

(1966) 04 BOM CK 0005

In the Bombay High Court

Case No : Appeal No. 21 of 1965 and Miscellaneous Petition No. 336 of 1963

A.G. Kazi and Others

APPELLANT

Vs

C.V. Jethwani

RESPONDENT

Date of Decision : 12-04-1966

Acts Referred:

Constitution of India, 1950 — Article 10, 14, 19, 21, 226
Passports Act, 1967 — Section 3

Citation : AIR 1967 Bom 235 : (1966) 68 BOMLR 529

Hon'ble Judges : Tambe, C.J; Bal, J

Bench : Division Bench

Advocate : Y.B. Rege and S. Baptista, instructed by P.G. Gokhale, for the Appellant; S.J. Sorabji and A.J. Rana, for the Respondent

Judgement

Tambe, C.J.

This appeal under the Letters Patent raises an important question as to the interpretation of Article 21 of the Constitution, and the question raised is whether the expression "personal liberty" occurring in the said Article includes the right to travel abroad. The second important question that arises is whether the refusal of a passport to the respondent by appellant No. 1 has resulted in the contravention of Articles 21 and 14 of the Constitution.

(2) Facts giving rise to this appeal in brief are: It is not in dispute that the respondent is a citizen of India. According to him, he is a partner of a firm in Bombay which carries on business of Bankers. Exporters and Importers. He is also a partner of a firm doing business at Dubai in Persian Gulf, which carries on the business of Indent Agents and Importers, According to the respondent passports were granted to him during the period from October 1952 to October 1962 to enable him to make trips to Dubai and certain other ports in the Persian Gulf. The passport that had been granted, expired on 28th October 1962. On 10th January 1963, the respondent applied to the Regional Passport Officer (second appellant before us) for the grant of a new passport for a period of three

years. That application was rejected by the Assistant Passport Officer, (first appellant before us). There was certain correspondence between the respondent and appellants Nos. 1 and 2, but ultimately by a further letter of date 27th June 1963 he was informed that the passport authorities had nothing to add to their previous letter date 24th May 1963. The respondent then filed a writ petition under Article 226 of the Constitution for an appropriate writ or direction to quash the order refusing to grant him a passport and for a direction against the appellants requiring them to grant and issue to him a passport as applied for by him. The respondent founded his petition principally on three grounds. According to him, the refusal of the passport was violative of his fundamental rights conferred on him by Article 19(1)(d) to (g). Article 21 and Article 14 of the Constitution. It is not necessary for us to state the facts pleaded by the respondent in support of his case under Article 19(1) (d) to (g), inasmuch as it was conceded before the trial Court that there being a proclamation of Emergency under Art. 352, enforcement of the rights under Article 19 was suspended by reason of Article 358 of the Constitution. It is, therefore, necessary to refer only to the pleas raised by the respondent as regards his contention relating to Articles 21 and 14 of the Constitution. According to the respondent it is not possible for him to leave India without a passport. Government having issued instructions to the shipping companies and Airlines not to take on board passengers leaving India unless they possess a valid passport. It is therefore impossible for him to leave India without a valid passport. Secondly it is alleged that the passport is necessary for reentry into India, and on this ground also it is claimed that possession of a valid passport is absolutely essential for going abroad both because without a passport no shipping company or an Airline would book a passage for him, and secondly because it would not be possible for him to return to his country. He further alleged that it was absolutely necessary for the purposes of his business to go to Dubai and to return to India as he had been doing for so many years. The right to travel abroad and return to India, according to the respondent, is a part of his "personal liberty" assured to him under Article 21 of the Constitution. He could be deprived of that liberty only "according to the procedure established by law" as provided in the said Article. There is no procedure prescribed by any law regulating the grant or refusal of a passport. The refusal of the passport has been arbitrary and thus violates the respondent's right under Article 21 of the Constitution. We would refer to the averments of the respondent relating to his contentions founded on the provisions of Article 14 later when we deal with them. We are proposing first to deal with his contentions relating to Article 21.

(3) As regards the aforesaid contentions of the respondent, the reply is contained in the affidavit of the Regional Passport Officer, the second appellant thereto. He denied that it was absolutely necessary for the respondent in the interests of his business to have a passport or to go abroad or to return to India. According to him, the grant of a passport is within the absolute discretion of the Union of India and, when granted it is in the nature of a request to another

State, requesting that State to give certain facilities and protection while the citizen of the Union of India is in the territory of the foreign State. There was no right in the respondent to have a passport issued to him and there was no statutory obligation on him (2nd appellant) or even on the Union of India to issue a passport to the respondent on an application made by him. The issuance of a passport is at the pleasure of the President of India, and he and appellant No. 1 act on the executive instructions received by them from the Union of India in regard to the grant or refusal of the passport. The Government of India by their letter of 1st May 1963 informed him that he passport facility should be refused to the respondent and that the respondent's name should be blacklisted for a period of two years. It is on account of these instructions that the passport was refused to the respondent.

(4) On behalf of the Union of India, the third appellant before us, an affidavit in reply has been filed by the Under Secretary to the Government of India, Ministry of External Affairs, and in the said affidavit, after adopting the pleas contained in the affidavit of the second appellant, it has been further pleaded that there was no legal prohibition preventing a citizen from leaving India: instructions issued to the shipping companies and the Airlines asking them not to book passage without a passport do not constitute a legal bar preventing a citizen from leaving India; grant of a passport is within the absolute discretion of the Government of India, and there is no right conferred on a citizen to have a passport issued to him; refusal of a passport is a non-statutory administrative action and is not subject to judicial review.

(5) The learned Judge held that the compendious expression "personal liberty" used in Article 21 includes in its ambit the right to go abroad, and that a person cannot be deprived of this right "except according to procedure established by law" as laid down in Article 21. The issue of passport is not regulated by any statute. Every citizen of India, therefore, is, as a right, entitled to have a passport issued to him. In absence of a law regulating the grant or refusal of a passport, the right to equal protection contained in Airlines 14 is available both against legislative as well as executive acts. The claim of the Government of India that the grant of a passport is in its absolute discretion is ex facie discriminatory, though the act may be an administrative act. On those findings, the conclusion to which the learned Judge reached, in this words is:

"The conclusion to which I have reached does not imply that every Indian citizen must have an absolute and unrestricted right to receive a passport. It implies that, in the absence of any legislative provision to guide the exercise of the discretion in the matter of issuing passports, the Government of India have no alternative but to issue passports to all Indian citizens who apply for them."

In this view of the matter, the learned Judge quashed the aforesaid order of 24th May 1963, refusing passport facilities to the respondent, and the appellants before us were directed to grant and issue to the respondent before us a passport as applied for by him by his application dated 10th January 1963. It

was further directed that the passport be issued to the respondent within two weeks from the date of the order i.e. 26th February 1965. Against this judgment of the learned Judge this appeal has been filed.

(6) Mr. Rege, learned Counsel for the appellants, contends that the right to cross the Indian frontier and to go to a foreign country cannot be spelt out of the expression "personal liberty" in Article 21, though in the American Constitution it is included in the expression "liberty". The Constituent Assembly has intentionally cut down the connotation of "liberty" by limiting its extend to "personal liberty" only. By including the right to travel abroad in the expression "personal liberty" we would be practically giving it the same meaning as "liberty" simpliciter. There is no law regulating the issue of a passport laying down what conditions are to be satisfied before it could be issued or on what grounds it could be refused. The grant or refusal of a passport, therefore, is a matter within the discretion of the executive. The grant of a passport is a political function. In England, the power to refuse a passport is derived from the Royal prerogative and is completely immune from judicial review. Passport serves purely a diplomatic protection of the issuing State and a request for safe passage to other States. It should, therefore, be held that the insurance of a passport is purely a discretionary act of the department charged with the conduct of foreign affairs.

