

(1972) 09 AHC CK 0024

In the Allahabad High Court

Case No : Criminal Miscellaneous Habeas Corpus Case No. 2872 of 1972

Fida Husain

APPELLANT

Vs

The Senior Superintendent of Police and Others

RESPONDENT

Date of Decision : 22-09-1972

Acts Referred:

Constitution of India, 1950 — Article 394, 5, 7

Citation : AIR 1973 All 364 : (1973) 43 AWR 23

Hon'ble Judges : M.N. Shukla, J;K.N. Seth, J

Bench : Division Bench

Advocate : S. Sadiq Ali and Haider Abbas, for the Appellant; Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Shukla, J.—This habeas corpus petition has been made u/s 491, Cr. P. C. read with Chapter XXI of the Rules of Court praying that the respondent No. 2 be directed to release the petitioner who has been detained on the allegation that he is a foreigner.

2. The question whether Fida Hussain is a foreigner has been canvassed in a series of proceedings since the year 1960. It is said in his petition that he was born in Qasba Kara, police station Saini in the district of Allahabad. His parents and ancestors were all born at the same place and Were Indian citizens. They had their domicile and permanent residence in Kara, district Allahabad. The petitioner too had his permanent residence and domicile in the same district and is an Indian citizen. On the 26th November, 1949 he was living at the same place and received information about the illness "of a near relation whom he held in high esteem and affection." He was in hurry and so he went to Pakistan without any permit or travel document. After the recovery of the said relation he returned to India in 1953 but since by that time restrictions had been imposed it was not possible for him to enter into India without a passport or proper travel document. Hence, he returned to India on a Pakistani passport and after his

arrival In this country he applied for his permanent stay and residence here, which request was not allowed. He claims that he never relinquished his Indian citizenship, that he had no intention to make Pakistan his permanent abode, that he had gone there only temporarily and so he continued to be an Indian citizen.

3. It appears that the petitioner over-stayed the period for which he was entitled to remain in India and hence he was prosecuted u/s 14 of the Foreigners Act by the Sub-divisional Magistrate, Sirathu, district Allahabad. He contested the case but he was convicted by the Magistrate whose judgment was upheld in appeal by the Sessions Judge of Allahabad. He preferred a revision which was dismissed by the High Court. He then preferred criminal appeal No. 49 of 1960 in the Supreme Court which was allowed. He was acquitted by the order and judgment of the Supreme Court dated 5-4-1961, reported in Fida Hussain Vs. State of Uttar Pradesh, The petitioner was arrested on 1-6-1972 by the local intelligence unit and the police of Saini. He was released on bail by the order of the Sub-Divisional Magistrate, Sirathu dated 2-6-1972 but was again arrested on 19-6-1972 by the order of the Senior Superintendent of Police, Allahabad (Civil Authority), and since then he has been kept under detention in the Central Jail, Naini, Allahabad.

4. The opposite parties contested the case and filed a counter-affidavit wherein it was admitted that the petitioner was born in Qasba Kara, district Allahabad, but it was denied that he was an Indian citizen. It was averred that enquiries revealed that the petitioner migrated to Pakistan without obtaining any permit or travel document in the beginning of 1949, much prior to 26-11-1949. It was admitted that he returned to India in 1953 on the basis of a Pakistani passport. The petitioner's allegation that he had gone to Pakistan only temporarily on receiving information about the illness of a near relation was not admitted. It was stated that the petitioner was a foreigner and was liable to prosecution and deportation.

5. The only point, therefore, which falls for decision is whether the petitioner can be said to be a foreigner so as to make himself liable for arrest, prosecution and deportation. At the very outset we cannot refrain from commenting on the factual aspects of this case. One feature which strikes us clearly is the petitioner's reluctance to disclose the material facts of the case. In the petition all that was said was that on 26-11-1949 the petitioner was living in Qasba Kara, district Allahabad, he received information about the illness of his near relation and he went to Pakistan without a permit or travel document. No date of his departure was mentioned by him. In his rejoinder affidavit it was for the first time divulged that the petitioner had gone to Pakistan in the last week of December, 1949. This is a very crucial date and circumstance about which the petitioner's silence throughout in the past is significant He placed strong reliance on the decision of the Supreme Court in his favour to which we shall refer again but even in the case before the Supreme Court this fact appears to have been carefully suppressed by him. The petitioner has been guilty of suppression vari

suggestion falsi.

