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Court : Kolkata

Decided On : May-05-1960

Reported in : AIR1960Cal740

Judge : D.N. Sinha, J.

Acts : [Constitution of India](#) - Articles 5 and 226

Appeal No. : Matter No. 101 of 1959

Appellant : Sultan Ahmad

Respondent : Deputy Commissioner of Police, Spl. Branch and Civil Authority for Calcutta and Suburbs and ors.

Judgement :

ORDER

D.N. Sinha, J.

1. The facts in this case are as follows. According to the petitioner, he was born in village Pitambarpur, Police Station Begumganj in the District of Noakhali, when it formed a part of India. He came to Calcutta in the beginning of the year 1943, and took employment as a domestic servant in the household establishment of the

then Assistant Shipping Master, Shipping Office, Calcutta where he has continued to be employed for the last 17 years. In August, 1947 when the partition took place, the petitioner at first provisionally opted for Pakistan but thereafter changed his mind and opted for India, where in fact he has continued to remain. According to him, at the commencement of the Constitution, 'he was domiciled in India and was ordinarily resident therein for not less than five years immediately preceding such commencement. In fact, according to him, during these 17 years he went to Pakistan only on three occasions for a total period of four months and eleven days. According to him, he has no relatives in Pakistan except his wife who is in Noakhali and lives with her parents there. He was married in 1955 and as his wife has not attained 18 years of age, according to family custom, she must live with her parents, and upon the attainment of 18 years she is expected to come and live with the petitioner. The petitioner says that he has no property whatsoever in Pakistan. In 1954, the petitioner applied for a passport which was granted to him by the Government of India. Such passport can only be applied for, upon a declaration that the petitioner was a citizen of India, and this position has been accepted by the issue of a passport to him by the Government of India.

2. On the 29th June, 1959 the Deputy Commissioner of Police, Special Branch, describing himself as the Civil Authority for the town of Calcutta and its suburbs, under the Foreigners Act, 1948, and the Foreigners Order, 1948, issued a notice upon the petitioner, directing him to leave India within seven days, failing which he would render himself liable for action, including prosecution under the provisions of the said Act and Order. Following this, on the 29th June, 1959 the Principle Officer, Mercantile Marine Department, Calcutta District, served a notice on the petitioner that inasmuch as he had been served with a notice to leave India by the Civil Authority, his services were terminated with effect from the afternoon of 30th June, 1959. It is against these two orders that the petitioner has come up to this Court.

3. In order that the Foreigners Act or Order should apply, the petitioner should be a foreigner, that is to say, not a citizen of India, it is conceded that if he is a citizen of India neither the Act nor the Order applies to him. The question of citizenship is dealt with in Part II of the Constitution. Article 5 states that at the commencement

of the Constitution, every person who had his domicile in the territory of India, and who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India. Doubtlessly, this is basically a question of fact, and in the ordinary course I would not be competent, in an application of this description, to go into such a disputed question of fact. In my opinion, however, on the materials before me, there is no dispute on any question of fact. The petitioner states in his petition, on oath, that he had been residing in Calcutta continuously ever since the beginning of the year 1943 and that he was domiciled here and had taken out an Indian passport. The taking out of the Indian passport is admitted, and with regard to the other facts, it is stated by the respondent No. 2 who has affirmed the affidavit in opposition, that he has no knowledge of the allegation and does not admit the same. It is firmly established that according to the rules of pleading, this does not amount to a denial. Excepting the fact that the petitioner's minor wife is living with her parents in Eastern Pakistan, there is not a single fact that has been put forward to show that the petitioner has not been domiciled in India, or was not so domiciled at the relevant time, or that he ever intended to be, or did become, a citizen of Pakistan. The learned Standing Counsel appearing on behalf of the respondents has argued that the question of domicile is a question of fact. He relies on an English case, -- *Winans v. Attorney General*, (1904) A.C. 287, There, it has been laid down that the onus of proving that a domicile has been chosen in substitution of the domicile of origin, lies upon those who assert that the domicile of origin has been lost. The domicile of origin continues unless altered, and the party must have the intention of abandoning his former domicile and acquiring another as his sole domicil. The case concerned an American citizen who left the United States and lived for many years in England, where he died. The Crown claimed a legacy on the ground that he had acquired adomicil in England. It was held that the onus of showing a change of domicile was upon the Crown, and that the proof of a fixed and settled purpose was not clearly made out and that legacy-duty was not payable. In my opinion, these principles have no application to the facts of this case. Where an American is said to have lost his American citizenship and acquired British Citizenship, it would certainly have to be shown that there was an intention of abandoning his former domicil and acquiring another. This is certainly a question

of fact and depends on the intention of the person concerned, as is shown by his conduct. In a case such as the present, it must not be forgotten that originally, Eastern Pakistan was a part of India. Prior to partition, people travelled from one part of India to another, that is to say, from East Bengal to West Bengal, and nobody thought about any change of domicil, because there could be none. On partition, however, the position was 'suddenly changed. But where a person continued to be in India and where there was nothing to show that he had an intention of going back to his place of birth, and where he had openly taken an Indian passport, I think that it is safely established that he had the intention of being domiciled in India, and had become an Indian citizen. Article 5, therefore, would entitle him to be called an Indian citizen. In the facts and circumstances like this, it would, in my opinion, be oppressive to say that Government did not know the facts or did not care to know the facts and yet could summarily ask a person to uproot himself from the place of his domicil, where he has lived and worked for 17 years, and go out of the country within the space of a few days.

4. The result is that the rule must be made absolute and the Order of the Deputy Commissioner of Police, Special Branch, dated 29th June, 1959 is quashed by a writ in the nature of certiorari. There will be a writ in the nature of mandamus directing the respondent No. 1 or the respondent No. 3 from giving effect to it. So far as the respondent No. 2 is concerned, the order dated 30th June, 1959 is expressly dependent upon, and refers to, the order for expulsion from Indian territory. Since the original order has been quashed this order cannot also stand, and is accordingly, quashed by an appropriate writ and there will also be a writ in the nature of mandamus directing the said respondent not to give further effect to it. The action taken by the second respondent however has been dependant on the order made by the respondent No. 1 and is not referable to any fault of his own, This petitioner agrees not to claim wages for the period during, which he did not work. He must however be reinstated in this service. There will be no order as to costs.