(7) Mr. Sorabji, learned counsel for the respondent, on the other hand, contends that the expression "personal liberty" includes a general right of a citizen of free movement or locomotion both within the country and also of travelling abroad and return to the home country without any impediment direct or indirect. This right emanates from the freedom of a person. The right of free movements within the country is recognised and conferred on the Indian citizen by Article 19(1)(d) of the Constitution and controlled to the extent provided by Clause (5) of Article 19. The other right of travelling abroad and return to the country without impediment direct or indirect is contained in the expression "personal liberty" occurring in Article 21 of the Constitution. The reason for the use of the expression "personal liberty" in Art. 21 was not to narrow down the concept of "personal liberty" but was to avoid over-lapping between the specific freedoms mentioned in Article 19, and other kinds of personal liberty. The refusal to grant a passport without there being any provision regulating the grant or refusal of a passport is violative of his rights under Article 21 of the Constitution.

(8) The first question that arises for consideration is the scope and ambit of the expression "personal liberty" occurring in Article 21 of the Constitution. Our Constitution has been enacted by the Constituent Assembly in the year 1950. It is well known that in framing the Constitution, the members of the Constituent Assembly have drawn from various sources of constitutional law prevailing at the time in other democracies, and in particular the democracies in England and in America. It would, therefore be advantageous to see what was the meaning given to the expression "personal liberty:" in those countries, and whether the right to travel abroad was recognised as one of the attributes of "personal

liberty". The right to go abroad was recognised as early as in the year 1215 in Article 42 of the Magna Carta which reads:

"It shall be lawful to any person for the future to go out of Kingdom, and to return, safely and securely, by land or by water, saving his allegiance to use unless it be in time of war, for some short space, for the common good of the Kingdom; excepting prisoners and outlaws, according to the laws of land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above"

Mr. Rege argued that it may be that this article found place in the Magna Carta of 1215, but the provisions thereof have undergone certain changes in the years 1216, 1217 and 1225. In the final version this article has been omitted. The only article that has bearing on "personal liberty" is Article 39 of the Magna Carta. In support, he has read observations to that effect from Taswell Langmead's English Constitutional History, 11th Ed at page 77. It is indeed true that the aforesaid article was omitted in the final version of Magna Carta of 1225, which is the version of the Magna Carta engrossed in the statute book of England. But that does not, however, mean that the right to travel abroad was not recognised in England as an attribute of "personal liberty" as we shall presently show. Article 39 of the Magna Carta is in following terms:

"No free man shall be taken or imprisoned or disseised, or outlawed, or exiled, or any ways destroyed; nor will we go upon him, not judgment of his peer, or by the law of the land,"

The argument of Mr. Rege virtually means that the expression "personal liberty" means "liberty from physical restraint" either by way of arrest or by imprisonment and nothing more. It is difficult for us to accept this argument.

(9) Chapter II of Odgers on the Common Law related to "Rights common to all", and at page 5, it is observed:

"Under this term (Rights common to all) we group those absolute rights which every one in the realm possesses which do not depend upon the ownership of property, or the tenure of any office, or the existence of any contract between the parties.

First among those stands the right of personal security.

"The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation, to each of which he has a natural inherent right which cannot be wantonly destroyed, infringed or restricted without a manifest breach of civil liberty. Every citizen enjoys the right of personal liberty; he is entitled to stay at home or walk abroad at his pleasure without interference or restraint from others."

At page 298 (of SCR): (at p. 110 of AIR), in A.K. Gopalan Vs. The State of Madras, , Mr. Justice Das had reproduced the following passage from Black-stone:

"Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."

Dennis Lloyd in his book "The Idea of Law". at page 160 observed:

"Freedom to travel, both within and out side the confines of the territory of the State raises important issues of personal freedom. This type of freedom has largely been regarded as axiomatic in modern times in Western Europe, but certainly no in Eastern Europe where restrictions on travel and residence in particular cities or territories have been traditionally severely restricted."

Lord Denning in his Book "Freedom under the law", under the heading "Personal Freedom" observed:

"Let me first define my terms. By personal freedom I mean the freedom of every law-abiding citizen to thin what he will, to say what he will, and to go where he will on his lawful occasions without let or hindrances changes that have come about in the other freedoms, this freedom has in our country remained intact."

From the aforesaid observations reproduced above, it becomes clear that the right to travel freely without restraint both within the country and outside the country has been accepted as one of the attributes of "personal liberty" and an absolute right of a British citizen in England in common law. Mr. Rege, however, pointed out the following passage at page 207 from Dicey's "Introduction to the study of the Laws of the Constitution":

"The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification."

Laying emphasis on these observations, Mr. Rege argued that in England the expression "personal Liberty" is understood only in the sense of freedom from arrest, imprisonment or any other physical coercion, and not others. Having regard to the passages quoted from the aforesaid authors. It is difficult to accept the argument of Mr. Rege. On the other hand., it appears that the learned author was dealing with the topic "Right to personal freedom", and it is in the context of this subject that the aforesaid observations, on which reliance has been placed, have been made.

(10) Turning now to the position in America, the question directly arose in *Rockwell Kent v. John Foster Dulles* (1958) 2 L Ed 1204. In that case, the Secretary of State refused to issue passports to each of the two applicants because of their refusal to file an affidavit concerning their membership in the Communist Party. Both of them had instituted suits against the Secretary of State, praying that they be granted a passport. They had lost in the lower Courts. By majority, the Supreme Court held that the Secretary of State was not

justified in withholding the passport. Considering the right to get a passport, in the majority judgment at page 1210, it has been observed:

"The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So must be conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta, Chafee. "Three Human Rights in the Constitution of 1787 (1956), 171, 181, 187 et. seq., shows how deeply engrained in our history this freedom of movement is. Freedom of movement across the frontiers in either direction, and inside frontiers as well, was a part of our heritage."

The aforesaid passage clearly indicates that the right to travel abroad and return to the country was part of the "personal liberty" of an American citizen and was considered as part of the heritage of an American citizen. Mr. Rege contended that the position as stated in the aforesaid passage is only on a concession made by the Solicitor General and it is not a finding of the Court. We fail to see what difference it makes that the observations have been made by the court on a concession made by the Solicitor General. It does not mean that had no concession been made by the Solicitor General, the court would have held otherwise. In fact, in support of the concession made, the Court has reproduced a passage from Chafee's book. Further, the aforesaid decision in (1958) 2 L Ed. 1204 has been affirmed by the Supreme Court in a subsequent decision in *Herbert Aptheker v. Secretary of State* (1964) 12 L Ed 992, and at page 997, the following passage from (1958) 2 L Ed 1204 has been cited with approval:

"The right to travel is a part of the "Liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country may be as close to the heart of the individual as the choice of what he eats or wears, or reads. Freedom of movement is basis in our scheme of values."

(11) On 10th December, 1948, the General Assembly of the United Nations proclaimed the "Universal Declaration of Human Rights", and the preamble indicates that this declaration of human rights has been made with a view that they should be recognised as inalienable rights of all human beings inasmuch as experience has shown that the disregard of these rights has compelled men to have recourse as the last resort to rebellion against tyranny and oppression. It was, therefore considered essential that these human rights should be protected by the rule of law. Article 13 thereof provided:

"1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country."

(12) Thus it would be seen that at the time our Constitution was enacted, the right to travel abroad and return back was considered as an absolute right and one of the attributes of "personal liberty" in England and in America as the "heritage of the American citizen". The General Assembly of United Nations and the Assembly of Representatives of Civilised nations had also recognised it as one of the attributes of human rights. Mr. Rege argued that it should not be assumed that India, though it was a member of the United Nations Assembly, has adopted all the human rights proclaimed in the Declaration. In this connection, he read to us the following passage at page 744 from Oppenheims International Law, Vol. I, (Peace) 8th Ed.:

"Pending the adoption of an International Bill or covenant of Human Rights embodying defined and enforceable legal obligations, the General Assembly of the United Nations deemed it desirable to adopt, in 1948, a declaration of principles and standards in the form of a Universal Declaration of Human Rights. As stated by most of the governments which voted for its adoption, the Declaration is not an instrument which is legally binding either directly or indirectly. In particular, there is no warrant for assuming that it can properly be resorted to for the interpretation of the provisions of the charter in the matter of human rights and fundamental freedoms. This absence of the element of binding obligation probably explains the willingness of Governments to subscribe to the wide terms of the Declaration."

