

(1965) 11 PAT CK 0002

In the Patna High Court

Case No : Civil Writ Jurs. Case No. 877 of 1965

Mohammad Sadique

APPELLANT

Vs

G. Narain and Another

RESPONDENT

Date of Decision : 25-11-1965

Acts Referred:

Constitution of India, 1950 — Article 226, 5, 6
Evidence Act, 1872 — Section 106, 32, 32(5)
Foreigners Act, 1946 — Section 2, 3(2), 9

Citation : AIR 1966 Patna 272

Hon'ble Judges : Tarkeshwar Nath, J; R.K. Choudhary, J

Bench : Division Bench

Advocate : S.S. Asghar Hussain and S.M. Rizvi, for the Appellant; A.G. and Bisheshwar Prasad Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Tarkeshwar Nath, J.—This is an application under Articles 226 and 227 of the Constitution of India for quashing the order (Annexure "A") dated the 15th July, 1965, passed by the Superintendent of Police and Registration Officer, Ranchi (opposite party No. 1) under Clause (c) of Sub-section (2) of Section 3 of the Foreigners Act (Act XXXI of 1946) directing the petitioner to leave India within a period of 16 days from the date of service of that order, failing which the petitioner would make himself liable for action under the said Act.

2. The case of the petitioner, in short, was that the parents of the petitioner belonged to village Chiniaut in district Jhung, West Pakistan, and that the petitioner was born at Chiniaut in 1914, but shortly after his birth he was taken by his father Maula Bux to Calcutta and he was brought up at Calcutta. Maula Bux had settled down in Calcutta in 1900 and he had a house on the Eden Hospital Road in the town of Calcutta. The petitioner settled down at Ranchi in the year 1930 and started a hide and skin business in the town of Ranchi. The business flourished for a few years but later on the petitioner sustained serious

loss and ultimately he sought employment. He was employed as Manager of the Ranchi Hide and Skin Company since 1950. The petitioner resided permanently at Ranchi since 1930 and he was a citizen of India at the time of partition of India in the year 1947 and also at the time of the passing of the Constitution of India in the year 1950. The petitioner opened an account in the savings bank of the Ranchi Post Office in the year 1933 and the pass book thereof has been marked Annexure "B". Similarly, he opened an account in the Chotanagpur Banking Association Ltd., Ranchi, in the year 1934 and that is evident from Annexure "B1". The petitioner got a motor driving license in the year 1947 (vide Annexure "B2"). The petitioner went to village Chiniat in West Pakistan in 1949 for a short time to see his relatives on a permit granted by the Deputy Commissioner, Ranchi, and he returned to India after a period of two months only on a permit issued by the Deputy High Commissioner for India at Lahore. The petitioner again visited Chiniat in the year 1954 on an Indian passport dated 23rd November, 1954, and returned to India after two months. The petitioner had visited Chiniat only on those two occasions as a citizen of India. His name is entered in electoral roll of the Ranchi Municipality as well as that of the State Legislature and Central Parliament and a copy of the relevant entries in the electoral roll has been marked Annexure "D". The petitioner neither migrated from India nor did he ever leave India and as such he never lost his Indian Nationality. He had acquired valuable properties in India such as, lands purchased in Ranchi. He alleged that he being a citizen of India, the provisions of the Foreigners Act were not applicable and the order directing him to leave India was mala fide, arbitrary and unreasonable.

3. This application has been opposed on behalf of the opposite party and Ravindra Kumar Sinha, Inspector of Police, Criminal Investigation Department, attached to the Foreigners section, Police Office, Ranchi, has sworn a counter affidavit stating that the permanent home of the petitioner was in village Chiniat where his wife, his children and his father were residing. According to him, the petitioner never settled down in Ranchi, although he has been often residing at Ranchi. The petitioner has constantly been in touch with his family members and relations and he often went to live with them. Since the creation of India and Pakistan as separate States the petitioner had still continued his home in village Chiniat as before where his family members were residing. The petitioner has been visiting West Pakistan clandestinely on some occasions. The petitioner gave his address from time to time at different places, such as (i) Fairs Lane, Calcutta, (ii) 32, Eden Hospital Road, Calcutta, (iii) Kali Asthan Road, Ranchi and (iv) Kantatoli Ranchi. An application was made on behalf of Mrs. Hazra Begum (petitioner's wife) in the year 1959-60 for a long term visa. An inquiry was made in that connection. The petitioner was called upon to produce evidence in regard to the business which he claimed to have been carrying in, but he was unable to produce any documentary evidence. In course of the inquiry the petitioner himself produced a certificate (Annexure "I") dated 10th October, 1960, indicating that he was Manager of the Ranchi Hide Company since

