

# **BOMBAY HIGH COURT**

State

Vs.

Sharifbhai Jamalbhai

Criminal Reference No. 19 of 1958

(Vyas and S.P. Kotwal, JJ.)

23.04.1958

## **JUDGMENT**

**Vyas, J.**

1. This is a reference made by the learned Sessions Judge of Baroda and it raises a question whether clause 3, schedule III of the Citizenship Rules, 1956, is ultra vires Article 19 of the Constitution. The reference arises in this way. In the case of *State v. Sharifbhai Jamalbhai*, which is pending in the Court of the Judicial Magistrate First Class, First Court, Baroda, the accused Sharifbhai Jamalbhai is being prosecuted for an infringement of the provisions of clause 7 of the Foreigners Order, 1948, which infringement is made punishable under Section 14 of the Foreigners Act, 1946. Sharifbhai was born in Baroda on 7th December 1933. He has produced a birth certificate in support of that fact. He was living in Baroda till the year 1951. He has produced two ration cards Exhs. 8 and 7 to show that he was drawing ration for himself and his people in the years 1949 and 1951 in Baroda. He has also produced Exh. 6, a muster roll of the Yamuna Mills, Baroda, to show that till December 1951 he was serving the said Mills. It would appear that Sharifbhai left India and went to Pakistan in January 1952. He lived in Pakistan from January 1952 till 1st August 1954. Thereafter and it may be noted that this is not disputed, he entered India on the basis of a Pakistani passport. It is not disputed that a Pakistani passport would be issued only to a Pakistan national and to none else. After the Pakistani passport was issued to the accused on the 3rd of August 1954, he approached the High Commissioner for India in Pakistan for obtaining a Visa and the High Commissioner granted him a Visa under the 'C' category. Now, a Visa under the 'C' category could only be granted to a Pakistani national. The Visa which was granted by the High Commissioner for India in Pakistan to the accused under the 'C' category was endorsed on the 6th November 1954 on the passport of the accused. It would appear that a few days after the 6th November 1954 the accused entered India. On the 18th June 1957 a notice was served upon the accused by the District Superintendent of Police, Baroda, calling upon him to leave India within one month from the date of service of the notice

as he was a foreigner. The accused did not comply with the notice and, therefore, on 31st July 1957 a complaint was filed against him and the charge which was made against him was that he had infringed the provisions of Clause 7 of the Foreigners Order, 1948 and had thereby committed an offence punishable under Section 14 of the Foreigners Act, 1946.

2. Now, the contention of the State is that the fact that the accused had on the 3rd August, 1954 obtained a passport from the Government of Pakistan, which was a Pakistani passport, is conclusive proof of the accused having voluntarily acquired the citizenship of Pakistan before the 3rd August 1954. For this contention, the State relies upon Clause 3, Schedule III of the Citizenship Rules, 1956. On the other hand, it is the contention of the accused that Clause 3, Schedule III of the Citizenship Rules, 1956, is ultra vires Article 19 of the Constitution and therefore he could not be said to have committed an infringement of Clause 7 of the Foreigners Order, 1948.

3. Now. Clause 3, Schedule III of the Citizenship Rules, 1956, is in these words :

"The fact that a citizen of India 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."

It may be noted that Clause 3, Schedule III of the Citizenship Rules, 1956, is a rule of evidence framed by Government under rule-making power conferred upon the Government by Section 18 of the Citizenship Act 1955, read with R. 30, Sub-Rule (2) of the Citizenship Rules, 1956. Section 18, Sub-Section (2), Clause (h) of the Citizenship Act, 1955, provides that the Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act and in particular and without prejudice to the generality of certain powers, such rules may provide for the authority to determine the question of acquisition of citizenship of another country, the procedure to be followed by such authority and rules of evidence relating to such cases. It is pursuant to this power conferred upon the Central Government under Section 18 of the Citizenship Act, 1955, that the Citizenship Rules, 1956, were framed and amongst the Citizenship Rules we find Rule 30. Sub-Rule (1) of R. 30 says 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 purposes of Section 9(2) be the Central Government. Then there is sub-rule (2) which provides that the Central Government shall in determining any such question have due regard to the rules of evidence specified in Schedule III. I have stated above that Clause 3 of Schedule III, which says that the fact that a citizen of India 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, is a rule of evidence. Now, the question is whether this rule of evidence is ultra vires Article 19 of the Constitution. Having considered the position carefully, we have come to the conclusion that Clause 3, Schedule III of the Citizenship Rules, 1956, is not ultra vires Article 19 of the Constitution. It is true that Article