It is indeed true that the said Declaration is not a legally binding document creating any obligations, and it was not legally binding even on the countries that had voted for the passing of the Declaration to adopt them in their Constitution. But nonetheless it could safely be presumed that a country that was a member at the time of the Declaration was proclaimed would adhere to the Declaration, or, at any rate, make its best possible efforts to adhere to it. In considering the question whether rights declared in Art. 26(3) of the Declaration of Human Rights have been adopted by India, in *Bombay Education Society Vs. State of Bombay*, Chagla, C. J. at P. 654 (of Bom LR): (at p. 473 of AIR) observed:

"Our constitution, be it said to its glory, has embodied most of the articles contained in the Declaration of Human Rights, and we would need very strong argument before we come to the conclusion that our Constitution has denied to the parent this fundamental right of choosing the kind of education that his child should have."

These observations with the necessary variations would, in our opinion, apply with equal force to the consideration of the question whether Art. 13 of the Declaration has been embodied in our Constitution. Our Constitution aims, as the Preamble would show, to secure to all its citizens justice, liberty and equality and promote amongst all the people of India fraternity assuring the dignity of the individual and the unity of nation. It is difficult to assume that the Constitution so nobly envisaged has not included this basic attribute of "personal liberty" in Art 21. Part III of the Constitution relates to Fundamental Rights, and Art 21 reads:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

In our opinion, the language used in the Article also indicates that the expression "personal liberty" is not confined only to freedom from physical restraint, i.e., freedom from arrest, imprisonment or any other form of physical restraint, but includes a full range of conduct which an individual is free to pursue within law, for instance, eat and drink what he like, sleep when and as long as he likes, say what he likes, travel wherever he limes, go wherever he likes, follow profession vocation or business he likes, of course in the manner and to the extent permitted by law: In short, "personal liberty" consists of liberty to do what one wills to the extent permitted by law. Had the Constituent Assembly intended to restrict "personal liberty" to freedom from arrest, imprisonment or any other manner of physical restraint, the words used would have been "personal security" and not "personal liberty". Right to "personal security" and right to "personal liberty" are two distinct and separate concepts well understood in law;

(13) We would now turn to the decisions in which the expression "personal liberty" occurring in Art. 21 has been considered by their Lordships of the Supreme Court.

(14) The first case is reported in A.K. Gopalan Vs. The State of Madras, . The question that was being considered was whether the Preventive Detention Act wither wholly or in part had infringed the fundamental right of a citizen as to freedom of movement. It was held by the majority that the Act was not ultra vires. In consideration of the question. both the scope and ambit of Arts. 19(1) (d) and 21 were considered. The question has been elaborately considered by Das, J. at page 297 (of SCR): (at p. 110 of AIR). His Lordships observed:

"Whatever the intentions of the Drafting Committee might have been, the Constitution as finally passed has in Art, 21 used the words "personal liberty" which have a definite connotation in law as I have explained,. It does not mean only liberty of the person but it means liberty or the rights attached to the person (jus personarum)."

Explaining the rights attached to the person. His Lordship at page 291 (of SCR): (at p.108 of AIR) observed:

"Civil rights of a person are generally divided into two classes, namely, the rights attached to the person (jus personarum) and the rights to things, i.e., property (jus rerum). Of the rights attached to the person, the first and foremost is the freedom of life, which means the right to live i.e., the right that one's life shall not be taken away except under authority of law. Next to the freedom of life comes the freedom of the person, which means that one's body shall not be touched, violated, arrested or imprisoned and one's limbs shall not be injured or maimed except under authority of law. The truth of the matter is that the right to live and the freedom of the person are the primary rights attached to the person. If a man's person is free, it is then and then only that he can exercise a variety

of other auxiliary rights, that is to say, he can, within certain limits, speak what he likes, assemble where he like, form any associations or unions, move about freely as his "own inclination may direct". reside and settle anywhere he likes and practise any profession or carry on any occupation, trade or business. These are attributes of the freedom of the person and are consequently rights attached to the person. It should be clearly borne in mind that these are not all the rights attached to the person. Besides them there are varieties of other rights which are also the attributes of the freedom of the person. All rights attached to the person are usually called personal liberties and they are too numerous to be enumerated. Some of these auxiliary rights are so important and fundamental that they are regarded and valued as separate and independent rights apart from the freedom of the person

Personal liberties may be compendiously summed up as the right to do as one pleases within the law. I say within the law because liberty is not unbridled licence. It is what Edmund Burke called "regulated Freedom".

It would be noticed that some of the rights attached to the person are expressly conferred on citizens by Art. 19, and as the provisions of Cls. (2) to (6) of Art. 19 would indicate, reasonable restriction on the exercise thereof could be placed by a valid law enacted for certain purposes mentioned in those clauses. The rest of the auxiliary personal rights are included in the expression "personal liberty" occurring in Art. 21 of the Constitution. The difference between Art 19 and Art. 21 is that rights conferred by Art, 19 which certainly are important personal rights, are conferred only on the citizens and restrictions thereon could be imposed by law in a limited manner stated in the said clauses. The rest of the personal rights are conferred not only on the citizens but on all including citizens. Every person could be deprived of these rights in their totality "according to procedure established by law". The expression "law" has been construed by the Supreme Court as law enacted by the Legislature of the State or the Central as the case may be. At page 299 of the Report (of SCR): (at p. 111 of AIR). His Lordship further observed;

"In my judgment , Art. 19 protects some of the important attributes of personal liberty as independent rights and the expression "personal liberty" has been used in Art. 21 as a compedious term including within its meaning all the varieties of rights which go to make up the personal liberties of men."

Dealing with the argument that the right of free movement is confined only to the limits of India. His Lordships further at the bottom of page 299 and at page 300 (of SCR): (at p. 111 of AIR) observed:

"It is argued on the authority of a decision of a Special Bench of the Calcutta High Court presided over by Sen, J. in Sunil Kumar Bose and Others Vs. The Chief Secretary to the Government of West Bengal and Another, that the words "throughout the territory of India" occurring in that sub-clause only indicate that our Constitution does not guarantee to its citizens the right of free movement in

or into foreign territory and that those words have been added to save passport restrictions. I am unable to accept this interpretation. Our Constitution cannot possibly given to any of its citizens any right of free movement in a foreign country and it was wholly superfluous to specifically indicate this in the Constitution, for that would have gone without saying."

His Lordships further at page 301 observed:

"Art. 19 (1) (d) is a guarantee against unfair discrimination in the matter of free movement of the Indian citizen throughout the Indian Union. In short, it is a protection against provincialism. It has nothing to do with the freedom of the person as such. That is guaranteed to every person, citizen or otherwise, in the manner and to the extent formulated by Art. 21."

It would be noticed that the expression "personal liberty" has been construed by His Lordship not in a restricted sense of freedom from arrest and detention, but in a very wide sense as including all the personal rights which have not been expressly included in Art. 19 of the Constitution. Mr. Rege, however, contended that it may be that the expression "personal liberty" has been construed in a wider sense both by Fazl Ali, J. as well as Das, J., but certain observations of Their Lordships clearly indicate that the right to travel abroad is not included in the expression "personal liberty". He first drew our attention to the observations of Fazl Ali, J. at page 139 of the report (of SCR): (at p. 49 of AIR):

"In my opinion, the words "throughout the territory of India" were used to stretch the ambit of the freedom of movement to the utmost extent to which it could be guaranteed by our Constitution. The Constitution could not guarantee freedom of movement outside the territorial limits of India, and so has used those words to show that a citizen was entitled to move from one corner of the country to another freely and without any obstruction. "Throughout" is an amplifying and not a limiting expression, and I am surprised to find that the expression "throughout the territory of India", which was used to give the widest possible scope to the freedom of movements, is sought to be construed as an expression limiting the scope and nature of freedom."

