

State of U.P. Vs. Wali Mohammad

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Court : Allahabad

Decided On : Apr-06-1972

Reported in : AIR1973All44

Judge : M.N. Shukla and ;K.N. Seth, JJ.

Acts : [Constitution of India](#) - Articles 5, 6, 7 and 394; [Citizenship Act, 1955](#) - Sections 9; Citizenship Rules, 1956; Foreigner's Act, 1946 - Sections 2 and 14; Foreigner's (Amendment) Act, 1957; [Foreigners Order, 1948](#)

Appeal No. : Govt. Appeal No. 2819 of 1968

Appellant : State of U.P.

Respondent : Wali Mohammad

Advocate for Def. : P.N. Wali and ;S. Sharafat Ali, Adv.

Advocate for Pet/Ap. : Government Adv.

Disposition : Appeal allowed

Judgement :

M.N. Shukla, J.

1. This Government appeal is directed against the order dated 16-9-1968 passed by the 1st Temporary Civil & Sessions Judge, Aligarh setting aside the conviction

and sentence of the respondent under Section 14 of the Foreigners Act. The respondent was convicted by the trial Magistrate under Section 14 of the Foreigners Act and sentenced to one year's rigorous imprisonment; he was also directed to be deported to Pakistan thereafter. The appellate Court set aside the conviction and sentence and with regard to the direction about deportation it observed that the order of deportation or externment was not one which could be passed by that Court, as it was within the competence of the 'civil Authority' as defined in the Foreigners Act. Aggrieved by this order the Government has preferred this appeal in which a point of law has been canvassed by the parties.

2. The peculiar facts of this case furnished the learned counsel for the respondent with an ingenious argument which was pressed upon us for consideration. The material facts are that Wall Mohammad respondent was born in India, He migrated to Pakistan in the year 1949. He entered India on the 8th June, 1954 on the strength of a Pakistani passport dated the 27th May, 1954 and an Indian category 'C' visa dated the 1st June, 1954 which was initially valid up to the 31st October, 1954. The period was extended to the 7th June, 1955. Since the respondent failed to obtain a residential permit extending the period of visa under paragraph 7 (2) of the Indian [Foreigners Order, 1948](#), he was alleged to have contravened the said provision. Consequently, he was arrested on 8-12-1967 and prosecuted under Section 14 of the Foreigners Act. Before the respondent could be prosecuted for the aforesaid offence it was necessary that he must be held to be a foreigner. The meaning of the expression 'foreigner' has undergone material alteration. By virtue of the Foreigners Laws (Amendment) Act, 1957 (11 of 1957) the definition of the term 'foreigner' was amended retrospectively with effect from the 19th June, 1957. Before the amendment Clause (a) of Section 2 of the Foreigners Act stood as below:

'(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.'

The definition of a 'foreigner' in Section 2(a) of the Foreigners Act as it stands today is 'a person who is not a citizen of India'. A comparative reading of the aforesaid provision makes it clear that whereas formerly a person who could show himself to be a natural born British subject could not be regarded as foreigner, now the position is that notwithstanding that qualification, if he is not a citizen of India the last circumstance makes him a foreigner.

3. Therefore, the question which falls to be decided in the present case is as to whether the respondent was a citizen of India. If he was not a citizen of India he could be treated as a foreigner and be proceeded against for contravention of paragraph 7 (2) of the Foreigners Order. Before the enactment of the [Citizenship Act, 1955](#) (No. 57 of 1955) the only provisions of law on the basis of which citizenship could be determined were those contained in the [Constitution of India](#). Article 5 of the Constitution reads as under:--

'5. 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 to the territory of India for not less than five years immediately preceding such commencement,

shall be a citizen of India.'

Another relevant provision of the Constitution is Article 7, the material portion of which runs as follows:--

'7. 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,'

It would be seen that while Article 5 confers the right of citizenship on a person if at the date of the commencement of the Constitution he fulfills any of the conditions enumerated therein, Article 7 engrafts a kind of proviso thereto. The opening words of Article 7 exclude the applicability of Article 5 and it cannot be doubted that if the condition prescribed by Article 7 exists in a case the person concerned shall not be deemed to be a citizen of India at the commencement of the Constitution. The non obstante clause makes it clear that Article 7 overrides Article 5 of the Constitution.

