

Mukhtar Ahmad Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : Jul-30-1964

Reported in : AIR1965All191; [1968(16)FLR413]

Judge : D.P. Uniyal and ;S.D. Khare, JJ.

Acts : Private International Law; [Constitution of India](#) - Article 7; [Citizenship Act, 1955](#) - Sections 9(2); [Foreigners Act, 1946](#) - Sections 3(2) and 14

Appeal No. : Criminal Misc. Case No. 1628 of 1964

Appellant : Mukhtar Ahmad

Respondent : State of U.P. and ors.

Advocate for Def. : J.R. Bhatt, Govt. Adv.

Advocate for Pet/Ap. : V.K. Khanna, ;S.C. Khare, ;V.N. Khare and ;Bashiruddin, Adv.

Disposition : Petition allowed

Judgement :

Uniyal, J.

1. This petition for habeas corpus under Section 491 Cr. P. C. has been filed by one Mukhtar Ahmad challenging an order No. 3597 T. Y. A/VIII-D-292 PT/55

Lucknow, dated June 19. 1964 made by the State Government in exercise of the powers conferred by Clauses (a), (b) and (c) of Subsection (2) of Section 3 of the [Foreigners Act, 1946](#) (No. XXXI of 1946) as amended by the Foreigners Laws (Amendment) Act, 1957 (II of 1957), directing the deportation of the petitioner from India on the ground that he was a Pakistani national and, as such, a foreigner. In pursuance of the order aforesaid the petitioner was arrested on 23-6-1964 and was sent to the Pakistan border for deportation under police escort. He could not be sent across the border without a passport as the Pakistani authorities had tightly sealed the border and did not allow anybody to cross the same without travel documents. The petitioner was being kept in detention ever since and it was claimed that his detention in police custody was unlawful, firstly because he was not a 'foreigner', and secondly because the Central Government had not determined the question of his citizenship in accordance with Section 9(2) of the Indian Citizenship Act.

2. The facts giving rise to the present petition may be stated briefly as follows. The petitioner was born on 16-9-1934 of parents domiciled in India. Some time in 1948, when he was still a minor, he left India and went to Pakistan. On 2-12-1954 he applied for a Pakistani passport and declared himself to be a Pakistani national in his application for visa dated 22-12-1954. At his request the visa was extended up to 20-10-1955. He, however, did not leave India after the expiry of the extended period. He was then served with 4 notice dated 31-7-1957 requiring him to leave India within one month. He did not do so. Instead he filed a petition under Article 226 of the Constitution praying for the issue of a writ of mandamus directing the State of U. P. and its officers not to arrest, prosecute or deport him. The petition was dismissed by Chaturvedi, J., on 24-9-1957 on the ground that it was open to the petitioner to apply to the Central Government to determine his nationality in accordance with Sub-section (2) of Section 9 'of the Citizenship Act. He was then prosecuted under Section 14 of the Foreigners Act for contravening Para 7 of the Foreigners Order 1946 but was acquitted on appeal by the learned Sessions Judge of Allahabad on the finding that he was not a foreigner within the meaning of Section 2(a) of the Foreigners Act (XXXI of 1946) as it stood before amendment. The order of acquittal passed by the Sessions Judge was upheld by the High Court on 8-9-1960 and the State Appeal was dismissed.

3. It appears that the petitioner had meanwhile addressed an application to the Central Government under Section 9(2) of the [Citizenship Act, 1955](#) praying that his prosecution under Section 14 of the Foreigners Act be withdrawn and that he be declared as an Indian citizen. In paragraph 9 of the said application it was stated that he had previously moved an application under Section 5(1) of the Citizenship Act for registration as a citizen of India but he had received no intimation of the decision of the government thereon. It appears that by an order dated 31-12-1958 the Government of India rejected the application of the petitioner for grant of permanent re-settlement in India and the decision of Central Government was communicated to the petitioner by a letter dated 16-1-1959. Thereafter the petitioner moved respondent No. 1, the State of U. P., to 'revise' its order and 'grant the applicant permanent resettlement right in India and Withdraw the case under Section 14, Foreigners Act'. Apparently nothing came of it and the petitioner was arrested on 23-6-1964 for being deported to Pakistan. It is under these circumstances that the petitioner has moved this Court for issue of a writ of habeas corpus seeking his release from detention.

4. The facts stated above are no longer in controversy. The contentions raised on behalf of the respondent, the State of U P., are as follows:

(1) that the petitioner having migrated from India to Pakistan after the 1st day of March, 1947 and before the coming into force of the Constitution, he 'shall not be deemed to be a citizen of India';

(2) that assuming that he was a citizen of India on 26-1-1950 when the Constitution came into force, he had ceased to be such by reason of the provisions of Article 9 of the Constitution which provides that no person shall be deemed to be citizen of India by virtue of Article 6 and Article 8 if he has voluntarily acquired the citizenship of any foreign State. The fact that the petitioner had come out to India on a Pakistani passport on which his nationality was described as Pakistani citizen indicated that he had become a Pakistani national;

(3) that in view of his having acquired foreign citizenship the provisions of Section 9(2) of the Indian Citizenship Act could not apply to him; and

(4) that in any case the burden of proof lay on the petitioner to prove that he was an Indian citizen and not a foreigner and in the absence of any decision by the Central Government on this matter, the present petition was liable to be dismissed.