It is difficult to read in these observations any finding giving by His Lordship that the right to travel abroad is not included in the expression "personal liberty". These observations have to be understood in the context in which they have been made. His Lordship was dealing with the contention which could best be reproduced in His Lordship's words (p.138 of SCR): (at p. 49 of AIR):

"There can therefore be no doubt that freedom of movement is in the last analysis the essence of personal liberty, and just as a man's wealth is generally measured in this country in terms of rupees, annas and pies, one's personal liberty depends upon the extent of his freedom of movement. But it is contended on behalf of the State that freedom of movement to which reference has been made in Art. 19(1)(d) is not the freedom of movement to which Blackstone and other authorities have referred, but is a different species of freedom which is

qualified by the words "throughout the territory of India". How the use of the expression "throughout the territory of India" can qualify the meaning of the rest of the words used in the article is a matter beyond my comprehension."

It is these contentions which His Lordship was dealing with, and in making the aforesaid observations, all that is stated is that the Constitution of no country can guarantee freedom of movement to its citizen beyond the territorial limits of the country, and it is in this sense that the words "throughout the territory of India" were used. The words were not used with any objective of restricting the ambit of right of freedom or the expression "personal liberty". It has to be kept in mind that what we are concerned with is whether a person has got a right has been included in the expression "personal liberty" occurring in Article 21. It is altogether a different question from whether that person would also have the liberty of free movement in the foreign country to which he goes. That of course would depend on the state of law in that country. Right to travel abroad is a right distinct and separate from the right of freedom of movement in a foreign country. The observations of Das. J. on which reliance was placed, is the last sentence of the observations at p. 300 (of SCR): (at p. 111 of AIR) which we have already quoted above. It reads:

"Our Constitution cannot possibly give to any of its citizens any right of free movement in a foreign country.. . . ."

We have quoted in extenso the observations of His Lordship of which the aforesaid sentence forms part, and it is abundantly clear that these observations have not been made as indicating a restriction on the right of a person to travel abroad as an attribute of his "personal liberty".

(15) The subsequent decision of Their Lordships reported in *Kharak Singh Vs. The State of U.P. and Others*, leaves no doubt that the expression "personal liberty" has not been used in the restricted sense of freedom from arrest and detention but has been used in a much wider sense. The petitioner in that case was prosecuted in a dacoity case, but was released as there was no evidence against him. The police, however, opened a history sheet against him. He was put under surveillance as defined in Regulation 236 of the U. P. Police Regulations. Surveillance involved secret picketing of the house or approaches to the house of the suspects, domiciliary visits at night, periodical enquiries by officers not below the rank of Sub-Inspector into repute, habits, association, income, expenses and occupation, the reporting by constables and chaukidars of movements and absences from home. the verification of movements and absences by means of inquiry slips and the collection and record on a history sheet of all information bearing on conduct. The petitioner filed a Writ application under Art 32 of the Constitution , challenging the constitutional validity of Ch. XX of U. P. Police Regulations in which Regulation 236 also occurred. the defence of the State of U. P. was that the impugned Act did not constitute an infringement of any of the freedoms guaranteed by Part III of the Constitution, and even if they were, the restrictions imposed by the regulations were reasonable

restrictions on the said freedoms. By majority, the Supreme Court held that out of the five kinds of surveillance referred to in Regulation 236, the part dealing with domiciliary visits was violative of Art. 21 of the Constitution and as there was no law on which the same could be justified it must be struck down as unconstitutional, and the petitioner was entitled to a writ of mandamus directing the respondent not to continue domiciliary visits. The minority judgment, however, took the view that the entire regulation 236 relating to the surveillance was unconstitutional. The question thus that arose for consideration was whether the expression "personal liberty" includes the right of free movement as well as right of privacy. The view taken by the Supreme Court clearly indicates that the interpretation put on the expression "personal liberty" was not in the restricted sense of freedom from arrest and detention only. Mr. Rege however, contended that it may be that the expression "personal liberty" includes rights other than the freedom from arrest and detention, but nonetheless the following observations in the majority judgment appearing at page 347 clearly indicate that in the opinion of the majority, the expression "personal liberty" did not include the right to move about or right of locomotion. The sentence on which reliance has been placed is in following terms:

"We shall now proceed with the examination of the width, scope and content of the expression "personal liberty" in Art. 21, Having regard to the terms of Art. 19(1)(d), we must take it that expression is used as not to include the right to move about or rather of locomotion."

The aforesaid observations read by themselves no doubt support the contention of Mr. Rege. But, again these observations have to be read in their proper context. The entire passage in which the aforesaid sentence occurs is as follows:

"We shall now proceed with the examination of the width, scope and content of the expression "personal liberty" in Art. 21. Having regard to the terms of Art 19(1)(d), we must take it that expression is used as not to include the right to move about or rather of locomotion. The right to move about being excluded its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that "personal liberty" is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberty" of man other than those dealt with in the several clauses of Art. 19(1)(d). In other words, while Art. 19(1) deals with particular species or attributes of that freedom. "personal liberty" in Art. 21 takes in and comprises the residue."

It would be abundantly clear, when the entire passage is read, that what Their Lordships have stated is that the right of locomotion included or referred to in Art. 19(1)(d) is excluded from the expression "personal liberty" occurring in Art. 21. Now, the right that has been referred to in Art. 19(1)(d) is a right of free

movement within the territories of India, and that right has been excluded from the expression "personal liberty", but that does not mean that the right to travel abroad, which does not form part of the contents of Art. 19(1)(d) is also excluded from the expression "personal liberty". On the other hand, the wider construction put on the expression "personal liberty" by Their Lordships, and in particular, the clear observation of Their Lordships that "personal liberty" includes within itself all varieties which go to make up "personal liberty" of a man other than those dealt with in the several clauses of Art. 19(1), clearly indicates that the right to travel abroad, if that be an attribute of "personal liberty" of man, is not excluded from the expression "personal liberty". We have already reproduced extracts in extenso which indicate the right to travel abroad is one of the attributes of "personal liberty" as understood in England as well as in America. It must, however, be noticed that in neither of the two decisions of Their Lordships, the question as to whether the right to travel abroad is included in the expression "personal liberty" directly arose for decision. The view taken by Their Lordships, however, lends support to the view that the expression "personal liberty" includes the right of freedom to travel abroad. The question directly arose for decision before the Kerala and Mysore High Courts.

(16) In *Francis Manjooran and Others Vs. Government of India, Ministry of External Affairs, New Delhi and Others*, the petitioner before the High Court was a graduate in Medicine and Surgery. He obtained facilities for higher training and studies in the United State of America and applied for a passport. The application was rejected. He filed a writ application, challenging the validity of the rejection. According to the petitioner, the rejection of his application was violative of Art. 21 of the Constitution. The case was heard by a Full Bench of the High Court, and though separate judgments have been written, all the three learned Judges have agreed that the expression "personal liberty" occurring in Art. 21 of the Constitution includes the right to travel abroad, and return to the country. The learned Chief Justice held:"

"Next to personal security, the law regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct without imprisonment or restraint, unless by due course of law:

The right to travel, except to the extent provided in Art. 19(1) (d), is within the ambit of the expression "personal liberty" as used in Art. 21 and, as a passport is essential for the enjoyment of that right the denial of a passport amounts to a deprivation of that right." Raman Nayar, J. held "the right of free movement whether within the country or across the frontiers, either in going out or in coming in, is a personal liberty within the meaning of Art. 21." Gopalan Nambiyar, J. held "right to travel beyond India or at least to cross its frontiers is within the purview of Art. 21. Personal liberty in Art. 21 was not intended to bear the narrow interpretation of freedom from physical restraint".

