

(2009) 01 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 15 Of 2009

Mohd.Ashraf Khan and others

APPELLANT

Vs

State of J&K and others

RESPONDENT

Date of Decision : 21-01-2009

Acts Referred:

Citizenship Act, 1955 — Section 3, 8, 9
Constitution of India, 1950 — Article 226
Foreigners Act, 1946 — Section 3

Citation : (2009) JKJ 67 Supp : (2009) 1 SriLJ 172

Hon'ble Judges : Muzaffar Hussain Attar, J

Bench : Single Bench

Advocate : Arshid Andrabi, Advocates appearing for the Parties

Judgement

1. With the advent of the human history, habitations have been created and its frontiers delineated which are guarded zealously and jealously by its inhabitants. With the evolution in different branches of activity which touch the human life, concept of making civilized societies was developed and groomed. In order to regulate human relations in different societies more particularly in civil societies laws were made to maintain and preserve the moral fabric of the societies. Borders are being guarded with all might against external aggression and laws have been enacted to prevent illegal incursion into one's territory and/or to push back a person who though permitted to enter the territory of a country, for any reason, whatsoever, his continuation becomes illegal. Every country has inherent right to preserve its political, socioeconomic and territorial integrity. This is an inalienable right vested in a state and cannot be compromised with at any cost. In our country, in order to achieve the above solemn purposes, affairs thereof

arc being conducted in accordance with provisions of constitution and laws made which include the Citizenship Act 1955, for short act of 1955,

the Foreigners Act 1946, for short act of 1946 and Passport Act 1967, for short act of 1967 and other allied laws.

2. It is not only the jurisdiction and power of an independent sovereign country like ours to safeguard its borders from illegal incursions and

intrusions, but is also its solemn duty, in order to maintain and preserve the territorial independence of our country to ensure that no foreigner is

permitted to gain foot hold on our land except in accordance with procedure established by law, as otherwise, said act would be fraught with

serious consequences. No foreigner has any guaranteed right to stay in this country without permission of the competent authority. And every

foreigner is duty bound to leave the country as and when ordered to do the same. A foreigner's entry and continuation in this country is not an

absolute right and he can be asked to leave the country at any point of time. A foreigner who enters this country carries with him all the limitations

which include to regulate not only his entry but his movement in this country. He cannot be permitted to move in this country in his own right and

according to his own wish. He cannot be permitted to stay in the country without proper permission granted by the competent authority. The

Supreme Court in case titled *Louis De Raedt v. Union of India* reported in AIR 1991 SC 1886 after referring to and relying on case titled *Hans*

Muller of Nuremburg vs. Superintendent Presidency Jail Calcutta reported in AIR 1955 SC 365 has in para 13 ruled as under

The next point taken on behalf of the petitioners, that the foreigners also enjoy some fundamental rights under the Constitution of this country is

also of not much help to them. The fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the rights to

reside and settle in this country, as mentioned in Article 19 (1) (e), which is applicable only to the citizens of this country. It was held by the

Constitution Bench in *Hans Midler of Nuremburn v. Superintendent, Presidency Jail, Calcutta* (1955) I SCR 1284: AIR 1955 SC 367; that the

power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the constitution fettering this discretion.

It was pointed out that the legal position on this aspect is not uniform in all the countries but so far the law which operates in India is concerned, the

Executive Government has unrestricted right to expel a foreigner. So far the right to be heard is concerned, there cannot be any hard and fast

rule about the manner in which a person concerned has to be given an opportunity to place his case and it is not claimed that if the authority

concerned had served a notice before passing the impugned order, the petitioners could have produced some relevant material in support of their

claim of acquisition of citizenship, which they failed to do in the absence of a notice.

3. The Supreme Court in case titled *Anwar V. State of J&K & Ors* reported in AIR 1971 SC 337 at para 4 of the judgement has held that a

foreigner being not a citizen is not entitled to any right guaranteed by Article 19 of the Constitution, and the only rights foreigner could claim are

those contained in Article 2022.

