

(1960) 04 MP CK 0023

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 86 of 1958

Firoz Meharuddin

APPELLANT

Vs

Sub-Divisional Officer and Others

RESPONDENT

Date of Decision : 26-04-1960

Acts Referred:

Citizenship Act, 1955 — Section 3, 4, 9(2)
Citizenship Rules, 2009 — Rule 30
Constitution of India, 1950 — Article 258, 5, 6, 7, 9
Foreigners Act, 1946 — Section 12, 2, 3(2)

Citation : AIR 1961 MP 110 : (1961) CriLJ 516 : (1961) JLJ 662 : (1960) 5 MPLJ 1246

Hon'ble Judges : V.R. Newaskar, J; T.P. Naik, J; T.C. Shrivastava, J

Bench : Full Bench

Advocate : R.K. Verma, for the Appellant; M. Adhikari, General and H.L. Khaskalam, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Shrivastava, J.

This is a petition under Article 226 of the Constitution by which the petitioner challenges the order passed by the Sub-Divisional Officer, Mahasamund, on 11-4-1958 ordering the petitioner to leave India on the ground that he is a Pakistan citizen and has overstayed the period of his visa. Ten other similar petitions involving common questions of law were heard along with this petition. They are:

S. No.

Case No.

Filed by.

1.

Misc. Pet. No. 290/1958

Mohammad Murtaza Khan

2.

Misc. Pet. No. 61/1959

Issab alias Yusuf

3.

Civil Misc. Pet. No. 39/1958

Akbarkhan Alam Khan

4.

Civil Misc. Pet. No. 59/1958

Maujmabibi & others

5.

Misc. Pet. No. 139/1957

Kaloo s/o Noor Mohd.

6.

Misc. Pet. No. 206/1957

Gulam Rasool

7.

Misc. Pet. No. 6/1958

Mohammd Yusuf

8.

Misc. Pet. No. 168/1958

Mohammad Abbas

9.

Misc. Pet. No. 70/1959

Shabrati s/o Mangoo

10.

Misc. Pet. No. 371/1958

Ghulam Mahmmmod Khan

All these petitions, except S. No. 3, are directed against the orders of the District

Superintendent of Police or the Collector u/s 3(2)(c) of the Foreigners Act, 1946, directing the petitioners to leave India. In S. No. 3 the impugned order was passed by the Sub-Divisional Officer, Jhabua, under S. 3(2)(e) of that Act imposing restrictions on the petitioner's movements,

In S. Nos. 4, 6 and 7 the petitioners state that they had gone to Pakistan before the Constitution, i.e., sometime in 1948 or 1949. In S. No. 1 the petitioner states that he went to Pakistan in the middle of 1950, whereas in the return it is stated that he went over in 1948. In the remaining cases the petitioners went to Pakistan between 1952 and 1954. The reasons for the departure to Pakistan are given differently in each case; but it is not necessary to refer to them here for the appreciation of the common law points involved in these cases.

The petitioners obtained passports in 1955 or 1956 and the necessary visas for visiting and staying in India. In some cases they made more than one visit to Pakistan. The period of stay was extended from time to time but in all cases the petitioners stayed beyond the date after the expiry of the final period of extension. The impugned orders were thereupon passed in the latter half of 1957 or in 1958. All these orders were passed after the definition of "foreigner" was amended by the Foreigners Law (Amendment) Act, which came into force on 19-1-1957.

There are 12 Criminal Appeals filed by the State Government against the acquittal of the respondents for offences u/s 14 of the Foreigners Act, 1946, for contravening an order passed u/s 3(2)(c) of the Act by the District Superintendent of Police directing them to leave India. They are as follows:

(1)

Cr. Appeal No. 388/1958

State v. Mst. Khatun

(2)

Cr. Appeal No. 479/1958

State v. Rashid Khan

(3)

Cr. Appeal No. 593/1958

State v. Sk. Munir

(4)

Cr. Appeal No. 455/1958

State v. Sibatulla khan

(5)

Cr. Appeal No. 408/1958

State v. Mohd. Siddique

(6)

Cr. Appeal No. 572/1958

State v. Musrafkhan

(7)

Cr. Appeal No. 10/1959

State v. Dost Mohd & another

(8)

Cr. Appeal No. 87/1959

State v. Bashir

(9)

Cr. Appeal No. 37/1959

State v. Khudabux & Another

(10)

Cr. Appeal No. 409/1958

State v. Abdul Latif

(11)

Cr. Appeal No. 456/1958

State v. Mohd. Akram

(12)

Cr. Appeal No. 172/1959

State v. Abdul Rashid

These appeals were heard along with the misc. petitions.

The first question which has been raised on behalf of the petitioners is that the Foreigners Act, 1946, which was amended on 19-1-1957, has no application to the case of persons who were Indian citizens at the commencement of the Constitution and had gone to Pakistan after the Constitution but had returned before the amendment came into force. It is further urged that under the Citizenship Act, 1955, the question whether the citizenship of such of the petitioners, who were Indian citizens at the commencement of the Constitution, had terminated is a matter which could be determined only by the Central

Government who have been prescribed as the authority for the purposes of Section 9(2) of that Act.

Accordingly, it is urged on behalf of the petitioners that unless such a determination was made by the Central Government, the State Government or the executive authorities of the District had no power to order their externment. The second point which has been urged on behalf of the petitioners is that the impugned orders, which have been passed by the District Superintendent of Police or the Collector or other authorities, are illegal, because it is only the Central Government to whom the power to pass orders u/s 3 of the Foreigners Act has been given; and unless there is a valid delegation in favour of a particular authority u/s 12 of that Act, no order could validly be passed.

Before considering the specific grounds on which the orders are attacked, it would be convenient to refer to the several laws which have been referred to in arguments before us.

There were no restrictions on the movements of persons from India to Pakistan or vice versa after the partition of the country in 1947 till 19-7-1948, when the Influx from West Pakistan (Control) Ordinance, 1948, was promulgated. By the Rules framed under that Ordinance a system of permits was introduced authorising the visitors and immigrants to go to Pakistan from India or to come to India from Pakistan. On 15th February 1949 a Notification was issued by the Central Government under which any person, who had entered India unlawfully in contravention of the rules, could be removed. The permit rules continued till 29th April, 1950 when the Indian Passport Rules, 1950, framed under the Passport Act, 1920, were introduced. According to those rules, it was necessary for any person coming from Pakistan to India to hold a passport with the necessary visa.

In *Ebrahim Vazir Mavat Vs. The State of Bombay and Others*, , it has been held that Section 7 of the Influx from Pakistan (Control) Act, 1949, which authorises the removal of any person from India, is void, in so far as it conflicts with the fundamental right of a citizen of India under Article 19(1)(e) of the Constitution. In other words, it was held that the Act and the Rules made thereunder could not be so interpreted as to authorise the removal from India of an Indian citizen who entered India without the proper permit. I need not refer to the provisions of the Act and the Rules made thereunder, as the question concerning them does not arise in any of the cases before us.

As regards the Indian Passport Rules, 1950, the only prohibition contained in Rule 30 is that no person shall enter or attempt to enter India unless he is in possession of a valid passport. It is only for contravening this rule that a person can be punished u/s 3 of the Indian Passport Act, 1920. As held in *The State Vs. Ibrahim Adam*, , stay beyond the term prescribed in the visa does not constitute an offence under Rule 3 and is not, therefore punishable I need not refer to the arguments which were addressed to us on this point, as the

implications of the Passport Rules also do not arise for consideration in any of the cases before us.

The subject of citizenship is dealt with in Articles 5 to 11 of the Constitution. Article 5 provides that every person who has his domicile in India and satisfies one of the three conditions (a), (b) and (c) shall be a citizen of India. Article 6 deals with persons who have migrated to the territory of India from Pakistan and lays down conditions under which a person would be a citizen of India. It divides such persons into two classes; i.e. those who migrated to India before 19-7-1948 and those who migrated after that date.

The first class of persons are deemed to be citizens if they have been ordinarily resident in India for six months after the migration. The second class of persons - can be deemed to be Indian citizens if they register themselves as such. The words "At the commencement of the Constitution" are expressly used in these two articles and thus there is no difficulty in appreciating that they deal with citizenship of persons as existing on that date.

Then follows Article 7 which begins with a non-obstante clause and is in the nature of a proviso to the earlier two articles. It is necessary to understand the implication of this Article, as the petitioners claim citizenship on the date of the commencement of the Constitution on the basis of Articles 5 and 6. Article 7 provides that a person who would be a citizen of India by virtue of the provisions in Articles 5 and 6 shall not be deemed to be such if he "has after the 1st day of March 1947 migrated from the territory of India to the territory now included in Pakistan". The question is whether the migration referred to in this article is restricted to migration prior to the Constitution or whether it applies to migration at any time after the Constitution also.

