
(1962) 09 CAL CK 0018
In the Calcutta High Court
Case No : Civil Revn. No. 4669 of 1960

Abdul Barik

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-09-1962

Acts Referred:

Citizenship Act, 1955 — Section 18
Citizenship Rules, 2009 — Rule 9
Constitution of India, 1950 — Article 226, 5, 6

Citation : AIR 1964 Cal 324

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : C.F. Ali and K.M. Ali, for the Appellant; S.N. Basu, for Opposite Party Nos. 2 to 5 and D.P. Pal, for Opposite Party No. 1, for the Respondent

Judgement

P.B. Mukharji, J.—This is a petition by Abdul Bank under Article 226 of the Constitution of India challenging the order No. 8381-PP/S-692/59 dated the 14th September, 1960, made by the Governor under Clause (c) of Sub-section (2) of Section 3 of the Foreigners Act, 1946 (XXXI of 1946) read with Govt. of India, Ministry of Home Affairs, Notification No, 4/3/56-1 F. I. dated the 19th April, 1958. The order is as follows:

"..... the Governor is pleased hereby to order that Sri Abdul. Batik son of late Talib Hossain a foreigner of Pakistan nationality shall not remain in India after the expiry of 7 days from the date of service of this order on him.

By order of the Governor.

Sd/- S. K. Ghosh, Dy. Secy, to the Govt. of West Bengal."

2. The petitioner's case is that he is not a foreigner of Pakistan nationality. He asserts that he is an Indian and of Indian nationality. He says further that he was born in Mymensingh in the year 1923 which is now in Pakistan. The petitioner says that he is the posthumous child of his father. At the age of 11 years he

came with some Ferang by the name of Nuru Serang of an adjoining village Sabagh to Calcutta. He came to Bhawanipore at Calcutta and was employed by a firm called Idris and Co., 46, Strand Road. Calcutta at a pay of Rs. 15/- per month with food and lodging as a sales boy. Then he is supposed to have joined as a Khalashi with M/s. E. S. N. Co., on the Strand Head, Calcutta. Thereafter he started a Pan Biri shop at 6/1 Munshigunj Road, Calcutta-23. His shop is now at 32/1 Munshigunj Road and he says that in 1950 he took a lease of those premises paying a rental to the landlord a sum of Rs. 150/- per month. According to the petitioner, he has no property in My-meusingh although he said that he had a brother who had died and who enjoyed the property of his father. The petitioner does not say that after the death of his brother sometime in 1953 what happened to those properties and whether he still has legal right to such properties or not. He was silent on the point. In support of his claim for Indian citizenship he says that he is in the electoral roll of the Legislative Assembly and annexes a copy of that electoral roll for 1956 only. Although in the petition he says that he was on the electoral roll also for 1950, but no proof of 1950 electoral roll has been submitted.

3. The petitioner's further case is that he had applied to the Collector for registration as an Indian citizen u/s 5(i)(a) of the Citizenship Act. While this application was pending the Governor made this order against him. Therefore, in his petition he asserts that no order could be made by the Governor while the application for citizenship u/s 5 of the Citizenship Act was pending. The Rule in this case was issued on the limited grounds Nos. 1 to 4 as set out in paragraph 12 of the petition. These grounds relate to the alleged pending application for citizenship u/s 5 of the Citizenship Act.

4. On the records before me the application has no merits either on facts or on law. At the outset it is necessary to say that the petitioner's whole case that the application for citizenship was pending while the Governor made the impugned order is false. The impugned order made by the Governor was made on or about the 14th September, 1960 and it was served on the petitioner on the 19th September, 1960. The petitioner did not make the application u/s 5 of the Citizenship Act until the 22nd September, 1960. The Governor's order was made before the petitioner's application for citizenship. In other words, he obtained this Rule on the 1st December, 1960, on the false allegation that the Governor had made this order while his application for citizenship was pending. In fact, his application for citizenship was made immediately after he was served with the order of the Governor, as the dates above stated indicate. The Rule, therefore, being limited on these four grounds must be discharged outright on this short point.