(17) Facts in *Dr. S. S. Sadashiva Rao v. Union of India* 1965 (44) M LJ 605 were: The petitioners were medical graduates. They were desirous of having higher studies, some in U. S. A. and some in U. K. For that purpose, each of them submitted an application to the Regional Passport Officer for a passport. The request was not complied with. Each of the petitioners, therefore, filed a writ application under Art. 226 praying for a writ of mandamus or order or direction requiring the passport officer, Madras, to issue a passport. One of the questions that fell for consideration was whether the right to go abroad was included in Art. 21. It has been held:

"The right of a citizen to go abroad must be held to fall within Art. 21 of the Constitution. thus a citizen has a fundamental right under Art. 21 to go abroad and also a fundamental right to come back to this country."

(18) Facts in *Misc. Petn. No. 167 of 1959 (Bom)*, *L. C. Bhatia v. K. S. Dilipsinhji*, decided by this Court on 16th June 1959 were: The petitioner was to travel to Zurich, but his passport along with some other articles had been seized by the Customs Officer. The action of the Customs Officer was challenged by a writ petition. The questions that arose for consideration related to the validity of the confiscation of the passport, and one of the contention raised on behalf of Government was that a passport was a mere request and not property, while on behalf of the petitioner it was contended that the passport is not a mere request but a document of travel, to obtain which a citizen has a right and for this reliance was placed on Art. 21. On behalf of the State it was argued that the right of movement of a citizen did not fall within the term "personal liberty" and therefore, though passport was a necessary document to enable a citizen to make his re-entry into this country, Government can in its absolute discretion refuse to grant it, seize or cancel it after having issued it, and that would not be a breach of Art. 21. After considering certain decisions, Mr. Justice Shelat (as he then was) observed:

"It follows from these observations that freedom of movement is included in the compendious term "personal liberty". That being so, prima facie a citizen of this country is entitled to a passport unless there is some statutory provision disabling him to obtain it. But Mr. Baptista contended that there is no rule, statutory or otherwise, which requires a passport to enable a man to make his exit from this country and therefore not issuing or seizing it after it has been issued would not constitute any breach of any fundamental right or any breach of Art. 21. Now, assuming that there is no law debarring exit without a passport as I have already pointed out, there are rules made under the Passport Act which debar a person from making his re-entry into this country unless he is equipped with a passport. Even if he were to be able to go abroad without a passport, there can be no doubt that it would be depriving him of his freedom of movement if he is not allowed to come back to his own country."

These observations indicate that in the view of the learned Judge, right to go abroad was included in the expression " personal liberty". It must, however, be

noticed that the learned Judge has not founded his decision on this view of the matter, and it may, therefore, be possible to say that the said observations are to a certain extent obiter.

(19) In Misc. Appln. No. 299 of 1959 (Bom), *Ismail Karmalli Pirbhoy v. R. C. Chawan* decided by this Court on 8th July 1960, the petitioner had, by a writ application under Art. 226 of the Constitution, challenged the cancellation of his passport, and had prayed that the order directing cancellation of his passport be quashed and that a direction be issued to the Passport Authorities to issue a new passport valid for the countries for which the original passport was valid. It was contended on behalf of the petitioner that under Art. 21 of the Constitution, the petitioner was entitled to travel abroad without any hindrance and was also entitled to return back without any hindrance. The petitioner cannot be deprived of that right except by procedure established by law. There being no procedure established by law, the order of cancellation was bad. It has been held by Mr. Justice K. K. Deasi that "no statutory obligation is cast on the President of India to renew the passport of the petitioner and/or not to cancel the same. As the provisions (of the Passport Act) have been held to be valid and as there is no statutory obligation making it incumbent on the President to renew the passport of the petitioner, it was not possible to grant the relief by way of mandamus or any other direction to the petitioner as prayed for". The decision to a certain extent no doubt supports the contention raised on behalf of the appellants, but is clearly contrary to the observations made by Mr. Justice Shelat and is contrary to the Full Bench decision of the Kerala High Court and the Mysore High Court. Mr. Justice Tarkunde has distinguished this judgment on the ground that the observations were in the nature of obiter dicta, and that undoubtedly is the position, because the ground of decision is that the period for which the renewal was asked for by the petitioner had already expired by the time the petition came up for hearing, and therefore, the application had become infructuous.

(20) Mr. Rege also referred us the following passage at page 714 of Basu's Commentary on the Constitution of India, 5th Ed. (Vol. I):

"The freedom of movement of a citizen has three aspects-

- (a) the right to move from any part of his country to any other part;
- (b) the right to move out of his country;
- (c) the right to return to his country from abroad.

It is the first aspect which is emphasised by Clause (1) (d) of Art 19. The third aspect is covered under clause (1) (e). The second aspect is not guaranteed by our Constitution, and is left to be governed by legislation in exercise of the power conferred by Entry 19 of List I."

The said entry No. 19 in List I reads:

"Admission into, and emigration and expulsion from, India; passport and visas."

(21) Considering the aforesaid material, it becomes abundantly clear that long before the year 1950 the year in which our Constitution was enacted, it had been well established both in England as well as in America that the right to travel abroad and to return back to one's own country was considered as a heritage of a free man, of basic value and part of his personal liberty. The right was recognised in the Declaration of Human Rights by the General Assembly of the United Nations, of which India was a member. It can hardly be disputed that travelling abroad has an important place in the modern life of a human being. People want to go abroad for education, for business, for medical treatment, for seeing friends and relations and for recreation. By standing between people and people is established, which in its turn results in broadening the outlook of people. This was the background at the time of the framing of the Constitution. It is difficult to assume that our Constitution so nobly envisaged has not conferred this valuable right on its citizens. On the other hand, the use of the expression "personal liberty" as contra-distinguished from "personal security" in Art. 21, itself clearly indicates that this right of travelling abroad and returning back to the country has been conferred on a citizen by the Constitution. It has been argued by Mr. Rege that the expression "liberty" appearing in the American Constitution may include the right to travel abroad. But our Constituent Assembly has intentionally cut down the connotation of "liberty" by adding the word "personal". If we hold that the expression "personal liberty" includes also the right to travel abroad and return to the country, we will be giving the two expressions "personal liberty" and "liberty" practically the same meaning, and thus treating both these expressions alike. In other words, the argument of Mr. Rege is that by the use of the word "personal" before the word "liberty", the Constituent Assembly has restricted the right of freedom from physical restraint, i.e., freedom from imprisonment, arrest and wrongful restraint only. We have already discussed above the connotation of the expression "personal liberty" as understood in the two democracies, England and America. There is no reason to assume that because the Constituent Assembly has used the word "personal", the Constituent Assembly had the intention of denying to its citizens or people residing in the country this important personal right. On the other hand, the note of the Drafting Committee on this Article (Art. 15 of the Draft Constitution) says:

"The Committee is of the opinion that the word "liberty" should be qualified by insertion of the word "physical" before for otherwise it might be construed very widely so as to include even the freedoms dealt with in Art. 13." It may be mentioned that Art. 13 of the draft Constitution referred to in the aforesaid note is Art. 19 of the Constitution. The note makes it abundantly clear that the purpose of qualifying the word "liberty" by insertion of the word "personal" was not to restrict in any manner or to narrow down in any manner the scope and ambit of that expression, but was with a view to avoiding inclusion of freedoms already dealt with in Art. 19 in this Article also and thus creating a conflict between the two articles. It would be noticed that the freedoms dealt with in Art. 19 are certain important aspects of "liberty" which are conferred only on the

citizens, and could be restricted only within the limits mentioned in Cls. (2) to (6) of the said Article. The other attributes of "personal liberty" or the residue of the "personal liberty" is contained in the expression "personal liberty" contained in Art. 21. and those rights have been conferred both on citizens as well as non-citizens, but the difference is that a citizen or other person could be deprived of those freedoms by a procedure established by law. It is for these reasons, we hold that the expression "personal liberty" occurring in Art. 21 includes the right to travel abroad and to return to India. The respondent therefore had a right under Art. 21 to go to Dubai.

