

Rajjab Ali Vs. the State

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Court : Allahabad

Decided On : Jul-23-1973

Reported in : 1974CriLJ139

Judge : K.B. Srivastava, J.

Appellant : Rajjab Ali

Respondent : The State

Judgement :

ORDER

K.B. Srivastava, J.

1. This criminal revision arises out of the following facts :

The petitioner Rajab Ali alias Khunnoo obtained a Pakistani Passport No. 291171 dated September 20, 1954 and an Indian Visa No. 53680 dated September 23, 1954 and entered India. He reported his arrival at P, S. Safipur, in the district of Unnao and stayed in India. The period of the Visa expired on December 22, 1954. He got his departure noted at the police station indicating that he was leaving India for Pakistan. However, no report was received from any border check post that he had actually left India and entered Pakistan and, therefore, the Intelligence became vigilant in locating his presence. The Station Officer, Police Station Safipur received information on May 20, 1965 that the petitioner was present at

the shop of one Umaid Ali at Safipur and went and arrested him. The case thereafter was registered and investigated, resulting in the prosecution of the petitioner under Section 14, Foreigners Act, for contravention of paragraph 7 of the Foreigners Order, 1948. The petitioner pleaded that he was an Indian citizen; that he had not obtained any Pakistani Passport or Indian Visa; that he was not a Pakistani national; and that he had not entered India on the basis of any passport or Visa.

2. The trial was held before the Sub-Divisional Magistrate, Safipur who ordered the acquittal of the petitioner on June 7, 1966. No appeal or revision was filed by the State against this order of acquittal and consequently it became final. The State Government passed an order Gre (Police-Gha-2) No. 444 Gha/8-Gha-2-88 D/65 dated February 26, 1970 under Section 3(2)(c), Foreigners Act requiring the petitioner to depart from India within 24 hours and when this order was not complied with by the petitioner, a case was registered and investigated and resulted in his prosecution under Section 14, Foreigners Act for breach of that order.

3. The petitioner made an application, even before the submission of the charge sheet on November 26, 1970 for dropping the prosecution on the ground that the principle of *autre fois acquit* enjoined in Section 403 Code of Criminal Procedure, was a bar to his subsequent trial under Section 14, Foreigners Act after his acquittal for the same offence on the same facts. This plea was negatived by the City Magistrate on January 7, 1971 and on revision by the Sessions Judge on May 15, 1972. It is in these circumstances that the petitioner has come up in revision to this Court seeking its intervention for quashing those orders. No prayer, has been made for quashing the proceedings as such under Section 561-A of the Code of Criminal Procedure.

4. The learned Counsel for the petitioner argued the revision on the following four points:

(1) That the trial is bad under Article 20 of the Constitution;

(2) That it is bad under Section 26, General Clauses Act;

(3) That Section 403, Code of Criminal Procedure is also a bar; and

(4) that it is evident from the record that the petitioner is an Indian citizen and not a foreigner and, therefore, the State Government was incompetent to pass an order for his departure from India to Pakistan.

I now proceed to dispose of these points. Point No. 1.

5. Article 20(2) of the Constitution enjoins that 'no person shall be prosecuted and punished for the same offence more than once.' The word 'offence' has not been defined in the Constitution. But Article 367 of the Constitution provides that the General Clauses Act, 1897 shall apply for the interpretation of the Constitution. Section 3(38), General Clauses Act defines an 'offence' to mean any act or omission made punishable by any law for the time being in force. There can be no doubt that the previous act of the petitioner in overstaying in India after the expiry of his Visa, assuming him to have been a foreigner and further assuming him to have been the person who had obtained the Pakistani Passport and the Indian Visa, amounted to an offence under Section 14, Foreigners Act, read with paragraph 7 of the Foreigners Order. The scope of Article 20(2) was stated by the Supreme Court in *Maqbool Hussain v. State of Bombay* : 1983 ECR 1598 D (SC) , and what follows immediately has been taken from that. The fundamental right under Article 20(2) enunciates the principle of *autre fois* convict or double jeopardy, that is to say, that where a person has been convicted of an offence by a Court of competent jurisdiction, the conviction is bar to all criminal proceedings for the same offence. Per Charles, J. in *Reg. v. Miles* (1890) 24 QBD 423. To the same effect is the ancient maxim *Nemo Bis Debet Puniri Pro Uno Delicto*, that is to say, that no one ought to be twice punished for one offence or as it is sometimes written '*Pro Eadem Causa*' that is for the same cause. Article 20(2) incorporates within its scope the plea of *autre fois* convict, but circumscribes it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence. Article 20(2) does not contain the principle of '*autre fois* acquit' at all. The Supreme Court held in *Vankataraman v. Union of India* : 1954 CriLJ 993 that in order to enable a citizen to invoke the protection of clause (2) of Article 20 of the

