

# **BOMBAY HIGH COURT**

Choithram Verhomal Jethwani

Vs.

A.G. Kazi

O.C.J. Miscellaneous No. 336 of 1963

(Tarkunde, J.)

24/26.02.1965

## **ORDER**

### **Tarkunde, J.**

1. This Writ Petition raises a question of considerable importance. The question can be given two alternative formulations. Do the government of India have an absolute and unfettered discretion to grant or refuse a passport to a citizen of India no right to get a passport from the government of India.

2. It is common ground that the petitioner is a citizen of India. He says that he is partner of a firm in Bombay which carries onto business of Bankers, Exporters and Importers and also of a firm in Dubai, in the Persian Gulf, which carries on the business of Indent Agents and Importers. I am told that Dubai in part of British protectorate. The petitioner claims, and this is not disputed that passports were granted to him during the period from October 1952 and October 1962 to enable him to make trips to Dubai and certain ports in the Persian Gult. The Last passport issued in favor of the petitioner express on 28th October 1962. On 10th January 1963 the petitioner applied to the Regional passport officer, who is the second respondents to this petitioner for the grant of a new passport for a period of three years. That application was rejected by the second respondents on 24th May 1963. The petitioner made some further efforts, but was informed by the Assistant passport officer who is respondents No. 1 to this petition by a letter dated 27th June 1963 that his office had nothing to add to the privies letter of 24th May 1963, and that the petitioner may appeal for reconsideration of his case to the chief passport office, New Delhi. No reasons were communicated to the petitioner for the rejection of this application for a fresh passport. On these fact the petitioner filed this petition under Article 226 of the constitution for an appropriate writ or direction to quash the order refusing to grant him a passport and for a direction against the respondents requiring them to grant and issue to hi a passport as applied for.

3. The petition is supported on three main grounds. It is alleged, firstly that it is absolutely necessary for the petitioner to go abroad and to return to India for the purpose of his business, and that the refusal of the passport by the respondents amounts to a contravention of his fundamental amounts to contravention of his fundamental right guaranteed by Article 21 of the constitution. In this connection the petitioners says that it is not possible for him leave India without a passport, because the government of India have issued instructions to the shipping and Air leaving India with out a valid passport and also because even if the petitioners were to go abroad without a passport the entry into India without a passport is forbidden by law and involves penal consequences. The second ground of the petition is that the respondent refusal to grant a passport to the petitioner amount to an infringement of his right to enter India and to reside, and is therefore, violative of the fundamental right declared under article 19(1) (d) and (e) of the constitution. The petitioner claim thirdly that the refusal of a passport without assigning any reason without giving the petitioner any opportunity be being heard or of showing cause is arbitrary, that a number of passports have been given to various of persons and who are similarly situated as the petitioner, and that the refusal of passport to the petitioner is contravention of Article 14 of the Constitution as it amounts to a discrimination against the petitioner.

4. An affidavit in reply to the petition was filed by the second respondent. He submits that by reason of a proclamation of Emergency the petitioner is precluded by Article 358 of constitution fro approaching the court for an alleged breach of article 19. He further says that the petitioners application for a fresh passport was rejected because he (the second respondent) received a communication from the Government of India, Ministry of External Affairs, dated 1st May 1963, whereby he was directed to refuse passport facilities to the petitioners and to black - list his name of two years. He further says that the grant of the a passport is with in the absolute discretion of the Union of India, that there is no right in the petitioner to have a passport issued to him, and that there to is no statutory obligation on the union of India to issue a passport to the petitioner.

5. In view of the contends of this affidavit, the Union of India were added as the third respondents to the petition. On behalf of the third respondents an affidavit in reply to the petition has been filed by the under Secretary to the Government of India in the Ministry of External Affairs. The affidavit says that there is no legal prohibition which prevents a citizen of India fro m going out of India without a passport and that-

"the instructions of the Government of India to the carriers and Travel agencies which have been issued from time to time that they should not take on board passengers leaving India without valid passports do not constitute a passport." The affidavit further says that the grant of passport it within the absolute discretion of the central Government that there is no right in the petitioner to have a passport issued to him and that "that refusal to grant the passport to the petitioner is non - statutory administrative action" which is not subject to judicial review.

The affidavit further say that as the refusal to grant a passport was an administrative act,

on show - cause notice was required to be issued to the petitioner.

6. It is not disputed on behalf of the petitioner that the order rejecting his application for a passport was made when the proclamation of Emergency by the President was in Operation and that the provision of Articles 358 of the constitution precludes him from having recourse to Article 19 for the purpose of impugning that order. Mr. Sorabjee who appeared to behalf of the petitioner confined his arguments to the alleged contravention of Article 21 and Article 14.