4. The petitioners have filed this writ petition seeking following reliefs:

a. Certiorari for quashing the action envisaged under communication styled as Notice dated 21.11.2008 issued by Respondent no 2.

b. Direct the respondents to declare the petitioner to have surrendered their Pakistani Nationality and resumed their status as Hereditary State

Subject and Indian Nationals and not to harass them in future in any way.

c. Mandamus directing the respondents to treat the petitioners as the State Subject/permanent residents of the State and allow them to enjoy all the

privileges and benefits as are available to the other State Subjects, permanent residents in the state with a further direction to respondents to allow

the petitioners to stay in their native village without any let or hindrance.

d. Any other relief which the Hon'ble Court may deem proper in the circumstances of the case in favour of the petitioner.

5. The Petitioners are challenging notice issued by respondent no. 3 which is reproduced as under:

Mr. Mohammad Ashraf Khan

(Pak National)

S/o Mohammad Ramzan Khan

C/o Baderkund Ganderbal

Passport no. KF 174123

dated 28.05.2005 Valid upto 27.05.2010.

Whereas you are a foreigner of Pak nationality and have entered India on 27.09.2005 by Rail via PCR Attari on a Pak passport no. KF. 174123

dated 28.05.2005 valid upto 27.05.2010 and visitors Visa no. P489413 dated 06.07.2005 good for 45 days stay at New Delhi.

Whereas instead of staying at Delhi, you jumped visa and came to Kashmir without seeking proper permission from the competent authorities and

thus jumped visa which is against the law of the country.

Whereas Police Ganderbal had registered a case against under FIR no. 71/05 U/S 14 Foreigners Act. The case had been decided by the Hon'ble

Court of Judicial Magistrate Ganderbal wherein you were acquitted of the charges with the observation ""Before parting with this judgement I place

on record if the District Administration or the authorities are not satisfied with the status of the accused being bonafide permanent resident of the

state, Authorities are well within their powers to proceed

Whereas you are a foreigner of Pakistan nationality and have entered India on a visa good for stay at Delhi, you were required to leave the State

for your country soon after expiry of your period of stay, which you have failed to do. Your stay in the State (India) is illegal, unauthorized and in

contravention of visa agreements between India and Pakistan.

Now, therefore, in exercise of powers conferred upon me under section 3(2)(C) of Foreigners Act, you are hereby directed to leave India within

ten days from the receipt of this notice failing which action under law shall be initiated.

Foreigners Registration Officer.

Kashmir Srinagar.

No. FRK/Pak/444448

Dated. 21.11.2008

6. The petitioners claim to be hereditary state subject of J&K and claim to be residents of village Buder Kund in District Ganderbal. It is further

claim in para 1 of the petition that petitioner no. 1 was born in the said village on 1st of November 1975. It is further claim that petitioner no. 2 is

his wife with whom he was initially engaged in the year 1987 and thereafter the marriage between petitioner no. 1 and 2 was solemnized in

Pakistan, when petitioner no. 1 traveled to Pakistan after obtaining proper

documents. In para 3 of the petition, it is pleaded that petitioner no. 1 stayed in Pakistan on visa issued by that country, and thereafter surrendered his Indian citizenship, as otherwise he would not be allowed to stay there. In the same para of the writ petition, petitioner no. 1 further claims that under compelling circumstances petitioner no. 1 had to acquire Pakistani citizenship and obtain Pakistani passport which enabled him to travel to India on a valid visa. It is further case of the petitioner that before the expiry of visa period he alongwith his wife and children made a joint representation to the concerned authorities in the Home Ministry through State Home Department and requested for restoration of Indian nationality, being a hereditary state subject of J&K State, and according to petitioner no. 1 his wife and children have also acquired the same status. The further case projected in the writ petition is that the authorities treated him as a Pakistani national and while his representation was pending before the authorities he was booked for commission of offence u/s 14 Act of 1946 and in this behalf case FIR no. 71/2005 was registered in Police Station Ganderbal. The petitioner, however, was acquitted by the criminal court by its judgement dated 27th of August 2007. Photo copy of the learned Judicial Magistrates order has also been placed on the writ record. The petitioner further claims that he is living with his mother in his ancestral house. He has however pleaded that he is having rented property in his name and his name entered into voting list and is in possession of electronic ID card which is issued by the competent authority in his favour. A ration card and state subject certificate is also issued in his favour by the competent authorities. It is further pleaded that he has inherited his father which fact is evidenced by the order on Mutation no. 456 attested by the competent authority, copies of all the documents have been placed on the writ record. The petitioner in para 6 of the writ petition has pleaded that petitioner no. 1 and 2 have recently been served with notice which directs them to leave India within ten days. Action is taken u/s 3 (2) (c) of the Act of 1946. The further case of the petitioner is that the said notice has been replied and request was made for regularizing there status as state subject of J&K and Indian citizens. Copy of the representation has also been placed on writ record.