October, 1951. According to the deponent of the counter-affidavit, the assertion of the petitioner that he was Manager was incorrect. The petitioner did not acquire the citizenship of India and he was not domiciled in India in the year 1950 and neither he nor his parents were born in the territory of India. Moreover, the petitioner was not ordinarily resident in the territory of India for the requisite period of five years immediately preceding the commencement of the Constitution. The petitioner had no doubt obtained an India Pakistan passport but the petitioner obtained that passport by wrongly stating in his application that he was born at Calcutta. The true fact having become known that he was born at Chiniaut and not at Calcutta, the said pass port was cancelled by the State Government on 12th December 1964 by the letter marked Annexure "II". The petitioner had 8 children, namely, (i) Nasim Sadique, (ii) Gulam Sadique, (iii) Anwar Sadique, born in 1948, (iv) Nisar Sadique, born in 1950, (v) Ayub Sadique, born in 1964, (vi) Gulzarina, (vii) Rafia Munir and (viii) Nasrin Begum born in 1962, and all of them were born and bred up in Pakistan and they were residing there. It did not appear that Mrs. Hazra Begum, the wife of the petitioner ever came to India after the commencement of the Constitution and before 1959. The father of the petitioner and other members of the petitioner's family were living in village Chiniaut and all of them were Pakistani citizens.

4. The petitioner filed a reply to the said counter-affidavit, reiterating that he was a permanent resident of Ranchi. He stated further that his wife was living with her father at Calcutta till 1954 but she suddenly went away to Pakistan against his wish and he had been trying for the return of his wife and children to India as Indian citizens but had not succeeded so far. He denied to have gone to Pakistan clandestinely and he asserted that he visited Pakistan in the years 1949 and 1954 only on an Indian passport. He disclosed that his father had a house bearing No. 32 on the Eden Hospital Road, Calcutta, and the office of the Ranchi Hide Co. was located in the Piers Lane, Calcutta. The petitioner was formerly residing at the Kali Asthan Road while he was running his own hide business but later on he purchased a house in Kantatoli, Ranchi, in 1940 and he shifted to that house subsequently, he further disclosed that there was a company known as Bharat Hide and Skin Co. prior to 1951 but that name of the company was changed and it came to be known as Ranchi Hide Co, in the year 1951. The petitioner alleged that he was under the impression that he was born at Calcutta, inasmuch as he was living there from his infancy with his parents but later on he came to know that the actual place of his birth was Chiniaut and his wife also was born at Chiniaut. The petitioner gave the names and the years of birth of his 8 children. He disclosed that he had purchased landed properties and the extracts of the sale deeds were marked Annexures I and II, whereas the extract of the sale deed relating to the purchase of the house in 1940 was marked Annexure "III".

5. After the said reply to the counter-affidavit, an application was filed on behalf of the State of Bihar (opposite party No. 1) pointing out that the statements made by the petitioner with regard to the actual date or dates on which his wife

left Calcutta for Pakistan and the dates of her return to India were misleading and the exact place of birth of the petitioner's children were not known according to his affidavit. It was necessary to clarify those matters and as such a prayer was made to direct the petitioner to appear before this Court and submit to cross-examination.

It was further made out that the examination of the petitioner was necessary in order to determine the true nature and genuineness of the various sale deeds relied upon by him. In answer to this petition, the petitioner filed a rejoinder and he made out a case for permission to examine the deponent of the counter-affidavit (Inspector Ravindra Kumar Sinha) and also opposite party No. 1 regarding the vague allegations made by the deponent. IN pursuance of these petitions, the petitioner was directed to appear in court for cross-examination.