19 of the Constitution provides, amongst other things, that all citizens shall have the right to move freely throughout the territory of India and to reside and settle in any part of the territory of India (Cl. (d) and (e)). It is also true that Article 5 of the Constitution provides that at the commencement of the Constitution, every person who has his domicile in the territory of India and who was born in the territory of India, or either of whose parents was born in territory of India, or who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India. It is necessary, however, to bear two things in mind; Article 7 of the Constitution provides that, notwithstanding anything in Articles 5 and 6, a person who has after the first day of March 1947 migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India. In this case it is clear that in January 1952 the accused left India and migrated to Pakistan. He resided in Pakistan for, nearly two years and eight months; and it was only upon obtaining a Pakistani passport from the Government of Pakistan and a Visa under the 'C' category from the High Commissioner for India in Pakistan that he entered India sometime in November 1954, that is to say, nearly two years and eleven months after his migration from India to Pakistan. Under these circumstances, notwithstanding the fact that at the commencement of the Constitution the accused had his domicile in the territory of India and notwithstanding the fact that he was born in the territory of India, it is clear that by reason of his migration from the territory of India to the territory of Pakistan in January 1952 he ceased to be deemed to be a citizen of India.

4. The next important point to be remembered is that although a person may be a citizen of a particular country to start with, there is nothing to prevent him from abandoning that citizenship and acquiring a citizenship of another country. Now, when a question arises of a person relinquishing his citizenship of one country and acquiring a citizenship of another country, it has got to be decided upon evidence and it is in that context that a rule of evidence is framed by the Central Government under the rule making power conferred upon the said Government by Section 18 of the Citizenship Act, 1955. The said rule of evidence provides that the fact that a citizen of India 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. It is in the light of this rule of evidence that a question of a person having voluntarily acquired the citizenship of another country has to be decided when such a question arises for decision. It may be emphasised again in the context of this point that on the 3rd August 1954 the passport which the accused obtained for returning to India was a Pakistani passport which could only be issued to a Pakistani national. Unless the accused had represented to the Government of Pakistan that he was a Pakistani national or that he had voluntarily acquired the citizenship of Pakistan, such a passport could not have been issued to him. Then again, upon the said passport there was an endorsement of a Visa which was issued by the High Commissioner for India in Pakistan under the 'C' category. It is not disputed that a visa under the 'C' category could only be issued to a Pakistani national. This is clear from paragraph 37, page 12, of the Law of Passport and Visa by M.A. Malik, 1953 edition. There are various categories of Visas for instance, categories A, B, C, D, E and F. If we turn to the provisions regarding the issue of category 'C'

Visa, it would appear that this Visa might be granted to Pakistani nationals who were not eligible for, or who did not require, Visas of categories A, B, D, E and F or transit Visas, but who wished to visit India. A Visa under category 'C' would be valid for specified places in India and for a single journey or specified duration not exceeding three months. It was a Visa under this category (category 'C') which was issued to the accused by the High Commissioner for India in Pakistan. It was this Visa which was endorsed upon his Pakistani passport on 6th November 1954. From what has been stated above, it is clear that unless the accused had given the Government of Pakistan to understand that he had voluntarily acquired the citizenship of Pakistan and that his purpose in entering India was to visit the specified place, namely Baroda only and stay there for a duration not exceeding three months, he would not have been able to secure a passport to leave Pakistan nor would he have been able to get a visa from the High Commissioner for India in Pakistan to enter India. It is in the context of these circumstances that the question of whether the accused had given up his citizenship of India has to be decided and when such a question has to be decided, there has got to be a rule of evidence to assist the Courts in deciding it. It is this rule of evidence which is found in Clause 3, Schedule III of the Citizenship Rules, 1956. As I have stated above, pursuant to the power conferred upon the Central Government under Section 18 of the Citizenship Act, 1955, the said Government had power to frame such a rule. Under rule 30, sub-rule (1) of the Citizenship Rules, 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 be the Central Government; and then there is sub-rule (2) which says that the Central Government shall in determining any such question have due regard to the rules of evidence specified in Schedule III. All that Article 19 of the Constitution says is that a citizen of India shall have certain rights. Article 19 does not envisage the position that would arise if the citizenship of India is abandoned and citizenship of another country is acquired. If a question arises whether the person concerned has acquired the citizenship of another country, it has got to be answered with the assistance of the rule of evidence contained in Clause 3, Schedule III, of the Citizenship Rules. Accordingly, we have come to the conclusion that Clause 3, Schedule III of the Citizenship Rules, 1956, is not ultra vires Article 19 of the Constitution.