It appears necessary to read Article 7 in the light of the earlier Articles, As these earlier articles deal with citizenship on the date of the commencement of the Constitution, it seems reasonable to infer that Article 7 also deals with a situation on that date. Further, Article 6, as I have said, deals with migration from Pakistan to India after a general provision has been made in Article 5. Article 7 then deals with migration from India to Pakistan, i.e. a situation opposite to that dealt with in Article 6.

Both the Articles read in juxtaposition refer to citizenship on the date of the Constitution as it is affected by the two events. In this connection, it is significant to note the words "has migrated" used in Article 7. The use of the present perfect tense denotes that the migration refers to the period before the Constitution. Else the use of the present tense would be more appropriate and the word "migrates" would be used to cover migration for all times in future. The other interpretation that citizenship on the date of the Constitution is lost by migration at any time leads to several difficulties.

Take the case of a person who is a citizen of India under Articles 5 and 6 holding from 1950 to 1960 an office for which Indian citizenship is a necessary

qualification under the Constitution. He would be validly holding the office, but if he migrates in 1961 to Pakistan, complications would arise if his citizenship is retrospectively wiped out and he is considered never to have been a citizen of India. I do not think such an effect was intended by the framers of the Constitution.

Giving retrospective effect to migration after the Constitution virtually amounts to terminating the citizenship already existing. This is repugnant to Article 10 which ensures continuance of citizenship and contemplates a law by Parliament for terminating existing citizenship. The relevant law has been enacted in 1955 called the Citizenship Act and according to that Act citizenship can be terminated on acquisition of citizenship of another country only. Another mode of terminating citizenship, albeit by a fiction, would seem inconsistent. Under Article 11, nothing in the Constitution derogates from the power of Parliament to frame laws on the subject of citizenship and it would appear that citizenship should not be lost by an Indian except as provided in that Act.

In my opinion, Articles 5, 6 and 7 provide for citizenship as it accrued on the date of commencement of the Constitution and there was no intention to provide for acquisition or loss of citizenship after that date in these articles. Article 9 also likewise, is, in my opinion, restricted to cases of acquisition of citizenship of any foreign State before the Constitution.

I may state that in 1948 there was an agreement between the Commonwealth countries (India, England, Pakistan, Canada, Australia, New Zealand etc.) on the question of citizenship and necessary Acts were passed by some of these countries on the subject. Pakistan promulgated its Citizenship Act in 1951. This could not however be done in India at that time, as the Constitution was on the anvil. However, from the fact that the question of acquisition of citizenship after the Constitution was not provided for in the Constitution, it appears that immediately after the Constitution it was intended to promulgate such an Act.

For some reasons, the matter was postponed until 30-12-1955 when the Citizenship Act, 1955 came into force. This Act provides for the acquisition of citizenship by birth, descent, registration or naturalization. It also provides for its renunciation, termination and deprivation. It will be noticed that under sections 3 and 4, which deal with acquisition of citizenship by birth and descent, the provisions are restricted to the acquisition after the 26th January 1950,

Similarly, the other provisions of the Act apply to the period after the commencement of the Constitution. The Act does not touch the question of those persons who were citizens or deemed to be citizens at the time of the commencement of the Act, except in the context of the termination of such citizenship. The provisions in the Constitution and this Act supplement each other and have to be read together.

Coming now to the contentions of the parties, the first question is whether citizens of Pakistan could be considered "foreigners" under the Foreigners Act,

1946, prior to the amendment. Section 2, as it stood in 1946, with the adaptations made in 1950 was as follows;

"(a) "foreigner" means a person who-

(i) 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 (4. and 5 Geo. 5, C 17), or

(ii) has not been granted a certificate of naturalization as a British subject under any law for the time being in force in India, Or

(iii) is not a citizen of India."

Shri M. Adhikari, Advocate General, for the State argues that even under the definition, as it stood prior to 1957, Pakistan citizens were foreigners within the meaning of the Foreigners Act, 1946. His contention is that they did not satisfy Clause (iii) and, therefore, they must be deemed to be foreigners. The three clauses are negative and are connected with the disjunctive conjunction "'or". It appears to me that if the qualifications stated in any one of those clauses exist affirmatively in any person, he would not be a foreigner. Thus, even if a person is not a citizen of India, but is a natural-born British subject within the meaning of Clause (i) he would not be a foreigner. The learned Advocate General points out that the British Nationality and Status of Aliens Act, 1914, which is referred to in Clause (i) had been amended and replaced by another Act in England in 1948. Therefore, the reference to it in that clause becomes meaningless and Clause (i) should be treated as non-existent. This contention is based upon a misapprehension of the effect of repeal of an Act, which has been incorporated in another Act by reference. The position is discussed in Craies on Statute Law (Fifth Edition) at page 385 as follows:

"Sometimes an Act of Parliament, instead of expressly repeating the words of a section contained in a former Act, merely refers to it, and by relation applies its provisions to some new state of things created by the subsequent Act. In such a case the "rule of construction is that where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second."

When an Act is incorporated by reference in another Act, all that it means is that instead of writing the relevant provisions in the Act, a reference is made to another Act for the sake of convenience; but for all practical purposes the provisions which are incorporated are deemed to have been written in the latter Act. The repeal of the former Act does not, therefore, affect the text of the latter Act.

This conclusion is further borne out by the fact that in the Citizenship Act of 1955 it has been expressly provided in Section 19 that the British Nationality and Status of Aliens Acts, 1914 to 1943, are repealed in their application to India. Such a provision would not be necessary if the repeal had already obliterated

them from the sections where they have been referred to. In this view, Pakistan citizens could not be treated as foreigners prior to the amendment made in 1957, as they then satisfied affirmatively the conditions mentioned in Clause (i) of Section 7(2?).

As the definition now stands, every person is-a foreigner who is not a citizen of India. The fact whether he is a citizen of India or not is to be decided with reference to the provisions in the Constitution and the Citizenship Act, 1955. Persons who migrated to Pakistan before the Constitution and did not return till the commencement of the Constitution would never be considered to have been citizens of India : Aslam Khan Vs. Fazal Haque Khan and Others, :

In cases where the person concerned was a citizen of India at the commencement of the Constitution, his citizenship could be terminated only as provided for in Section 9 of the Citizenship Act, 1955. Sub-section (2) of Section 9 is as follows:

"(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf."

Under rule 30 of the Rules framed under that Act the Central Government has constituted itself as the authority for the purposes of Section 9(2).

It is contended on behalf of the petitioners that the effect of Sub-section (2) of Section 9, read with Rule 30, is that the Central Government has been constituted as the exclusive authority to decide the question whether citizenship of a person has ceased on account of the acquisition of citizenship of another country. I have no doubt that this contention is well founded. The language of subsection (2) makes it clear that in all cases where! such a question arises, it shall be determined by the prescribed authority. A question arose in all the petitions before us whether the citizenship of the petitioners terminated on account of the acquisition of citizenship of Pakistan.

This question cannot be decided by any other authority, whether executive or judicial, in view of the provisions in this section. In *Nasir Ahmed v. Chief Commissioner Delhi*, AIR 1959 Punj 261 it was held that a citizen cannot be deported unless an enquiry u/s 9 of that Act is held as to when and how he lost his citizenship. A similar view has been taken in *Mohd. Khan v. Govt. of Andhra Pradesh* AIR 1957 A P 1047. This appears to me to be the correct position. Accordingly, in cases where the petitioners were citizens of India at the commencement of the Constitution, they continue to be so. The question whether they lost citizenship must be left to be determined by the Central Government u/s 9 of the Citizenship Act, 1955.

Shri R. K. Verma for some of the petitioners requests that if we leave the matter to be decided by the Central Government, we must accept his contention that

rule 3 of Schedule III of the Citizenship Rules, 1956, which provides that the obtaining of a passport would be conclusive evidence of the acquisition of citizenship of another country, is in excess of the rule-making power and amounts to a refusal to make an enquiry as required by Section 9 of the Citizenship Act, 1955. This is "the view which has been taken in AIR 1957 A. P. 1047 (cit. sup.). I may observe that a contrary view has been taken in *State Vs. Sharifbhai Jamalbhai*, .

The question regarding the acquisition of citizenship of another country is still to be determined in these cases u/s 9 by the Central Government and it would, therefore, be premature to say anything regarding the procedural roles to be followed in determining the question. If the petitioners feel aggrieved by the decision of the Central Government on the ground that it is illegal or contrary to the provisions of the Citizenship Act, 1955, they would be entitled to move for an appropriate writ. At this stage, it would be premature to decide the question.

Nor is it necessary to discuss the implications of obtaining a Pakistan passport by a citizen. The views of the different High Courts differ on this point. One view is that the obtaining of a passport is not evidence of the acquisition of the citizenship of another country. AIR 1957 A P 1047 (cit. sup.). Another view is that passport and visa furnish prima facie evidence of the intention of a person having voluntarily acquired the citizenship of another country, *Dawood Ali Arif and Another Vs. Deputy Commissioner of Police and Others*, and *Mohd. Ghouse v. State of Andh Pra* AIR 1958 AP 761. As the matter will arise only when the question is decided by the Central Government u/s 9(2) of the Citizenship Act, 1955, I refrain from making any observations on this matter.

