acting arbitrarily. The affidavit in reply negatives the suggestion of mala fides. It may also be pointed out that there being no obligation laid by law on the respondents to grant a passport, mere omission to give reasons by itself, and without more, may also not suffice in law to establish mala fides. It certainly does not suffice in the case in hand. The attack on the ground of mala fides is thus futile and must fail.

18. In view of the foregoing discussion. I am constrained to hold that the petitioner has not made out any case either of mala fides or of violation of his right under Article 21 or under any other Article of the Constitution. I am not unmindful of the fact that this view virtually vests in the respondents an uncontrolled power to grant or refuse or unduly - and at times perhaps indefinitely - delay the grant of passports to Indian citizens, but with this aspect, this Court may not be concerned, this matter being foreign to its function. Legislative policy pertains to other than judicial wings of Government. It is, however, hoped that suitable law will be made on the question of grant of passports to Indian citizens so that travel abroad and return to their own country is adequately facilitated and assured, for, when all is said and done, the fact remains that in the present international conditions and development of science, social intercourse amongst the peoples of the various nations is most essential for maintaining and promoting peaceful co-existence and mutual understanding, help and

co-operation for fostering appropriate healthy progress of developing nations like India. Foreign travel has unique educative value, inter alia, in broadening and liberalizing one's outlook on life and democratizing one's way of life. It opens to the traveler's vision a vast vista of man's progress and serves to take him out of the static and narrow parochial channels of mental thinking. I have had to deal with the points canvassed at the bar at some length because I have not been able to persuade myself to agree with the contrary view expressed in the decisions cited on behalf of the petitioner given by learned Judges whose opinion I hold in very high esteem.

19. As a result of the foregoing discussion, all the points raised by the petitioner's learned counsel fail. As the decisions on these points determine the fate of the writ petition, the same must fail and is dismissed. In the circumstances, there would be no order as to costs.

20. H. R. Khanna, J.:- I agree.

21. S. K. Kapur, J.:- I have had the benefit of reading the judgment of my learned brother, the Acting Chief Justice, and I agree with the reasonings and the conclusions arrived at. In view of the importance of the matter, however, I would like to say a few words.

22. The facts have been set out in the judgment of Dua, A. C. J., and I need not repeat the same. The main question is about the ambit and scope of Article 21 of the Constitution and the argument at the bar on behalf of the petitioner is that it embraces both the right to travel out of the country and to re-enter. As has been discussed by my learned brother Dua, A. C. J., Article 21 deals only with the residue and, therefore, rights other than those guaranteed by Article 19. In my opinion, the right to enter the country has been guaranteed not by Article 21 but by Article 19 (1) (e) which provides that all citizens shall have the right to reside and settle in any part of the territory of India. This right is confined only to the citizens. A citizen living outside the territory of India can claim that he has the right to come back and settle in any part of the territory of India. The right to come back is, therefore, inherent in the right to reside and settle in the territory of India. That being so, the State may, in exercise of power under Article 19 (5), make a law imposing reasonable restrictions on the right to re-enter the country. Those restrictions have, in my opinion, been validly imposed by law, that is, by the Passport Act and the rules made thereunder. They have been held to be reasonable by their Lordships of the Supreme Court in AIR 1959 Supreme Court 1315.

Apart from that, the petitioner has not, before us, challenged the constitutionality of the said Act and the rules and, therefore, the matter must be decided on the assumption that they rightly restrict the right of a citizen to enter the country. If the view canvassed at the bar on behalf of the petitioner, namely, that the right to enter the country is guaranteed by Article 21, were to be accepted it would lead to serious consequences. The right under Article 21, as has been observed by my learned brother Dua, A. C. J., extends not only to the citizens but to all persons and consequently to non-citizens as well. The result would be that every person, whether a citizen or not, and whether hostile or friendly, in the absence of any law will be entitled to say that he has a right to enter the country; a situation which could never have been contemplated by the constitution-makers. It was also argued by Mr. Yogeshwar Dayal, the learned counsel for the petitioner, that restriction on the right of a person to enter the country indirectly operates as a restriction to go out and, therefore, violates Article 21. Even if that were to be accepted, the right to enter has been restricted by law. Under Article 21 every right guaranteed thereby can be curtailed by law. The expression "established by law" in Article 21 accepted the English principle of supremacy of law in preference to the American doctrine of 'due process of law'. In this view even if it be held that the right to go out is directly curtailed by restricting the right to re-enter, then the answer must be that that right is restricted by law, the validity of which has not even been challenged before us.