Constitution, there must have been both prosecution and punishment in respect of the same offence. The words 'prosecuted and punished' are to be taken not distributively so as to mean prosecuted or punished. Both the factors must coexist in order that the operation of the clause may be attracted. The petitioner was undoubtedly prosecuted in the earlier case but was ordered to be acquitted and, therefore Article 20(2) does not come into play at all. Point No. 2

6. Section 26, General Clauses Act provides that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be punished twice for the same offence. This section, it is obvious, relates to offences punishable under two or more enactments. It was observed by the Supreme Court in *Baliah v. Rangachari* : [1969]72ITR787(SC) , that:

A plain reading of the section shows that there is no bar to the trial or conviction of the offender under both enactments but there is only a bar to the punishment of the offender twice for the same offence. In other words, the section provides that where an act or omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both the enactments but shall not be liable to be punished twice for the same offence.

Section 26, in my view, has no application whatsoever to the facts of the instant case. For one thing, the second prosecution is also under the same Act and not under a different Act; and secondly, a fresh trial and the conviction is not barred; and thirdly the same act or omission should constitute an offence under two or more Acts, but while the act or omission which was made the subject-matter of the first trial was disobedience of paragraph 7 of the Foreigners Order by overstaying in India after the expiry of the Visa, involving different ingredients of one offence, the subject-matter of the present trial is the disobedience of Section 3(2)(c) of the same Act by not departing from India in spite of an order to that effect. This point is also, accordingly, overruled. Point No. 3.

7. The learned Counsel placed reliance upon Section 403(1) of the Code of Criminal Procedure. That section says that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such

offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237. It incorporates the common law principle of the well known pleas of *autre fois acquit* and *autre fois convict*, namely that no one shall be punished or put in peril twice for the same offence, when he has once been tried earlier and convicted or acquitted. For the applicability of the rule of *autre fois acquit*, as in the instant case, three essential conditions have to be satisfied, namely (1) there must have been a trial of the accused for the offence charged against him in the second trial, (2) the trial must have been by a Court of competent jurisdiction and (3) there must have been a judgment or order of acquittal. When all these three conditions are satisfied, the subsequent trial of the accused can be successfully resisted by him on the plea of *autre fois acquit*. The last two conditions exist but not the first. The judgment of the Sub-Divisional Magistrate ordering the acquittal on June 7, 1966 shows that the argument raised before him was that when the petitioner entered India in 1954, he did not enter as a foreigner under Section 2(a), as it originally stood, before its amendment by the Foreigners Laws (Amendment) Act, 1957 and reliance for that was placed on *Mohammad Hanif Khan v. State* : AIR1960 All434 . The learned Sub-Divisional Magistrate, therefore, held that since the petitioner was not a foreigner in 1954 when he entered India, there was no requirement in law for him to obtain a permit for his continued stay after the expiry of the period of three months fixed by the Visa and, therefore, he had not committed any offence. In this connection, I would like to reproduce paragraph 7, Foreigners Order, in so far as it is relevant. It says that every foreigner who enters India on the authority of a Visa shall obtain from the Registration Officer 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, depart from India before the expiry of the said period. The learned Sub-Divisional Magistrate proceeded further and observed that after the amendment of the word 'foreigner' in 1957, no order was passed under Section 3(2)(c) and, therefore, there could be no breach of any such order. Finally, he placed reliance upon the evidence of a defence witness for his conclusion that the petitioner had not left India at all. On these facts, it has been

vehemently argued that Section 403(1) has full application because once it has been held that the petitioner had never left India and migrated to Pakistan, it cannot now be held that he had migrated and had returned to India. This argument has not appealed to me at all. The definition of the word 'foreigner' prior to the amendment, was as follows:

2 (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 naturalisation as a British subject under any law for the time being in force in India; or

(iii) is not citizen of India.

