
(1987) 03 RAJ CK 0015

In the Rajasthan High Court

Case No : Criminal Rev. Petition No. 358 of 1979

Ali Mohammed

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 24-03-1987

Acts Referred:

Citizenship Act, 1955 — Section 9
Constitution of India, 1950 — Article 5
Criminal Procedure Code, 1973 (CrPC) — Section 313
Foreigners Act, 1946 — Section 14, 9

Citation : (1987) WLN 238

Hon'ble Judges : Jas Raj Chopra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Jas Raj Chopra, J.—This revision petition has been filed against the appellate order of the learned Additional Sessions Judge No. 1. Jodhpur whereby he has maintained the conviction and sentence u/s 14 of the Foreigners Act of the accused-petitioner Ali Mohd. recorded by the learned Chief Judicial Magistrate, Jaisalmer vide his Judgment dated 5-2-1979. The accused-petitioner has been sentenced to five years rigorous imprisonment together with a fine of Rs. 300/- and in default, to undergo two month's rigorous imprisonment.

2. The facts necessary to be noticed for the disposal of this revision briefly stated are: that accused Ali Mohd. was caught by PW 5 Jet Singh, PW 2 Bhanwar Singh and PW 3 Lal Singh while he was crossing the Indian Boarder towards Pakistan. They were serving on B.O.P. Post 16 BSF, Dharmi. On 14-2-1977 in the morning at about 8 a.m., they went on gush duty between Pillers No. 563/1 and 563/2 and, there, they saw the fresh foot prints of two camels going towards Pakistan. They went in search of the camels and found this accused riding on one of those two camels. Two camels were also found loaded with goods which was to be smuggled to Pakistan. The accused petitioner was challenged by the Incharge of the party PW 5 Jet Singh and was arrested. He informed them that his

Companion has gone to bring water towards Pakistan and, therefore, they, waited for him and when he did not come for sometime, they informed Anjutant Shri B.V. Singh, who immediately reached the Dharmi Outpost. He interrogated the accused-petitioner Ali Mohd. who informed him that he belongs to Pakistan and he has brought certain goods from Jaipur to smuggle them out to Pakistan. He was found in possession of one letter written in Urdu, which was addressed to a citizen of Pakistan for paying money to the accused. He also possessed a roadways ticket and some other paper chits. He was then taken to Police Station, Ramgarh where he was arrested and after investigation, the case again him was challaned u/s 14 of the Foreigners Act for contravention of Clause (3) of the Foreigners Order, 1948. As he was crossing the border to Pakistan by away which was not meant for crossing over from India to Pakistan, he could have been charged for the contravention of Clause (3) of the Foreigners Order 1948 but that, of course, was not done and he was only charged with the offence of entering India without any valid passport, or travel documents.

3. In support of this charge, the prosecution examined PW 1 Adjutant B.V. Singh, PW 2 Bhanwar Singh PW 3 Lal Singh, PW 4 Narayan Singh, PW 5 Hawaldar Jet Singh and PW 6 Badridan being accused-petitioner was examined u/s 313 Cr. PC and he took the plea that he has been living in India for the past about 14 years and when India and Pakistan were formed he was in Hyderabad and he was put in jail in the year 1948 and was released in the year 1953 and, thereafter, he was asked to disclose him choice whether he wants to live in India or wants to migrate to Pakistan and he expressed his willingnees to live in India. He came to Jaisalmer to purchase the sheep. In support of his case that he remained in Jaipur and Bombay etc. he has examined DW 1 Abdul Majid, DW 2 Abdul Hakim, DW 3 Alliahdin, and DW 4 Peeru. He has examined himself as DW 5.

4. After hearing the parties, the learned Chief Judicial Magistrate has held that the accused has entered India without any travelling documents of passport and he has not been able to prove that he is a citizen of India and therefore, for contravention of Clause (3) of the Foreigners Order, 1948, he has been convicted and sentenced as aforesaid. An appeal was filed against that order and that has also been rejected by the learned Additional Sessions Judge No. 1, Jodhpur. Hence this revision.

5. I have heard Mr. I.S. Champawat, learned Counsel for the accused petitioner and Mr. S K. Mathur, learned Public Prosecutor for the State. I have carefully gone through the record of the case.