5. It is not for the first time that the petitioner knew that his nationality was questioned. The first order was made in the earlier part of 1959 and thereafter a restrictive order restricting his movement was made on the 7th December, 1959. During this period in 1959 the petitioner took no step to assert that he was an

Indian citizen. It was only when the Governor's order had been served upon him that he started making the case that he was an Indian citizen.

6. The petitioner's present case that he has been a citizen of India ever since he came from Mymensingh to Calcutta is contradicted by two outstanding facts. One is that the petitioner "applied for and in fact obtained a Pakistan "Passport in 1953 and an Indian Visa permitting him to stay. A Pakistan Passport could only have been obtained by the petitioner by declaring Ms Pakistan nationality. It is, therefore, plain that in 1953 the petitioner was declaring himself to be a Pakistan national even though he may have come to Calcutta in 1934 or thereafter as he now alleges. The petitioner used to stay in Calcutta with "F" category Visa and continued to renew it annually until 1956 when the Government of West Bengal gave him the exit endorsement. The Visa has not been renewed since then. In other words, he was staying in India without a valid document and therefore notice was issued oh him on the 28th August, 1959.

7. The second fact that contradicts the petitioner's present case of being an Indian national is his own admission again by making an application u/s 5 of the Citizenship Act. An application u/s 5 of the Citizenship Act can only be made by "..... any person who is not already such citizen by virtue of the constitution or by viture of any of the ether provisions of this Act....." Therefore, on the express language of this section it is clear that no application can be made or is permissible or need be made by a person who is already such a citizen by virtue of the Constitution or by virtue of any of the other provisions of the Citizenship Act. The petitioner's present case is that he had already been a citizen of India by virtue of the Constitution and the present case therefore is flatly contradicted by his making the application u/s 5 of the Citizenship Act.

8. Coming now to the petitioner's assertion that he is a citizen of India by virtue of Articles 5 and 6 of the Constitution Mr. Ali appearing in support of the petitioner contends that the petitioner comes under Article 5(c) of the Constitution as well as under Article 6(b)(i) of the Constitution. In order to come within Article 5(c) of the Constitution the petitioner has to satisfy three main conditions. One is that at the commencement of the Constitution the petitioner had his domicile in the territory of India; second is that he must have been ordinarily a resident in the territory of India; and the third is that such residence must have been not less than five years immediately preceding such commencement of the Constitution. It is only when he satisfies these three conditions under Article 5(c) of the Constitution that he shall be regarded a citizen of India. Now there is no proof before me that he has his domicile in India. He, therefore, does not satisfy the very first condition of Article 5, Admittedly the petitioner's domicile is the domicile of origin and that is Pakistan domicile. That domicile of origin continues until it is rebutted. See Cheshire on Private International Law, Fifth Edition. page 180 and the observation of Lord Macnaghten in *Winans v. A. G.*, (1904) AC 287 at p. 290 quoted there. Nothing is shown before me on the records of the present case to suggest, far less to prove,

that this domicile of origin of the petitioner has been displaced. This Indian domicile under Article 5 has to be shown at the commencement of the Constitution, that is, 26th January, 1950. The petitioner cannot show this Indian domicile because of his own application for Pakistan Passport where he himself declared to be a Pakistan national and his obtaining a Pakistan Passport in 1953, three years after the commencement of the Constitution and his continued renewal of the Visa on such Pakistan Passport until 1956. He has also to prove the other two conditions under Article 5(c) of the Constitution which require that he must be ordinarily a resident in the territory of India and that for a period not less than five years immediately before the commencement of the Constitution. No material is forthcoming to prove that he was ordinarily a resident in India for the requisite period of five years. No doubt the petitioner claims that he has been always residing here ever since he came to India in 1934. But the point is that the fact of being ordinarily a resident for the requisite period has to be proved for that particular period. No proof for this period is annexed to the petition. Proofs such as they have been put forward in the petition are proofs subsequent to this period and these proofs are certificates from persons, Municipal Trade Licence granted by the Corporation of Calcutta and the copy of the electoral roll of the State Legislative Assembly for the year 1956. But they are subsequent to the 26th January, 1950. No rent receipts even have been produced for the period of five years immediately preceding the commencement of the Constitution; no Trade Licence either even for this particular period of five years immediately before the 26th January, 1950, has been produced. On this state of materials and facts I must hold that the petitioner does not satisfy the three conditions under Article 5(c) of the Constitution of India to be a citizen of India.

