

Afzar Ali Baig Vs. the State

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Court : Orissa

Decided On : Jan-16-1961

Reported in : AIR1961Ori174; 1961CriLJ658

Judge : R.L. Narasimham, C.J.

Acts : [Constitution of India](#) - Article 7; [Citizenship Act, 1955](#) - Sections 5 and 9; Citizenship Rules, 1956 - Rule 30; [Foreigners Act, 1946](#) - Sections 3(2), 9 and 14

Appeal No. : Criminal Revn. No. 201 of 1960

Appellant : Afzar Ali Baig

Respondent : The State

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : R. Mohanty and ;S.C. Ghosh, Advs.

Disposition : Revision dismissed

Judgement :

ORDER

R.L. Narasimham, C.J.

1. This is a revision against the appellate judgment of the Additional Sessions Judge of Cut-tack maintaining the conviction of the petitioner under Section 14 of

the Foreigners Act 1946 and the sentence of three months rigorous imprisonment and a fine of Rs. 50/- passed by a First Class Magistrate, Cuttack.

2. The petitioner was originally a resident of village Routrapur, Sadar P. S. in Cuttack district where his father Mohammad Ali Baig (D. W. 1) has a house and some lands. The said Mohammad Ali Baig is working as a sorting postman in the Postal Department at Cuttack. The petitioner appears to have been born in village Routrapur on the 4th November 1935, He studied in Angul High School from 1943 to 1951. He failed in the Matriculation Examination and then left Orissa in September 1952 for Dacca in East Pakistan where he managed to secure a job as a clerk in the General Post Office.

Early in 1955 he applied for a visa for a trip to Orissa to see the parents and near relations (vide Ex. 9). In that application he described himself as of Pakistan nationality stating that he held a passport No. 417858 dated 21-12-53 issued by the passport officer, Government of East Bengal. He applied for a B visa available for a period of one year from 7-3-55. The visa was issued in due course and was made valid from 10th March 1955 to 9th March 1956. Having thus entered India with the said passport and the said Visa the petitioner never returned to Pakistan after the expiry of the period.

On the other hand, he appears to have applied for a permit, for long term stay in India, to Government who however rejected the same. He was informed on the 29th August 1955 (Ex. 2) that he should leave India within two months Again on the 26th February 1957 (Ex. 3) he was directed to leave India within one month. In a subsequent letter of June 1957, 'Ex. 4' the Government of Orissa made it clear that the prayer of the petitioner for grant of a permanent resettlement permit in India had been rejected by the Government of India and that he should leave the country within one month failing which he should be deported under the provisions of the Foreigners Act.

Then, on the 16th October 1957, (Ex. 5) the State Government informed the Superintendent of Police, Cuttack through the Special Branch that a notice should be served on the petitioner to quit the country within a month from the date of service of the notice. On receipt of this letter the Superintendent of Police issued

notice to the petitioner (Ex. 6) on the 1st November 1957, directing him to leave India within a month from the date of receipt of the same.

Though the notice was served on the petitioner on 20th November 1957 he did not leave India within the period prescribed therein. On the other hand his mother filed a representation on his behalf (Ex. 8) to the Prime Minister of India requesting him to stay the operation of the deportation order. Nothing came out of this representation and in due course the petitioner was prosecuted and convicted and sentenced as stated above,

3. Mr. R. Mohanty for the petitioner challenged the legality of the conviction on the following three grounds :

(i) The petitioner has established that he is a citizen of India and not a citizen of Pakistan.

(ii) As a dispute was raised regarding the nationality of the petitioner the matter should have been referred to the Government of India for their decision under Rule 30 of the Citizenship Rules 1956 and that the Magistrate had no jurisdiction to proceed with the trial and convict the petitioner.

(iii) There was no valid order of deportation of the petitioner from India and consequently the question of contravention of deportation order does not arise.

4. It is true that the petitioner was born in Orissa and his father is an Indian Citizen. As a minor the petitioner had the same citizenship as that of his father. When he went to Pakistan in September 1952 he was undoubtedly a minor, but he stayed in Pakistan after attaining majority and also joined Pakistan Government Service as a clerk in the General Post Office at Dacca. He also obtained a Pakistani passport and in his application for B visa he described himself as a Pakistan national and wanted permission to visit India for a period of one year, to see his parents.