4. In the present case there is no controversy that the respondent was born in India and that he returned to India in 1954. So far as the date of his migration to Pakistan is concerned, the finding of fact recorded by the Court below is that he migrated in the year 1949. The exact date or month of his migration could not be fixed from the evidence in the case. Hence, the possibility of his migration after the 1st March, 1947 but prior to the 26th November, 1949 cannot be ruled out. It is precisely of this little lacuna that the respondent wants to take advantage and the entire contention raised on behalf of the respondent is based on this circumstance, namely, the uncertainty of the exact date of his migration. In support of his contention the learned counsel for the respondent placed reliance on Article 394 of the Constitution which reads as follows:--'394. This Article and Articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391; 392 and 393 shall come into force at once, and the remaining provisions of this Constitution shall come into force on the twenty-sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution.' The above Article provides that Articles 5, 6, 7, 8, 9 etc. shall come into force at once while the remaining provisions of the Constitution shall come into force on the 26th January, 1950. The earlier date on which Articles 5 to 9 etc. came into force is the 26th November, 1949 as borne out by the preamble of the Constitution. On the basis of this date Sri Sharafat Ali, learned counsel for the respondent has strenuously contended before us that the consequence contemplated by Article 7 will be visited only upon a person who migrated from India to Pakistan after the 26th November, 1949, the date of the enforcement of Article 7. According to him by virtue of being born in India and having resided in India till some date in 1949 the respondent acquired the right of citizenship and must be deemed under Article 5 to have become a citizen of India at

the commencement of the Constitution. He can be disentitled from that right only when he comes within the mischief of Article 7, which event cannot transpire before the said Article came into force. In other words, the respondent wants us in substance to read in Article 7 a proviso to the effect that such a person shall not be deemed to be a citizen of India if he migrated after the 26th November, 1949. The argument is attractive but untenable. In our opinion the language of Article 7 cannot bear such construction. Article 5 expressly speaks of the rights which would accrue at the commencement of this Constitution, which words again have a fixed meaning as provided by Article 394. Article 394 refers to 26th January, 1950 as the date 'of the commencement of this Constitution'. Therefore, Article 7 must be read in conjunction with Article 5 and must relate to the same crucial date as the date of the commencement of the Constitution.

5. A close scrutiny of Article 7 of the Constitution leads to the conclusion that it is a drastic provision which results in deprivation of the right of citizenship of a person who earned it by virtue of Article 5. It is common knowledge that the 1st day of March, 1947 was the vital date when an option was given to a class of Indian citizens either to stay in this country or to migrate to the territory now included in Pakistan. Those who exercised this option by migrating to Pakistan after the aforesaid date were not considered entitled to acquire Indian citizenship. From all points of view that remained the cardinal date and consequently the date of the commencement of Article 7 i.e. 26th November, 1949 is irrelevant. Any one who migrated to the territory now included in Pakistan in the period between the 1st of March, 1947 and the 26th January, 1950 (the date of the commencement of the Constitution) shall not be deemed to be a citizen of India. This is the conclusion which emerges on a comparative perusal of Articles 5 and 7 of the Constitution.

6. Sri Sharafat Ali, learned counsel for the respondent relied on a decision of the Supreme Court in *Shanno Devi v. Man-gal Sain* : [1961]1SCR576 wherein while construing Article 6(b) of the Constitution it was observed by Das Gupta, J. (In paragraph 16 of the Reports.).

'For applying the test of being 'ordinarily resident in the territory of India since the date of his migration', it is necessary therefore to consider the period upto the 26th

day of November, 1949 from the date of migration. It is not, however, even necessary that on the 26th day of November, 1949 or immediately before that date he must have been residing in the territory of India. What is necessary is that taking the period beginning with the date on which migration became complete and ending with the date November, 26, 1949, as a whole, the person has been 'ordinarily resident in the territory of India.'

On the strength of the above observation it was submitted that it was the date of the enforcement of the relevant Article which must be taken as the basis for determining whether the person acquired the right sought to be conferred by that Article. No such generalisation is possible from the above observation inasmuch as in that particular case the effect of Article 7 did not arise for consideration. While dealing with Article 6(b) the relevant dates for determining the right conferred by that provision were considered but no occasion arose to decide as to the circumstances in which by virtue of Article 7 rights of citizenship might be lost. Hence, the above ruling does not offer any assistance to the respondent.