(22) The question which next arises is whether the refusal of appellant No. 1 to grant a passport to the respondent results in the deprivation of the said right of the respondent. Before we proceed to deal with this question, it would be necessary to consider the contention of Mr. Rege as to the true nature and character of a passport. and whether the grant or refusal of the passport by the competent authorities is a matter completely immuned from judicial review. It is the first argument of Mr. Rege that in issuing a passport the Government of India by reason of its status as Sovereign State only purports to address other foreign States to give certain facilities to its citizens. By granting or refusing to grant a passport, Government does not purport to exercise any power at all. It is the exercise of its sovereign rights. Grant of a passport is a political function. In England, the power to refuse a passport being derived from the royal prerogative is completely immune from the judicial review. Passport serves purely a diplomatic function, affording the bearer the diplomatic protection of the issuing State and request for safe passage to the other State. It should therefore, be held that the issuance of a passport is purely a discretionary act of the department charged with the conduct of foreign affairs and is, therefore, not subject to judicial review. Mr. Rege has referred us to certain passages from different authorities and text-books to which we will presently advert.

(23) The material part of the text of the passport is as follows:

"These are to request and require in the name of the President of the Republic of India all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford him or her every assistance and protection of which he or she may stand in need."

In the American Jurisprudence, Volume 40, at page 523, it is stated;

"A passport as the term is used here is a formal document issued by a competent officer of a sovereign State to a citizen or subject of the State, certifying his citizenship or allegiance, addressed to foreign powers, and requesting that the bearer of it pass freely and safely. It is essentially in character a political document by which the bearer is recognised in foreign countries as a citizen of the country which issued the passport. Ordinarily, citizens of this country are not required to have passports to obtain re-entry here after a visit to foreign countries although the use of passports for re-entry is convenient and has

become customary.

The issuance of passports to citizens and subjects of this country is now regulated by acts of Congress , although for many years there were no Federal laws regulating their issuance.

With regard to the persons who may secure passports the Federal law provides that no passport shall be granted, issued or verified for any person other than those owing allegiance, whether citizens or not, to the United States, but there is no mandatory duty obligating the Secretary of State to issue passports even to citizens of the United States. It is contemplated that such documents are to be issued or denied as the Secretary in his discretion may consider for the best interest of the country. The Courts will not undertake by mandamus or otherwise to compel the issuance of a passport, or to control by means of declaratory judgment and discretion of the Secretary of State in regard to issuance of such documents"

(24) Mr. Rege then referred to us the following passage from Lord Alverstone, C. J.'s judgment in *Rex v. Brailsford* (1905) 2 KB 730 , reproduced by Raman Nayar, J. in *Francis Manjooran and Others Vs. Government of India, Ministry of External Affairs, New Delhi and Others*, :

"It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be present to the Governments of foreign Nations and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named."

Mr. Rege then referred to us the following passage from Harry Street's "Freedom, the Individual and the Law" relating to the position in England:

"Granting a passport is entirely a matter of royal prerogative which is exercised on behalf of the Queen by the Foreign Office. The subject has no legal right to a passport, the Crown can refuse him one without giving any reasons, he is not entitled to a hearing in order to argue his case for the grant of one. there is no Court to which he can appeal if he is refused one, he is not entitled to compensation for any loss suffered because of the refusal."

"The Crown has had prerogatives in foreign affairs those which Parliament has not taken away. Passports are treated as falling within that prerogative domain of foreign affairs, and have been left untouched."

(25) Lastly, Mr. Rege referred us to para 568 of Halsbury's Laws of England, vol. 7. 3rd Edition;

"Passports may be granted by the Crown at any time, to enable British subjects to travel with safety in foreign countries, but such passports would clearly not be available so as to permit travel in any enemy's country during war. Passports are

issued by the Foreign Office or by diplomatic officers abroad."

(26) It is on the basis of these observations that the argument of Mr. Rege has been founded. It is indeed true that the passage from Harry's Street's book does to a certain extent lend support to the argument of Mr. Rege. But then it will be noticed that what has been stated therein is that the grant of a passport being a matter of royal prerogative, a citizen could be deprived of his "personal liberty" of going abroad in exercise of that royal prerogative. The learned author himself in his book has regretted the fact that no British citizen is entitled to a passport as a matter of right even if his British nationality is beyond doubt. He characterises the absence of right as startling. It has to be borne in mind that the theory of Crown's prerogative has not been imported into the Indian Constitution, and no royal prerogatives have been conferred on the Union as such. What is sovereign in India is the Constitution. Be it Union of India, Legislature or the Executive, they are all subordinate to the Constitution, and have to act within the Constitution. The theory of royal prerogative, therefore, in our opinion, cannot be imported in considering the scope and ambit of administrative or executive powers affecting the rights of Indian citizens under the Constitution. It is indeed true that certain acts of the Government of India are not subject to the judicial review, but these are the matters relating to conduct of foreign affairs, such as whether a foreign State shall be recognised for the purposes of international law and dealings; whether a person shall be recognised as the sovereign or accredited agent of a foreign Government, whether a foreign air carrier should be permitted to operate in the country, even where the power of the executive in the matter of air navigation is regulated by legislation, the implementation of the State's obligations under an international treaty or obligation, and whether a territory belongs to its State or to a foreign State (vide Basu's Commentary on the Constitution of India, 5th Ed., Vol. I, pp. 325 and 326). The observations in the American Jurisprudence that "There is no mandatory duty obligating the Secretary of State to issue a passport even to the citizens of United States", cannot now, in view of the aforesaid two decisions of the Supreme Court, be taken to mean that the matter as to the grant or refusal of passport is not justiciable. It would be noticed that in both the aforesaid cases, the citizen had moved the Supreme court challenging the orders, and the challenge has been upheld. The passage from Lord Alverstone's Judgment, on which reliance has been placed no doubt indicates that the passport also is a character certificate which vouches the respectability of the person named, and it has been argued on the strength of this passage that when the Government has to vouch the respectability of a person, it must necessarily be left to the discretion of Government whether it would so vouch or not. This passage has not been relied on in its entirety in respect of the true import of the passport. For instance in *Joyce v. Director of Public Prosecution* 1946 AC 347, the portion of the aforesaid observations of Lord Alverstone C. J., which have been reproduced with approval, do not include the concluding part which relates to the vouching of the respectability of the person named. The definition of "passport" given by

Halsbury in para 568 also does not show that the passport vouchsafes the respectability of the person named. The passport no doubt is issued by the country to its citizen, certifying that he is a citizen of that country and requesting the foreign country that the holder of the passport be granted protection and assistance as its citizen. In short, a passport is a piece of evidence as to the nationality, certifying the nationality of the holder of the passport and the request by the issuing country to a foreign country to treat him as such as grant him protection and assistance. It is nothing more than that. The grant of a passport is nothing but an administrative action of the Government in its executive or administrative function. In fact, the plea of the Union of India has been to that effect. In para 10-A of the affidavit of the Under Secretary of the Government of India Ministry of External Affairs, filed on behalf of the Union of India, it has been stated:

"The refusal to grant the passport to the petitioner (respondent before us) is a non-statutory administrative action."

It has also been pleaded on behalf of the Union of India that this non-statutory administrative action is not subject to the judicial review. But it can now hardly be disputed that the question as to whether an administrative action is violative of the citizen's fundamental rights under Part III of the Constitution is subject to the judicial review by this Court in exercise of its powers under Article 226 and 227 of the Constitution.

(27) We now turn to the question as to whether the refusal to grant passport has violated the respondent's right under Art 21 of the Constitution. In other words, whether refusal of the passport has resulted in the deprivation of the right of the respondent to go abroad. Before we deal with the arguments advanced by Mr. Rege on this aspect of the case, it would be convenient to notice the relevant provisions. We have already held that the right to go abroad and return to the country is one of the attributes of "personal liberty" within the meaning of Article 21 of the Constitution. As provided in that Article, "No person shall be deprived of his life or personal liberty except according to procedure established by law". It has been well settled that the expression "law" in Article 21 means law enacted either by the State Legislature or by the Central Legislature. The only enactment which has any relevance is the Indian Passport Act (Act 34 of 1920), and the rules framed thereunder. It was found expedient to take power to require passports of persons entering India and, it is for this purpose that the Act has been enacted. It is very short Act consisting of five sections, The first section relates to the title and the extent of the Act. The second section relates to definitions, and passport has been defined as:

"Passport" means a passport for the time being in force issued or renewed by the prescribed authority and satisfying the conditions prescribed relating to the class of passports to which it belongs."