9. Mr. Ali, for the petitioner, thereupon relied on Article 6 of the Constitution. He claimed to come within Article 6(a) and (b)(i) of the Constitution. That provision of the Constitution under Article 6(a) says that the claimant himself or either of his parents or any of his grandparents must have been born in India as defined in the Government of India Act, 1935. That condition is satisfied by the petitioner. But that is not the only condition. In addition to the condition so laid down in Article 6(a) of the Constitution, Sub-clause (b) (i) of that Article lays down the further condition that such person must have migrated before the nineteenth day of July, 1948 and that he has been ordinarily resident in the territory of India since the date of migration. It is here that the petitioner's case on the fact falls. The crucial word in Article 6(b)(i) is "migration". Migration does not mean mere coming over. It means something more. This word "migration" has been finally construed and the law laid down on the point by the Supreme Court in Smt. Shanno Devi Vs. Mangal Sain, . That decision lays down that the only explanation of the "Constitution makers not expressly mentioning "domicile" or the "intention to reside permanently" in Article 6 is that they were confident that in the scheme of this Constitution the word "migration" could only be interpreted to mean "come to the country with the intention of residing there permanently". Therefore, mere coming to the country will be unable to show

migration. What has to be shown is the animus and the intention to reside there permanently. This intention to reside in India permanently cannot be proved by the petitioner in this case by reason of the fact that he himself applied and obtained a Pakistan Passport on his own declaration that he was a Pakistan national in 1953-The petitioner, therefore, cannot be a citizen of India under Article 6 of the Constitution on the facts of this case.

10. Mr. Ali thereafter fell back on Rule 9 of the Citizenship Rules under the Citizenship Act. His contention is that the Collector under that Rule shall before registering a person u/s 5(i)(a), satisfy himself that the person -

(a) is of Indian origin and has been actually resident in India for six months immediately preceding the date of application;

(b) has close connections in India;

(c) has an intention to make India his permanent home;

(d) has signed the oath of allegiance as prescribed in the form of application;

(e) is of good character and is otherwise a fit and proper person to be registered as a citizen of India.

Mr. Ali contends that the petitioner has satisfied these conditions. That, however, is a disputed question of fact. It is disputed that the petitioner is a man of good character or is otherwise a fit and proper person. It is alleged that he has been involved in many criminal cases, that he kept a brothel and that he acted as a pimp and that he was even involved in a kidnapping case. It is unnecessary for me to come into those disputed questions of fact. Indeed all these allegations about residence, close connection in India, intention to make India permanent home, are disputed questions of fact in this case. The Supreme Court in *The Union of India (UOI) Vs. Ghaus Mohammad*, observed that where the question whether the applicant was a foreigner was a question of fact and where there was a great deal of dispute on the question which would require a detailed examination of evidence a proceeding under Article 226 of the Constitution would not be appropriate for a decision of the question.

11. Mr. Ali then relied on three more Supreme Court decisions none of which, in my opinion, helps the petitioner. One is the decision in *State of Andhra Pradesh Vs. Abdul Khader*, . As pointed out there at page 1469 the Supreme Court expressly declared -

"The question whether a person is an Indian citizen or a foreigner, as distinct from the question whether a person having once been an Indian citizen has renounced that citizenship and acquired a foreign nationality, is not one which is within the exclusive jurisdiction of the Central Government to decide. The Courts can decide it and, therefore, the learned Magistrate could have done so. He however, did not decide that question, that is, find that the respondent had been a Pakistani national all along. On the evidence on the record such a finding would

not have been warranted.""