It has been urged before us in some cases that the petitioners were minors at the time when they applied for passports in Pakistan and could not therefore have the necessary intention to terminate their citizenship. It has also been argued in some cases that the petitioners were compelled to apply for passports by force of circumstances and they made false declarations at the instance of some professionals who induced them to do so for obtaining the passports. These are also matters to be decided by the Central Government u/s 9 of the Citizenship Act, 1955, and it would not be proper for me to express any views before the question is considered by the proper authority,

The second question which has been raised on behalf of the petitioners is that the authorities who passed the impugned orders u/s 3(2) of the Foreigners Act were not competent to pass such orders for want of necessary delegation from the Central Government and the impugned orders are, therefore, invalid. Section 12 of that Act authorises the authority empowered under the Act to delegate it further to any authority subordinate to it. Acting on this provision, read with Article 258 of the Constitution, the Central Government issued S. R. O. 1072 and 1073 published in the Government of India Gazette, dated 13th May 1955, authorising the State Governments to exercise the functions of the Central Government in making orders of the nature specified in Clause (c) of Sub-section

(2) of Section 3 of the Foreigners Act Accordingly, it is clear that the State Government had authority to pass orders under that section.

The petitioners contend that even if there was a valid delegation in favour of the State Government, it could not further delegate the power to its subordinates. We find that Section 12 itself permits such further delegation. The order of the Central Government delegating its functions to the State Government is an order which confers an authority on the State Government under the Act within the meaning of that expression as used in Section 12 and, therefore, the State Government! can delegate the functions to any authority subordinate to it. This view finds support in *Dawood Ali Arif and Another Vs. Deputy Commissioner of Police and Others*, .

Our attention has been drawn to the Notification No. 1603, dated 21-2-1958, under which the State Government has delegated its power to pass orders u/s 3 to the "Civil Authorities" which have been authorised to pass orders under the Foreigners Act, 1946. The District Superintendents of Police have been designated as the "Civil Authorities" for the purposes of the Foreigners Order by Notification No. 10779/737/4-1, dated 18th July 1957, and they can, therefore, pass orders u/s 3 of the Foreigners Act also. However, as the delegation which has been shown to us is dated 21-2-1958, any orders which have been passed prior to that date are invalid for want of necessary delegation.

The question of the validity or the existence of a delegation in favour of the District Superintendent of Police came up for consideration before a Division Bench of this Court in *The State of Madhya Pradesh Vs. Mumtaz Ali Faiz Ali and Others*, . While holding that a valid delegation to pass orders u/s 3(2) has been made in favour of the State Government, it was held in those cases that no such delegation in favour of the District Superintendent of Police was shown to have been made. In those cases, the order of the District Superintendent of Police was sought to be supported on the ground that he had been appointed as the "Civil Authority" under the Foreigners Order, 1948. It was held that this stand was untenable, as the Civil Authority appointed under that Order could not, by virtue of such appointment alone, act under the Foreigners Act and could not validly pass orders under the Foreigners Act.

We find ourselves in full agreement with these views. A specific delegation u/s 12 of that Act for enabling the subordinate authorities to pass orders u/s 3 is necessary. The delegation which has now been made on 21-2-1958 was not brought to the notice of the Division Bench, presumably because the orders impugned in those cases were passed prior to that date. The delegation which was made on 21-2-1958 is valid and the District Superintendents of Police now have the power to pass orders u/s 3(2) of the Foreigners Act.

Scrutinising the orders which are impugned before us, we find that in most of them it has been stated by the issuing authority that the State Government has passed the necessary orders for the deportment of the petitioners and the

petitioners should therefore leave India before the specified date given therein. In cases where the order has actually been passed by the State Government, the authority merely communicated it to the petitioner concerned, its action was more or less ministerial. The orders in such cases derived their validity from the orders of the State Government and therefore cannot be challenged on the ground of want of necessary delegation.

We have now to examine the facts of each case in the light of these observations. However, as my learned brother is taking a different view on the interpretation of Articles 5, 7 and 9 of the Constitution, we postpone the consideration of the cases on merits till the difference is resolved.

Naik, J.

I have read the opinion of my brother Shrivastava J., but I regret I cannot persuade myself to accept his interpretation of Articles 5, 7 and 9 of the Constitution.

All these petitions and appeals arise under similar facts and raise some common points of law. They were, therefore all heard together and can also be conveniently disposed of together.

In my opinion, each case will have to be considered on its own facts separately. But before doing so, the common questions of law, on some of which difference has arisen between us and which govern all cases and which, if decided in favour of the petitioners in the miscellaneous petitions and in favour of the respondents in the criminal appeals, as the opinion of my learned brother seeks to do, and which would conclude the matter, making it unnecessary to go into facts of any case, may first be considered.

In a general way, it may be said that all the cases have the following facts in common:

(1) All the cases relate to persons who left the territory now included in India and went over to the territories now included in Pakistan, after 1st March 1947. They may, for the purposes of clearly understanding the contentions raised before us, be divided into categories:

(a) Those relating to persons who went before the inauguration of the Constitution, i.e., before 26th January 1950; these may be called "pre-Constitution cases." These persons went in 1948 and thereafter.

(b) Those relating to persons who went after the inauguration of the Constitution. These may be called post-Constitution cases. This period is usually between 1952 and 1954.

(2) All the persons concerned did not leave India in a normal legal way with such travel documents as the laws of India had, from time to time, prescribed.

(3) In some cases, there is evidence of their having earned a living in Pakistan;

in other cases they have kept silent on the point.

(4) They have all entered India on the basis of Pakistani passports issued to them by the Government of Pakistan in about the years 1955 and 1956, and Indian visas usually category "C" valid for a few months only of which the time was extended from time to time and the time so extended had in all cases expired when the impugned orders were passed.

(5) The impugned orders, which are all under the Foreigners Act, 1946, as amended in 1957, (hereinafter referred to as the Act), were passed some in the latter half of 1957 and the others in the year 1958:

(a) Some orders were passed by the State of Madhya Pradesh u/s 3(2)(e) of the Act and communicated to the persons concerned by the Collectors of the districts where the persons resided.

(b) Some orders were passed by the District Superintendents of Police of the Districts concerned as "Civil authorities" designated under the Act read with the relevant notifications. These were also u/s 3(2)(c) of the Act.

All these orders simply warned the persons concerned that the periods of their stay in India which was to be regulated by their visas had expired and unless they left India within the time allowed by the orders, they shall be dealt with according to law, i.e., they shall be prosecuted u/s 14 of the Act or deported.

(c) In one case, an order was passed u/s 3(2)(c) and (f) of the Act regulating his movements and conduct while to enter into a bond with sureties for the due observance of the restrictions so prescribed.

(d) In pursuance of the orders u/s 3(2)(c) of the Act aforesaid-

(i) in some cases, no action has been taken so far,

(ii) in some cases, prosecutions u/s 14 of the Act are pending,

(iii) in some cases, prosecutions u/s 14 of the Act have resulted in convictions and sentences and revisions are pending in this Court against such convictions and sentences,

(iv) while in others prosecutions u/s 14 of the Act have resulted in acquittals and the appeals filed by the State Government against the aforesaid acquittals are pending in this Court,

(6) In all these cases, the contentions of the persons concerned, inter alia, are:

(i) that they were all citizens of India and therefore not "foreigners" within the meaning of the Act because-

(a) they have never lost their Indian citizenship in any manner provided by law,

(b) they have not acquired the citizenship of Pakistan and consequently their Indian citizenship is not terminated u/s 9 of the Citizenship Act, 1955, and

(c) that even if a question arose whether they had acquired the citizenship of Pakistan, the method and manner of determining such a question as provided by Section 9(2) of the Citizenship Act, 1955, and the rules made thereunder had not been followed.

(ii) that the impugned orders, on the basis of which they are-

(a) threatened with prosecution and deportation,

(b) being prosecuted, or

(c) convicted u/s 14 of the Act, are illegal and invalid for the reason that the Collectors or the District Superintendents of police who purported to pass them had no legal authority to do so as required by the Act.

We shall now examine these contentions seriatim.

The first contention is that the persons concerned were all citizens of India and consequently were not foreigners within the meaning of the Act.

The Foreigners Act, 1946, as it stood, prior to its amendment in 1957, defined a "foreigner" as follows:

" "Foreigner" means a person who-

(i) 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

(ii) has not been granted a certificate of naturalization as a British subject under any law for the time being in force in India, Or

(iii) is not a ruler or subject of an Acceding State, or

(iv) is not a native of the Assam tribal areas; Provided that any British subject who under any law for the time being in force in India, ceases to be a British subject shall thereupon be deemed to be a foreigner."