7. A passport is an official document issued in the name of the head of a state to a traveler for his safe passage and protection in a foreign country, and is intended to be presented to a foreign government for this purpose *R v. Brailsford*<sup>1</sup>, at p. 745. It is clear that a passport is issued to a traveler by the Government of his own country. In India a passport is now issued in the following form:

"These are to request and require in the name of the president of the Republic of India all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford him or her every assistance, and protection of which he or she may stand in need."

Basu's commentary on the constitution of India, 4th Edition, Volume 5, page 371)

8. It is crucial to notice that the issue of a passport by the Government of India to a citizen of India is not regulated by any statute. However the subject of passport and visas of included in Items 19 of List I (Union List) of the Seventh Schedule of the Constitution. Item 19 of List I reads:

"Admission into, and emigration of and expulsion from India, passport and visas"

Article 73 of the constitution defines the extent of the executive power of the Indian Union, and provides inter alia, that the executive power of the Union shall extend "to the matter which respect to which parliament has power to make laws? It follows that although the issue of passports by the Union Government of regulated by any statues, the function the issuing passports is bested in the Indian Union.

9. A reference may next be made to the Indian Passport Act, 1920, and the Indian Passport Rules, 1950, issued thereunder. It is evident from the preamble of the Act that its purpose was to provide for a statutory requirement that persons desiring to enter India shall be in possession of valid passports. Section 3 of the act empowers the central Government to make rule requiring that persons entering India shall be in possession of passports and for all matter ancillary that incidental to the purpose. Section 5 of the Act empowers the central Government to direct the removal of any person from India who in contravene of the rule under Section 3 prohibiting entry into India without passport, has entered therein, Rule 3 of the Indian passport Rules 1950 lays

down that able a as provided in R. 4, no person proceedings for many place outside India shall enter or attempt to entree possession of the valid passport conforming to the condition prescribed in R. 5 Rule 4 provides for classes of persons who are exempted from the necessity of having a passport. We are not concerned with those exemptions in the present case. In *Abdul Rahim Ismail v. State of Bombay*<sup>2</sup> the Supreme Court held that the Section 3 of the Indian passport Act 1920 and Rules 1950 applied to all person including Indian citizens. The result is that an India citizen cannot enter India from abroad unless he is in possession of a valid passport.

10. With the background of this legal position, I will first consider the petitioners contention that the claim made on behalf of the Government of India of absolute discretion to grant or refuse passports to Indian citizens is inconsistent with the

<sup>1</sup>(1905) 2 KB 730

<sup>2</sup>1959 AIR SC 1315, S.C. 61 Bom.L.R. 1547

fundamental right guaranteed by Article 14 of the constitution. Article 14 lays down that the state shall not deny to any persons equality before the law or the equal protection of the law within the territory of India. This and the subsequent four Articles have been placed in the Constitution under the heading "Right in Equality" The word "State" as defined by Article 12 includes in Government and parliament of India, the Government and the legislature office o the state and all local or other authorities within the territory of India or under the control of the Government of India. It follows that the right to equality which is guaranteed by Article 14 is designed to protect all persons against discriminatory treatment irrespective of whether it result from legislative or from executive action. The claim of absolute and unfettered discretion of to grant or the refuse passports is ex facie discern minatory and, therefore, violative of Article 14 of the constitution.

11. On behalf of the Government of India Mr. Baptista argued that the grant or the refusal of a passport was a purely administrative act, and that such an act does not fall within the ambit of article 14. The argument implies that a purely administrative act has greater validity than a legislative act a view which is clearly untenable. In *Bidi Supply Co v. Union of India*<sup>3</sup>, the Supreme court considered the validity of the an order by which the assessment records of the petitioners in that cast which was a registered firm, and were transferred from Calcutta where the head officer of the firm situated to the officer of the Income-tax officer, special circle Ranchi, with whom the petitioners was required to correspond in future regarding is assessment proceedings. The supreme court held that the order was not contemplated or sanctioned by the particular provision of the Income- tax Act under which it purposed to have been made. Treating the order as purely executive order ,the supreme court observed.

"In the circumstances this substantial discrimination has been inflicted on the petitioner by an executive flat which is not founded on any law and no question or reasonable classification for purpose of legislation of can arise. Here "the state" which includes its Income - Tax departments has by an illegal order denied to the petitioners as comported with other Bidi Merchants who are similarly situate, equality before the law or the equal

protection, of the law and the petitioners can legitimately complain of an infraction of his fundamental right under Article 14 of the constitution"

It is true clear that the protection given by the whether executive to all discriminatory action, whether executive or legislative. If any doubt existed on this question or it was removed by the judgment of S.R. Das C.J. in *Bheshar Nath v. Commr of Income - tax Delhi and Rajasthan*<sup>4</sup>, His lordship observed.