6. In view of the allegations made in the application for writ and the counter-affidavit and the reply to the same, a question arose as to whether the petitioner was a foreigner. "Foreigner", according to Section 2(a) of the Foreigners Act means a person who is not a citizen of India. Learned counsel for the petitioner urged at the hearing that the petitioner was a citizen of India according to Articles 5(c) and 6(b)(i) of the Constitution of India. The question as to whether the petitioner was a citizen of India depends on investigation of certain facts and these disputed questions of fact could not ordinarily be gone into in the present proceeding under Article 226 of the Constitution of India. The Court is reluctant to decide these questions in such a proceeding and the ordinary remedy of the petitioner was to file a suit for impugning the order in question. The decision of these questions in a suit was bound to take some time and until the decision of the suit the petitioner could have made a prayer for some interim relief so that the order in question might not be enforced against him. The petitioner, in that case, could manage to stay in India for one or two years till the disposal of the suit, but the State of Bihar did not like his continuance in India any more and, for that reason, the learned Advocate General made a prayer for deciding these disputed questions in the present proceeding so that it might be determined as quickly as possible as to whether the petitioner was a citizen of India or was a foreigner. In these circumstances, the parties to this application have adduced evidence. The petitioner has been cross-examined at length by the Advocate General and the petitioner has figured as witness No.1. The petitioner examined another person Md. Ibrahim as witness No. 2. On behalf of the opposite party, three witnesses, namely, Muneshwar Deyal, a clerk of the Foreigners Section. Sri Ramendra Narain Sinha, the then Superintendent of Police at Ranchi, and Ravindra Kumar Sinha, Inspector attached to the Foreigners Section have been examined. Some documents as well have been marked exhibits on behalf of the parties and they will be referred to at the proper place.

7. The substantial question for consideration is as to whether the petitioner is a citizen of India and if he is a citizen of India, then he is not a foreigner and the order in question was not justified For determining this question the various

affidavits and the evidence have to be carefully examined. But before doing so, it is necessary to refer to the relevant provisions of the Constitution of India. Article 5 provides as follows:

"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."

Article 6 reads thus:

"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) xx xx xx xx xx (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.

It is not necessary to quote the other provisions of Article 6 as learned counsel for the petitioner relied on Article 6(b)(i) only.

He, first, tried to bring the case of the petitioner under Article 5(c) and submitted that the petitioner was domiciled in the territory of India and had been ordinarily resident in the territory of India for more than five years immediately preceding the commencement of the Constitution. He referred to the statements made in the petition as well as the evidence of the petitioner and pointed out that the petitioner had been residing in Ranchi permanently since the year 1930, either for the purposes of his business or for the purpose of employment as a Manager.

Learned Advocate General, on the other hand, contended that even if the petitioner was at Ranchi for not less than five years immediately preceding the commencement of the Constitution, he (petitioner) was not a domicile in the territory of India. Persons who had domicile in India at the time of coming into force of the Constitution of India were given the status of citizens according to Article 5 and they acquired Indian nationality. As to what is meant by "domicil" came to be considered in *Central Bank of India Vs. Ram Narain, and Mahajan*, C J quoted the simplest definition of this expression as given by Chitty, J. in *In re Craignish; Craignish v. Hewitt* (1892) 3 Ch 180 at p 192, wherein the learned Judge said:

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

His Lordship (Mahajan, C J.) proceeded and observed as follows:

"But even this definition is not an absolute one. The truth is that the term "domicil" lends itself to illustrations but not to definition. Be that as it may, two constituent elements that are necessary by English Law for the existence of domicil are: (1) a residence of a particular kind, and (2) an intention of a particular kind. There must be the factum and mere must be the animus. The residence need not be continuous but it must be indefinite, not purely fleeting. The intention must be a present intention to reside for ever in the country where the residence has been taken up.....

In order to make the rule that nobody can be without a domicil effective, the law assigns what is called a domicil of origin to every person at his birth. This prevails until a new domicil has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicil of origin adheres to him until he actually settles with the requisite intention in some other country."

8. The distinction between domicil of origin and the domicil of choice was pointed out by the Supreme Court in *Kedar Pandey Vs. Narain Bikram Sah*, . The crucial question for determination in that case was as to whether Narain Raja had acquired the domicile of choice in India. Ramaswami, J. observed as follows:

"The law on the topic is well established but the difficulty is found in its application to varying combination of circumstances in each case. The law attributes to every person at birth a domicile which is called a domicile of origin. This domicile may be changed, and a new domicil, which is called a domicile of choice, acquired; but the two kinds of domicile differ in one respect. The domicile of origin is received by operation of law at birth; the domicile of choice is acquired later by the actual removal of an individual to another country accompanied by his animus manendi. The domicile of origin is determined by the domicile, at the time of the child's birth of that person upon whom he is legally dependent. A legitimate child born in a wedlock to a living father receives the domicile of the father at the time of the birth; a posthumous legitimate child receives that of the mother at that time. As regards change of domicile, any person not under disability may at any time change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country other than that of his domicil of origin with the intention of continuing to reside there indefinitely. For this purpose residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material. The state of mind, or animus manendi, which is required demands that the person whose domicile is the object of the inquiry should have formed a fixed and settled purpose of making his principal or sole permanent home in the country of residence, or in effect, he should have formed a deliberate intention to settle there. It is also well established 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. The domicile of origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as the sole domicile is clearly shown; See *Winans v. Attorney General* 1904 AC 287."