5. It is true that in the case of *Mahamad Khan v. Govt. of Andhra Pradesh*<sup>1</sup>, it was held by the learned Judges that a passport was not the basis of legal evidence to establish the fact of citizenship and that it merely embodied a request to a foreign Government to allow the bearer free passage and afford him every assistance and protection. The learned Judges in that case took the view that the fact that a passport was issued by a Government to a citizen did not make it a piece of evidence in a Court of law to establish that fact and they said that Clause 3, Schedule III, of the Citizenship Rules was a device which barred the persons concerned from establishing that they had not acquired the citizenship of Pakistan. With great respect, we are unable to share the view of the learned Judges of the Andhra Pradesh High Court. When a person leaves India without obtaining an Indian Passport and migrates to Pakistan, lives there continuously for two years and eight months, then represents to the Government or Pakistan that he is a national of Pakistan and gives the High Commissioner for India in Pakistan to understand that he wishes to

enter India with the purpose of staying not longer than three months in a specified place, via., Baroda only, we do not understand why all this should not amount to legal evidence of his own conduct to show that he has voluntarily acquired the citizenship of Pakistan. The fact that the accused left India in January 1952 without caring to obtain an Indian Passport would, in our view, be evidence of his own conduct to show that he had no intention to return to India. Had he then intended to continue his citizenship of India, he would have obtained a passport from the Government of India and also a visa to visit a particular place or places in Pakistan for a specified duration of time. He deliberately refrained from adopting that course, because his object in going to Pakistan, in our view, was not to stay there merely for a specified duration of time, but the object was to leave India and settle down in Pakistan; and he did not think of re-entering India for two years and eight months thereafter. It is clear that the learned Judges in Mohamad Khan's case took the view that a mere act of the accused in obtaining a Pakistani passport, which was only "a link in, the chain of international intercourse" was no evidence to show his

<sup>1</sup> AIR 1957 And Pra 1047

voluntary acquisition of citizenship of Pakistan, because they seemed to think that if the accused wished to re-enter India from Pakistan, there was no other remedy open to him but to secure a Pakistani passport and, therefore, he was helplessly obliged to obtain a Pakistani passport. The learned Judges appeared to think that the accused had only two alternatives before him and the alternatives were : (1) either to obtain a Pakistani passport and enter India, or (2) give up the idea of entering India. With very great respect, we are unable to agree. If the accused had not abandoned his citizenship of India and if he had not voluntarily acquired the citizenship of Pakistan, he, whilst in Pakistan, could have and should have, applied to the Government of India for an Indian Passport, stating that although he had been a resident in Pakistan for over two years, he had continued to be a citizen of India, that he wanted to return to India and, therefore, he wanted an Indian Passport. We cannot believe that the accused did not know that this procedure was available to him. In our view, he purposely avoided it. It is not correct to say that even though the accused had all along continued to be a citizen of India, he could not have effected re-entry into India without a Pakistani passport. This aspect of the case, which in our view is a vital and fundamental aspect, appears with great respect, to have been overlooked in Mohammad Khan's case. The learned Judges observed in that case that the irrebuttable presumption referred to in Clause 3, Schedule III, of the Citizenship Rules, 1936, had the effect of depriving a person's right without enquiry. With great respect, we are unable to see what further enquiry was necessary in a case where a person living in Pakistan and pretending to be a citizen of India did not apply, as he ought to have, to the Government of India for an Indian Passport, but instead obtained a Pakistani passport and visa (for only a temporary stay in India) which only a Pakistani national could obtain. What further enquiry is necessary when a person does all this, having in the first instance left India without an Indian Passport and having thereafter settled down in Pakistan without making re-entry in India for two years and eight months ?

6. In our view, the fact that the accused did not move for an Indian Passport, but made a

representation to the Government of Pakistan that he wanted a Pakistani passport, which could only be issued to him if he was a Pakistani national and obtained a visa in category 'C' which only, a Pakistani national could secure, is legal evidence to establish the fact that at the time when he asked for a Pakistani passport and the Visa, he was a citizen of Pakistan.

7. In the result, we hold that R. 3, Schedule III of the Citizenship Rules, 1956, is not ultra vires Article 19 of the Constitution, We are not called upon to decide in this case whether R. 3, Sch, III of the Citizenship Rules is within the rule-making power conferred upon the Central Government by Section 18 of the Citizenship Act, 1955.

8. We direct that the papers be returned to the learned Sessions Judge or Baroda for transmitting them to the Judicial Magistrate, First Class, First Court, Baroda for disposing of the case against the accused, which is pending in his Court, in the light of this decision.

Order accordingly.