State Vs. Abdullah Khan

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Court : Rajasthan

Decided On : Feb-19-1962

Reported in : AIR1963Raj11; 1963CriLJ66

Judge : I.N. Modi and; L.N. Chhangani, JJ.

Acts : Constitution of India - Articles 5 and 9

Appeal No. : Criminal Appeal No. 405 of 1960

Appellant : State

Respondent : Abdullah Khan

Advocate for Pet/Ap. : Kan Singh, Govt. Adv.

Disposition : Appeal dismissed

Judgement :

Modi, J.

1. This is an appeal by the State against a judgment and order of the City Magistrate, Kotah, dated the 28th February, 1959, in a case under section 14 of the Foreigners Act (Act 31 of 1946 hereinafter called the 'Act') by which he has acquitted the accused.

2. The material facts are these:

It is alleged that the accused is a citizen of Afganistan and that under a passport from that Government and a visa obtained in consequence thereof, the accused came to India on the 19/20th August, 1955. He was originally permitted to stay in India for six months and this permission seems to have been subsequently extended from time to time until the 13th of August, 1957. For certain reasons however which are not disclosed on the record, the Government of India, by its letter dated the 2ndof August, 1956, (Ex. P.3) to the Chief Secretary to the Government of Rajasthan, required that the accused be served with a notice to wind up his business and to leave India within a period of six months from the date of its service on him, and that in case he failed to do so, he be prosecuted according to law.

The case for the prosecution then is that the accused was served with a notice (Ex. P-l) to quit India by the Superintendent of Police, Kotah, which is said to have been served on the accused on 25th of September, 1956. According to this, the accused must have left India by the 25th of March, 1957, but he failed to do so. Consequently, the accused was charge-sheeted for an offence under section 14 of the Act in the Court of the City Magistrate, Kotah.

3. The defence of the- accused put briefly, was that he was a citizen of Afganistan as well as India and that he has been living in both countries. He further pleaded in this connection that his father had been living in India for a period of about forty years and that he also had been living here for the last twenty-six years preceding the filing of the case against him and that he was also registered as a voter on the electoral rolls of this country. It is further important to note that according to the accused he was born in Afganistan and that he had left India sometime in 1949 under some kind of permit, the particulars of which, he has not disclosed, and that he had returned therefrom sometime in 1951, and similarly, he had again gone to Afganistan in 1954 and last came to India in 1955 and that he has throughout been coming and going like this. A definite question was put to the accus ed whether he had come back from Afganistan under a passport in 1955 and having lost the same he had obtained a duplicate copy thereof, and the accused admitted that that was so. A further question was put to him whether the accused had obtained a registration certificate (Ex. P-5) under the Registration of Foreigners

Rules 1939 on the 1st of June, 1956, and curiously enough, his reply was that he did not remember if he had obtained any such certificate. It may be noted that in this certificate the accused had mentioned bis nationality as 'Afghan', and his place of birth as 'Rained Khal, District Gazni', which is in Afganistan, and in column No. 6 headed as 'previous nationality ('if any)', he made no statement whatsoever. He mentioned the purpose of his visiting India as 'money lending'.

4. The prosecution produced five witnesses in support of its case and the accused also led evidence in support of his defence, and in the result, the learned Magistrate held that the prosecution had failed to prove that the accused was a foreigner and also that it had not been proved that the notice to quit India (Ex. P-l) had been duly served on the accused, and for both these reasons, acquitted the accused. Aggrieved by this decision, the State has come up in appeal.

5. It has been strenuously contended before us by the learned Government Advocate that although there is some force in the finding of the learned Magistrate that the notice given to the accused to quit India is not proved to have beenduly served on him, his other finding to the effect that the accused was not a foreigner was quite wrong and deserved to be set aside.

6. Having gone through the entire evidence on record and on a careful consideration of the law relevant to the subject, we are disposed to think that this submission has force. The case of the prosecution is that the accused is a foreigner and was never a national of India. It is admitted that the accused was not in India at the time the Constitution came in force in 1950 and his case is that he had left India earlier in 1949. It is significant, however, that be has failed to produce a certified copy of the original passport or to have the original summoned in that connection. Was the accused an Indian citizen at the commencement of the Constitution? For, it is riot his case that he had acquired such citizenship later. Now Article 5 of the Constitution of India reads as follows:

'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 in the territory of India tor not less than five years immediately preceding such commencement,

shall be a citizen of India.'