6. It was contended by Mr. I.S. Champawat, learned Counsel for the accused petitioner that the accused was in Hyderabad jail from 1942 to 1953. In this respect, he drew my attention to the certified copy of the jail record produced on behalf of the accused. It has been marked Ex. D 3. This document relates to one Saleh Mohd. Khan son of Shah Hyder Khan by caste Pathan resident of Jhansi Tehsil Marakand where as the accused is Ali Mohd. also belongs to Village Tana in District Nardan in Pakistan and, therefore, this document cannot be related to

this accused. The accused has stated in his testimony that he was born in Malkan town where as the document Ex. D 3 shows that relates to one Saleh Mohd. resident of Jhansi in District Marakand in Pakistan. When the accused was arrested, he informed the BSF party that he is Ali Mohd. also belongs to Village Tane in District Mardan and not Village Jansi Tehsil Marakand. Thus, it was very much essential for him to have proved that this document relates to him. No jail authorities have been produced and no effort has been made to prove that this document relates to the accused-petitioner. His own bald statement cannot be relied on in view of the circumstances explained above. When this is not proved that he was in India at the time of partition, then the presumption regarding citizenship under Article 5(1) of the Constitution is not available to him. He has stated that he served in Bombay and remained therefore about 7 to 10 years and then served at Jaipur. If that was so then he could have produced the persons under whom he has served. He also could have produced the ration-cards of the places where he has lived. He could have given the names of his employers and his residential addresses but he has failed to do so. He has only stated that he remained in Bombay and served in a Masjid at Jaipur. The learned lower court has held that such type of the evidence can be procured at any time.

7. Mr. I.S. Champawat, learned Counsel for the petitioner has submitted that as the accused has raised a question that is a citizen of India, that question should first be decided by the Central Govt. and then alone, proceedings could be taken against these accused. In this respect, he placed reliance on a decision of State of U.P. Vs. Rehmatullah, In that case, the accused who entered India was not a Pak national. He of course, entered on a Pak passport but he contended that he is a citizen of India and he applied to the Government of India u/s 9 of the Citizenship Act to grant him citizenship. The facts of this case had no application to the present case. Here, the accused has failed to prove that he was in India at the time, the partition took place on the basis of Ex. D 3. His contention that he served in Bombay and Jaipur has not been established by him. Section 9 of the Foreigners Act provides that if any question arises whether any person is a foreigner or not, it is upon such person to prove that he is a citizen of India. It was for the accused to have proved that he has served at Bombay and at Jaipur. The evidence regarding his service at Jaipur has been disbelieved by both the Courts below and that finding of fact cannot be disturbed by this Court in revision. I have considered these findings and I do not find them perverse or illegal because neither any voters list has been produced nor any ration card has been produced. Even it has not been proved that in which house, he was living and who was his employer at Bombay and, therefore, the facts of this case have no application to the facts of State of U.P.'s case (supra).

8. Mr. Champawat further placed reliance on a decision of their Lordships of the Supreme Court in State of Gujarat v. Yakub Ibrahim (1974 Cri. LR 63) wherein the accused took the plea that he was a citizen of India on 26-1-1950 and thereafter, he migrated to Pakistan. Here, the accused has taken the plea that he was in India since 1942 but he has not been able to prove it and the document on

which he has based his plea has been disbelieved and, therefore, this case also does not apply to the facts of the present case.

9. Mr. Champawat has also placed reliance on a decision of the Judicial Commissioner of Tripura in *Assan ulla v. State* AIR 1964 Tripura 5) wherein it has been held that the Passport Rules do not make any distinction between an Indian National and a foreign national as far as entry into India from outside without a valid passport is concerned. Even if Indian national enters India from a place which is not meant for such entry than he also can be held guilty of the contravention of the Passport Rules. In this case, the accused has not been charged for the contravention of the Passport Rules but he has been charged for contravention of Clause (5) of the Foreigners Order, 1948. It has been alleged against him that he entered into India without any permission of the competent authority and without possession of any valid passport or travel documents. It was on him to prove that he possessed a valid passport or travel documents to enter into India but he has failed to do so. He was found crossing the border at a place which is not meant for crossing the border. Had any permission been sought from the competent authority it would certainly have been refused. He was found indulging in smuggling the goods from India to Pakistan and, therefore, the Courts below were right in holding him guilty for contravention of Clause (3) of the Foreigners Order, 1948. As observed earlier, he could have also been held guilty of the contravention of Clause (5) of the Foreigners Order but that charge has not been framed against him and, therefore, it is of no avail to the prosecution.

10. Reliance was also placed on a decision of this Court in *Yar Mohd. v. State of Rajasthan* (1982 R C C 92) where in it has been held that the charge framed against the accused did not specify as to what contravention has been made by him. This ruling also does not apply to the case in hand. Here, the charge has categorically stated that the accused has contravened Clause (3) of the Foreigners Order, 1948.

11. The result is that I find no force in this revision and it is, hereby dismissed. The learned Addl. Sessions Judge No. 1, Jodhpur is directed to effect the arrest of the accused-petitioner to undergo the sentence imposed against him, if he has already not undergone the sentence imposed against him.