

In Re: Abdul Khader

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Court : Andhra Pradesh

Decided On : Oct-27-1958

Reported in : AIR1959AP241; 1959CriLJ561

Judge : Muni Kanniah, J.

Acts : [Constitution of India](#) - Articles 5, 6 and 7; [Citizenship Act, 1955](#) - Sections 9 and 10; Citizenship Rules - Rule 30; [Foreigners Act, 1946](#) - Sections 2

Appeal No. : Criminal Revn. Case No. 395 of 1958 and Criminal Revn. Petn. No. 329 of 1958

Appellant : In Re: Abdul Khader

Advocate for Def. : K. Kolanda Reddy, Adv. for ;Public Prosecutor

Advocate for Pet/Ap. : R. Ramalinga Reddy, Adv.

Disposition : Revision allowed

Judgement :

ORDER

Muni Kanniah, J.

1. The petitioner was convicted by the Judicial First Class Magistrate, Adoni for all offence under Section 14 read with Clause (c) of Sub-section (2) of Section 3 of

the Foreigners Act of 1940, and sentenced to undergo rigorous imprisonment for eighteen months. On appeal, the Sessions Judge of Kurnool confirmed the conviction and sentence imposed on the accused. Hence this revision application.

2. The petitioner came to Adoni from Pakistan on 20-1-1955. He had a Pakistan passport No. 250660 dated 10-1-1955 and 'C' visa No. 2657 dated 14-1-1955 which was valid upto 14-4-1955. He did not go to Pakistan after the expiry of his visa but applied for extension on medical grounds till 2-9-1957. He had therefore to be served with a quit order directing him to leave India after One month from the date of service of that order. This quit order dated 9-8-1957 was served on him on 3-9-1957. As he disobeyed this order and still remained at Adoni, he was prosecuted.

The defence is that the accused had been born and bred up at Adoni where his parents lived, that he was married in India long ago and that he had six children by that wife, that he after coming from Pakistan had also married another wife in regard to which D. W. 4, who is the Government Khaji at Adoni, gave Exhibit D-1, the marriage certificate dated 29-7-1956, that he had been a tailor for the last 12 years having rented a shop in Roshan market which was managed by D. W. 5 on behalf of the Mosque Committee, that he went to Bombay in search of his son in 1955 and having learnt at Bombay that his son had gone to Karachi he too went to Karachi and that when he wanted to return to India he had to obtain the passport from Pakistan as he was not allowed to enter India.

The accused has, after coming into India, applied to the Minister for Rehabilitation, Government of India, on 9th February 1956 for permission for permanent resettlement in India and he was informed on 1st March 1956 by the Ministry of Home Affairs Government of India, that his application had been forwarded for consideration to the Government of Andhra, Home Department, Kurnool.

He received a notice L. Dis. No. 7653/M/58 dated 28-8-57 from the District Magistrate, Kurnool, and in compliance therewith he sent on 30-8-1957 the certificate of birth, a challan No. 3018 dated 30-6-47 of the Adoni Co-operative Town Bank Ltd, in respect of a dealing of his and profession tax receipt under assessment No. 564 dated 10-5-1954 of the Adoni Municipality and prayed for the

Issue of the citizenship certificate.

He, however, admitted that he received Exhibit P-2, the quit order of the Government of Andhra Pradesh on 3-9-1957, but contends that he is not a 'foreigner' being a citizen of India by birth who had temporarily migrated to Pakistan. On his behalf, the plea that since he was awaiting orders on his application for issue of a citizenship certificate he applied for the extension of the visa only by way of caution and that he had no intention of making Pakistan as his permanent home, is urged.

3. Mr. Ranalinga Reddy for the petitioner has submitted that while the plea of the accused has not been properly understood by both the lower Courts, the Judicial First Class Magistrate, Adoni, has wrongly treated this as a case to which Section 8 of the Foreigners Act is applicable, and that in basing the conviction on the ground that a determination made by the Government under Sub-section (2) of that provision is final it wrongly concluded the issue whether the accused is a 'foreigner'.

He took objection to the reliance placed by both the lower Courts on the conduct of the accused in applying for extension of the period of his visa as it neither constituted evidence nor created any rule of estoppel which precluded the accused from asserting his rights as a citizen of India.

A further contention is that the prosecution should prove positively that the accused acquired citizenship of a foreign country, and therefore no action under the Foreigners Act (Act No. XXXI of 1946) could be taken by the Government against the accused. Yet another point viz, that this being a case concerning when or how the accused has acquired the citizenship of another country that matter has to be determined in the manner provided for under Rule 30 and Clause 4 of Schedule III attached to these rules, has also been pressed.

4. In other words the contentions on behalf of the accused are (1) that he is an Indian National and not a 'foreigner' (2) that there is an evidence that he is a Pakistani national and (3) the determination of this question could be made conclusive only by a decision of the Government of India.