The averments contained in the affidavit and rejoinder affidavit filed on behalf of the petitioner in the case before us do not inspire confidence. By referring to a near relation whom he held in high esteem and affection the petitioner has indulged in the widest generalities. Even the name of the alleged relation is not mentioned. No proof of the date of his actual departure has been furnished by him. We are asked to assume that the petitioner left India in the last week of December, 1949 and on that basis to decide this case. In the setting in which this disclosure was made at such a belated stage for the first time in the rejoinder affidavit filed in the proceedings before us we cannot possibly give any credence to this assertion. If, therefore, the petitioner had left India before 26-11-1949, the relevance of which date would be explained later, he is not entitled to the relief claimed by him. On the facts mentioned above the petitioner would clearly come within the mischief of Article 7 of the Constitution and he would be a foreigner. Article 7 of the Constitution reads:

"7. Notwithstanding anything in Articles 5, 6, a person who has after the first day of March, 1947 migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:

Provided that nothing in this Article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for purposes of Clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948".

It was contended by Sri Sadiq Ali that the petitioner did not migrate to Pakistan and his visit was a casual and temporary visit necessitated by the illness of a near relation. The petitioner stayed in Pakistan from 1949 to some time in 1953 when he returned to India on a Pakistani passport. We have already observed that the allegations about the illness of his near relation in Pakistan are extremely vague and not corroborated by any evidence. His stay for a period of nearly four years in Pakistan is consistent only with a desire to make that country his permanent abode. It does not suggest that his sojourn accidental or involuntary or prompted by some unforeseen circumstance and that he did not intend to stay there but to return to India as early as possible.

6. The term "migrate" has come in for interpretation by the Supreme Court and according to the interview of that court a wide meaning is to be given to that word. In *Kulathil Mammu Vs. The State of Kerala*, , Article 7 was interpreted and it was held that the word "migrated" was capable of two meanings. In its narrower connotation it meant going from one place to another with the intention of residing permanently in the latter place; in its wider connotation it simply meant going from one place to another whether or not with any intention of permanent residence in the latter place. In Article 7 the word was used in its

wider sense, viz., going from one territory to the other. There was only one qualification which must be attached to its meaning, which was that the movement should have been voluntary and should not have been for a specific purpose and for a short and limited period. Bearing in mind this connotation of the word "migrated" we have not the least doubt that the petitioner migrated to Pakistan in the year 1949.

7. Sri Sadiq Ali's contention, however, was that still on the date of his entering into India in the year 1953 the petitioner continued to be an Indian citizen. He was born in India and he could not be affected by the amended definition of the term "foreigner" which was introduced by Act XI of 1957 with effect from January 19, 1957. It may be noted that according to the definition as it stood in 1953 when the petitioner entered India, the word foreigner meant a person who

(1) is not a natural-born British subject as defined in Sub-sections (1) and (2) of Section 1 of the British Nationality and Status of Aliens Act, 1914, or

(2) has not been granted a certificate of naturalisation as a British subject under any law for the time being in force in British India, or

(3) is not a citizen of India."

The definition of "foreigner" in Section 1 (1) of the Foreigners Act as it stands today after the Foreigners Law (Amendment) Act, 1957 is "any person who is not a citizen of India". Therefore, the argument that the petitioner was not a foreigner inasmuch as he was a natural born British subject which would have BEEN open to him under the unamended definition of the word "foreigner" is no longer available to him. Consequently on the finding that the petitioner migrated to Pakistan he must be deemed to have become a foreigner provided the amended definition was applicable to him. Since, however, he claims to have returned to India in 1953 he would not be governed by the amended definition and did not become a foreigner and continued to be an Indian citizen according to the contention of the learned counsel for the petitioner. This argument, however, ignores the effect of Article 7 of the Constitution.

8. The learned counsel for the petitioner relied on the provisions of Article 5 of the Constitution which runs as follows:--

"5. At the commencement of this Constitution every person who has his domicile in the territory of India and-

(a) who was born in the territory of India;

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement shall be a citizen of India,"

He puts his case within the ambit of Clause (a) of Article 5 and contends that the petitioner was on that basis a citizen of India. This argument completely

overlooks the implications of Article 7 of the Constitution which are clearly attracted by the facts of the instant case. It would be seen that while Article 5 confers a right of citizenship on a person if at the date of the commencement of the Constitution he fulfills any of the conditions enumerated therein, Article 7 is a distinct provision which prevents the consequences contemplated by Article 5, in the event of circumstances which fulfil the provisions of Article 7. The same point was argued before us in another case i.e. Government Appeal No. 2819 of 1968 and our decision is reported in State of U.P. Vs. Wali Mohammad, . While dealing with the respective implications of Articles 5 and 7 of the Constitution it was observed at p. 421:

"Article 7 engrafts a kind of proviso thereto. The opening words of Article 7 exclude the applicability of Article 5 and it cannot be doubled that if the condition prescribed by Article 7 exists in a case the person concerned shall not be deemed to be a citizen of India at the commencement of the Constitution. The non obstinate clause makes it clear that Article 7 overrides Article 5 of the Constitution."