Learned counsel for the petitioner referred to *Bowie or Ramsay v. Liverpool Royal Infirmary* 1980 AC 588 for indicating as to what was meant by domicile of origin and domicile of choice. But, in that case as well, it was pointed out that a change of domicile must be made *animo et facto*.

Lord Thankerton observed as follows in that case:

"It seems clear on the authorities that mere length of residence by itself is insufficient evidence from which to infer the *animus*; but the quality of the residence may afford the necessary inference. For instance, the purchase of a house or estate coupled with long residence therein and non-retention of any home in the domicile of origin, might be sufficient to prove the intention to acquire a new domicile."

The position thus is that the *animus* has to be proved but it cannot be proved from the mere *factum* of residence and the length of it and a person seeking to establish that he has changed his domicile of origin and acquired a domicile of choice must establish that the place which he has chosen for domicile has become his home and he is no longer retaining any home in the domicile of origin. Learned counsel for the petitioner referred to the 5th edition of *Private International Law* by G. C. Cheshire and the learned author pointed out at page 170 as follows :

"It is impossible to lay down any positive rule with respect to the evidence necessary to prove intention. All that can be said is that every conceivable event and incident in a man's life is a relevant and an admissible indication of his state of mind. It may be necessary to examine the history of his life with the most scrupulous care, and to resort even to hearsay evidence where the question concerns the domicile that a person, now deceased possessed in his lifetime. Nothing must be overlooked that might possibly show the place which he regarded as his permanent home at the relevant time. No, fact is too trifling to merit consideration."

After referring to certain decisions, the learned author summarised the position at page 172 in the following words:

"Having regard, therefore, to the roving commission imposed upon the courts, it is not surprising that their decisions exhibit a multiplicity of different factors which have been regarded as *indicia* of intention. Without attempting to give an exhaustive list, it may be useful to observe that at one time and another the following have been regarded as criteria of intention; naturalization, purchase of a house or of a burial ground, the exercise of political rights, the establishment of children in business, the statutory declaration made by a candidate for naturalization that he intends to reside permanently in the United Kingdom, the

place where a man's wife and family reside, departure from a country owing to compulsion of war, the refusal of a foreign finance to leave her own country, statements as to his domiciliary intentions made by a deceased person in his lifetime."

At page 173, the passage runs thus:

"Undue stress must not be laid upon any single fact, however impressive it may appear when viewed out of its context, for its importance as a determining factor may well be minimized when considered in the light of other qualifying events. Again, no one fact is of constant value, for every case varies in its circumstances, and what is of decisive importance in one may be of little weight in another.

9. The position thus is that as soon as a person is born he gets a domicil which is called the domicil of origin but this domicil can be changed. The two conditions for acquiring a domicil of choice are--(a) the factum of residence in another country, and (b) the intention of permanent residence in that country for an indefinite period. A person going to another country for the purpose of carrying on business only, or even with the intention of staying there until he has made a fortune would not acquire a domicil in that country and he would still retain his domicil of origin. The crux, therefore, is to find out whether the petitioner in the present case, made Ranchi as his permanent home, as alleged by him and the evidence, adduced in this case, has to be scrutinised in this light

10. Learned counsel for the petitioner tried to bring the case of the petitioner under Article 6(b)(i) of the Constitution of India and he urged that the petitioner had migrated to India before the 19th day of July, 1948, and was ordinarily resident in the territory of India since the date of his migration Learned Advocate General referred to Smt. Shanno Devi Vs. Mangal Sain, for indicating as to what was meant by the words "has migrated to the territory of India" occurring in Article 6 This was the main question in that case before the Supreme Court Das Gupta, J. observed as follows :

" there can be no doubt that the word "migrate" may have in some contexts the wider meaning "come or remove to a place with out an intention to reside permanently" and in some context the narrower meaning "come or removed to a place with the intention of residing there permanently". The fact that the Constitution makers did not use the words "with the intention to reside permanently" in Article 6 is however no reason to think that the wider meaning was intended."