By virtue of Article 7 of the Constitution he clearly lost his Indian Citizenship when he stayed in Pakistan after attaining majority. The true meaning of the expression 'migrated from the territory of: India' occurring in Article 7 of the Constitution has been explained by their Lordships of the Supreme Court in a very recent

(unreported) decision in Civil Appeal No, 247 of 1960: (Since reported in AIR 1961 SC 58), Sm. Shanno Devi v. Mangal Sain. They pointed out that the word 'migration' connotes not only going to a country but going there with the intention of residing there permanently.

The petitioner's intention to reside in Pakistan permanently must be gathered from his own conduct in securing a job as Clerk in the General Post Office at Dacca, in obtaining a Pakistani pass-port and in declaring himself as Pakistani national in his application for a B visa. Doubtless the petitioner has led evidence to show that after his return to India on the strength of the B visa he married in Orissa. There is also some evidence to show that the petitioner ran away to Pakistan because he failed in the Matriculation Examination and was severely rebuked by his father.

On the basis of these facts it was urged by Mr. Mohanty that the petitioner's going to Pakistan was only for a brief sojourn brought about by the waywardness of an immature boy and that he had no intention of permanently residing there. This argument runs counter not only to the declaration given by the petitioner in the B visa mentioned above but also to the affidavit sworn by the petitioner himself (Ext. 7) on 19th December 1957 before the Magistrate after the issue of the quit notice on him. Therein he says :

'I have finally decided to live here, in India permanently and I have relinquished my Pakistani Citizenship and nationality; and I desire to acquire domicile citizenship and nationality of the Indian Republic to which I owe allegiance. I have no other foreign nationality. I surrender my Pakistani passport to the Pakistani authority concerned for its cancellation.'

The above statement in the affidavit clearly shows that the petitioner was aware that he was a Pakis-thani citizen but wanted to become a citizen of India and for that purpose he made a declaration relinquishing his Pakistani citizenship and saying that he wanted to live permanently in India,

The belated story put forward by him before the lower court for the first time to the effect that his trip to Pakistan was itself a brief sojourn and that he had no intention of residing in that country permanently when he went there and accepted a

Government service, was not stated in the affidavit. The legal position therefore is that though a citizen of India the petitioner lost his citizenship by virtue of Article 7 of the Constitution when he went to East Pakistan and remained there even after attaining majority.

If after his return to India he wanted to acquire Indian Citizenship, it was open to him to apply to the authorities concerned, under Section 5 of the Citizenship Act. Section 9(1) of that Act makes it 'clear that once a citizen of India has acquired Pakistani citizenship between the 26th January 1950 and the date of commencement of that Act he ceased to be a citizen of India. His application for grant of a permit to stay in India permanently was also rejected by the Government of India.

He cannot therefore claim Indian citizenship unless the Central Government after due enquiry, registers him as a citizen of India under Section 5 of (the Citizenship Act. The motive which impelled him to run away from his parents and go to Pakistan in September 1952, is not material. His subsequent conduct in Dacca and his own declaration in his application for a B visa showed that he had intended to reside in Pakistan permanently and acquire Pakistani nationality.

5. Mr. Mohanty thereupon contended that the passport was not conclusive evidence of citizenship and that paragraph 3 of Schedule III of the Citizenship Rules which says that a passport issued by the Government of a Country shall be conclusive proof of acquisition of citizenship of that country was void as held in a recent decision of the Andhra High Court reported in AIR 1957 Andhra Pra 1047, Mahomed Khan v. Government of Andhra Pradesh. The correctness of this decision has however been doubted in Syed Shah Mohammad Abdali v. State of Bihar, AIR 1960 Pat 98.

It is unnecessary to decide this question here because even if the passport is not held to be conclusive evidence of citizenship nevertheless it is prima facie evidence of citizenship as held uniformly by all the High Courts -- See AIR 1958 Cal 565, Dawood Ali v. Dy, Commr. of Police, AIR 1959 Bom 525, State v. Ibrahim Nabiji, AIR 1960 Andhra Pra 106, Mohd. Naseeruddin v. State of Andhra Pradesh and AIR 1960 Pat 98, already cited. In the present case, apart from the passport

the application of the petitioner for a B visa (ex. 9) in which he declared himself to be a Pakistani citizen is an additional piece of evidence.