23. This takes me to the other argument of the learned counsel for the petitioner that the expression "personal liberty" in Article 21 includes the right of a person to go out of the country as and when he pleases and that right can be curtailed only by law made by the legislature. It is in aid of this argument that support has been sought by the learned counsel from decisions of the Supreme Court of the United States in (1958) 2 Law Ed (2d) 1204 and (1964) 12 Law Ed (2d) 992.

I agree with the learned counsel for the petitioner that the right of personal liberty guaranteed by Article 21 is not dwarfed into mere freedom from physical restraint of the person of the citizen, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator. But it is here that the agreement ends, for I am not prepared to accept the argument on behalf of the petitioner that Article 21 also guarantees a right to travel outside the country. No doubt, 'liberty' is a very comprehensive term and let alone it would include not merely freedom to move about unrestricted but such liberty of conduct choice and action as a person may choose to enjoy. In the United States of America the Supreme Court has

expanded the scope of 'due process' clause by giving the word 'liberty' in the Fifth Amendment of the Constitution of the United States of America a very wide meaning. Though no effort has ever been made to define the word 'liberty' in a straight jacket of a definition judicially evolved, the Supreme Court has more than once emphasized that it is not confined to mere freedom from bodily restraint but extends to the full range of conduct which the individual is free to pursue. To my mind, however, it appears that by qualifying the word 'liberty' by the word 'personal', the import of the expression in Article 21 is narrowed down to the meaning given to the expression 'liberty of the person' or 'personal freedom' as used by the English lawyers. According to Blackstone (Blackstone's Commentaries, p. 134), the right of personal liberty includes "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law."

To me it appears that 'personal liberty' in Article 21 is the antithesis of physical restraint or coercion. To the extent the right of locomotion is not covered by Article 19, it is no doubt guaranteed by Article 21, but to a limit. The right of locomotion may include right to move about within the territory of India without any surveillance or vigilant supervision. It may also include the right to eat and drink what man wants, to work or not to work, to sleep or not to sleep, to travel when and where one likes and such like other things but it certainly does not extend to travelling outside the country. There are various other elements of personal liberty which may not be covered by Article 19 and they will find their guarantee in Article 21, such as the right to exist and the right to enjoyment of life while existing and to enjoy life according to nature, temperament and lawful desires of the individual. Article 21 may also be said to recognize the sanctity of a man's home and the privacies of his life, the freedom from arbitrary personal restraint or servitude, and right to acquire useful knowledge, to marry to establish a home and bring up children, and generally to enjoy those privileges long recognized at common law as necessary to the orderly pursuit of happiness by free man.

Again, freedom from coercion is not confined to narrow limits in the modern age. In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty. But as civilization advances, even the psychological restraints may have to be forbidden and have in fact been forbidden by guaranteeing personal liberty under Article 21. In my opinion, therefore, the right of personal liberty in Article 21 is a right of an individual to be free from restrictions or encroachments

on his person where these restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. The concept of the expression 'liberty' as interpreted in America was well known to the constitution-makers and there must have been some purpose behind adding the word 'personal' before the word 'liberty' in Article 21 and that purpose, to my mind appears to be to make the guarantee, as I have already said, the antithesis of physical restraint or coercion.

Mr. Yogeshwar Dayal strongly appealed to us not to unnecessarily curtail the rights of the persons under the protection of the Republic of our country. No doubt, it is true that the constitutional provisions should normally not be interpreted to cut down the rights of the subjects, but, at the same time the provisions of the Constitution are not merely mathematical formulae having their essence in their form. They are organic living institutions transplanted from the soils of freedom lovers. Their significance is vital and not formal, it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and their line of growth. Our charter of Government is not a temporary measure. It was intended to endure for ages and be adaptable to a changing world and to the growth of men's experience and enlargement of their vision. In democracy, limitations on governmental powers are undoubtedly significant but the wise restraints that make men free are restraints upon public authority as well as restraints on private persons. If the provisions of the Constitution and of Article 21 have to be construed in the setting in which they are placed and the object for which they were enacted then it necessarily leads one to the conclusion that the constitution-makers adopted and guaranteed by Article 21 what the British lawyers understood by the concept of 'personal freedom'. When our free men realize that time has upset many fighting faiths, they will come to believe even more than they believe the very foundation of their own conduct that the ultimate good desired is better reached by paying due heed to various circumstances and the urges of the time that led the constitution-makers in recognizing and/or extending various guarantees of rights.