His Lordship then considered the purpose and scheme of the Constitutional legislation and concluded as follows :

"...it appears clear that when the framers of the Constitution used the words "migrated to the territory of India" they meant "come to the territory of India with the intention of residing there permanently". The only explanation of their not expressly mentioning "domicile" or the intention to reside permanently" in

Article 6 seems to be that they were confident that in the scheme of this Constitution the word "migration" could only be interpreted to mean "come to the country with the intention of residing there permanently" ".

Relying on this decision, learned Advocate General submitted that the petitioner must establish in the present case that he had come to the territory of India with the intention of residing in India permanently and then only he can be held to have migrated to the territory of India. In other words, the concept of permanent home was common either to a person's domicile in the territory of India or his migration to the territory of India, meaning thereby, that he had chosen to have his permanent home in the territory of India. This contention has great force and the petitioner has to establish that he intended to reside permanently in the territory of India after his migration to this country.

11. Learned counsel for the petitioner referred to (1892) 3 Ch 180. In that case, Chitty, J. observed as follows:

"According to Story's definition, that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom: Story's Conflict of Laws (Section 43).... A man may be in fact homeless, but he cannot in law be without a domicile Subject to this distinction the term "home", in its ordinary popular sense, is practically identical with the legal idea of domicile: Dicey on Domicil (pages 42-55) Living in lodgings and changing the lodgings from time to time are circumstances to be taken into consideration on a question of domicile; they are not inconsistent with domicile. There are many foreigners resident and domiciled in this country who pass their lives in lodgings only: a man may be domiciled in a country without having a fixed habitation in some particular spot in that country."

This decision of Chitty, J. was held to be right and the appeal against the judgment in that case was dismissed.

12. In the light of the principles laid down in the decisions referred to above, evidence has to be scrutinized for ascertaining as to whether the petitioner chose to have a permanent home at Ranchi in the territory of India. The petitioner has figured as witness No. 1 and I would refer to the various statements made by him (His Lordship after referring to them proceeded).

13. There has been a controversy as to whether the marriage of the petitioner took place at Calcutta or at Chiniat. The petitioner deposed that his father Moula Bux was living in Calcutta and the petitioner used to go to his father sometime. The petitioner went to Calcutta in 1930 to attend the marriage of his sister and he again went in 1934 and, on that occasion, he stayed for one month.

Hajra Begum, the wife of the petitioner, filed an application (Ex. C) for registration as a citizen of India u/s 5(1)(c) of the Citizenship Act (No. 57 of 1955). Rule 4 of the Citizenship Rules, 1956, provided that an application by a woman for registration as a citizen of India made u/s 5(1)(c) shall be in Form II

and, according to that rule, a form was prescribed. This application was filed on 16-9-1961 and the two signatures of Hajra Begum on this application (Ex. C) have been marked exhibits C(1) and C(2). In column No. 3 of this application, Hajra Begum stated that she was married at Chiniaut in the year 1938 and the name of her husband was Md. Sadique and his address was Kantatoli, Ranchi. In column No. 4, she stated that her husband was born at Chiniaut in the year 1914. The year of marriage given by her in that application seems to be incorrect, inasmuch as her daughter Gulzarina was born in 1987 and if the daughter was born in 1937 the marriage must have taken place prior to 1937. Section 32 of the Evidence Act provides, inter alia, that statements, written or verbal, of relevant facts made by a person whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in certain cases. The effect of Clause (5) of that section is that when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised, such statement would be admissible. The statement about the marriage of Hajra Begum with the petitioner Md. Sadique in 1938 made by her (Hajra Begum) would be admissible as the statement was about her marriage and she had a special means of knowledge about her marriage. She is admittedly at Chiniaut in West Pakistan and her attendance could not be procured at the present moment in October 1965 without considerable delay and expense. It was not possible to postpone the hearing of this case for her attendance and her coming to court from Chiniaut, would have meant a lot of expense. In these circumstances, her statement about her marriage with the petitioner in 1938 is admissible and can be taken into consideration.