By the Foreigners Laws (Amendment) Ordinance, 1957, (No. 1 of 1957), which came into force On 19th January 1957, the aforesaid definition was amended. The amendment definition now reads:

" "Foreigner" means a person who is not a citizen of India."

All the impugned orders were passed after the amendment came into force. Consequently, if the persons concerned are not citizens of India, they shall all be foreigners and liable to prosecution u/s 14 of the Act, provided the other requirements of the Act are satisfied.

Prior to the inauguration of the Constitution on 26th January 1950, we had no laws of our own governing the citizenship of free India than came into being in 1947. The Constitution, however, by Articles 5 to 9 in Part II, conferred rights of citizenship on certain persons who satisfied the conditions therein laid down.

Alan Gledhil in "The Republic of India" has described these persons as "the founding members of the Indian Republic". This was in the nature of a gift of the right of citizenship by the Constitution, so that till such time as Parliament legislated on the subject, there was a body of persons constituting the nation, who had the privilege of exercising civic rights as its citizens.

Article 10 of the Constitution provided that citizenship once acquired under the Constitution was not to be divested, except in accordance with any law that Parliament may make in that behalf. Article 11 gave an unfettered discretion to Parliament to legislate on all matters relating to citizenship, including its acquisition and termination. Such a law was made by Parliament in 1955 and is known as "The Citizenship Act, 1955 (Act No. 57 of 1955)".

If we analyse the citizenship laws contained in the Citizenship Act and the Constitution, broadly speaking we may say, some are born citizens, some acquire citizenship and some have citizenship thrust on them. In the first category, come persons who acquire citizenship by birth or descent under Sections 3 and 4 of the Citizenship Act. In the second category, come persons who acquire it by registration or by naturalization under Sections 5 and 6 of the Citizenship Act respectively. In the last category are persons on whom citizenship has been conferred by the Constitution (vide Articles 5 to 9) or by an order of the Central Government (notified in the Official Gazette) on incorporation into India or territory with which they had connection, vide Section 7 of the Citizenship Act.

It is common ground that the petitioners in all the Miscellaneous Petitions and the respondents in all the appeals claim citizenship by virtue of the Constitution. We shall, therefore, examine in some detail the provisions in the Constitution relating to this topic. The Articles with which we are concerned are 5, 6, 7 and 9, which, for the sake of convenience, are reproduced below:

"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; or
- (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.
- (6) Notwithstanding anything in Article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if-
 - (a) he or either his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and
 - (b) (i) in the case where such person has so migrated before the nineteenth day of July 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(ii) In the case where such person has so migrated on or after the nineteenth day of July 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefore to such officer before the commencement of this Constitution in the form and manner prescribed by that Government:

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

(7) Notwithstanding anything in Articles 5 and 6, a person who had 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 the purposes of Clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July 1948.

(9) No person shall be a citizen, of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State."

As I read these provisions, their plain meaning appears to me to be this. At the commencement of the Constitution, Article 5 conferred citizenship on any person who had his domicile in the territory of India and who also satisfied any one of the conditions laid down in Clause (a), (b) or (c) thereof. Article 7 then contains a non-obstante clause. It says that though a person who satisfies the requirements of Article 5 shall, in fact, be a citizen of India at the commencement of the Constitution, he shall be treated as if he were not in that category by a legal fiction, if he has migrated from the territory of India to the territory now included in Pakistan after the first day of March 1947.

This fiction, however, shall not operate if that person having so migrated to Pakistan returns to India with a permit for resettlement or permanent return issued by the appropriate authority, in which case he shall be in the category of persons who have migrated to India from Pakistan on or after the nineteenth day of July 1948 within the meaning of Article 6(b) of the Constitution. Conferral of this status of citizenship of India by the Constitution under Article 5 is thus conditioned by the fact that the person who claims that status shall not have migrated to Pakistan after the first day of March, 1947.

Conferral of citizenship on a person by Article 5 is thus never absolute. It is always conditional and thus liable to be defeated by his migration to Pakistan with the result that a person who has migrated to Pakistan after the 1st day of March, 1947, can never claim to be a citizen of India on the ground that he fulfils

all the requirements of Article 5. In his case, the position would be that he would never be deemed to have acquired the citizenship of India, in spite of the fact that he was domiciled in India at the commencement of the Constitution and also fulfilled the condition of any of the Clauses (a), (b) or (c) of Article 5.

The learned counsel for the petitioners, however, contend that the non-obstante clause- in Article 7 only applies to a person who migrated to Pakistan between the period 1st March, 1947 to 26th January 1950, but that if the migration to Pakistan took place on or after 26th January 1950, it would have no effect on his status as an Indian citizen, which automatically got conferred on him on 26th January 1950. It is further contended that such a person can only be deprived of his citizenship in one of the manners provided in the Citizenship Act, and as in the cases before us they are being deprived of their citizenship on the ground of their having acquired the citizenship of Pakistan, their cases fall u/s 9 of the Citizenship Act and, therefore, the procedure prescribed in Subsection (2) of Section 9 of that Act must be followed.

In my opinion, the aforesaid contention is based on a misapprehension. As pointed out in the foregoing paragraphs, Article 5 of the Constitution, no doubt, confers a right of Indian citizenship at the commencement of the Constitution on persons who satisfy its conditions on the date the Constitution was inaugurated. But this right is a precarious right, which is always liable to be extinguished with retrospective effect if the claimant to the citizenship has migrated to Pakistan after the first day of March 1947.

If the contention of the petitioners were correct, the Constitution-makers need not have resorted to a non-obstante clause and a legal fiction in Article 7. If, at the commencement of the Constitution, absolute right of citizenship were being conferred by the Constitution on all persons who satisfied the conditions of Article 5, excepting on those who had already migrated to Pakistan between 1st March 1947 and 26th January 1950, the matter could have been very simply put by adding a proviso to Article 5, or by inserting another condition in Article 5- Such a proviso could have been:

"Provided that nothing said in Article 5 also apply to a person who has migrated from the territory now included in Pakistan between the period 1st March 1947 to 26th January 1950",

or the same thing could have been inserted as a condition (d) to Article 5, viz.,--

"and who had not migrated from the territory of India to the territory now included in Pakistan after 1st March 1947 and before the inauguration of the Constitution."

Instead of adopting this simple procedure the Constitution used a non-obstante clause and a legal fiction. The correct approach for construing a non-obstante clause was indicated by the Supreme Court in *Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another*, at p. 376:

"It should first be ascertained what the enacting part of the Section provides on a fair construction of the words used according to their natural and ordinary meaning, and the non-obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment."

Following this line of approach, we shall first have to ascertain whether the petitioners could claim to be citizens of India by virtue of Article 5 of the Constitution, and then to exclude from its scope and operation those persons who clearly fall within the provisions of Article 7 of the Constitution.

First, Article 5 enumerates the conditions on the satisfaction of which a person shall ipso facto become a citizen of India at the commencement of the Constitution. Then, Article 7 provides that notwithstanding the fact that he has so acquired the citizenship of India at the commencement of the Constitution, he shall be deemed as from that date not to have so acquired it, if he has migrated from India to Pakistan after 1st March 1947. So that, though, in fact, a person became a citizen of India at the commencement of the Constitution, he is fictionally taken out of that category with retrospective effect.

We are forbidden to treat this imaginary state of facts as real by force of the legal fiction. The Constitution, in effect, says that notwithstanding the fact that a person had become a citizen of India at the commencement of the Constitution, he shall not be deemed to be so, if he has migrated from India to Pakistan after the first day of March 1947. In my opinion, the legal fiction would not have been necessary if the Constitution were conferring rights of citizenship on a person at the commencement of the Constitution unconditionally.

For, in that case, all that it had to provide for were contingencies that had already happened, i.e., migration after the first day of March, 1947 and prior to 26th January, 1950. It had not at all to provide for future contingencies, the happening of which would operate to take away retrospectively the Rights already conferred at the commencement of the Constitution. But, if all that the Constitution was conferring was a precarious right of citizenship which was always liable to be defeated by migration which has taken place after 1st March, 1947, the provision of Article 7 would be the more appropriate mode.

Some difficulty is, however, created by the use of the expression "has migrated" in Article 7. From this it was suggested that migration spoken of must be an accomplished fact at the commencement of the Constitution, and must also be continuing when the Constitution was inaugurated. There are various difficulties in adopting this strict grammatical construction. This interpretation would make the Constitution speak only on the date it was inaugurated. But, Constitution, unlike ordinary law, is dynamic, not static.

Being a fundamental law, it speaks not for any particular time but for all times. The full import and the true meaning of the words used in it can only be gathered in relation to facts and circumstances which emerge from time to time,

and at the moment when its provisions come to be applied. Consequently, though the expression "has migrated" is in present perfect tense and is referable to the time when the migration was completed and continuing, the completion of migration has to be considered in relation to the time when the question comes to be considered.