His own affidavit (Ex. 7) dated the 10th December 1957, in which he declared his intention of relinquishing Pakistani Citizenship and expressed his desire to acquire Indian Citizenship confirms the view that he was a citizen of Pakistan but wanted to relinquish that citizenship and acquire Indian citizenship in accordance with the law for the time being in force. Hence the prima facie view deducible from the Pakistani passport is practically confirmed by the petitioner's own subsequent conduct. The Government of India however declined to grant him a permanent permit to stay in India. I must accordingly hold that the petitioner is a citizen of Pakistan.

6. As regards the second point, Mr. Mohanty's contention is that once a dispute as regards the citizenship of the petitioner was raised during his trial in the criminal Court, that Court ought to have stayed further proceedings and referred the matter to the Government of India for their decision. He relied on Section 9(2) of the Citizenship Act read with Rule 30 of the Citizenship Rules, and also on AIR 1959 Andhra Pra 241, In re Abdul Khader and on AIR 1960 All 637, Sharafat Ali Khan v. State of Uttar Pradesh. Rule 30 of the Citizenship Rules makes the Central Government the sole authority to decide the question as to whether a person having been formerly a citizen of India had acquired the citizenship of another country between the 26th January 1950 and the date of commencement of the Citizenship Act (30th December 1955) and had consequently ceased to be a citizen of India.

If the petitioner wanted to take advantage of this statutory provision he should have, soon after entering India in March 1955, raised such a dispute about his citizenship and asked the Central Government to decide the question. The petitioner not only omitted to raise such a dispute, but by his own successive applications to the Government of India for long term stay in India and for a permanent resettlement permit, admitted that he was a citizen of Pakistan.

7. All his applications were rejected by the Government of India and even after the service of the quit notice he admitted in his affidavit dated 10th December, 1957

that he was a Pakistani citizen who wanted to acquire Indian citizenship. It will be unreasonable to construe Rule 30 of the Citizenship Rules as conferring on a person the right to raise the question about his citizenship at any time he chooses regardless of his own previous admissions or conduct.

If after entering India, the petitioner admitted before the very Tribunal who is required to decide the dispute namely the Central Government, that he was a citizen of Pakistan and that he wanted to acquire Indian citizenship, it is no longer open to him to contend in subsequent proceedings that the Government of India alone were competent to decide this question under Rule 30 of Citizenship Rules. In AIR 1959 Andh Pra 241, it appears that the accused had taken the necessary steps and invited a decision by the Central Government under Rule 30.

While that matter was pending with the Central Govt. an order of deportation was passed against him and he was prosecuted under Section 14 of the Foreigners Act. The learned Judge rightly held, in such circumstances, that the prosecution was premature. Here however the facts are fundamentally different. In AIR 1960 All 637 this question did not directly arise and the learned Judge merely held that the powers of the High Court under Article 226 of the Constitution cannot be taken away by Section 9(2) of the Citizenship Act and the Rules framed thereunder. Moreover, in that decision it was further pointed out that Section 9(2) of that Act and Rule 30 of the Citizenship Rules did not provide for an application being made to the Central Govt. by a person who claims to be an Indian national and finds that his status is disputed by the Indian Authorities.

It is unnecessary for me here to say whether I accept these observations as correct. But whatever that may be that decision does not go so far as to say that in the circumstances as found in the present case the Criminal Court should stay its hands merely because the dispute about citizenship is raised before it for the first time. This question must be decided by the Criminal Court on the facts proved, bearing in mind the burden of proof specially cast by Section 9 of the [Foreigners Act, 1946](#).

8. As regards the third contention It is necessary to quote the two letters Exts. 5 and 6 :

Ext. 5.

'No. 218-53 (12807)/S. B. Cuttack

Dated the 16th October, 1957.

To

The Superintendent of Police, Cuttack.

Sub: Refusal of grant of a permanent resettlement permit to Asfar Ali Baig, a Pakistan national.

Please refer to your letter No. 3120/D1B D/-13-9-5.7 on the above subject. The State Government who were referred to in the matter now inform us in their letter No. 15406/PFr-2P-349/57 to serve Asfar Ali Baig with a notice to quit the country within a month from the date of its service on him, failing which he should be prosecuted. Asfar Ali Baig may, therefore, be served with a notice as indicated above, and a copy of the same may be sent to me for record in this Office.