"The underlying object of the (Article 14) is undoubtedly to secure to all person, citizens or non - citizens the equality of status of and the opportunity referred to in the glorious preamble of our constitution. It combines the English doctrine of the rule of law and the equal protection clauses of the 14th Amendment to the American Federal constitution which enjoins that no state shall "Deny to any persons within the jurisdiction the equal protection of the law" there can therefore be no doubt or dispute that this Arise is no founded on a sound public policy

<sup>3</sup>1956 A.I.R. S.C. 479

<sup>4</sup>1959 A.I.R. S.C. 149

recognized and valued in all civilized states"

After referring to the definition of the "the state" in Article 12 his, Lordship said:

"Article 14, therefore is an injunction of to both the legislative as well as the executive organs of the state and other subordinate authorities..... It is not necessary for the purpose of this appeal to consider whether an executive order is a "law" within the meaning of Article 13 for even with out the aid the law is protected against the vagaries, in any of the executive government also ..... Thus Article 14 protects us from both the legislative and executive tyranny by way of the discrimination"

In view of these observations of the supreme court it is not necessary to refer to the American decisions which were cited by Mr. Sorabjee to show that the equal protection clause of the 14th Amendment to the American constitution gave protection of against the legislative as well as executive discrimination.

12. As stated above, the function of issuing passports vests with the government of India by virtue with the of Article 73 read with List I Item 19 of the Seventh schedule of the constitution. Article 14 requiems that the function shall be discharged by the Government of India without discrimination. The legislature has not provided any guidance for the discharge of the at function. I asked Mr. Baptista when the Government of India have framed any administrative rule for the regulation of it function of issuing passports and Mr. Baptista told me that on such rule have been framed. Under these fundamental right of equality guaranteed by the Article 14 of the constitution that the Government of India can adopt either of the two courses they can refuse passports to the all India citizen or grant passports to the same and not to Article 14 out of these

two alternative one is clearly excluded, for it is obvious that the Government of India cannot dispense with issuing passports altogether. It is true that the right to equality guaranteed by Article 14 is available or not but to no persons whether Indian citizens require a passport from the Government of India. The petitioner has given in Ex D to the petition the names has six other Indians to whom granted passport facilities for going to Dubai were granted by the Government of India. It was not denied on behalf of the Government of India that the passport facilities were granted of these persons. Since the Government of India to others, it must follow that the in absence to other classification between those who are and those who are not entitled to passport facilities the Government offend must grant passports to all Indian citizen who apply for them

13. The Government of India claims to an absolute and unfettered discretion of granting or refusing passport of facilities appears to be founded on the fact that the legislature has not mad any law or regulations to the grant of those facilities. What is guaranteed by Article 14, however is the rule of law and not equal subjection to lawless rule. Supposing the legislature had passed a law bestowing upon the executive and absolute an unfettered discretion in issuing passports and the law would have been invalid by virtue of article 14 of the constitution, *State of West Bengal v. Anwar Ali Sarkar*<sup>5</sup>, The fact that on such discriminatory law has been passed by the legislature cannot possibly enable the executive to claim an also absolute and the unfettered discretion in the matter of refusing

<sup>5</sup>1952 S.C.R. 284

passports.

14 A different view was expressed by a Division Bench of the Madras High Court in *V. G. Row v. State of the Madras*<sup>6</sup>, The petitioner in that case had applied for the issue of the passport for traveling to various countries including to the soviet union. A passport was issue to petitioner but his required to have it endorsed for certain countries including the soviet Union was refused. He applied for appropriate writ or direction requiring the respondents to endorse his passport for the remaining countries including the Soviet Union. His petition to was rejected b the Madras High Court is for the most part based on the view that there was a no statutory provisions which prevented a person from leaving and Indian citizen from entering India with out a passport. The subsequent decision of the supreme court , in , which I have already referred to show that the view that there was no provisions preventing an Indian citizen fro metering India without a passport was incorrect. After stating that an Indian citizen was not precluded by any legal provision for melding precluded by the legal provision a passport, the Madras High Court observed.

"In this view we do not see much substance in the contentions of the petitioners learned counsel. Article 14 guarantees equality before the law and equal protection of the laws. Equal protection of the law has been constructed to mean that the protection of equal laws legislation and arbitrary classification. But this article can have no application of the matter like the issue of passports which consists in the exercise of a purely political

function"

With great respect, I do not find it easy to understand what is meant by the exercise of "a purely political function" in this context and why action taken in the exercise of the political function should be outside the ambit of Article 14 of the Constitution. Even supporting that a passport was unnecessary to an Indian citizen for either going abroad or for entering in India the fact remains that certain facilities in respect of foreign travel are available to persons who are in possession of a passport. The government cannot give or deny them to others at their sweet will without violating Article 14 of the Constitution.

15. I must, accordingly, uphold the contention of the petitioner that the order refusing his application for a passport was made in contravention of Article 14 of the Constitution.

16. The other contention of the petitioners is that the rejection of his application for a passport amounts to a contravention of Article 21 of the Constitution. That Article lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law.