7. It is also contended by Sri Sharafat Ali that the fact of migration by itself could not deprive a person of his Indian citizenship in case he had once acquired it. With regard to the Citizenship Act which was enacted in the year 1955 his submission was that the effect of Section 9 of that Act was to deprive a person of such citizenship only in the event of his acquiring the citizenship of another country. The material part of Section 9 may be quoted:

'9. Termination of citizenship.-- (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.'

The point pressed upon us was that even though a person who was admittedly an Indian citizen migrated to Pakistan, yet if he failed to acquire the citizenship of that country, he continued to be a citizen of India. It is really not necessary for us to pronounce on this aspect inasmuch as the respondent in the instant case migrated in the year 1949 whereas Section 9 deals with persons who acquired

citizenship of another country in the three modes enumerated in the section between the 26-1-1950, and the commencement of this Act, still however, we cannot refrain from observing that in cases where the migration takes place after the 1st March, 1947 and before the 26th January, 1950, and the person migrating does not acquire the citizenship of another country, he does not 'ipso facto' retain his Indian citizenship. His status must be determined with reference to the provisions of Articles, 5 and 7 of the Constitution. The inevitable effect of Article 7 in such case would be that he would not be deemed to be a citizen of India under Article 5. We may refer in this connection to some authorities cited by the learned counsel for the appellant. The first case cited by him was State of Andhra Pradesh v. Abdul Khadar : 1961 CriLJ573a . In paragraph 14 of the reports it was observed:--

'The reference in the opening words of Article 7 to Articles 5 and 6 taken in conjunction with the fact that both Articles 5 and 6 are concerned with citizenship (at the commencement of the Constitution) apart from various other considerations would appear to point to the conclusion that the migration referred to in Article 7 is one before January 26, 1950 and that the contrary construction which the learned Judge has put upon Article 7 is not justified

In the above case the words 'commencement of the Constitution' were interpreted as referring to January 26, 1950, and, further the migration referred to in Article 7 was held to mean any migration which took place before 26th January, 1950. Obviously it did not restrict this migration to the date of the commencement of Article 7, namely the 26th November, 1949.

The next case on which reliance was placed was State of Madhya Pradesh v. Peer Mohd. : AIR 1963 SC645 . It was pointedly observed (in paragraph 12) therein:--

'Article 7 refers to migration which has taken place between the 1st day of March, 1947, and January 26, 1950.'

Therefore, we are of the opinion that in terms of Article 394 of the Constitution we must read for the words 'at the commencement of this Constitution' occurring in

Article 5, 26th day of January, 1950.' We also come to the conclusion that Article 7 by referring to the 1st of March, 1947, as the date of migration does not fix the outer limit of such migration but only its first limit. Hence where the migration takes place between the 1st of March, 1947 and 26th January, 1950, Article 7 would be attracted and the person so migrated shall not be deemed to be an Indian citizen under Article 5 at the commencement of the Constitution.

8. For these reasons the respondent cannot derive any benefit from the fact that on the finding recorded by the Court below it is possible that he might have migrated to Pakistan prior to the 26th November, 1949, which was the date of enforcement of Article 7. That date in our opinion is not at all relevant for determining as to whether a person can be deemed to be a citizen of India under Article 5 or whether he became disentitled to such right on account of the intervention of Article 7.

9. There is yet another reason for coming to the conclusion that the respondent was a 'foreigner'. Article 9 of the Constitution postulates the fundamental rule that no person shall be a citizen of India by virtue of Article 5 or be deemed to be a citizen of India by virtue of Article 6 or Article 8 if he has voluntarily acquired the citizenship of any foreign state. The same principle is incorporated in Section 9 of the Citizenship Act which we have quoted in the earlier part of this judgment. It applies to a person, who voluntarily acquires the citizenship of another country between the 26th January, 1950 and the commencement of this Act. We may also advert in this context to Rule 30 of the Citizenship Rules, 1956 which runs as follows:--

'30. 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.' Schedule III of the citizenship Rules prescribes a conclusive rule of evidence applicable to the investigation of the question whether a person has acquired citizenship of another country. Paragraph 3 of the Schedule runs as below:-- '3. 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.'