I may also be kept informed of the developments from time to time,

Sd. Chhotaray

Superintendent of Police (Special)

Branch

Ext. 6 :

'No. 3801/DIB. CuttackThe 1st November, 1957.

To

Shri Asfar Ali Baig. s/o Mohammad Ali Baig,

village Routrapur, P, S. Sadar Cuttack.

Dear Sir,

Since your application for grant of a permanent resettlement permit in India has been rejected by the Government of India, you are hereby directed to leave India within a period of one month from the date of receipt of this notice, failing which you will be liable for prosecution and deportation under the Foreigners Act 1946 and Foreigners Order 1948.

Yours faithfully,

Sd. B. K. Mohapatra.

Supdt. of Police and District Registering

Officer, Cuttack.

It was urged by Mr. Mohanty that the power to 'deport' a foreigner vests either in the Central Government or its delegated authority and that the State Government alone was conferred this power by Government of India by Notification No. S. R. O. 1072 dated 13th May, 1955. There was no order of delegation authorising the Superintendent of Police to exercise the power to deport a foreigner and that consequently Ext. 6 would not be a valid order under Section 3(2)(c) of the Foreigners Act.

This argument is based on a misconception of the true scope of Ext. 6. The Superintendent of Police, Cuttack did not purport to act as the delegated authority of the Government of India for the purpose of passing an order of deportation under Sec; 3(2)(c). On the other hand in Ext. 5 he had been informed that Government in their letter No. 15405 PPT/2P-349/57 dated 11th October 1957 had directed him to serve on the petitioner a notice to quit the country within a month from the date of its service.

It is this Order of the Government dated 11th October 1957 which would be true order under Section 3(2)(c) of the Act. The Government, instead of serving the order directly on the petitioner merely used the medium of the Superintendent of Police to get it served, and the latter Officer merely acted as a conduit pipe. Full instructions were given to him about the nature of the order and the person on whom it was required to be served. It would have been much better if the

prosecution had proved the said order of Government during the trial of the criminal case.

But it appears that this aspect of the matter was never challenged. The entire cross-examination was directed to establish that the petitioner continued to be a citizen of India. Hence prosecution contented themselves with merely proving Ext. 5 which contains a summary of the order of Government and Ext. 6 which only shows that the Superintendent of Police carried out that order. The Sub-Inspector of Police, Cuttack (P. W. 2) also was examined to prove the service of the notice.

He 'stated in cross-examination that the notice was issued on the basis of instructions issued by the Government, and his cross examination shows that this point was never challenged. Hence, though it would have been much better if the prosecution had proved the letter of the Government dated 17th October, 1957 I think Exts. 5 and 6 are sufficient to show that the deportation order against the petitioner was passed by the State Government which is a validly delegated authority, and that the Superintendent of Police merely carried it into effect.

In this respect this case differs from the Calcutta case reported in AIR 1958 Cal 565 on which Mr. Mohanty relied. There the deportation order was passed by the Deputy Commissioner of Calcutta on the basis of a general order of Government that certain classes of Pakistani nationals should be deported. That deportation order was held to be invalid. Here however as already shown there was an express direction from the Government for a service of notice on the petitioner.

9. I should further notice the slight defect in the charge which was rightly not pressed by Mr. Mohanty. The charge while referring to the contravention of the quit notice served on the petitioner on the 20th November 1957 'Ext. 5' further says that the petitioner contravened paragraph 7 of the order under the Foreigners Act. The reference to the 'order under the Foreigners Act' is quite inept. The provisions of the Foreigners Order 1955 have no application at all in the present case, as pointed out in 26 Cut LT 610 : (AIR 1961 Orissa 150), Mohammed Umar v. State.

Here there is no question of contravening any 'permit' issued under paragraph 7 of the Foreigners Order. This is a simple case of disobedience of an order directing a foreigner to quit India within a stated period which is punishable under Section 14 of the Foreigners Act. The mention of the 'Order under the Foreigners Act' has not, in any way, prejudiced the petitioner, especially because the quit notice was expressly mentioned in the charge. Hence this irregularity in the description of the offence in the charge, is not material.

10. For these reasons I uphold the conviction and sentence and dismiss this revision.

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