I am unable to visualize that our constitution-makers were recognizing by Article 21 of the right of everyone to go out wherever he wants and the right of anyone to come and settle in India. This difficulty is sought to be met by the learned counsel for the petitioner by suggesting that power has been given to the Parliament to regulate the inlet and exit by legislation. That may be so, but the question still remains whether the constitution-makers were contemplating in the absence of any law, to guarantee a right even to an alien enemy detained in the country to go out as and when he pleases. A Judge is not a variety of impersonal calculating machine who merely applies the letter

of the law. When interpreting the provisions of law, and particularly of the constitution, susceptible to different meanings, a Judge has to pay due regard, though to a limited extent, to the policies which he believes to represent the sober second thought of the community that framed it and are suited to its inarticulate needs. To the layman constitutionalism's emphasis upon freedom of movement, freedom of belief, freedom of communication and freedom of association etc. would seem the kernel of the whole structure. These freedoms are directly connected with the recognition that individual is the ultimate seat of authority. There may be abundant truth in this approach, but no matter how hospitable a State may be no one of them represents an absolute right. All liberties are the result of social process and each constitutional liberty has to be weighed against considerations of order, stability and security. It therefore, becomes necessary to construe the constitutional provisions in the background of the various circumstances necessitating its enactment. As I have said above the more I look at the nature of the guarantee the more I feel that our Constitution did not mean to extend the right to each and every person within the realm to go out wherever he liked and, to my mind, the word 'liberty' has for this reason been qualified by the word 'personal'.

24. There is yet another aspect of the matter. The petitioner has asked us to issue a mandamus to the respondents directing them to give him a passport. The nature of the passport has been discussed by my learned brother Dua, A. C. J., and I need not elaborate on the same any more. Whatever its nature there would be no doubt that it casts certain obligations on the Government to extend some type of protection to a citizen travelling abroad. Can it then be suggested that a person wanting to leave the country can compel the Government to extend that protection to him irrespective of his antecedents. I do not see such a positive obligation being cast on the Government by Article 21. So far as the petitioner's claim to equal treatment under Article 14 is concerned, each case must depend on its own facts. If he has no right under the Constitution to go out of the country, the matter must be left to the Executive. I am not suggesting that the Executive can, while extending that benefit, treat two persons, exactly similarly situated, differently, but for the purpose of this petition it is enough to say that - (i) the petitioner has no right to travel out of the country under Article 21; and (ii) he has not succeeded in discharging the burden cast on him that he has been treated differently from other persons equally circumstanced.

25. Lastly, it was suggested that the denial of passport to the petitioner is mala fide. It has been alleged in paragraph 8 of the petition "that there is no case pending against

the petitioner in any Court of law and that under the administrative instructions as well passport to an Indian citizen can only be refused in five cases, namely, anti-Government, hot communist, established smuggler trying to jump the bail granted in a criminal case or being involved in a murder case or trying to run away. The petitioner does not fall in any of the above categories". If the petitioner has no right under Article 21, as I have discussed already, then by very nature of things even if there be any such instructions they cannot be exhaustive, as in extending the benefit to an individual the Government must act having regard to fact and circumstances of each case. In this view I would dismiss the petition leaving the parties to bear their own costs.

Petition dismissed.

Cases Referred.

1. 1966-68 Bom LR 529;
2. 1966 (2) Mys LJ 605.
3. AIR 1966 Kerala 20 (FB)
4. AIR 1954 Madras 240,
5. (1958) 2 Law Ed. (2d) 1204,
6. (1964) 12 Law Ed. (2d) 992
7. AIR 1963 Supreme Court 1295.

8. AIR 1950 Supreme Court 27
9. (1905) 2 KB 730 at p. 745
10. , AIR 1959 Supreme Court 1315
11. AIR 1954 Supreme Court 229.