The petitioner admitted in his evidence that an application for citizenship on behalf of his wife was filed and that he had taken all the steps in that connection on behalf of his wife. His evidence further is that he got that application (Ex. C) dated 15-9-1961 filled up and that application bore two signatures, Exhibits C(1) and C(2), of his wife. A question was put to him as to whether in the application for citizenship his wife mentioned that she was married in Chiniaut and not in Calcutta, but his answer was that he did not know. It is clear that he was not giving a straightforward answer, inasmuch as he had taken all the steps for the filing of that application and had got that application filled up but still he pleaded ignorance about the statements made therein.

14-20. It is necessary to consider the case of the petitioner as to whether he chose Ranchi in the territory of India to make it as his permanent home. (His Lordship discussed the evidence oral and documentary and continued).

21. The petitioner stated in paragraph 7 of the application for writ that he went to village Chiniaut in West Pakistan in the year 1949 to see his relatives on a

permit being granted by the Deputy Commissioner, Ranchi, and returned to India after a brief sojourn of two months on a permit issued by the Deputy High Commissioner for India at Lahore. The last line of that paragraph is as follows:

"copies of the letter and of the Order stating that copy of permit cannot be granted are annexed to this petition and is marked by the letters C and C1."

Annexure C, however, is a permit issued by the Deputy High Commissioner for India, Lahore, to the petitioner to return to India within 15 days from the date of issue. The full address of the petitioner in Pakistan was mentioned as Chiniaut, district Jhung. Learned counsel for the petitioner laid great stress on this permit and urged that this was granted under Rule 16-A of the Permit System Rules, 1948. He referred to the decision in the case of Shabbir Husain Vs. The State of U.P. and Another, and pointed out that Rule 16-A was quoted in that decision. It appears from that decision that the Influx from West Pakistan (Control) Ordinance XVII of 1948 was passed on 19-7-1948 and the rules framed under it were published in the Gazette of India dated 7-8-1948. Part I, at page 976. This Ordinance and rules required that a person entering from West Pakistan should possess a permit unless exempted from possessing one. Those rules, however, were replaced by the Permit System Rules of 1948 on 7-9-1948 and Rule 3 of the Permit System Rules, 1948 provided for three kinds of permits, viz., (1) permits for temporary visits. (2) permits for resettlement or permanent return and (3) permanent permits. Rule 16 dealt with the issue of a permit for resettlement or return and those rules made no distinction between persons of Indian domicile and those who did not have Indian domicile. Raghubar Dayal J. then referred to Rule 16-A which was added on 4-10-1948. Rule 16-A dealt with an application from a person who claimed to be domiciled in India and was staying in Pakistan on a temporary visit. Rule 16-A(1) provides that a person who claimed to be domiciled in India and was staying in Pakistan on a temporary visit might apply to the High Commissioner or the Deputy High Commissioner for a permit to return to India in the form specified in Appendix III with such proof to establish his claim as might be in his power or possession. Clause (2) of that rule provides that the High Commissioner or the Deputy High Commissioner may, if he is satisfied that the statements made in the application are correct, issue a permit for return to India in the form specified, in Appendix IV. In case of any difficulty or doubt, he may make a reference to the Provincial Government of the Province or the Government of the State concerned. Learned counsel for the petitioner submitted that the permit (Annexure "C") was granted in the form specified in Appendix IV under Rule 16-A(2). He contended that the petitioner was domiciled in India but had gone to Pakistan on a temporary visit and at the time of returning to India he applied for a permit. The application which the petitioner purported to have filed for a permit for returning to India has not been produced to show that he had claimed at that time to be domiciled in India.

It further appears that the Influx from West Pakistan (Control) Ordinance XVII of 1948 was repealed by the Influx from Pakistan (Control) Ordinance XXXIV of

1948 and this latter Ordinance as well was repealed by the Influx from Pakistan (Control) Act XXIII of 1949. Section 4 of that Act gave power to the Central Government to make rules and the "Permit System Rules, 1949" were published on 20-5-1949 and by these rules the Permit System Rules, 1948, were repealed. Rule 3 of the Permit System Rules of 1949 provided five kinds of permits, viz., (i) permits for temporary visits. (ii) permits for permanent return to India, (iii) permits for repeated journeys, (iv) transit permits, and (v) permit for permanent resettlement. Rule 2(i) indicated that "Check Post" meant a place where permits were checked. The permit (Annexure "C") appears to have been signed on 16th June, as "16/6" only has been mentioned on it, but counsel for the parties agreed that this was issued on the 16th June in the year 1949. The Permit System Rules, 1949 were however, published even prior to the date of the issue of the permit (Annexure "C") and there does not seem to be any explanation as to how this permit came to be issued under Rule 16-A of the Permit System Rules, 1948.