Section 3 empowers the Central Government to make rules, requiring that

persons entering India shall be in possession of passports, and for all matters ancillary or incidental to that purpose. Without prejudice to the generality of this power, sub-section (2) of section 3 empowers Government to make rules in respect of certain matters also. Section 4 confers powers on certain police officers to arrest a person without warrant, who has contravened rules or orders made u/s 3, or against whom a reasonable suspicion exists that he has contravened them. Section 5 empowers the Central Government by general or special order to direct the removal of a person who has entered India without a passport. Till the year 1950, no rules were framed. The rules have been framed for the first time in the year 1950, which were published in the Government of India Gazette of date 29-4-50. Rule 3 provides that "save as provided in rule 4, no person proceeding from any place outside India shall enter, or attempt to enter India by water, land or air unless he is in possession of a valid passport conforming to the conditions prescribed in rule 5." There is no other rule which has any bearing on the question which we have to consider. The position thus that emerges is that neither the provisions of Act nor those of the rules require that a person must have a passport to enable him to leave the country. Passport is, however, necessary for a person to enter this country. If a person, after having gone abroad enters the country without a passport, then he is liable to a criminal prosecution, imprisonment and also liable to be removed from the country. There is no provision either in the Act or in the rules regulating the issue or refusal of a passport. No guidance has been given either in the Act or in the rules as to in what circumstances a passport should be granted or refused. It appears to have been left completely to the absolute and unfettered discretion of the officer empowered to grant passports.

(28) It is contended by Mr. Rege that there is no law in India under which an Indian citizen is not permitted to leave the country without a passport. Refusal of a passport, therefore, does not in any manner deprive the respondent of his right or freedom to travel abroad. In support of his contention, he has placed reliance on a decision of the Madras High Court in V.G. Row Vs. The State of Madras, . Merely because under the Indian Passport Act, a citizen will require a passport to enter the Indian territory, he cannot claim that he must be given a passport to exercise his right to go abroad. It was suggested during the course of the argument by Mr. Rege that the respondent had not applied that he should be given a passport to re-enter India. He had only applied that a passport should be issued to him to visit certain countries, which he wanted to visit. Neither the Passport Act nor the rules require a passport to leave the borders of the Indian territory. The refusal, therefore, to grant a passport does not amount to the deprivation of the respondent's alleged right to go abroad. It is not possible for us to accept the contention of Mr. Rege. It is indeed true that there is no express provision either in the Passport Act or in the rules requiring a citizen to have a passport to enable him to leave the borders of the Indian territory and travel abroad. But the fact of the matter is that since the first World War in almost all countries, aliens who wish to enter a foreign territory are required to produce a

passport issued by the authorities of their country of nationality. The learned Chief Justice of Kerala High Court in delivering his judgment in *Francis Manjooran and Others Vs. Government of India, Ministry of External Affairs, New Delhi and Others*, has reproduced the following passage from the book by Weis in the *Liberty of World Affairs, Nationality and Statelessness in International Law*, at p. 671 of the Report (ILR Ker) : (at p. 21 of AIR)

"The use of passports issued by the authorities of the country of nationality to nationals travelling abroad became more frequent in the nineteenth and the beginning of the twentieth century. The possession of a passport was, however, not as a rule requirement for the crossing of frontiers. Only since the First World War has the passport system in its modern sense been introduced in most countries, i.e., the system whereby aliens who wish to enter a foreign territory are required to produce a passport issued by the authorities of this country of nationality."

It is abundantly clear that is the right to travel abroad is to be effectively exercise, possession of a passport is an absolute necessity, because otherwise a person would not get admittance in any foreign country. Mr. Rege, however, argues that the Constitution of no country can guarantee, and certainly the Constitution of India does not guarantee freedom of movement in any foreign country. No citizen, therefore, has a right to claim that he must get a passport in order that he should secure admittance in a foreign country. In our opinion, the argument is not well made. It is true that the Constitution of no country can guarantee its citizen a complete freedom of movement in any foreign country. That of course would depend on the laws of the country and the diplomatic relations between the two countries. But that is altogether a different matter than the right of a citizen to claim facility from his country to secure admittance in a foreign country. The right to travel abroad by its necessary implications means the right to leave the home country and visit a foreign country. Now, if for the purpose of securing admittance in a foreign country a passport is required. certainly a citizen would be entitled to ask his country that it should assist him in facilitating admittance to that country, and for that purpose issuance of a passport becomes necessary. Similarly, it is implicit in the right to travel abroad a right to return to the country after a sojourn in a foreign country . Otherwise the right would be meaningless, and it would only mean a right to come back to the home country. The right to travel abroad cannot be equated with the right to leave the country altogether for ever.

(29) The argument that the respondent, in order to exercise his right to travel abroad should have applied for a passport to return to the country and not a passport to go abroad, is also, in our opinion, without any merit. We have not been shown, nor have we been able to find any provision either in the Act or in the rules which provide for the grant of a passport only for the purpose of returning to the country. Rule 3 provides:

"Save as provided in rule 4, no person proceeding from any place outside India

shall enter, or attempt to enter, India by water, land or air unless he is in possession of a valid passport conforming to the conditions prescribed in rule 5."

Rule 4 deals with certain classes of persons who are exempt from the operation of the provisions of rule 3, and rule 5 enumerates the conditions of a valid passport. It is clear from the reading of rule 3 that a citizen who desires to return to India from any place outside India must be in possession of a passport. The "passport" has been defined in section 2 of the Act. We have already reproduced the definition, and it means "a passport for the time being in force issued or renewed by the prescribed authority." The text of the passport issued by the Indian authorities. We have also reproduced. There is no other class of passport issued by the prescribed authority. It is for the issuance of this passport that the respondent had applied, and as we have already stated, it was necessary for him to have it both for the purposes of securing admittance in a foreign country as well as for ensuring his re-entry into India. There is being no other class of passport issued by the prescribed authority, it is futile to contend that the respondent should have applied for a passport to return to India. It is for these reasons. we hold that the refusal to grant a passport has resulted in the deprivation of "personal liberty" of the respondent, namely,. his right or freedom to travel abroad and return to his home country, which had been guaranteed to him under Article 21 of the Constitution.

(30) The decision on which reliance has been placed is reported in V.G. Row Vs. The State of Madras, , Facts in that case were: The petitioner was an advocate of the Madras High Court and was also an elected member of the Madras Legislative Council. He had applied for issue of a passport to him for travelling to countries including Union of Soviet Socialist Republics. He was granted passport to visit certain countries but not for visiting U. S. S. R. The petitioner, therefore, had moved the High Court by a Writ Petition. It was contended on behalf of the petitioner that the refusal of an endorsement on the passport enabling the petitioner to visit U. S. S. R. is violation of the fundamental right granted to him under Article 19(1)(d) of the Constitution., The view taken by the High Court was that since the law of the State did not prevent a person from leaving for nay country on the ground that he does not hold a passport endorsed for that country, or prevent a citizen from re-entering India after travelling to foreign countries except for the passport, the question of involving Article 19(1)(d) cannot arise. Thus the view taken was that the passport was not necessary to enable a citizen to leave the country, nor was it necessary to enable a citizen to re-enter the country and it is in this view of the matter that no right it has been held that the petitioner had no right to get a passport, and in the matter of granting a passport, Government did not purport to exercise any power at all but by reason of its status as a Sovereign State, it purports to address to the other foreign States to give certain facilities to one of its citizens. The view that a citizen does not require a passport for re-entering this country no more holds good in view of the decision of the Supreme Court in Abdul Rahim Ismail Rahimtoola Vs. The State of Bombay, , wherein Their Lordships held:

"On a reasonable interpretation of Section 3 of the Act and Rr. 3 and 4 of the rules, which say that "person" entering India shall be in possession of a valid passport, there can be no manner of doubt that the provisions apply to all persons entering India including Indian Citizens."