9. If, therefore, the case of the petitioner comes within the purview of Article 7 of the Constitution, he cannot derive any assistance from Article 5 and he cannot be held to be a citizen of India.

10. Sri Sadiq Ali attempted to steer clear of Article 7 by resorting to a rather ingenious argument. According to his contention the interpretation of Article 7 must be made with reference to the specific date on which the provisions of the Constitution relating to citizenship i.e. Articles 5, 6, 7, 8, 9 etc. of the Constitution came into force Article 394 provides that the aforesaid Article shall come into force at once and the remaining provisions of the Constitution shall come into force on the twenty sixth day of January, 1950 "which day is referred to in this Constitution as the commencement of this Constitution." It is argued that a reading of the preamble makes it clear that Articles 5, 6, 7, 8 and 9 etc. had come into effect on the 26th November, 1949. It was therefore, submitted that the words "at the commencement of this Constitution", occurring in Article 5 must be deemed to mean 26th November, 1949. Since accord-ins to the averment made in the rejoinder affidavit the petitioner had not left India prior to the last week of December, 1949, he was in India on the 26th November, 1949 and therefore under Article 5(a) of the Constitution he should be deemed to be a citizen of India. This argument in our opinion is untenable. Article 394 on which reliance has been placed for urging this proposition itself docs not support the petitioner. On the other hand, it expressly refers to the 26th day of January, 1950 as the date of the commencement of the Constitution.

Thus, for the purposes of construing the words "at the commencement of this Constitution" there is intrinsic evidence in Article 394 itself to the effect that they can refer to only one date i.e. the 26th January, 1950. It is true that some specified provisions of the Constitution mentioned in Article 394 came into effect earlier but that fact cannot be equated with the commencement of the

Constitution itself. That phrase can bear only one meaning which is set out in Article 394 itself. Thus, even on the assumption that the petitioner was in India on the 26th November, 1949 and had left for Pakistan in the last week of December, 1949 he would not be emitted to the benefit of Article 5(a) of the Constitution and cannot be deemed to be a citizen of India.

11. The learned counsel referred us to the decision of the Supreme Court in the earlier case of the petitioner reported in Fida Hussain Vs. State of Uttar Pradesh, and said that according to the verdict of that court the petitioner was not a foreigner. We have already observed that throughout the previous proceedings commenced at the instance of the petitioner the date of his actual migration had been studiously suppressed. It is remarkable that in the case before the Supreme Court this date was not disclosed and had it been disclosed in all probability the petitioner would have foundered on the rock of Article 7. Even in the habeas corpus petition moved before this court it was kept a closely guarded secret and in order to lay the foundation for raising a legal argument it was for the first time stated in the rejoinder affidavit that the petitioner left for Pakistan in the last week of December, 1949. Be that as it may, we propose to deal with the legal question on the assumption that he left for Pakistan after 26th January, 1949. We are afraid that even on this footing the petitioner cannot be deemed to be a citizen of India.

12. In our opinion Article 7 of the Constitution clearly overrides Article 5. Firstly, the non obstinate clause in Article 7 is very significant. Whatever rights a person might acquire by virtue of having his domicile in India at the commencement of the Constitution and on account of his birth in India, those rights would be lost if he migrates from India to Pakistan after the 1st day of March, 1947. The words "notwithstanding anything in Article 5" which occur in Article 6 unmistakably destroy the rights which would otherwise accrue by virtue of Article 5. Secondly, we have already referred to Article 394 in accordance with which the words "at the commencement of this Constitution" can mean only the 26th January, 1950. Thirdly, the omission of the words "at the commencement of this Constitution" in Article 7 is very significant. It appears to us that where the Constitution wanted to limit the scope of an Article by reference to the date of the commencement of the Constitution, it used an appropriate phrase in that behalf. That is why the words "at the commencement of this Constitution" which occurred in Articles 5 and 6 did not occur in Article 7. Fourthly, the matter appears to have been clinched by the decision of the Supreme Court in the case of State of Madhya Pradesh Vs. Peer Mohd. and Another, . It is true that the petitioner in that case had migrated after January 26, 1950 and in that connection it was held that the petitioner could not be said to be a foreigner but Article 7 was interpreted and the dictum was clearly laid down in paragraph 12 of the Reports in these terms:--

"Therefore we are satisfied that Article 7 refers to migration which has taken place between the 1st day of March, 1947 and January 26, 1950."