It may also be noted that the proviso to Article 7 speaks of a person "who has migrated" and "having so migrated" has also "returned under a permit for resettlement or permanent return". To such cases, "had migrated" would be more appropriate. The grammatical construction alone cannot, therefore, be the determining factor in the interpretation of these Articles. Therefore, when a question arises whether a person can claim a right of citizenship which he claims had been conferred on him by the Constitution --he shall have to prove not only that he satisfied the requirements of Article 5 but also that he had never migrated from India to Pakistan after 1st March 1947.

There is one more reason for the interpretation I seek to put on Article 7. This Article overrides the whole of Article 5. Under Clause (c) of Article 5, at the commencement of the Constitution, every person who has his domicile in the territory of India and who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India. Even such a person, if he has, after 1st 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.

Now, if the migration were to be confined to a period before the commencement of the Constitution, it will be difficult to visualise cases where the person was domiciled and was also ordinarily resident in the territory of India at the commencement of the Constitution to be entitled to claim rights of citizenship under Article 5, but who was fictionally taken out of that category because he had at the same time migrated to Pakistan. A person may be domiciled in India and yet may have migrated.

But a person cannot be ordinarily resident in India for five years preceding the Constitution and yet be said to have migrated to Pakistan after 1st March 1947. The result would, therefore, be that Article 7 would have no application to cases covered by Clause (c) of Article 5. But, if Article 7, overrides the whole of Article 5, we must give Article 7 a meaning which would be applicable to cases covered by Clause (c) of Article 5 also.

There is one more provision which may now be noticed, i.e., Article 9 of the Constitution. The provisions of this Article create further fetters against the acquisition of rights of citizenship by any person under the Constitution. "No person shall be a citizen of India by virtue of Article 5. ... if he has voluntarily acquired the citizenship of any foreign State" (Art. 9). This Article thus provides that if any person has voluntarily acquired the citizenship of any foreign State, he shall be disqualified from claiming citizenship under the Constitution. The result

would be similar to the one envisaged in Article 7. Under Article 7, migration to Pakistan after 1st March 1947 takes away that right retrospectively as if it had never been conferred, and under Article 9 the voluntary acquisition of citizenship of a foreign State similarly precludes the conferral of that right by virtue of any provision of the Constitution.

It may, however, be argued that Section 9 of the Citizenship Act provides the termination of citizenship on acquisition of citizenship of another country and therefore by virtue of Article 11 of the Constitution, the Parliamentary Act, e.g., the Citizenship Act, shall have precedence. A little reflection would, however, show that the provisions are in no way contradictory. The Constitutional provisions regarding citizenship deal with ad hoc situation, where rights of citizenship were conferred on persons at the commencement of the Constitution with certain qualifications and reservations. For, having thus provided, it further says that on the happening of certain contingencies, those rights shall be deemed never to have been conferred. When the conditions of defeasance operated, the citizenship rights were as successfully extinguished as if they had never existed. Under the Constitutional provisions, therefore, it was not a case of termination of citizenship but its extinction with retrospective effect, or its non-accrual at any point of time. Termination pre-supposes that at some moment of time that person was a citizen of India, but if he never could claim to be a citizen under the Constitution the question of termination of his citizenship does not arise.

On the aforesaid view of law, it will be necessary to determine in each case whether the person claiming the rights of citizenship could be regarded in law as ever having been a citizen of India. In all these cases, before us, a claim for citizenship is laid under Article 5, of the Constitution; and as Articles 7 and 9 override Article 5, it will have to be determined in each case whether the person claiming the rights of citizenship had ever migrated to Pakistan after 1st March, 1947; and even if he had so migrated, whether he could claim the benefit of the proviso to Article 7 of the Constitution, and, alternatively, whether he had voluntarily acquired the citizenship of any foreign State.

The word "Migrate" is not defined in the Constitution. The dictionary meaning of it is:

Oxford Dictionary, Vol. VI p. 432:

"Of persons, a tribe, etc.: To move from one's place of abode to another; esp. to leave one's county to settle in another; to remove to another country, town, college, etc."

Webster's New International Dictionary, Part II, p. 1369:

"To go from one place to another; esp. to move from one country, region, or place of abode or sojourn to another, with a view to residence; to change one's place of residence to move."

Webster's New World Dictionary, p. 932:

"To move from one place to another; especially to leave one's country and settle in another." It may be contrasted with the word "emigrate" which means "to leave one country to settle in another". According to Oxford Dictionary, Vol. III, p. 121, "Emigrate" means:

"1. To remove out of a country for the purpose of settling in another.

To cause or assist to emigrate; to send out to settle in a foreign country."

Apart from these dictionary meanings, some key to its interpretation is also furnished by the fact that the Constitution uses the following three words in relation to its citizenship provisions: domicile, residence and migration. Domicile is a legal concept based on the physical fact of residence and the mental fact (animus manendi) of present intention to reside permanently or for an indefinite period at that place. It is not necessarily the same place which is, in fact, his home but the place which the law considers to be his home.

Residence is the place where one actually resides (his home for the present). The mere physical fact of living at a place makes it his residence. The intention to make the place his permanent home or the intention to reside there permanently or for an indefinite period is not material for the purpose.

Migration connotes a change of residence. The change may not necessarily be accompanied with animus manendi. It is very much less than a change of domicile with the result that a dependent person may migrate independently of the person on whom he is dependent while such a person may not be capable of changing his domicile.

It will be a question of fact in every case to determine whether, under the circumstances established in the case, it can be said that a person has "migrated" within the meaning of Article 7 of the Constitution. No hard and fast rule can be laid down, though the change of residence must not be for a temporary visit, which again will be a question of fact, (see Mohammad Hanif v. State of M. P. AIR 1951 Nag 185 , Shabbir Husain Vs. The State of U.P. and Another, , Kulsum Bibi Vs. District Magistrate, Kanpur and Another, , Khurshid Abdul Satar v. State of Saurashtra AIR 1953 Sau 37 (FB), Abdul Shakoor v. Custodian of Evacuee Property AIR 1954 Mys 152, Suleman Hussain v. State of Hyderabad, (S) AIR 1955 Hyd 34, Iqbal Ahmad v. State of Bhopal AIR 1954 Bho 9 and Karimunnissa v. State Government of Madhya Pradesh, (S) AIR 1955 Nag 6.

Though the evidence of a change of domicile would be good evidence of migration, the converse need not be true, because a person may migrate to Pakistan, while retaining his domicile in India as in the case of a dependent person. Thus, in The State of Bihar Vs. Kumar Amar Singh and Others, , on proof of the following facts, the Supreme Court held that the person concerned, e.g., the Kumar Rani, must be held to have migrated from India to Pakistan:

"(1) Kumar Rani went to Karachi in July 1948.

(2) Her story that she went there temporarily for medical treatment has been doubted by the High Court and appears to us to be unfounded.

(3) When she came to India in December 1948, she did so on a temporary permit stating in her application for the said permit that she was domiciled in Pakistan and accordingly representing herself to be a Pakistani national.

(4) She went back to Pakistan in April 1949 on the expiry of that temporary permit.

(5) She made an attempt to obtain a permit for permanent return to India only after steps had been taken to vest the property in the Custodian and after the same was taken possession of."

The aforesaid case further laid down that:

"Even if therefore Article 5 can be said to be applicable to her on the assumption that Captain Narayan Singh was her husband and that her domicile was that of her husband, the facts bring her case under Article 7. Article 7 clearly overrides Article 5. It is peremptory in its scope and makes no exception for such a case, i.e., of the wife migrating to Pakistan leaving her husband in India. Even such a wife must be deemed not to be a citizen of India unless the particular facts bring her case within the proviso to Article 7."

In *Mandhara Jakab v. Kutch Government* AIR 1951 Kut 38, departure from India to Pakistan for the purpose of employment OP labour was held to constitute migration.

It may here be mentioned that 1st March 1947 and 19th July 1948 are two important dates for determining the rights of persons claiming rights of Indian citizenship under the Constitution. First day of March 1947 refers to the date accepted by the Constitution, when disturbances, consequent on the impending partition of the undivided India, started, and, generally speaking, the Hindus and Muslims started moving to territories now included in India or Pakistan. This movement has continued to this day and there is no knowing how long it shall continue.

It, therefore, created serious doubts regarding the intention of such "migrants" whether they wanted to be citizens of India. The Constitution recognised that there was neither logic nor principle in conferring citizenship rights on persons who had deliberately chosen or may hereafter deliberately decide to choose to make some other Country their home. It, therefore, provided that the conferral of citizenship rights by Article 5 of the Constitution was subject to its defeasance under certain contingencies provided for in the Constitution.