17. The first question which arises in this connection is whether the expression "personal liberty" in Article 21 included the freedom to go abroad. The meaning of the expression was considered by the Supreme Court in *A.K. Gopalan v. State of Madras*<sup>7</sup>. There was some difference in that case between Fazl Ali J and the other learned judges on whether the right to freedom from arrest and detention was or was not guaranteed by Article 19(1)(d) but there was no difference between them as to the scope of the expression "personal liberty" as used in Article

<sup>6</sup>1954 A.I.R. Mad 240

<sup>7</sup>1950 S.C.R. 88

21. They all agreed that the expression "personal liberty" in Article 21 was not confined to the mere freedom from arrest and detention. Mr. Das J observed in this judgment that besides the rights mentioned in the several sub-clauses of Article 19(1), there are many other personal liberties which a free man may exercise, and these personal liberties are included in the expression "personal liberty" used in Article 21. He quoted with approval a passage from a full bench decision of the Calcutta High Court in *Kshitindra v. Chief Secretary of West Bengal*<sup>8</sup>, in which it was stated.

"For example, a free man can do what he likes subject to retaining law, work as much as he likes or idle as much as he likes. He can license law and the smoke and do a hundred and one thing which are not included in Article 19. If freedom of person was the result of the seven rights mentioned in the article. But obviously the free man in India has far greater rights"

His Lordship added:

"Indeed I regard it merit of our constitution that it does not attempt to enumerate exhaustively all the personal rights but uses the compendious expression "personal liberty" in article 21 and protects all of them" his lordship observed that the expression "personal liberty" did not meanly liberty of the person but meant liberty or the rights attached to the person i.e., personarum, and went on to say.

"In my judgment Article 19 protects some of the important attributes of personal liberty as independent right and the expression "personal liberty" has been and used in Article 21 as a compensation terms including within its menage all the varieties of right which go to make up the personal liberties of man"

18. The scope and the expression "personal liberty" in Article 21 was again considered by the supreme court in *Kharak Singh v. State of U.P.*<sup>8</sup>, The petitioners in that the case had challenged the constitutional validity of the certain police regulation in Uttar Pradesh which provided for the five kinds or surveillance by the police over person suspected of the offenses. The supreme court found that the impugned police regulation did not have any statutory basis and consisted of executive or departmental instruction framed for the guidance of police officer. One made of surveillance provided by the impugned police regulations provided to by the impugned police regulations and this involved the knocking at this door at the night and the consequent disturbance to his sleep and rest. The majority of the judges held that the part to the police regulations which allowed domiciliary visits was violations of article 21 while the minority was of the view that the whole regulations inclusive of all the five kinds of the surveillance violated that article. In the course of his judgment of the majority, Ayyangar, J observed:

We shall now proceed with the examination of the width scope and content of the expression "personal liberty" in Article 21. Having regard to the terms of Article 19(1)(d), we must take it the expression is used as not to include the right to move about or rather of locomotion its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement. We feel

<sup>8</sup> Miscellaneous Case No. 166 of 1950 (Unrep. Cal)

<sup>9</sup> 1964 1 S.C.R. 332

imprisonment's or wrongful confinement. We feel unable to or hold that the term was intended to bear only this narrow interpretation but on the other hand consider that "Personal liberty" is used in the Article as a compendious term to include within itself all the varieties of right which go to make up the "Personal Liberties" is used in the with itself at the varieties of the right which to do make the "personal liberties" of man the than those dealt within the several clauses of deal 19 (1). In other words while Article 19(1) deal with particular species or attributes of that freedom "personal Liberty" in Article 21 takes in and comprises the residue"

His Lordship further said:

"Is than the words "personal Liberty" to be constructed as excluding from its purview an

invasion of the part of the police the sanctify of the man's home and an intrusion into this personal security and his right to sleep which its normal comfort and dire necessity for human existence even as an animal? It might be inappropriate to refer here to the words of the preamble to the constitution that the Framers designed to "Assure the 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 objections 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 bring on a par to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories".

The minority view in the case did not attach to the expression 'personal liberty' a less comprehensive connotation. They were of the view however, that the expression 'personal liberty' Article 21 did not exclude those aspects of personal liberty which have received a separate treatment in Article 19. Subba Rao, J. who delivered the judgment of the minority said:

"At this stage it will be convenient to ascertain the scope of the said two provisions (Article 19 and 21) and their relation interior in the context of the question raised. Both of them are distinct fundamental rights. No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression personal liberty in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carried out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned. In other words, the State must satisfy both the fundamental rights are not infringed by showing that there is a law and that it does not amount to a reasonable restriction within the meaning of Article 19(2) of the Constitution".