In the case of Shabbir Husain Vs. The State of U.P. and Another, , the temporary permit was issued to the petitioner (of that case) on 27-10-1948 under Ordinance XXXIV of 1948 at a time when the Permit System Rules of 1948 were in force and the petitioner in that case was born in the territory of India and it was not disputed that his domicile was in the territory of India at the commencement of the Constitution. On those facts, there was no difficulty in considering the petitioner of that case to be a citizen of India by virtue of the provision of Article 5. The facts of the present case before me are entirely different. The permit (Annexure "C") does not, however, indicate as to whether the petitioner intended to stay permanently in the territory of India. The next document marked (Annexure C1) indicates that the petitioner was not granted a copy of the petition which was filed by him for a permit to go to Pakistan and the inquiry report in that connection.

22-23. (His Lordship further examined the evidence and proceeded)

24. Learned counsel for the petitioner urged that it was for the opposite party to prove that the petitioner had remained in Pakistan in the year 1950. He referred to Section 8 of the Pakistan Citizenship Act, 1961. Section 3(a) of that Act provides that at the commencement of this Act every person shall be deemed to be a citizen of Pakistan who or any of whose parents or grand parents was born in the territory now included in Pakistan and who after the fourteenth day of August, 1947, has not been permanently resident in any country outside Pakistan. The petitioner was admittedly born at Chiniaut in the year 1914 but at that time Chiniaut was a part of India. Subsequently Chiniaut came to be included in Pakistan. The petitioner will become a citizen of Pakistan if he is not permanently resident in any country outside Pakistan after 14-8-1947. The fact as to where the petitioner had been residing permanently is within his special knowledge and it was for him to prove his permanent residence by cogent evidence.

In any event, the question for consideration in the present case is not as to whether the petitioner is a citizen of Pakistan. The order impugned in the present application for writ was passed under the Foreigner's Act and Section 9 of that Act provides as follows:

""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 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 domicile of the origin prevails until a new domicile has been acquired There is a presumption in favour of the continuance of an existing domicile until that presumption is rebutted by the person alleging that there was change in domicile. It was held by the Supreme Court in Kedar Pandey Vs. Narain Bikram Sah, already referred to, that the onus of proving that a domicile had been chosen in substitution for the domicile of origin lay upon those who asserted that the domicile of origin had been lost. The position thus is that the burden lay in the present case on the petitioner to establish that he had acquired a new domicile in India.

26. Learned counsel for the petitioner relied on Sultan Ahmad Vs. Deputy Commissioner of Police, Spl. Branch and Civil Authority for Calcutta and Suburbs and Others, in support of his contention that the petitioner had acquired a domicile in the territory of India. In that case, the petitioner was born in the district of Noakhali which formed a part of India. He came to Calcutta in the beginning of the year 1943, and took employment as a domestic servant and served there for 17 years. In the year 1947 when the partition took place, he at first provisionally opted for Pakistan but thereafter changed his mind and opted for India, where in fact he had continued to remain. His case was that at the commencement of the Constitution, he was domiciled in India and was ordinarily resident therein for not less than five years immediately preceding such commencement. He had no relatives in Pakistan except his wife who was in Noakhali and lived with her parents there. He had no property what so ever in Pakistan.

In that case there was no dispute on any question of fact and besides that, the petitioner had admittedly taken an Indian passport. There was nothing to show on behalf of the opposite party (in that case) that the petitioner was not domiciled in India at the relevant time or that he ever intended to be or did become a citizen of Pakistan. On those facts, it was held that the petitioner (of that case) had become an Indian Citizen according to Article 5 of the Constitution of India. The question as to whether a person has acquired domicile in any country has to be decided on the facts and circumstances of each case.

26. Learned counsel for the petitioner referred to State Vs. Abdul Rashid, . The

respondent in that case was acquitted in respect of a charge u/s 14 of the Foreigner's Act and the State had preferred an appeal against the said acquittal. The prosecution had alleged that the respondent was originally a citizen of India but he migrated to Pakistan after 1-3-1947 and became a Pakistani national. He came back to India in 1953 on a Pakistan passport and a visa of the B category. He failed to leave India within the scheduled time and then he was served with a notice to quit India by 24-8-1957. This order not having been complied with, the respondent was prosecuted u/s 14 of the Foreigner's Act. The defence was that the respondent was a citizen of India and that he had never migrated to Pakistan. According to him, he went to Pakistan on railway service without any intention of settling there permanently and thus, the order in question was said to be illegal and without jurisdiction.

