

(1956) 01 BOM CK 0008
In the Bombay High Court
Case No : Misc. No. 394 of 1955

Michael Anthony Rodrigues

APPELLANT

Vs

State of Bombay and Others

RESPONDENT

Date of Decision : 19-01-1956

Acts Referred:

Constitution of India, 1950 — Article 5
Evidence Act, 1872 — Section 101, 102, 103, 104
Foreigners Act, 1946 — Section 2

Citation : AIR 1956 Bom 501

Hon'ble Judges : Coyajee, J

Bench : Single Bench

Advocate : D.P. Madon and F.R. Paruck, for the Appellant; G.N. Joshi, for the Respondent

Judgement

1. This is a petition impugning a certain Order passed by the Under-Secretary to Government under the Foreigners Act (31 of 1946) calling upon the Petitioner to leave India within 24 hours of the service of that order upon him. The Order is made under the Foreigners Act, and "foreigner" is defined by Section 2, which says that a "foreigner" means a person who is not a natural-born subject of India and has not been granted a certificate of naturalization as a subject of India under any law for the time being in force. It is not denied that the Petitioner was born in Goa.

2. In his petition, however, he says that he came from Goa as far as 1927 with the intention of settling down in India permanently. If that were right he was rather a precocious child having decided to change his domicile at the age of ten. But Mr. Madon concedes that this sentence is unhappily drafted and it does not mean what" it says.

According to the Petitioner he started his schooling here and he has produced a school-leaving certificate from the St. Xavier's High School. He says that thereafter he started the business of tailoring with his father Peter Rodrigues. He

did this business for some time and from 1942 to 1946 he was a wireless operator with the Royal Indian Air Force. He has produced a certificate showing his discharge from that force. Thereafter he says that he was employed in Bombay by Messrs. Turner Morison & Co. Ltd. up to September 1948 and thereafter he again resumed his father's business.

3. It is stated that without any reason and without, his having given any cause on 29th November last he was served with this Order and taken to the Railway Station. He says that he has a wife and children in Bombay, he has lived with his family in Bombay and is a citizen of India. Now it is one thing for a person to say, after the service of such an order, that his domicile is India and that it is his intention to make India his domicile.

One must, however, look to the facts of each case and find out whether there was a definite intention to abandon one domicile and acquire another. It is a cardinal principle of private international law as laid down in the leading case of "Winans V. Attorney-General" (1904) A. C. 287 (A), that a party is really anchored to his domicile of birth, if he has a domicile of birth; and a very clear intention must be apparent from his conduct to show that he wrenched himself free from that domicile of birth and deliberately by a due process of intention and conduct acquired another domicile.

As pointed out in that case by Lord Macnaghten who quoted from the words of Lord Cottenham

"the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile. Residence alone has no effect per se, though it may be most important as a ground from which to infer intention,"

Lord Cairne in "Bell v. Kennedy" (1868) L. R. 1 H. L. Sc. 307 (B), observed that

"The Law is beyond all doubt clear with regard to the domicile of birth that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which a personal status of another domicile is acquired."

It is clear that the onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost. In the light of this I might as well refer to the definition in the authority cited by Mr. Madon. That was from the observations made by Chitty J. in "Craignish v. Hewitt" (1892) 3 Ch. 180 (c), as follows:

"That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing there from".

Mr. Madon relied upon Article 5 of the Constitution which says that at the commencement of this 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. The most important part of this article is that he should have been domiciled in India; residence is purely an incidental factor which goes up to build domicile,

4. In these circumstances let us proceed to consider the facts and averments set out in the petition. The main averment on which the Petitioner can rely is contained in the first two lines of para 9 of the petition, viz., that the Petitioner has acquired the domicile of India by his long residence and occupation in India. These facts cannot be gainsaid.

But there are foreigners who come to India for a living who live here for ten to thirty years without having the faintest idea of abandoning their domicile of origin, viz., England, Scotland, Goa or Ceylon. It is for them, if they claim to be citizens of India, to show by definite evidence that they had a deliberate intention of acquiring the domicile of India. Now a man does not change his domicile of birth except for a purpose, e.g., a fugitive from another country may take asylum here with the sole object of spending his life here and with the intention of making this country his home, and his fixed abode. In these circumstances he does change his domicile.

Take another instance: a man may come here, live here for over forty years, prosper here, marry and have children here. He may then be agitated with the Question of succession, taxation and other similar questions. Having agitated his mind he would consider whether he would make India the country of his domicile or stand by his domicile of birth or acquire altogether a different domicile; because after all domicile is a matter of intention although one always starts with the domicile of birth.

Therefore, the mere statement by the Petitioner that he had a long residence in India and has his family here per se cannot form the foundation of his claim that he is domiciled in India. He has annexed to his affidavit in rejoinder a certain affidavit and application made by his father. Now it must be remembered that the Petitioner himself says that his father is living in India for the last forty years for the purpose of supporting his case that he himself thereby obtained the Indian domicile. The father, Peter Rodrigues, says in his affidavit that he is a permanent resident of Bombay for over forty years.

But it is queer that as the end of the third paragraph he states that he applies to be permitted to stay in Bombay permanently. It would be un-natural for a man who has acquired a domicile in Bombay which he has acquired as a natural domicile, as distinguished from domicile of birth, to ask for leave to permanently reside in the country where he has already his domicile. In his letter, of 8-9-1955, i.e., as late as a few months ago he again writes to the Commissioner of Police, sending his affidavit), and asks for permission to stay in Bombay.

5. Turning now to the affidavit of the Respondent, the Commissioner of Police, in

para. 5 he says that the Petitioner has deliberately made certain incorrect statements which are set out in the affidavit in reply. The Commissioner points out in his affidavit that the Petitioner was born in Goa and it is alleged that the Petitioner is a Portuguese subject by birth.

The deponent says that on inquiries he has found that the Petitioner's parents permanently reside in Goa and own an Immovable property in Goa. He has further alleged that the Petitioner's father who came from Goa to Bombay applied for and obtained a permit from the Indian authorities in Goa to allow him to come here and that Peter Rodrigues the Petitioner's father is a national of Goa.

It is true according to him that the Petitioner is not registered under the Foreigners Act; but according to Registration of Foreigners (Exemption) Order, 1949, Clause 3(g) Goans who are not holders of Portuguese passports are exempted from registration under that Act. The deponent in para 13 says that the Petitioner is an anti-social person and has been indulging in anti-social and anti-Indian activities, and has become a danger to the persons residing in the locality where he resides and is likely to create breach of peace.

Under these circumstances the order was made. The order was scrutinised and the Undersecretary to Government, Home Department, has said that he was satisfied on the materials placed before him that the order should be made. It was under these circumstances that the order was passed.

6. In the above circumstances the Petitioner has, in my opinion, failed to establish that he is an Indian National and, therefore, no order could be made against him under the Foreigners Act. The petition will, therefore, stand dismissed and the Rule discharged with costs fixed at Rs. 250.

7. Mr. Joshi says that the Respondents will not execute the order until Tuesday next, 1 P. M. on the Petitioner undertaking to report himself at the C. J. D. Headquarters at 10-30 A. M, every day.

8. Rule discharged.