19. It must follow that the compendious expression 'personal liberty' used in Article 21 includes in its ambit the right to go abroad, and that a person cannot be deprived of this right 'except according to procedure established by law' as laid down in Article 21. Mr. Baptista, however, argued that it can be gathered from the majority judgment in the above case that the right to go abroad was excluded from the expression 'personal liberty' used in Article 21. For this argument Mr. Baptista relied on the following sentence which occurs in a part of the majority judgment of Ayyangar, J. Quoted above:

"having regard to the terms of the Article 19(1)(d), we must take it that the expression

(i.e. 'personal liberty') is used as to not include the right to move about or rather of locomotion."

According to Mr. Baptista, this sentence implies that the right to go abroad is not part of the 'personal liberty' guaranteed in Art. 21. This argument is clearly untenable, because what the majority judgment has done is to exclude from the ambit of 'personal liberty', as the expression occurs in Article 21, the right which is specified in Art. 19(1)(d), namely, the right "to move freely throughout the territory of India". The right to go abroad being not covered by Article 19(1)(d) is not excluded from Article 21.

20. It was then urged by Mr. Baptista that the Constitution can be deemed to have protected only such rights as can be exercised within the territory of India, that the right to go abroad is not such a right, and that, therefore, it cannot be deemed to have been included in the personal liberty protected by Article 21. This argument also has no substance, because the right to go abroad as claimed by the petitioner consists of his right to cross the Indian border, and it is the petitioner's case that, although this right is protected by Article 21 the respondents have deprived him of this right without resort to any procedure established by law.

21. The right to go abroad has always been regarded as an important aspect of "personal liberty". The right was recognized as early as the Magna Carta. Article 42 of the Magna Carta says:

"It shall be lawful to any person, for the future to go out of our kingdom, and to return safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation at war against us, and merchants who shall be treated as it is said above".

In recent times the right was recognized and included in the Declaration of Human Rights adopted by the United Nations. Article 13, paragraph 2 of the Declaration runs thus:

"Everyone has the right to leave any country, including his own, and to return to his country".

There is no reason why this important right of personal freedom should be held to have been excluded from the expression 'personal liberty' in Article 21 of the Constitution.

22. Considerable support for this view can be derived from a recent decision of the Federal Supreme Court of the United States in *Rockwell Kent and Walter Breihl v. John Foster Dulles, Secy of State*<sup>10</sup>, A federal statute of the United States of 1952 provides that it is

unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport".

The petitioners in the above case had applied for passports , but they were called upon to file affidavits , concerning their membership in the Communist Party , and on their failure to file such affidavits , passport facilities were denied to them . The Supreme Court held by a majority vote that the petitioners were entitled to passports , and that the pertinent statutes did not authorize the Secretary of State to withhold passports for reasons stated above . In delivering the opinion of the court, Douglas J observed :

" A passport not only is of great value - indeed necessary - abroad ; it is also an aid in establishing citizenship for purposes of re-entry into the United States".

With reference to the Fifth Amendment to the American Federal Constitution which provides in so far as it is relevant for present purpose , that no person shall , " be deprived of .... liberty ..without due process of law", the learned judge observed :

" The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth amendment . so much is conceded by the Solicitor General .. Freedom of movement across frontiers in either direction , and inside frontiers as well , was a part of our heritage .Travel abroad, like travel within the country , may be necessary for a livelihood . It may be as close to the heart of the individual as the choice of what he eats , or wears , or reads . Freedom of movement is basic in our scheme of values ."

It must be added that the minority in that case did not take a different view from the majority with regard to the scope of the ' liberty' guaranteed by the Fifth Amendment.

23. If the petitioners right to go abroad , being part of his personal liberty , is protected by Article 21 it follows that he is entitled , as of right , to a passport provided , firstly , that a passport is necessary for going abroad , and secondly, he is not deprived of that right by some procedure established by law. It is the case of the respondents that there is no legal prohibition which prevents the petitioner from going out of India without a passport. The respondents admit that the Government of India have issued instructions to Carriers and Travel Agencies that they should not take on board passengers leaving India without valid passport . But the respondents claim that these instructions do not constitute a legal bar to a citizen leaving the country without a passport. Even supposing , however , the petitioner can leave India without a passport , it is clear that he has no right to re-enter India without a passport. That is the result of Rule 3 of the Indian Passport Rules 1920 . Now it is obvious that an Indian Citizen unless he intends to give up his nationality can exercise right of going abroad only if he does not lose thereby the right to return to his country . It is clear therefore , that the restriction on the right to re-enter which has been imposed by Rule 3 of the Indian Passport Rules operates at the same time as restriction on the right to

go abroad . It must , therefore , follow that, in the absence of any law to the contrary , the right to go abroad which is protected by Article 21 carries with the right to receive a passport which is essential for the enjoyment of that right.

24. It is the case of the respondents that the Government of India are not subject to any lawful obligation to issue a passport to an Indian Citizen. This contention implies , in the last analysis , that the Government of India right to issue passports is not included with any responsibility - a view which I find very difficult to accept. The better view is that the right to is coupled with an obligation , and the obligation is to issue passports to those who have a right to receive them . As shown above , in the absence of a law to the contrary , all Indian Citizens have that right.