5. Taking the first point whether the accused was a foreigner on the date Exhibit P-2 was issued, the answer is essentially dependent, in this case, upon the fact whether the accused migrated from the territory of India to the territory of Pakistan after the first day of March 47; for, assuming that the accused was an Indian National, to begin with, the question would nevertheless be the same. In Section 2(a) of the Foreigners Act (XXXI of 1946) we have

'(a) 'foreigner' means a person who-

(i) is not a natural-born British subject as defined in Sub-sections (1) and (2) of Section 1 of the British Nationality and Status of Aliens Act, 1914, or

(ii) has not been granted a certificate of naturalization as a British subject under any law for the time being in force in India or

(iii) is not a citizen of India.' In dealing with citizenship as at the commencement of the [Constitution of India](#) Article 5 is relevant to be noticed. It reads as follows:

'at the commencement of this Constitution, every person who has his domicile in the territory of India and (a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) 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.' Article 6 confers rights of citizenship on certain persons who have migrated to India from Pakistan, and Article 7 which concerns with the rights of citizenship of certain migrants to Pakistan is of more importance in the present context. This Article states-

'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:

'Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the

authority of any law and every such Person shall for the purposes of Clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.'

On a combined reading of these provisions, it is manifest that a person born in the territory of India, or either of whose parents was born in the territory of India, or who has been ordinarily a resident of India for not less than five years in the territory of India before the commencement of the Constitution, shall be entitled to citizenship rights but subject to his losing such rights on his migrating to Pakistan after the first day of March, 1947.

In the instant case, as there is merely an application for a permit for resettlement or permanent return to India which has not been granted, it would not allow the case of the accused to come within the proviso to Article 7. So on the admitted facts and even accepting the evidence for the defence, it is established beyond doubt that the accused having migrated to Pakistan after 1-3-1947, he is not to be deemed a citizen of India; and therefore he would be a 'foreigner'.

He does not therefore comply with the requirements of Clause (iii) of Sub-section (a) of Section 2 of the Foreigners Act. Hence he has to be classified prima facie as a 'foreigner'. To make the law clear on the point, it may be enunciated that for person to be an Indian national, he should first of all qualify himself as a citizen under Article 5 or under Article 6 of the Constitution without having migrated to Pakistan after the first day of March, 1947.

If he has migrated a permit for resettlement or permanent return would again operate to revest rights of citizenship under Article 6 Clause (b) as if that person has migrated to India before the nine-teeth day of July, 1943 and has been ordinarily a resident in the territory of India. The case of a person who has migrated to Pakistan after the coming into force of the [Constitution of India](#), hut has not obtained a permit as mentioned in the proviso to Article 7, will have to be treated as having lost the rights to citizenship of India and has become ipso facto a 'foreigner' in spite of the fact that he had the qualifications mentioned in Article 5.

In this view the aspect whether a passport or visa is to be treated as evidence to prove whether a person is a 'foreigner' or a citizen of another country does not arise in this case though it is laid down in *Mohammad Khan v. Government of Andhra Pradesh*, AIR 1957 Andh-Pra 1047 that the passport obtained from the High Commissioner for Pakistan in India is not evidence.

6. Had the Law of Citizenship merely rested upon the Articles of the Constitution, no further consideration in regard to a migrant from India to Pakistan would arise. But having regard to Article 11 itself, and the passing of the Citizenship Act by the Parliament in 1955, the zealous way in which the deprivation of citizenship of an Indian national is guarded is made more, than evident. Sections 9 and 10 of the Citizenship Act (Act No. LVII of 1955) are extracted hereunder:

'Section 9:-- (1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January 1950 and the commencement of this Act voluntarily acquired the citizenship of another country shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India.

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

'Section 10:-- (1) A citizen of India who is such by naturalisation or by virtue only of Clause (c) of Article 5 of the Constitution or by registration otherwise than under Clause (b)(ii) of Article 6 of the Constitution or Clause (a) of Sub-section (1) of Section 5 of this Act shall cease to be a citizen of India, if he is deprived of that citizenship by an order of the Central Government under this section.

(2) Subject to the provisions of this section, the Central Government may, by order, deprive any such citizen of Indian citizenship, if it is satisfied that-

(a) the registration or certificate of naturalisation was obtained by means of fraud, false representation or the concealment of any material fact; or

(b) that citizen has shown himself by act or speech to be disloyal or disaffected towards the [Constitution of India](#) as by law established, or

(c) that citizen has, during any war in which India may be engaged, unlawfully traded or communicated with an enemy or been engaged in, or associated with, any business that was to his knowledge carried on in such manner as to assist an enemy in that war; or

(d) that citizen has, within five years after registration or naturalisation, been sentenced in any country to imprisonment for a term of not less than two years; or

(e) that citizen has been ordinarily resident out of India for a continuous period of seven years, and during that period, has neither been at any time a student of any educational institution in a country outside India or in the service of a Government in India or of an international organisation of which India is a member, nor registered annually in the prescribed manner at an Indian consulate his intention to retain his citizenship of India.