Thus, it is manifest that the material date for the purpose of applying Article 7 to

the facts of this case is the period between the 1st March, 1947 and the 26th January, 1950. The alternative date suggested on behalf of the petitioner viz., 26th November, 1949 is not material.

13. Sri Sushil Kumar, learned counsel for the State cited before us a later decision of the Supreme Court in which *Fida Hussain Vs. State of Uttar Pradesh*, was explained. In *State of Assam Vs. Jilkadar Ali*, the petitioner had opted for service in Pakistan. In 1947 he left India for Pakistan. On December 23, 1953 he entered India on the strength of a Pakistani passport and returned to Pakistan on April 25, 1954. He re-entered India on April 4, 1955 and instead of returning to Pakistan overstayed beyond January 26, 1955 and was consequently arrested and prosecuted u/s 14 of the Foreigners Act. In a revision filed by him in the High Court of Assam-Nagaland it was held that the petitioner was a natural born British subject and since he entered India in April, 1955, he was not governed by the amended definition of the word "foreigner" which was introduced in 1957 and so he must be deemed to be an Indian citizen. The Supreme Court rejected this reasoning and remarked at page 322 of the Reports:--

"In our view the reasoning adopted by the High Court, of which the basis was the decision in *Fida Husain's* case (supra), was not valid as the High Court omitted to take into account the fact of the respondent having left India for Pakistan in August, 1947 after he had opted for service in Pakistan." It was observed by Shelat, J.:--

"Under Article 7, notwithstanding anything in Article 5, a person, who has after the first day of March, 1947 migrated from the territory of India to the territory included in Pakistan shall not be deemed to be a citizen of India. If Article 7 applied to this case, the respondent would not be deemed to be a citizen of India notwithstanding his complying with the conditions of Article 5. It is quite clear from *State of M. P. v. Peer Mohammad* that it would be Article 7 and not the Citizenship Act, 1955 which would apply to a case where a person has migrated to Pakistan between March 1, 1947 and January 26, 1950 when the Constitution came into force."

On facts also the finding recorded by the Supreme Court was that the petitioner had migrated to Pakistan, that his movement to Pakistan was neither involuntary nor for a short or limited period, but was clearly with the definite intention of having a permanent place of abode there. His case thus fell within Article 7 and therefore on his entry in India on April, 1955 he was a person who was deemed not to be a citizen of India. Explaining the verdict obtained by *Fida Hussain Vs. State of Uttar Pradesh*, it was observed:--

"In *Fida Hussain v. State of U. P.* (supra) the question of the applicability of Article 7 did not arise and was not considered presumably because it was not contended that *Fida Hussain* had migrated to the territory which fell within Pakistan between March 1, 1947 and January 26, 1950. The court, therefore, considered only Clause (1) of Section 2(1) of the Foreigners Act, 1946 and not its

Clause (3) as it stood before its amendment in 1957. It appears that the only date available there was the date of his entry in 1953, when the unamended definition prevailed."

14. The learned counsel for the petitioner relied on the case of State of U.P. Vs. Rehmatullah, wherein it was held that the decision of the Government of India was a condition precedent to the prosecution by the State of any person on the basis that he had lost the citizenship of India and had acquired that of a foreign country. In that case the petitioner advanced the defence that he was born in India in 1932, that he had gone to Pakistan and re-entered India on April 1, 1955 on a Pakistani passport dated the 15th March, 1955. In that view of the matter it was held that the petitioner could not come within the amended definition of the term "Foreigner" which came into effect from the 19th January, 1957. He was given the benefit of Article 5 in view of the fact that he was a natural born British subject. He was held to be not a foreigner. But that case is clearly distinguishable inasmuch as Article 7 of the Constitution did not apply to its facts. It is clear from paragraph 5 of the Reports that according to the finding recorded by the City Magistrate, Varanasi the respondent had voluntarily gone to Pakistan and had stayed there for eight or nine months. He had returned to India on April 1, 1955 which implies that he must have gone to Pakistan round about July or August, 1954 i.e. not between 1st of March, 1947 and 26th January, 1950. He, therefore, did not cease to be a foreigner by virtue of the provision of Article 7. That case obviously cannot assist the present petitioner.

15. Consequently in our view the petitioner is a foreigner and his detention in pursuance of the order passed by the Civil Authority is not illegal. No other point was argued before us.

16. The petition is, therefore, dismissed.