The material fact in the instant case is that the respondent came to India in 1954 on the strength of a Pakistani Passport dated 27th May, 1954 and an Indian category 'C' visa dated the 1st June, 1954. The application for visa contained a recital that the respondent belonged to Pakistani nationality. Prima facie, when a person enters India under a passport issued by a foreign country and under a visa obtained by him on an application submitted by him claiming that he was a national of a foreign country and that he desired to visit India for a limited period, it may be assumed that he is not a citizen of India. The circumstance that the respondent being originally a British subject was not a foreigner, within the meaning of that expression as used in the Foreigners Act, 1946, before it was amended, will not come to his aid. See *State v. Ibrahim Nabiji* : AIR1959 Bom525 and *Mushtaq Hus-sain v. State of Uttar Pradesh* : AIR1960 All559 . Thus, there is reliable evidence that the respondent was not an Indian citizen.

10. Lastly, it was submitted by the learned counsel for the respondent that the view expressed by the Appellate Court was correct to this extent that even though the respondent might not be an Indian citizen he had to be served with an order apprising him of the fact that he had ceased to be an Indian citizen and was liable to be deported, otherwise, he could not be prosecuted on that account. This argument loses sight of the amendment effected in paragraph 7 of the [Foreigners Order, 1948](#). The said paragraph originally stood as follows:--

'7. Restriction on sojourn in India. - Every foreigner who enters India on the authority of a Visa issued in pursuance of the Indian Passport Act, 1920 (XXXIV of 1920) shall obtain from the Registration officer having jurisdiction, 'either at the place at which the said foreigner enters India or at the place at which he presents a registration report in accordance with Rule 6 of the Registration of Foreigners Rules, 1939, a permit indicating, the period during which he is authorised to remain in India and shall, unless the period indicated in the permit is extended by the Central Government, depart from India before the expiry of the said period, and at the time of foreigner's departure from India the permit shall be surrendered

by him to the Registration Officer having jurisdiction at the place from which he departs: Provided that this requirement shall be deemed to have been complied with by a foreigner who enters India as a 'Tourist' is granted a certificate of Registration in Form 'D' as provided for in the Registration of Foreigners Rules, 1939.'

The above order was amended with effect from the 4th December, 1958 and now runs as follows:--

'7. Restriction of sojourn in India-- (1) Every foreigner who enters India on the authority of a visa issued in pursuance of the Indian Passport Act, 1920 (34 of 1920) shall obtain from the Registration Officer having jurisdiction either at the place at which the said foreigner enters India or at the place at which he presents a registration report in accordance with Rule 6 of the Registration of Foreigners Rules, 1939, a permit indicating the period during which he is authorised to remain in India.

(2) Every foreigner resident in India to whom the provisions of sub-paragraph (1) do not apply shall, on or before the 5th January, 1960, obtain from the Registration officer having jurisdiction at the place at which he resides a permit indicating the period during which he is authorised to remain in India.

(3) Every foreigner to whom a permit is issued under sub-paragraph (1) or sub-paragraph (2) shall, unless the period indicated in the permit is extended by the Central Government, depart from India before the expiry of the said period; and at the time of the foreigner's departure from India the permit shall be surrendered by him to the Registration Officer having jurisdiction at the place from which he departs.' It is clear that Clause 2 of paragraph 7 of the said order casts a duty on every foreigner where the provisions of sub-paragraph (1) do not apply to obtain a residential permit on or before the 5th January, 1960. His failure to obtain such permit amounts to contravention of paragraph 7 and exposes him to criminal liability. In *Delhi Administration v. Mohammad Iqbal* : 1971 CriLJ509 it was held:-- 'The charge is that by failing to obtain a residential permit the respondent contravened the provisions of Rule 7 (2) of the Foreigners Order. His failure to obtain the residential permit as well as his contraven--tion of the Foreigners Act

suffices to hold that not only he had mens rea but he was guilty of an offence in contravention of Rule 7 (2), of the [Foreigners Order, 1948](#) and Section 8(2) of the Foreigners Act'

Thus, on the facts of the instant case the conclusion becomes irresistible that the respondent contravened paragraph 7 (2) of the [Foreigners Order, 1948](#), and was, therefore, liable to be convicted and punished under Section 14 of the Foreigners Act.

11. In the result we allow this appeal and set aside the order of acquittal passed by the Appellate Court which is based on an erroneous view of law. The order passed by the learned Magistrate is restored. The respondent is, therefore, convicted under Section 14 of the Foreigners Act and sentenced to one year's rigorous imprisonment. He shall be taken into custody forthwith to Undergo the sentence now awarded to him.

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