The unrestricted flow of persons migrating from India to Pakistan and vice versa continued without check or hindrance of any kind up to 19th July, 1948, when Influx from West Pakistan (Control) Ordinance, 1948 (No. XVII of 1948), was

promulgated. Thereafter, entry and exit from and to India was regulated first by permits and then by passports and visas. As the intention of persons visiting Pakistan thereafter could be known with some reasonable degree of certainty, it was provided under Article 6(a) that a person shall be deemed to be a citizen of India at the commencement of the Constitution if he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and in case he had migrated into India before 19th July 1948, that he had been ordinarily resident in the territory of India since the date of his migration, that he had been registered as a citizen of India in the manner prescribed. Proviso to Article 7 further provided that if a person who had migrated to Pakistan returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of law, he shall be deemed to have migrated to India after 19th July, 1948 under Clause (b) (i) of Article 6 of the Constitution.

The law, therefore, works no hardships on any person. If a person had migrated from India to Pakistan between 1st March 1947 and 19th July, 1948, he can return to claim citizenship of India only under the proviso to Article 7. Thereafter, i.e., after 19th July 1948, a person could go to Pakistan only under a permit or with a passport. If, however, he chose to go in an unauthorised or surreptitious way, the question would be whether he had "migrated", and if it was found that he had "migrated", he could claim citizenship rights under the proviso to Article 7 only. The mere presence of the person in India at the commencement of the Constitution, satisfying the conditions laid down in Article 5, could not and was not intended to confer absolute rights of citizenship on him under Article 5 of the Constitution, because Article 5 was specifically made subject to Art, 7 without reference to any point of time when its operation would cease.

I, therefore, do not agree that Article 7 does not override Article 5 in respect of persons migrating from India to Pakistan after 26th January, 1950.

In this view of the law, the petitioners if they have migrated or acquired the citizenship of Pakistan, could never claim the Indian Citizenship and consequently, the question of its termination u/s 9 of the Citizenship Act could not arise. It may also be mentioned that the impugned orders have all been passed under the. Foreigners Act, 1946, which u/s 9 provides a special burden of proof. The section says:

"If in any case not falling u/s 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is Or is not a foreigner or is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person."

The burden of proving that the petitioners are not "foreigners" as defined in Section 2 of the Foreigners Act, 1946, shall thus be on them. This they can show

by establishing that they are citizens of India under Article 5 of the Constitution; but as Article 7 overrides Article 5, they shall have to prove not only that they satisfy the requirements of Article 5 but also that they had not migrated from India to Pakistan after 1st March 1947. Similarly, they shall also have to establish that they had not voluntarily acquired the citizenship of a foreign State.

The second contention was that the impugned orders were passed by unauthorised persons, i.e., by persons or authorities to whom the necessary delegation empowering them to pass orders under the Foreigners Act had not been made.

Under Section 3 of the Foreigners Act, the Central Government has been empowered to make orders providing for the subject detailed therein. Under Article 258 of the Constitution, the Central Government issued a S. R. O. 1072 and 1073, published in the Gazette of India, dated 13-3-1955 authorising the State Governments to exercise the functions of the Central Government in making orders of the nature specified in Section 3(2)(c) of the Foreigners Act. Section 12 of the Act further provides that:

"Any authority upon which any power to make or give any direction, consent or permission to do any other act is conferred by this Act or by any order made thereunder may, unless express provision is made to the contrary, in writing authorise, conditionally or otherwise, any authority subordinate to it, to exercise such power on its behalf, and thereupon the said subordinate authority shall, subject to such conditions as may be contained in the authorisation, be deemed to be the authority upon which such power is conferred by or under this Act."

So that the State Government, on whom authority has been conferred by the Central Government under Art, 258 of the Constitution, could, acting u/s 12 of the Foreigners Act, delegate its power to any authority subordinate to it. The orders would thus be valid wherever the written authority of the State Government exists.

Newaskar, J.

These are 23 cases which involve common points. They were heard together by Division Bench consisting of T. P. Naik, and T. C. Shrivastava, JJ. They differed in their opinion as regards two common points which according to their view materially affected the decision of these cases. They are, therefore, laid before me for expressing my opinion on those points of difference: The said points of difference are:

Whether "migration" referred to in Article 7 of the Constitution has reference to a migration between the period 1st March 1947 and 26th January 1950 only or to a migration any time after 1st March 1947, whether before or after inauguration of the Constitution, so that a person ?migrating to Pakistan after the inauguration of the Constitution could claim to be a citizen of India by virtue of Article 5 of the Constitution?

Whether by virtue of Article 9 of the Constitution, the voluntary acquisition of citizenship of a foreign State precludes a person from claiming citizenship under Article 5 of the Constitution?

It is agreed at the Bar that the principal point is point No. 1. As regards point No. 2, as far as I can see, it answers itself. This is also what is submitted! at the Bar both by the learned counsel for the petitioners as well as by the learned Advocate-General. The answer to the second point seems to be contained in the terms of Article 9 itself. That Article provides (omitting immaterial part of it) that no person shall be a citizen of India by virtue of Article 5 if he has voluntarily acquired the citizenship of any foreign State. It is therefore clear that if a person has voluntarily acquired the citizenship of any foreign State that circumstance precludes that person from claiming citizenship under Article 5, of the Constitution. The Article also precludes such a person from claiming to be a citizen of India by virtue of Article 6 or 8. But the latter Articles do not seem to be included in the second point.

Now before dealing with the first point it will be useful to give a resume of the Articles of the Constitution of India having a bearing on that point. These Articles are contained in Part II of the Constitution dealing with the subject of citizenship and are from 5 to 11. It may be mentioned here that Articles 5 to 9, among others, which provide for who are deemed to be and who are deemed not to be the citizens of India came into force on 26-11-1949 that is before the date referred to in the Constitution as the date of the commencement of the Constitution. This date is 26-1-1950.

Article 5 speaks as to who shall be taken to be the citizen of India at the commencement of the Constitution. According to it every person who has his domicile in India and who was born in India or either of whose parents was born or who has been ordinarily resident in India for not less than five years immediately preceding the commencement of the Constitution shall be the citizen of India at the commencement of the Constitution.

Article 6 increased the scope of the aforesaid category at the commencement of the Constitution by including therein, by means of a legal fiction, persons who though they did not fulfill the qualifications contained in Article 5 fulfilled some other qualifications mentioned in this Article. These qualifications are:

I. that either the person concerned or either of his parents or any of his grandparents was born in India as defined in the Government of India Act, 1935 (as originally enacted);

II. that he has migrated to India and that in case his migration had taken place before 19-7-1948 he has been ordinarily resident in the territory of India since the date of his migration or that in case his migration had taken place subsequent to that date he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him for the purpose before the commencement of the

Constitution of the prescribed sort after fulfilling a further qualification regarding his residence in the territory of India for not less than six months before the date of such application.

It is not disputed and is also clear from the terms of these two Articles that both of them have a reference to the date of commencement of the Constitution. They indicate who are and who are deemed to be the citizens of India at the date of the commencement of the Constitution.

Article 7, which is the material Article for the purpose of point No. 1, is as follows:--

"Notwithstanding anything in Articles 5 and 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 the purposes of Clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948."

Article 8 is another deeming provision and serves to broaden the scope of the category of citizens of India by including therein persons who though they do not fulfil the qualifications contained in Article 5 fulfilled certain other qualifications as indicated in that Article. These qualifications are that the person concerned or either of his parents or any of his grand parents was born in India as defined in the Government of India Act, 1935 (as originally enacted) and who being ordinarily resident in any country outside India as so defined has registered himself as a citizen of India by the diplomatic or consular representative of India in the country of his residence on an application made by him to that authority either before or after the commencement of the Constitution in the form and manner prescribed by the Government of the Dominion of India or the Government of India.

Article 9, as already indicated, provides that no person shall be a citizen of India by virtue of Article 5 or shall be deemed to be a citizen of India by virtue of Article 8 or Article 9 if he has voluntarily acquired the citizenship of any foreign State.

Articles 10 and 11 are as follows:--Article 10:--

"Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen."

Article 11:--

"Nothing in the foregoing provisions of this Part shall derogate from the power of

Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship."

It will be clear from this resume of these Articles that Article 5 indicates who are citizens of India at the commencement of the Constitution. Article 6 indicates who are deemed to be citizens of India also at the commencement of the Constitution. Article 7 indicates who are deemed not to be the citizens of India in spite of their fulfilling qualifications for their inclusion in the categories mentioned in either of the two Articles 5 and 6. This category includes persons who have migrated from the territory of India to the territory now included in Pakistan after the first day of March, 1947.

But out of this last mentioned category of the persons who have migrated to Pakistan, persons who have returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law are excluded. These last mentioned persons are placed in the position of persons who have migrated to the territory of India after the 19th day of July 1948 for the purpose of Article 6(b).

The point for consideration is whether migration referred to in Article 7 of the Constitution has a reference to migration to Pakistan up to the date of commencement of the Constitution only Or to migration even after that date?