25. Whether such a right and such an obligation do or do not exist can be tested by raising the questions whether an Indian Citizen , who happens to be abroad without a passport from the Government of India in order to enter the country , can the Government of India in such a case claim an absolute discretion to grant or refuse a passport to the Indian Citizen ? Article 19(1)(o) guarantees to all Indian citizens the right ' reside and settle in any part of the territory of India' and this right necessarily carries with it the right to receive a passport in order that an Indian citizen who happens to be abroad without a passport , may be able to enter the country and reside and settle in its territory . Such a question did in fact arise in two cases decided by the Supreme Court and both the cases were decided on the assumption that an Indian citizen in such circumstances was entitled as of right to get a permit or a passport to enter India .

26. In *Embrahim Vazir Mavatt v. State of Bombay*<sup>11</sup>, the Supreme Court dealt with the case of several persons who were assumed to be Indian citizens and who entered India in contravention of Section 3 of the influx from Pakistan (Control )Act , being Act XXIII of 1949. Section 3 of that Act provided in so far as it is relevant that no person shall enter India from any place in Pakistan , whether directly or indirectly , unless he was in possession of a permit or a valid passport. Section 4 of the Act empowered the central government to make rules with regard to the manner in which permits may be applied for and obtained . Section 5 provided inter alia , that whoever entered India in contravention of the provisions of Section 3 shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both . Section 7 of the Act was material to the case before the Supreme Court, and it empowered to the Central Government to direct the removal from India any person who had committed , or against whom a reasonable suspicion existed that he had committed , an offense under the Act. The question before the Supreme Court was whether Section 7 of the Act , in so far as it authorized the removal from India of Indian Citizens who had committed an offense under the Act or were reasonably suspected of having committed such an offense, was in the nature of a reasonable restriction on the citizens right to reside and settle in any part of the territory of India guaranteed by Article 19(1)(e) of the Constitution . The Supreme Court held by majority that Section 7 of that Act contravened the said fundamental right , and not being a reasonable restriction thereof, was void . In coming to that conclusion , Ghulam Hasan J, who

delivered the majority judgment, observed, in the first place, that the provision in Section 3 of the Act requiring an Indian citizen to have a permit or a passport to be able to enter India from Pakistan could be

<sup>11</sup>12 1954 S.C.R. 933

regarded as a reasonable restriction upon his right to enter the country. His Lordship observed :

" that an Indian citizen visiting Pakistan for any purpose whatsoever and returning to India may be required to produce a permit or passport as the case may be before he can be allowed to enter the country, may be well regarded as a proper restriction upon entry but to say that if he enters the country without a permit or on an invalid permit or commits a breach of any of the conditions of the permit he may, on conviction for such offense, be ordered to be removed from the country is tantamount to taking away his fundamental right guaranteed under article 19(1)(e) " to reside and settle in any part of the territory of India".

In a later part of the judgment, his lordship observed with reference to Section 7 of the Act :

" A law which subjects a citizen to the extreme penalty of a virtual forfeiture of his citizenship upon conviction for a mere breach of the permit regulations or upon a reasonable suspicion of having committed such a breach can hardly be justified upon the ground that it imposes a reasonable restriction upon the fundamental right to reside and settle in the country in the interest of the public".

It is clear from these observations that, according to the Supreme Court, it was permissible to prevent an Indian citizen from entering the country unless he produced a permit or passport but that it was not permissible, if he did enter the country without such a permit or passport, to remove him from the country for the breach committed by him. In this connection the Supreme Court considered what the duty would be of the sentry on guard at the check post on the frontier, in case an Indian citizen tried to enter the country without having secured a permit or passport. On this point, Ghulam Hasan, J said in his judgment.

"If any person claims to have the right to enter,, the sentry duty would be to hand to enter him over to the commander of the Guard and normally it would be the duty of that the commander to hand him over to proper authority empowered to determine the right which he claims"

It is obvious from these remarks that according to the Supreme Court an Indian citizen had to a right to get such a permit and a mere breach of permit Regulations" and that therefore although such a citizen could be prevented from entering the country unless he had secured a permit, he could not be lawfully expelled from the country if he effected an entry in breach of permit regulations.