The learned Magistrate had held that the respondent was a railway engine driver and had opted for service in Pakistan, where he lived for about five or seven years, but he acquitted the respondent on the ground that since the latter had land, a house and cattle in India, he could not be said to have migrated to Pakistan. The contention on behalf of the State in the appeal was that the evidence and the circumstances clearly established that the respondent had migrated to Pakistan after 1-3-1947 and hence, under Article 7 of the Constitution of India he could not be deemed to be a citizen of India. The provisions of Article 7 of the Constitution of India came to be considered in that decision. On a review of the evidence and the facts of the case, it was held that the respondent had migrated to Pakistan after 1-3-1947 and consequently he could not be deemed to be a citizen of India, as laid down in Article 7 of the Constitution of India. This decision is of no avail as in the present case. Learned counsel for the petitioner had tried to bring the case of the petitioner within the four corners of Article 5 and Article 6(b)(i) of the Constitution of India and not those of Article 7. Learned counsel for the petitioner further relied on the decision of the Supreme Court in Kedar Pandey Vs. Narain Bikram Sah, and urged that the facts of that case were somewhat similar to those of the present case and it was held in that case that Narain Bikram Sah (referred to in that judgment subsequently as Narain Raja) was a citizen of India under Article 6 of the Constitution of India. It appeared that Narain Raja was born in Banaras in 1918 and was living in India from 1939 right up to 1949 and even thereafter. His wife belonged to a place in Himachal Pradesh near Patiala and his marriage had taken place at Banaras. Narain Raja had a son and a daughter by that marriage and the son was born at Bettiah, whereas the daughter was born in Banaras. The daughter prosecuted her studies in Dehradun. Narain Raja established a Sanskrit Vidyalaya in Ramnagar in 1950 or 1951 and he was the Chairman or President of the Union Board in Ramnagar. He had other political activities in the district of Champaran and he was the President of the Bettisah Sub-divisional Swantra Party. Taking all the events and circumstances of Narain Raja's life into account, their Lordships were satisfied that long before the end of 1949 he had acquired a domicile of choice in India, meaning thereby, that he had formed the deliberate

intention of making India his home with the intention of permanently establishing himself and his family in India.

The facts of that case are entirely different. The petitioner, in the present case, was born at Chiniaut which is now a part of Pakistan and his wife and children are in Pakistan. His daughters have been married in East Pakistan and West Pakistan respectively and his one or two sons are carrying on business in West Pakistan. Accordingly, the decision relied upon is of no assistance to the petitioner.

27. Learned Advocate General had referred to *Wahi v. Attorney-General* 1932 All ER 922. In that case, the deceased Charles Frederick Wahl was a natural-born German subject and his parents were Germans domiciled in Germany where he was born in 1852. His domicile of origin was, therefore, German. Rowlatt J. had held that the deceased had in 1884 acquired an English domicile of choice, and that, accordingly, the question for determination was as to whether that domicile of choice was ever abandoned. This position was accepted in the court of Appeal, which also decided that the supposed domicile of choice had not been abandoned. On appeal, the House of Lords took a different view and it was observed that the foundation of the two judgments, namely, the adoption in 1884 of an English domicile of choice did not in fact exist, and the real question was whether on the whole of the facts the domicile of origin of the deceased was abandoned and an English domicile of choice acquired. The evidence was wholly insufficient to establish the abandonment by the deceased of a German domicile. His business interests were entirely in Germany, all his income was derived therefrom. He did not seem to have severed a single tie with his native country. With these observations, the appeal was allowed and the orders of Rowlatt, J. and the court of Appeal were reversed. The position thus is that the severance of the tie with the domicile of origin had to be established by the petitioner in the present case, but he has failed to discharge this burden. On a review of the evidence and the various affidavits and the counter-affidavits, I am of the opinion that the petitioner is not a citizen of India, either under Article 5 or Article 6(b)(i) of the Constitution of India. The petitioner thus is not entitled to a writ of any kind and the order (Annexure "A") dated 15-7-1965 passed by the opposite party No. 1 cannot be quashed.

28. In the result, the application is dismissed with a consolidated cost of Rs. 250.

Choudhary, J.

29. I agree.