Here on the facts, the initial hurdle of the petitioner is that he has not established that he ever had Indian citizenship, far less the fact of renouncing it. Here his initial difficulty is that he never had Indian domicile on the facts of the case. He had Pakistan domicile of origin and it is further corroborated by the fact that even after the commencement of the Constitution, in the year 1953, it was the Pakistan State which has given him a Passport as a Pakistan national,

12. The other case to which Mr. AH made reference is *Izhar Ahmad Khan Vs. Union of India (UOI)*, . A majority decision in that case holds in favour of the Constitutional validity of the rule of evidence as prescribed by Section 9(2) of the Citizenship Act and lays down that a passport obtained by a person from a foreign country is relevant in an enquiry as to the citizenship of the person holding the passport, See the observation of Gajendragadkar, J., in *Izhar Ahmad Khan Vs. Union of India (UOI)*, .

13. The last decision to which reference is made is the unreported decision of the Supreme Court in *The Government of Andhra Pradesh Vs. Syed Mohd. Khan*, . This decision explains the previous decision of the Supreme Court in *Izhar Ahmad Khan Vs. Union of India (UOI)*, . It was contended there that *Izhar Ahmad*'s decision showed that as soon as a person acquired a passport from a foreign Government, his citizenship of India automatically came to an end and therefore in such a case it was not necessary that the Central Government should hold any enquiry and make a finding against the person before the order of deportation was made against him. This impression was corrected by saying:

"It is plain, therefore, that the observations on which Mr. Tatachari relied were not intended to mean that as soon as it is alleged that a passport has been obtained by a person from a foreign Government, the State Government can immediately proceed to deport him without the necessary enquiry by the Central Government. Indeed, it is clear that in the course of the judgment, this Court has emphasised the fact that the question as to whether a person has lost his citizenship of this country and has acquired the citizenship of a foreign country has to be tried by the Central Government and it is only after the Central Government has decided the point that the State Government can deal with the person as a foreigner."

I do not see how this case helps the petitioner because here there is no question of the petitioner losing the Indian citizenship at all and acquiring citizenship of a foreign country. As I have indicated above, here the fact is that the petitioner never acquired Indian citizenship at any time. Besides there is no question of any enquiry here in this case.

14. On behalf of the State it has been contended before me that the petitioner is even out of Court by reason of the fact that he cannot come u/s 5(1)(a) of the Citizenship Act but could at best come u/s 5(1)(e) of the Act after overcoming the initial hurdle that an application can only be made by a person who is not

already a citizen by virtue of the constitution or by virtue of the Act. Now Section 5(1)(e) of the Citizenship Act says that the application can be made by persons of full age and capacity who are citizens of a country specified in the First Schedule. The First Schedule of the Citizenship Act includes many other countries including Pakistan. It is, therefore, said that the petitioner being a citizen of Pakistan by reason of the facts mentioned above he can, if at all, only make an application u/s 5(1)(e) of the Act and not u/s 5(1)(a) of the Act. For this purpose my attention was drawn to the decision of Gaurul Hasan and Others Vs. The State of Rajasthan and Another, , where it is laid down that clauses (a) and (e) of Section 5 of the Citizenship Act are mutually exclusive and that even if there is some overlapping between Clauses (a) and (e) where Clause (e) applies, Clause (a) will not apply. It is, however, not necessary for me for purposes of this application to decide that point but only to say this that in that view of the matter the application by the petitioner to the Collector really was without jurisdiction because the Collector had no authority under Rule 8 of the Citizenship Rules which provides :

"The authority to register a person as a citizen of India u/s 5(1)(a) or Section 5(1)(d) shall be the Collector, and in any other case under these Rules, the Central Government."

Finally, Mr. Bose, on behalf of the State of West Bengal, has drawn my attention to Section 14 of the Citizenship Act that even where Sections 5 and 6 of that Act apply the prescribed authority or the Central Government may, in its discretion, grant or refuse an application under these sections without assigning any reason for such grant or refusal. The point, he wished to press, is that it is a matter of discretion.

15. Lastly, the petitioner has joined the Union of India as a party respondent to this application. There is no case against the Union of India at all because (i) the order complained of was not made by the Union Government and (2) the Union of India can only come as an appellate authority after the order of the State Government has been made and (3) no relief even is asked from the Union of India and (4) no vires either of the Act or the Rules has been challenged as against the Constitution to make the Union of India a necessary or a proper party.

16. For these reasons this petition must fail and the Rule must be discharged. Interim orders, if any, are vacated. There will be no order as to costs.