(3) The Central Government shall not deprive a person of citizenship under this section unless it is satisfied that it is not conducive to the public good that that person should continue to be a citizen of India.

(4) Before making an order under this section, the Central Government shall give the person against whom the order is proposed to be made notice in writing informing him of the ground on which it is proposed to be made and if the order is proposed to be made on any of the grounds specified in Sub-section (2) other than Clause (e) thereof, of his right, upon making application therefor in the prescribed manner, to have his case referred to a committee of inquiry under this section.

(5) If the order is proposed to be made against a person on any of the grounds specified in Sub-section (2) other than Clause (e) thereof and that person so applies in the prescribed manner, the Central Government shall, and in any other case it may, refer the case to a Committee of Inquiry consisting of a Chairman (being a person who has for at least ten years held a judicial Office) and two other members appointed by the Central Government in this behalf.

(6) The Committee of Inquiry shall, on such reference, hold the inquiry in such manner as may be prescribed and submit its report to the Central Government, and the Central Government shall ordinarily be guided by such report in making an order under this section.'

7. The provisions taken along with Article 11 of the Constitution which is as follows:--

'Nothing in the foregoing provisions of this part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.'

make it amply clear, that while the deprivation of citizenship of an Indian National has not to be made lightly except in accordance with Section 10 and Section 9 would not occasion the cesser of citizen-shin except on a determination by the prescribed authority, having regard to the rules of evidence (vide Sub-section (2) of Section 9), the position in regard to voluntary acquisition of citizenship of another country is placed on a different footing. (Vide Sub-section (1) of Section 9).

8. Rule 30 framed under the Citizenship Act is as follows:--

'authority to determine acquisition of citizenship of another country-

(1) 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.

(2) The Central Government shall in determining any such question have due regard to the rules of evidence specified in Schedule III.' Clause 4 of Schedule III of those Rules states:--

'In determining whether a citizen of India has or has not voluntarily acquired the citizenship of any other country, the Central Government may take the following circumstances into consideration, namely:--

- (a) Whether the person has migrated to that country with the intention of making it his permanent home;
- (b) Whether he has in fact taken up permanent residence in that country; and
- (c) Any other circumstances relevant to the purpose.'

While thus these Rules contemplate the Central Government as the authority for determining the question arising under Section 9(2) of the Citizenship Act Clause 4 of Schedule III of the Rules framed under the said Act, takes within its ambit the case of a migrated person as also one to be determined under the powers conferred under Section 9(2) and specifies that the permanency of residence and the intention of the migrant as considerations to be taken account of.

It should therefore be not improper to lay down that even in cases governed by Article 7 of the Constitution, which deals with persons who have migrated from India to Pakistan, an enquiry by the Central Government is not out of the purview of the provisions of the Citizenship Act. But such a consideration will not arise in cases where the person concerned does not set up that he is a national of India but merely contends that though he remained in Pakistan a determination by the Central Government before he is proceeded against as a 'foreigner' is absolutely necessary.

Subject to this limitation, a prosecution especially where the accused has been making efforts to raise the question that he did not acquire the citizenship of Pakistan but had been temporarily a migrant and where there is also evidence to show that he could have been an Indian National having rights of citizenship in India before his migration to Pakistan as in this case is in my view, not only premature but unwarranted.

In *Shabbir Husain v. State of U.P.*, : AIR1952 All257 , a Bench of the Allahabad High Court held that a temporary visit to another country on business or otherwise cannot amount to migration. Undoubtedly each case has to necessarily depend upon its own facts. But the mere mistaken conduct of a certain person due perhaps to exigencies of a situation which he could not help being in, cannot be so

penalised as to cost him the basic rights of citizenship, A person placed in that situation is entitled to ask for a determination by the Central Government of the question whether, in the circumstances, he did acquire the citizenship of another country. In fact the accused has taken steps and has invited a decision by the Central Government.

That decision when given by the Central Government will operate to determine the status of citizenship of the accused; and it may therefore be made clear that the result of this decision is not calculated in any manner to take away any rights of the State to proceed against the accused as needs be after the issue whether the accused is a foreigner or not is determined by the Central Government as required by law.

9. From the foregoing discussion, it is clear that it is not possible to uphold the conviction of the accused either on the ground that he applied for extension of the time for visa or that he entered India armed with a passport issued by Pakistan. Also in the view I have taken that the prosecution is premature without the determination of the question of the acquisition of citizenship of Pakistan as contemplated under the Citizenship Act, the conviction and sentence are unsustainable.

10. In the result the revision petition is allowed and the accused is acquitted.

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