27. It must be observed that normally an Indian citizen wanting to enter India From Pakistan would have required a permit issued under Section 4 of the influx from Pakistan (Control) Act and not a passport and that therefore the above cases related rather to the right of the Indian citizen to get a permit under Section 4 of that act than to his right to get a passport from the Government offend. The latter question however, was more clearly involved in the subsequent decision of the supreme court in ., which I have already referred to the another connection. The appellant in that case was an Indian citizen and he had admittedly entered Indian without and he a passport and thereby committed breach of the Rule 3 of the Indian Passport under R. 6 (a) and was sentenced to a nominal fine,. He challenged the order conviction and sentence, and one of the grounds of the challenge was that R. 3 of the Indian passport and Section 3 of the the Indian passport Act were ultra vires of the constitution in so far as they purported to affect the right of an Indian citizen to enter Indian without a passport. After observing that the fundamental rights "to reside and settle in any part of the territory of India" was subject to reasonable restrictions under C1. (5) of the Article 19, Imam J., who delivered the judgment of the court said:

"In the case of the (Referred to above) the majority judgment of this court held that an Indian citizen visiting Pakistan for any purpose whatsoever and returning to India may be required to produce a permit or a passport as the case may be before he can be allowed to enter India, and this requirement may well be regarded to and proper restriction upon entry. This court, however, held that it was quite a different matter to say that if he conviction for such offense be ordered to be removed from India. It was the rode directing this removal from India who was held by this court to be tantamount to taking way his fundamental right guaranteed under Article 19(1)(e) "to reside and settle in any part of the territory of India". It is clear, therefore that so far as this court is concerned it has already decided that to require an Indian citizen to produce a passport before he can be allowed to enter India may be India. This decision is binding on us and we must follow the decision of this court in the case referred to".

The supreme court have thus held that the provision which requiems an Indian citizen to produce a passport before he can be allowed to enter India is reasonable restriction on his right to enter India. No such view could possibly have been taken if an Indian citizen wanting to enter India from abroad had no right to obtain a passport and if his application for a passport could be rejected at the absolute discretion of the Government of India. The above decision necessarily implies that Indian citizen, having his rights to enter India guaranteed in the constitution has also he right to receive from his government of a passport which is necessary for the exercise of that right. On what is essentially the same grounds, I hold that the petitioner having the right to go abroad that provided by Article 21 of the constitution which includes the right to return from this government the passport necessary for the exercise of his right to go abroad.

28. Mr. Baptista argued that the above decision of the supreme court is not inconsistent with the

absolute discretion claimed by the government of India in the matter of issuing passports of Indian the citizens, According to Mr. Baptista, to the above, decision means that the if an Indian citizen succeeds in entering India without a passport he can be lawfully punished under R. 6 (a) of he India passport Rules under but cannot be deported as provided in Section 5 of the Indian passport Act. In my view Mr. Baptista's argument amounts to the putting a premium on the ability of an Indian citizen to hoodwink the sentries whose duty is to prevent any person from entering India without a passport. Under R. 3 of the Indian Passport Rules, an Indian citizen can be lawfully prevented from entering India, if he is unable to the produce a passport, and the constitutional validity of that provisions is based on the assumption that an Indian citizen wishing to enter India is entitled to a passport. The further conclusion of that he cannot be deported is he enters India without a passport which receives support from the earlier decision of the supreme court in goes to reinforce the view that the government of India do not have an absolute and unfettered discretion of toe refuse a passport of Indian citizen.

29. I have already referred to a decision of the Madras High Court in . It was there held that on contravention of the right under Article 19(1)(d) occurs when passport facilities are denied to an Indian citizen. That conclusion was based on the view, which was subsequent held to the be incorrect by the supreme court in the case of Abdul Rahim Ismail, , that the refusal of passport does not amount to restriction of the Indian citizens right to leave and re - enter India.

30. My conclusion of that an Indian citizen is entitled to a passport in the absence to any statutory to provisions which disables him from obtaining it find support in certain observations of it find Mr. Justice Shelat in his judgment in Misc. Petn. No. 167 of 1959, dated 16-6-1959 (bom). A passport of the petitioner in Authorities. The custom Authorities handed over the passport to the Regional passport an the Officer on demand made by the police and the Regional passport officer detained the passport pending order from the Government of India. Mr. Justice shelat held that the Regional Passport officer was not entitled to detain the passport and directed hat the passport be returned to the petitioner. After the observations that the term "Personal liberty" in Article 21 includes freedom of movement the learned judge said:

"That being so prima facie a citizen of the this country is entitled to a passport unless there is some statutory provision disabling him to obtain if..... Now, assuming that the is law debarring exit without a passport as I have already pointed out there are rules made under the passport act which debar a person from making his re - entry into this county unless he is equipped with a passport. Even if he were to be ablate go abroad with in a passport, there can been abroad with doubt that if would be depriving him of his freedom of movement if he is not allowed to come back to his own country"

The learned Judge, however, went on to say that it was not necessary for the purpose of that case before him to go into the question whether the Government have the right to refuse a passport on the ground of its absolute discretion. If is clear that the learned the learned judge himself treated

the observations of quoted above as biter dicta.