Naik J., has held on consideration of the entire scheme of Part II and the wording of Article 7 that migration referred to in that Article has a reference not only to the period prior to the Constitution but will include migration even subsequent to that date and in spite of the fact that the person who is said to have migrated has acquired a status of the citizen of India under Article 5 or 6. According to the learned Judge the status even though acquired is wiped out with retrospective effect by reason of his migration subsequent to the date of commencement of the Constitution as if such status had never been conferred upon him and his position becomes as if he had never been a citizen of India.

Shrivastava J., however, takes a contrary view. According to him migration referred to in Article 7 has no reference to migration subsequent to the commencement of the Constitution. According to his view Article 7 like earlier Articles 5 and 6 has a clear reference to the commencement of the Constitution and although the words "upto the date of commencement of the Constitution" are not there in the terms of Article 7, they are necessarily implied by reason of reference contained in that Article of Articles 5 and 6.

I will briefly mention the reasons which prompted Naik J., to take the view that "migration" in Article 7 has reference not only to the period prior to the Constitution but also to the period subsequent to the Constitution. It seems to be the opinion of Naik J., that whatever may be the date of migration of a person to Pakistan after the first day of March 1947 his position is reduced to be that of a person who had never had the status of citizen of India and that the provision is intended to be applied at any time.

The learned Judge reads Articles 5 and 7 together and holds that inasmuch as there is deeming provision under Article 7 notwithstanding Article 5 it has a necessary reference to the period subsequent to the Constitution. According to him the legal fiction created by the deeming provision in Article 7 would not have been necessary if the Constitution were conferring rights of citizenship on a person at the commencement of the Constitution unconditionally.

The use of the term "has migrated" in Article 7 does not necessarily connote that the migration spoken of there must be an accomplished fact at the commencement of the Constitution and must also be a continuing one at that time. According to him the term "has migrated" would be proper if considered with reference to the point of time when the question as to the effect of such migration has to be considered. "Has migrated", according to him, does not mean that the person concerned has migrated at the date of commencement of the Constitution but it means he has migrated when the question of his migration comes to be considered.

Another reason given by the learned Judge for taking the view that "migration" in Article 7 has a wider connotation and is not confined to migration upto the date of commencement of the Constitution is based on the consideration that incongruity would result with reference to cases covered by Article 5(c) if wider connotation is not attributed to that term. Exact reasoning on this aspect of the matter may be put in the words of the learned Judge himself:--

"Now, if the migration were to be confined to the period before the commencement of the Constitution, it will be difficult to visualise cases where the person was domiciled and was also ordinarily resident in the territory of India at the commencement of the Constitution to be entitled to claim rights of citizenship under Article 5, but who was fictionally taken out of that category because he had at the same time migrated to Pakistan. A person may be domiciled in India and yet may have migrated. But a person cannot be ordinarily resident in India for five years preceding the Constitution and yet be said to have migrated to Pakistan after 1st March 1947. The result would, therefore, be that Article 7 would have no application to cases covered by Clause (c) of Article 5. But, if Article 7 overrides the whole of Article 5, we must give Article 7 a meaning which would be applicable to cases covered by Clause (c) of Article 5 also."

The third reason given by him for taking the view is based on the comparison of the wordings of Article 7 and Article 9. It seems to have been assumed that Article 9 has application to the date subsequent to the commencement of the Constitution and that acquisition of a citizenship of a foreign State even subsequent to the date of commencement of the Constitution prevents a person who had acquired the rights of citizenship under Articles 5, 6 and 8 from claiming those rights in the same manner as if they have never been conferred upon him. He, therefore, on the basis of these reasons, held that Article 7 should be taken to include a reference to migration subsequent to the commencement of the Constitution involving deprivation of his status as if it had never been conferred

upon him. These are broadly the three reasons.

The reasons, in my humble opinion, do not represent the correct line of thought. The answer to them will be implicit in the discussion I shall hereafter make as regards the entire scheme of Part II and the wordings of Article 7 in the context in which they occur.

Part II of the Constitution which deals with the subject of citizenship immediately follows Part I which deals with what is the Union and its territory. Article 5, which is the first Article in Part II, gives the qualifications of a person who at the commencement of the Constitution is to be called the citizen of India. The qualifications indicated there are domicile in the territory of India in the first instance and the birth of self or of either of his parents or ordinary residence in the territory of India for not less than five years in the second instance.

Article 8 also has a reference to the commencement of the Constitution and to a certain extent broadens the category of citizens referred in Article 5. The category of citizens under Article 5 as broadened by Article 6 is sought to be cut down by the principal part of Article 7 omitting the proviso. The proviso seeks to add to the category to a certain extent. Out of the portion cut down by the principal part of Article 7. Article 8 again seeks to add to the category of citizens by legal fiction although the persons concerned do not fulfil the qualifications as contained in Article 5.

As this Article deals with the cases of citizens who are ordinarily residing in the countries outside India the requirement of an application to the diplomatic or consular representative of India in the Country before the commencement of the Constitution is slackened in their cases and they are allowed to submit their applications even subsequent to that date. Article 9 again like Article 7, seeks to narrow down the category of citizens referable to Articles 5, 6 and 8 by excluding persons who have voluntarily acquired citizenship of any foreign State. Thus Articles 5 to 9 between them contain the entire scheme as to who are not the citizens of India.

Article 10 then ensures to the persons who are citizens their status subject to the provisions of any Parliamentary legislation. Article 11 contains the over-riding powers of Parliament to legislate on the subjects of acquisition of citizenship, termination of citizenship and all other matters relating to citizenship. The scheme contained in Part II thus provides for a situation at the date of commencement of the Constitution and its continuance until the intervention by the Parliamentary legislation. The scheme would thus be in favour of the view that migration referred to in Article 7 has a reference to the period before the commencement of the Constitution and not subsequent to that date.

Thus having regard to the context in which Article 7 occurs, the reference it makes to Articles 5 and 6 and also having regard to the use of expression "has migrated" which is in the present perfect form there are clear reasons to hold that it refers to migration prior to the Constitution. The proviso which engrafts an

exception to the disqualification resulting from migration to Pakistan also refers to the period prior to the Constitution since it places such a person in the category referred to in Article 8(b).

Articles 8 and 9 refer to the case of a person who had gone out of India and Pakistan and therefore they have no bearing on the exact scope of Article 7. Then comes Article 10 and this also lends support to the construction that Article 7 has a reference to migration prior to the Constitution. Article 10 provides for continuance of the status of a person as a citizen of India which he held at the commencement of the Constitution subject to any future Parliamentary legislation and makes no exception with regard to a person who has migrated to Pakistan after the Constitution by providing that in his case such a continuance will not occur.

The matter will be further clear if we take into account the circumstances which led to formulate Articles 6 and 7 in Part II of the Constitution dealing with the question of citizenship. Had there been nothing unusual on the eve of independence when India and Pakistan were formed into two different States, probably, having regard to the well accepted principles of private International Law as recognised in England the provisions contained in Articles 5, 8 and 9 would have sufficed to indicate the qualifications and disqualifications of a citizen.

But just before the partition there was great political upheaval and due to fear of disturbances and due to the partition large masses of people began to flow out of and into India approximately from 1-3-1947. In the absence of such a movement) the persons answering qualification in Article 5 would have become Indian citizens and those who were living in the Pakistan territory would not have attained that status. But as a result of the movement consideration had to be given to such persons.

Upto 19-7-1948 the movement of population between India and Pakistan due to fear of disturbances and maltreatment continued uninterrupted. Then came the Influx of Pakistan Control Order followed by the Act of that name and the movement was restricted by the introduction of permit system. Question with regard to the status of such persons who had sought shelter in India either before 19-7-1948 or after 19-7-1948 on the basis of permits was under consideration and it was decided to amalgamate them into the Indian people and confer upon them the status of Indian citizens.

Question with regard to others who had gone out of India to Pakistan with the intention of taking shelter and reside there was also under consideration. It was to provide for the status of both these kinds of persons that Articles 6 and 7 were specially formulated. Article 6 provided for conferral of Indian citizenship upon the persons of the first category unconditionally if they had come prior to 19-7-1948 and subject to certain conditions if they had come later. It was for this special recognition given to them that the provision in Article 6 was expressed in the "deeming" form.

On the other hand Article 7 provided for those who had gone out to Pakistan and in their cases, as a departure from generally accepted principles of private international law, a special provision was made that in their cases mere migration without change of domicile would prevent them from being citizens of India. This was obviously necessary having regard to a very large mass of people involved and the difficulty of verifying facts indicating intention to alter the domicile. There was nothing peculiar between India and Pakistan except as regards the particular period after 1-3-1947.

By the time the Constitution came to be framed the things in both the countries had settled down and after the attainment by a person of the status of an Indian citizen a disqualification resulting from migration to a single country namely Pakistan for all times to come would have been an anomaly and would also be contrary to what Article 10 provided without making an exception in case Article 7 is taken to be applicable to migration after the Constitution.