5. On behalf of the detenu it was urged that he was a minor on the date he left India for Pakistan and that on 26-1-1950 when the [Constitution of India](#) came into force he was under a disability and, as such, did not possess the animus required for acquiring domicile of a foreign state, particularly as the parents of the petitioner have been living in India and are Indian citizens.

6. It is an accepted principle of Private Inter-' national Law that 'the domicile of an infant automatically changes with any change that occurs in the domicile of the father. As between a living father and his infant child there is a necessary unity of domicile, even though they may reside in different countries. This unity is not destructible at the will of the father. It is not terminated if he purports to create a separate domicile for his son, for Instance, by entrusting his future care and maintenance to a relative domiciled in another country or by setting him up in business abroad'. See Cheshire on Private International Law (6th Edition), page 190.

7. The position, therefore, is that an infant is unable to acquire a domicile of choice by his , own act. From the above discussion it would follow, that the petitioner continued to retain his domicile of origin on 26-1-1950 and, therefore, Article 7 of the Constitution could have no application to his case. In State of Madhya Pradesh v. Peer Mohammad, AIR 1963 SC P45 Gafendragadkar, J. (as he then was) construed the true scope and meaning of Article 7 of the Constitution and observed:

'Migration after January 26, 1950 would be migration after the 1st day of March, 1947, but it is clear that a person who has migrated after January 26, 1950 cannot fall within the relevant clause because the requirement of the clause is that he must have migrated at the date when the Constitution came into force. 'Has migrated' in the context cannot possibly include cases of persons who would migrate after the commencement of the Constitution. It is thus clear that it is only persons who have migrated prior to the commencement of the Constitution that fall

within the scope of Article 7'.

8. The point as to whether a person has voluntarily acquired citizenship of a foreign State after 26-1-1950 is one which falls to be determined by the Central Government, under Section 9(2) 31' Citizenship Act. The fact that the petitioner entered India on a Pakistani passport is a piece of evidence which may be considered by the appropriate authority when it proceeds to determine his citizenship in accordance with the rules framed under the Citizenship Act. It is now beyond controversy that the rules prescribed under the Citizenship Act have made the Central Government or its delegate appropriate authority to deal with this question and that means that this particular question cannot be tried in Court. This being so, a person cannot be considered to have lost his citizenship merely by virtue of his remaining in Pakistan after January 26, 1950.

9. The learned Government Advocate argued that the petitioner had not complied with the direction of this Court in obtaining the decision of the Central Government in regard to his status and that he was precluded from agitating this matter in this Court, it was said that in the application made by him to the Central Government on 23-9-1958 he had only asked to be registered as a citizen of India and had 'thus impliedly admitted that he was not an Indian Citizen. A perusal of the application aforesaid goes to show that it was headed as one under Section 9(2) of the Indian Citizenship Act and the prayer contained therein was to the following effect :-

'That as his application for Indian citizenship is still pending so in the interest of justice it is expedient that his prosecution under Section 14 Foreigners' Act be withdrawn and the applicant may be declared as Indian National and be not deported out of India. '

It cannot, therefore, be said that the application made by the petitioner to the Central Government did not relate to the determination of his status as a citizen of India. In paragraph 9 of the said application he had casually claimed a relief for being registered as an Indian citizen, but that appeared to have been in the nature of an alternative relief, that in case it was found that he was not a citizen of India his name may be allowed to be registered as such. The two reliefs were distinct

and separate and could not be confused one with the other. Nor there was any reason to suppose that the rejection of one amounted to the rejection of the other.

10. it seems to us that the Central Government had failed to pass suitable and proper orders on the application of the petitioner dated 23-9-1958 and it must, therefore, be deemed to be pending before it. If and when the application is decided it may be open to the Central Government or its delegate to take suitable action against the petitioner, but so long as the matter is pending decision the State Government has no power or authority to make an order directing his deportation to Pakistan.

11. Another argument raised on behalf of the State was that it was for the petitioner to approach the Central Government for the determination of his status. This contention appears to us to be wholly unfounded. In the very nature of things it is the state Government which has to justify its action of deportation by showing that the petitioner is not a citizen of India, It can do that only by obtaining a decision of the Central Government on that matter. In *Government of Andhra Pradesh v. Mahmud Khan*, AIR 1962 SC 1778 and AIR 1963 SC 645 the Supreme Court held that In order to justify its action for the purpose of deportation of a person the State Government must first obtain the determination of the Central Government on the question of the nationality of the person concerned. In the instant case there had been no such determination, and consequently, the order dated June 19, 1964 made by the State Government was illegal and unenforceable.

12. We accordingly allow this petition and direct the release of the petitioner from the custody of the respondents.

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