31. A contrary view is found expressed by Mr. Justice K.K. Desai in his judgment of In Misc. Appln. No 299 of the 1959 dated 8-7-1960 (Bom). The petitioner in that case had a passport which was valid up to the 15th May 1959. He applied for the extension of the validity of the passport of the further period of the one years (i.e. till 15th May 1960). But the Regional passport Officer rejected his application and returned his passport officer rejected his applying the same. The petitioner applied to this court India under Article 226 of the constitution and prayed that the cancellation of his passport should be quashed and further that the respondent should be directed to replace the old passport wrongfully cancellations of this passport should be quashed and further that the respondent should be directed to replace the old passport wrongfully canceled by a fresh one or in the alternative to issue toe new passport. In dismissing this application the learned judge pointed out the by the time his judgment, the period for which the petitioner had asked for the extension of his passport had already expired the learned judge said.

"The compliant is that the respondents has not acceded to the his (petitioner) application for renewal of passport for one years which period of course has expired on May 16, 1960. Having regard to the fact that the period of the application for renewal has expired the application for renewal is now not outstanding and cannot for be ordered to be considered once against. The cancellation of his exhausted passport cannot create any rights in the petition or to issue of a new passport."

It was thus held by the learned judge that in view of the expire of the one years period mentioned in the petitioners application., it was not possible to grant him any relief, irrespective of the merits of the case and that the petition under Article 226 of the constitution had become in fructuous. The learned judge, however want on to deal with the various argument which were on the deal with the advanced before the him during the hearings of the petition. It was urged before him that the view of the fundamental rights guaranteed by Article 21 as the well of the Article 19(1)(d) and (e) of the constitution there was an obligation on the president (the Government of India) to issue a passport to the petitioner. With the reference to the article the learned judge said:

"To me it is obvious that the Articles 21 and 19(1) (d) and (e) have no relation of the statement of obligation making in incumbent on the president to issue a passport. The argument appears to me to the prima facie not sustainable".

Towards the end of the judgment the learned judge quoted some passages from the judgment in including a passage where it was stated that no person and any legal right to obtain a pastor to any particular right to and after these quotations the learned judge said:

"I find it unnecessary in this case to discuss the above observations"

Having carefully gone through the judgment of the learned judge. I have come to the conclusion

that his observations on Articles 21 and 19(1)(d) and (e) of the constitution and his statement that there is no statutory obligation making it incumbent on the president to issue a passport are in the nature of observations the learned judge had already held that the petition had become infructuous on the expiry of the one year period mentioned by the petitioner of his application for renewal of his passport. Moreover, the learned judge himself has described his view as being *per se* Mr. Baptista pointed out that at one place in the judgment the learned judge as stated that he had "already held" that it did not appear to him that there was any statutory obligation cast on the president to issue a passport in favor of the petitioner. This is however, followed by the observations quoted from the Madras case and the final statement of the learned judge that he found it necessary to disjoin which he found it unnecessary to disjoin which was that "no person has any legal right to obtain a passport to any particular country". It appears to me that the learned judge dismissed the application as it had become infructuous and since he was with the arguments which were addressed to him on the merits.

32. Treating the view of the learned judge as *obiter dicta* I must further observe, with great respect that I cannot accept his view that the Government of India have no obligations to issue a passport in favor of an Indian citizen. In the first place Article 14 of the Constitution is expressly directed to the "State" (which is included in Government of India) and its effect is that in the absence of any regulations in regard to the issue of passport the Government of India must issue passports to all Indian citizens or protects the rights of every person to "personal liberty" which he cannot be deprived "except according to procedure established by law". An Indian citizen has therefore the right in the absence of any law to the contrary, to obtain a passport which is necessary for the exercise of this right to go abroad, which right is clearly a part of the "personal liberty"

33. Mr. Baptista drew my attention to the following statement which was contained in the affidavit in reply which was filed by the Under Secretary Ministry of External Affairs on behalf of the Government of India.

"I say that on the basis of the communications received in official confidence and for being disclosed in the public interest the Government of India decided that in the interest of the country it should not be granted further passport facilities"

This statement does not even touch the contention of the petitioner that by the virtue of Article 21 he is entitled to a passport in the absence of any legal provision to the contrary. The statement does not also affect the petitioner's contention under Article 14 of the Constitution. So long as the rule has been formulated for guiding the exercise of discretion in the matter of issuing passports any refusal of the passport to an Indian citizen, when passports are granted to other Indian citizens must be held to be discriminatory.

34. The conclusion to which I have reached does not imply that every Indian citizen must have

to an absolute and unrestricted right to receive a passport. It implies that in the absence of any legislative provision to guide the exercise of the discretion in the matter of issuing passports the Government of India have no alternative but to issue passports to all Indian citizens who apply for them.

35. Accordingly, the order of the first respondents dated 24th May 1963 refusing passport facilities to the petitioner is set aside, and the respondents are directed to grant and issue to the petitioner a passport as applied for by him by application dated 10th January 1963. The passport to be issued within two weeks from today. The respondents will pay the petitioner the costs of this petition as taxed.

Order accordingly.