The other distinguishing feature of the Madras case is that no contention had been raised on behalf of the petitioner that his right to travel abroad was included in the "personal liberty" guaranteed to him under Article 21 of the Constitution. Consequently, the question was not considered from that aspect. The decision, therefore, is hardly of any assistance in considering the question which we have to consider in this case.

(31) The next question that arises is whether refusal to grant passport which, in our opinion, has resulted in deprivation of the "personal liberty" of the respondent, is in contravention of the provisions of Article 21 of the Constitution. We have already reproduced the article and on reading the article, it is clear that the mandate of the article is that the deprivation of the "personal liberty" has to be "according to procedure established by law." We have already stated that it is well settled that law herein means the law enacted by a competent Legislature. It is an admitted position that there is no law prescribing any procedure for regulating the grant or refusal of a passport. That being the position, we hold that the order refusing to grant a passport to the respondent has been made in contravention of the provisions of Article 21 of the Constitution, and is violative of the right guaranteed to the respondent under Art. 21. The order is, therefore, liable to be set aside.

(32) In view of our aforesaid finding and having regard to the statement made by Counsel for the parties that a passport has not been granted to the respondent, in our opinion, it is not necessary to proceed to consider the other question that arose in this case for consideration at the trial, namely, whether the order refusing to grant the passport was violative of Article 14 of the Constitution. However, for the sake of completing the judgment, we would very briefly state our opinion on that question.

(33) The case of the respondent in brief was that in absence of any law regulating the grant or refusal to grant a passport, it is left to the whim and pleasure and arbitrary decision of the passport authorities to give passports. A number of passports have been given to various persons who were similarly situated to him. The refusal to grant renewal of the passport to the respondent contravenes Article 14 inasmuch as it has resulted in arbitrarily discriminating him against the other persons similarly situated and who have been granted passports to go to Dubai. The list of persons who were granted passports was attached by the respondent to his petition. The Regional Passport Officer in his affidavit has denied in absence of any law regulating the grant or refusal of passports, passports were issued at the whim and pleasure or according to the arbitrary decision of the respondent (the appellant before us). He denied that he had granted passports to other persons who were situated similarly to the

respondent. As regards the case of the person mentioned in the list attached to the petition, he stated that they were granted passports after considering their applications on merits. He further stated that the passports were being issued under the instructions received from the Central Government, and the respondent was not given a passport in accordance with the instructions received from the Central Government. In the affidavit filed by the Under Secretary of Government in India, Ministry of External Affairs, it has been stated that "on the basis of the communications received in official confidence and for which reasons, it is considered should not be disclosed in the public interest, the government of India decided that in the interest of the State and the Public, the petitioner should not be granted further passport facilities." It was learnt by him that the firm of which the respondent claimed to be a partner was not a genuine exporter of goods, and it was therefore, the instruction were given to the passport authorities not to issue a passport to him. As regards the other persons, it was stated that in their case there was no ground or cause to apprehend that public interest or interest of the State would suffer by reason of the passport facilities being granted to them, and therefore, passports were granted to them. In the case of the respondent, it was apprehended that public interest or the interest of the State would suffer if passport was granted to him, and therefore, passport was refused to him. The learned Judge held that the claim of the Government of India of absolute and unfettered discretion to grant or refuse passport was ex facie discriminatory and therefore violative of Article 14 of the Constitution. The learned Judge has not recorded any finding that the respondent has been meted out a discriminatory treatment as compared with the other six persons whose names had been given in the list attached to his petition.

(34) Mr. Rege, learned counsel for the appellants, contended that the order made by the passport officer refusing to grant passport to the respondent was neither a judicial order, nor an administrative or executive order. On the other hand, it was an order made by the Union of India in exercise of its political function. Such an order cannot be challenged on the ground that it is violative of Article 14 of the Constitution. Mr. Sorabji, learned counsel for the respondent, on the other hand,. contends that the order made by the passport authorities is an executive order or an administrative order, and the protection granted to citizen under Article 14 is both against legislative as well as administrative action. The executive or administrative action affecting the rights of the citizen must be in accordance with law Admittedly, there is no law enacted regulating the grant or refusal of passports. It is left to the absolute discretion of the passport authorities. these powers conferred on them are arbitrary and uncontrolled, and therefore, article 14 has been vilated. In view of our finding that the respondent could be deprived of his right to travel abroad only in accordance with procedure established by law, it is not necessary for us to consider in this case the wider issue raised by Mr. Sorabji, namely, whether absence of any law by itself is violative of Article 14 of the Constitution We find it difficult to accept the argument of Mr. Rege that the order refusing the passport having been made in

exercise of the political function. Article 14 is not attracted. In the first instance, it was admitted position at the trial that the order made was an administrative order. In para 10A of the affidavit in reply of the Under Secretary, filed on behalf of the Union of India, the plea raised was:

"The refusal to grant the passport to the petitioner (respondent before us) is a non-statutory administrative action"

At the argument stage also, the contention raised was that it was an administrative action. The contention raised on behalf of the Union of India has been summarised thus:

"On behalf of the Government of India Mr. Baptista argued that the grant or the refusal of a passport was a purely administrative act, and that such an act does not fall within the ambit of Article 14" /blockquote> There is, therefore, no doubt that the case of the Government of India all throughout had been that the refusal to grant the passport was an administrative act. No doubt, the contention raised was that the administrative act does not fall within the ambit of article 14. That contention has been fully dealt with by the learned Judge, and after referring to certain Supreme Court decisions. he had held that the protection given by article 14 extends to all discriminatory actions, whether executive or legislative. this conclusion, has not been challenged before us. Now, it may be that in the matter of grant of a passport or refusal to grant a passport, the function performed is diplomatic in its nature, in a sense that the passport apart from it being evidence of the nationality of the person named therein, is also request on behalf of one State to another for grant of facilities to the person named while in a foreign country. But we fail to see why the order of the government, whether it be granting a passport or not granting a passport would not be an executive order or an administrative order. It is in relation to a right of a citizen and affects him. The functions of the State have been divided into legislative, judicial and exective. There is no fourth category. It is an admitted position that there is no law regulating the grant or refusal of a passport. It was also an admitted position during the course of the arguments before the learned trial Judge that no administrative rule regulating the grant or refusal of the passports have been issued by the Government of India to the passport officers. It is thus clear that arbitrary and uncontrolled powers have been conferred on the passport authorities in the matter of grant or refusal of the passports. No guidance has been given to them in this respect. and the conferral of such arbitrary and uncontrolled powers is by itself violative of Article 14 of the Constitution. We are, therefore, of the same view as has been taken by the learned Judge on this aspect of the case. It is for these reasons that, in our opinion, the appeal is liable to be dismissed, and we hereby dismiss the appeal with costs.

(35) Costs to be taxed on the basis of a Long Cause scale.

(36) Before parting with the case, we would like to say that we were not

unmindful of the necessity of regulating the issue or refusal of passports. On the other hand, we are fully conscious that in certain cases, it may be necessary in the interests of the country, and in public interest to prevent certain persons from leaving India. But as we have already pointed out, for the said purpose it is necessary to have a procedure established by law enacted by a competent legislature . In such a law, certain things may have to be left to the discretion of the Government, which alone could have confidential information about persons. But then proper guidance in this respect will have to be given in the enactment. We have no doubt that then the Courts would rarely interfere with the discretion exercised by the authorities concerned in this matter unless of course it be a mala fide exercise of it, or there be some other good reason for interference.

(37) Liberty to the respondent's attorneys to withdraw the sum of Rs. 500/- deposited in Court towards the costs.

(38) Appeal dismissed.