The definition was amended by Act II of 1957 which came into force on 19-1-1957 by which the expression 'foreigner' was defined to mean a person who is not a citizen of India. Sub-section (1) of Section 1 of the British Nationality and Status of Aliens Act enacted that any person born within his Majesty's dominions and owing allegiance shall be deemed to be a natural born British subject. The petitioner, having been born in India, fell within this definition of natural born British subject and was, therefore, not a foreigner when he entered India in 1954. For the purpose of enabling the Government to pass an order under Section 3(2)(c), the only question is not the status of the individual when he entered India but whether he was or was not a foreigner within Section 2(a) on the date when the order was passed or the direction issued. It was held by the Supreme Court in *Fateh Mohd. v. Delhi Administration* : AIR 1963 SC1035 thus:

It is contended that as the appellant was not a foreigner at the time he made his entry into India, he could not be convicted on the basis he was a foreigner within the meaning of the definition of a foreigner as subsequently amended. There is a fallacy underlying in this argument. The appellant was certainly not a foreigner when he entered India under the definition of a foreigner as it then stood, In view of the amendment of the definition he became a foreigner after January 19, 1957.

He could not be convicted for an offence for an act done by him before the amendment on the basis he was a foreigner; for instance an act done by him such as his entry into India or his non-compliance with the conditions of an order issued on him before the amendment on the foot that he was a foreigner. But the offence for which he is now charged is an act done by him in derogation of an order issued to him after the amendment.... The legality of the act done by him must be judged on the basis of the existing law as the act was done subsequent to the amendment.

See also State v. Ibrahim Nabiji : AIR1959 Bom525 ; Mohamed Usman v. State of Madras : AIR1961 Mad129 ; Abdul Aleem v. State of Andhra Pradesh : AIR 1963 AP441 ; Ibrahim v. State of Rajasthan 0043/1964 : 1965 CriLJ506 . The mere observation of the Sub-Divisional Magistrate that the defence witness was more reliable did not form the crux of the case as he had already held that the petitioner was not a foreigner within the meaning of the definition, before the amendment. The second line of argument of the learned Counsel that the second portion of Section 403(1) is also applicable, is not well founded. No charge could have been framed for disobedience of any order under Section 3(2)(c) in the first trial, because no such order had been passed till then. Point No 4.

8. The last contention is that it should be held on the basis of the evidence on the record that the petitioner is still not a foreigner within the meaning of the existing definition also. This raises both questions of law and fact which cannot be decided by this Court on the revisional side. The petitioner appears to have been in great hurry in rushing to superior Courts, even before the submission of the charge sheet and the recording of evidence. It was open to him to raise this plea in his defence and prove that he was not a foreigner; the onus lying on him under Section 9 of the Foreigners Act. A finding on a question of fact can be given only after hearing the evidence and ascertaining what the real factual position is. See M. N. Mukherjee v. Matangi Charan Palit AIR 1919 Cal 57 (1) : 20 Cri LJ 572 and Radha Kissen v. Fateh Chand AIR 1920 Cal 972 : 22 Cri LJ 67 which lay down that a decision that a prosecution is barred under the provisions of Section 403, Code of Criminal Procedure, ought not to be arrived at without an investigation of the facts.

9. Altogether, therefore, this revision has no force at this stage and is accordingly, dismissed. If the petitioner was ordered to be released on bail during the pendency of the revision, that order stands cancelled. The record of the revisional Court below shall be transmitted to that Court and that of the Magistrate's Court to his Court, with the direction that he shall now proceed with the trial.

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