The provision in Article 7 in "deeming" form was necessary not because the status of a citizen once created at the commencement of the Constitution was intended to be taken away as if it had never been conferred but because a departure was being made due to special circumstances from the well accepted principles of private international law that mere migration without change of domicile does not bring about loss of citizenship. This should answer one of the objections for placing construction upon Article 7 so as to confine migration to a period prior to the Constitution.

As regards the second objection regarding the frame of Article 7 and the suggestion, regarding another, simpler and straightway of expressing the Article in case migration meant to refer to a period prior to the Constitution, it may well be said that reference to Articles 5 and 6 in Article 7 might have been considered sufficient to express that intention more particularly so by reason of what was indicated in the proviso to Article 7 and Article 10. One of the objections was that in case migration was confined to the period prior to the Constitution it will not be possible to conceive of non-conferral of the status of a citizen upon a person migrating who fulfilled the conditions of Article 5(c) which required residence for five years while the period from 1-3-1947 upto the date of the Constitution is only less than three years. The reasoning is far from clear. If it is intended to suggest that migration has necessary reference to a period subsequent to the Constitution that would be contrary to the decision of the Supreme Court in *The State of Bihar Vs. Kumar Amar Singh and Others*, besides the reasons given by Naik J.

One of the reasons suggested by the learned Advocate General, for taking "migration" in Article 7 as referable even to period subsequent to the Constitution, is that in case that were not accepted as the correct interpretation it would lead to the result that a gap will be created between the date of the Constitution, i.e. 26-1-1950 and the date on which the Citizenship Act came into force i.e. 30-12-1955 and persons migrating between these dates to Pakistan

could claim the Indian citizenship.

To my mind this is in no way a strange result as all that it will mean is that principles of private international law as followed by English Judges which we are apt to follow would come into play and the question as to loss of citizenship has to be considered on those principles assuming that there is no parliamentary provision to cover the gap. But to my mind there is in fact no gap and although the Citizenship Act was delayed and came into force on 30-12-1955, Section 9 of the Act already provided for termination of Indian citizenship only in the case of a person voluntarily acquiring citizenship of another country even during the period from 26-1-1950 upto the commencement of the Citizenship Act and no exception is made in that Section with reference to Pakistan. The provision clearly indicates acceptance of well-recognised principle of law.

We shall next consider some of the decisions to which reference was made in the argument at the bar including two decisions of the Supreme Court reported in AIR 1955 SC 252 and A.V. Fernandez Vs. The State of Kerala, .

85a. In the former case the facts were that one Kumar Rani went to Pakistan in July 1948 leaving her husband in India. She came back to India in December 1948 on a temporary permit obtained by her on the basis of the statement that she was domiciled in Pakistan. She went back to Pakistan in April 1949 on the expiry of the temporary permit. She tried to obtain permit for permanent settlement in India but it was invalid. It was held on these facts that she had migrated to Pakistan after 1-3-1947. Their Lordships observed at page 285 column 2:--

"Even if therefore Article 5 can be said to be applicable to her on the assumption that Captain Narayan Singh was her husband and that her domicile was that of her husband, the facts bring her case under Article 7. Article 7 clearly over-rides Article 5. It is peremptory in its scope and makes no exception for such a case, i.e. of the wife migrating to Pakistan leaving her husband in India. Even such a wife must be deemed not to be a citizen of India unless the particular facts bring her case within the proviso to Article 7."

It is clear from the facts of this case that Kumar Rani had migrated before the Constitution and even on the assumption that her domicile, depending upon that of her husband, continued to be Indian, she was held not to be a citizen of India by the bare fact of her migration to Pakistan after 1-3-1947 and before the Constitution. It was in this context that their Lordships said that Article 7 over-rides Article 5 and being peremptory in scope made no exception for a case of that sort. The observations with regard to over-riding and peremptory character of Article 7 do not necessarily refer to the case of migration even after the commencement of the Constitution and on acquisition of the status of an Indian citizen at the commencement of the Constitution.

In the second case of the Supreme Court a person was prosecuted for an offence of cheating said to have been committed by him while residing at Karachi. In the

appeal before the Supreme Court with respect to that charge he claimed to be Pakistani national and contended that he could not be convicted when the acts attributed to him had been committed outside India. Passingly dealing with the question whether he could be called Pakistani national their Lordships referred to his categoric admission that he had migrated to Pakistan in July 1950. Their Lordships observed at page 866:--

"This is a categorical statement of the appellant himself which shows that he continued to be in India till July, 1950. If so, it appears prima facie that by virtue of Article 5 of the Constitution read with Article 7 thereof, he was a citizen of India on the date of the Constitution and continued to be so at the date of the offence in July-August 1951, unless he shows that under Article 9 of the Constitution, he voluntarily acquired the citizenship of a foreign State. Prima facie mere migration to Pakistan is not enough to show that he had lost Indian citizenship."

These observations though did not lead directly to the ultimate decision, since their Lordships proceeded on the assumption that he was a Pakistani national, are significant and clearly express the view of their Lordships as regards the exact scope and effect of Articles 5 and 7 when read together. The observations being of the Supreme Court are entitled to great weight until their Lordships express contrary opinion. The observations fully support the line of reasoning adopted by me that migration in Article 7 has a reference to the period prior to the Constitution. Had that not been the view of their Lordships they would have expressed otherwise and would have said that the person concerned had sensed to be an Indian national as if that status had never been conferred upon him.

In *Noor Mohammad v. The State* AIR 1956 M p. 211, it is no doubt held that there is nothing in the language of Articles 5 and 7 or anything in the background to justify the view that Article 7 is restricted to cases of migration between 1-3-1947 and 26-1-1950 and that the conclusion that Article 7 is inapplicable to those persons who migrated to Pakistan after 26-1-1950 would render nugatory Article 7, but with great respect, for reasons already discussed I am unable to agree with this. The decision in *Mohammad Naseeruddin v. State of Andhra Pradesh*, AIR 1960 Andh Pra 106, also takes a similar view as in the aforesaid case.

The reasoning employed in that case is that whereas Articles 5 and 6 speak of "the commencement of the Constitution, Article 7 makes no reference to it. But this, in my opinion, is not a substantial reason particularly in view of the fact that Article 7 makes a reference to Articles 5 and 6 and practically provides for disqualification of persons falling in the group of Articles 5 and 6 for attaining the status of a citizen. The provision cannot be said to be rendered nugatory on such a construction. This is clear from the decision of the Supreme Court in *The State of Bihar Vs. Kumar Amar Singh and Others*, , relied upon in that case and also the decision of Allahabad High Court in *Aslam Khan Vs. Fazal Haque Khan and Others*, . It does apply to those persons who have migrated before 26-1-1950.

In the view I take of the wording of Article 7 the Article has no application to the migration of a person to Pakistan subsequent to the coming into force of the Constitution.

My answers to the two points therefore are

(1) "Migration" referred to in Article 7 of the Constitution has reference to a migration between the period 1-3-1947 and 26-1-1950 only.

(2) By virtue of Article 9 of the Constitution, the voluntary acquisition of the citizenship of a foreign State precludes a person from claiming citizenship under Article 5 of the Constitution.

ORDER OF THE DIVISION BENCH

Shrivastava J.

This order shall also govern the disposal of the following ten Miscellaneous Petitions:--

ORDER OF THE DIVISION BENCH

SHRIVASTAVA J.:

(92) This order shall also govern the disposal of the following ten Miscellaneous Petitions;?

S. No. Case No.

Filed by.

1.

Misc. Pet. No. 290/1958

Mohammad Murtazz

Khan

2.

Misc. Pet. No. 61/1959

Issab alias Yusuf

3.

Misc. Pet. No. 130/1959

Akbarkhan Alamkhan

4.

Misc. Pet. No. 131/1952

Maujma Bibi & others

5.

Misc. Pet. No. 139/1957

Kalloo s/o Noor Mohd.

6.

Misc. Pet. No. 206/1957

Gulam Rasool

7.

Misc. Pet. No. 6/1958

Mohammad Yusuf

8.

Misc. Pet. No. 168/1958

Mohammad Abbas

9.

Misc. Pet. No. 70/1959

Shabrati s/o Mangoo

10.

Misc. Pet. No. 371/1958

Ghulam Mahmood

Khan

-99. The position in cases where the petitioners concerned were citizens of India at the commencement of the Constitution is that the question of termination of their citizenship can only be decided by the Central Government. We need, therefore, examine only those cases in which the petitioners had migrated to Pakistan prior to the Constitution. (His Lordship considered the individual case and concluded):

Miscellaneous Petition No. 131 of 1959 has been withdrawn and we have already passed necessary orders dismissing it in the original case.

In the result, all the miscellaneous petitions are allowed, except Miscellaneous Petition No. 131 of 1959, which has been withdrawn. We order that the orders of expulsion passed against the petitioners in each of the cases, referred to above, be and are hereby quashed. We make no order as to costs. The outstanding amount of the security shall be refunded to the petitioners in each case.