According to this Article before a person could be entitled to have the status of Indian citizenship on the coming into force of the Constitution, he must have had his domicile here and then he must have had any one of the three qualifications which have been mentioned in that Article, that is,

(a) he was born in India, or

(b) that any of his parents were born in India, or

(c) he had been ordinarily resident in India for not less than five years immediately preceding such commencement.

It is obvious that on the facts we have mentioned above, the accused does not fulfil any of these three conditions last mentioned, and it is extremely difficult for us to hold on the same material that he had ever his domicile in this country. We may also take this opportunity of pointing out that the word 'domicile', broadly speaking, means the permanent place of dwelling, or home of the person concerned. Every person is supposed to have a domicile in law. This would usually be the place where the person is born, in the absence of any other domicile. But in the present case, we have it from the accused himself that he was born in Afganistan and not in India. It also seems to us that, in the absence of anything to the contrary, a person must be deemed to have the place of his birth as his ordinary domicile. Prima facie, therefore, the accused's domicile was and would be in Afganistan. Then in order to induce us to hold that the accused had acquired any other domicile which is usually called a 'domicile of choice' and that he intended to live in India as his home and had actually done so, a heavy burden lay uponhim to establish that It is true that the accused has led some evidence to show that he and his father have been living in India, presumably in connection with business, for a few years from time to time but it is highly remarkable that the accused has

not had the courage to say that he had ever adopted India as his home or that he had lived in this country with that animus. In this connection, we wish to draw attention to two provisions of law, the first being of the Municipal Law and the other of International Law. The former provision is contained in section 9 of the Act. It reads as follows:

'If in any case not falling under Section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1S72, lie upon such person.'

7. We may also point out here that Section 9 of the Act can have no application to the present case, the reason being that the accused claims to be an Indian citizen and not a foreigner. The second provision of law, and which is a rule of International law, is that there is a presumption of continuance of domicile, and that a domicile of origin continues to adhere to a person even after he has abandoned it until such time as he obtains a domicile of choice (see Dicey's Conflict of Eaws, Seventh Edition, Pages 90-92). The combined effect of these two provisions, in our mind, can only be that where a person wants it to be held that he had abandoned his domicile of origin, a very heavy onus lies on him and he must lead clear and cogent evidence before he can be held to have discharged that onus. We have carefully considered the evidence led by all the witnesses in this connection -- whether on the prosecution side or the defence--and are categorically of the opinion that this onus has not been discharged. We have no hesitation in saying that mere residence in another country, even for a certain number of years, cannot be held to be sufficient to give that person a domicile of choice where he has held any other domicile, namely, that of origin and where such residence does not appear to have been attended with the intention of making the other country his home, a condition which, if we may say so, constitutes the very kernel of the matter. At no place has the accused said that he had ever lived in India with the intention of making it his home. On the other hand, we have it from him (accused) that he considers himself a national of both India

and Afganistan, a position which to our mind, shatters his claim to Indian citizenship without more. In this connection, we may in passing refer to Article 9 of the Constitution of India which clearly provides 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 8, if he has voluntarily acquired the citizenship of any foreign State. We mention this to show that our Constitution does not accept the concept of dual citizenshipand, therefore, where a person says that be claims himself to be a citizen of another country we find ourselves utterly unable to hold that he can at the same time lay claim to citizenship of this country.

8. In view of the above state of law, we are definitely, of the opinion that the finding of the learned Magistrate that the prosecution has failed to prove that the accused was a foreigner, is untenable and we must set it aside. We hold accordingly.

9. In the view we take, the accused must be held to be a foreigner within the meaning of section 2 of the Act and so it was open to the Central Government under section 3 thereof to order him to quit this country, and such a person, where he contravenes the provisions of such an order, would certainly bring himself within the clutches of section 14 of the Act. As we have already pointed out above however it has not been duly proved on the record that the order to quit was properly served on the accused, and that being so, we think that in spite of our finding that he has been proved to be a foreigner, we would not be justified in convicting and sentencing the accused under the last mentioned section.

10. The result, therefore, is that this appealmust fail in the light of the observations we havemade above, and we hereby dismiss it.