7. The petitioner has challenged the said notice on various grounds which inter

alia include that he is the hereditary state subject of J&K and Indian national by birth and has been acquitted by the criminal court and has already surrendered Pakistani passport and Pakistani nationality. The petitioners have also pleaded that their problem is humanitarian which is governed by various covenants, laws and U.N. charters. The petitioners have also referred to and reproduced in para 9 of writ petition the notification dated 20th April 1927 and seeks support of said notification to project his case. The petitioner has also referred to same para of book (Constitution of J&K by Dr. A.S. Anand) to further buttress his case. The petitioners have also referred to full bench judgement of this Court titled Mohsin Shah Vs. State of J&K & Ors reported in AIR 1974 JK 48.

8. Heard. Considered. The petitioner has annexed copy of document as Annexure A of the writ petition which shows him to be permanent resident of Rawalpindi Pakistan. The photo copy of passport also shows petitioners to be residents of Rawalpindi Pakistan. The other documents placed on record are vi/as issued by Government of India permitting the entry of petitioners into India by train and place of visit is shown to be Delhi only. Petitioners have been permitted to stay in the specific territory of Delhi for 45 days. Photographs of six minor children have also been placed on record of the writ petition. Visa has been issued on 6th of July 2005 and its expiry is shown to be 30th of November 2005. A photo copy of application dated 29th of July 2005 addressed to the Additional Chief Secretary Home Department Government of J&K is also placed on the writ record which application is filed by petitioner no. 1. In the said application, the petitioner has stated that he is a state subject and traveled to Pakistan in the year 1994 and married his cousin in the same year. He has further stated in the application that after expiry of visa period he was compelled to obtain Pakistani citizenship and traveled back to his native place on Pakistani passport. He has further stated in the application that he is having ancestral house, landed property in state of J&K and his family members including his mother and brothers are living in a joint family. The applicant prayed that his status as state subject and Indian National may be restored to him and to his wife and six minor children.

9. The averments made in the writ petition demonstratively show that petitioner no. 1 originally belonged to state of J&K and was an Indian citizen

but after his marriage with his cousin at Rawalpindi Pakistan, he surrendered his Indian citizenship and obtained Pakistani citizenship which he

claims was acquired under the compelling circumstances as his visa issued by Pakistani Government was to expire. Admittedly petitioner no. 2 is a

resident of Rawalpindi Pakistan as demonstrated by the documents placed on the record of the writ petition and the children born are also

Pakistani nationals. The petitioner no. 1 was granted visa under the Act of 1946 for a limited period and the visa was granted for stay at Delhi

alone. The petitioners have placed nothing on record of the writ petition to show or suggest that they were permitted by the competent authority in

the Government of India to travel beyond Delhi and to visit State of J&K, which has been his home state. There is not even whisper in the writ

petition as to how and in which circumstances he landed in state of J&K. The petitioner no. 1 was prosecuted for having committed offence u/s 14

of Act of 1946, but was acquitted by the learned trial magistrate, as according to the judgement, copy whereof has been placed by the petitioners

on the record of the writ petition, the acquittal has been ordered as the prosecution failed to prove the guilt against petitioner no. 1.

10. Section 3 (2) (C) of Act of 1946 provides that an order can be issued that foreigner shall not remain in India or in any prescribed area therein.

The authority who has issued the order impugned in this writ petition in the attendant facts and circumstances of the case was within its rights to

issue the order. Nothing has been said in writ petition which would render the order bad in the eyes of law. The claim of the petitioner no. 1 that he

was compelled by the circumstances to surrender his Indian citizenship and to acquire the Pakistani citizenship as projected by him in the

application which is part of the writ record, it appears, has not been decided till date.

11. Section 9(1) of the Act of 1955 provides that any citizen of India who otherwise voluntarily acquires citizen of another country upon such

acquisitions or, as the case may be, ceases to be a citizen of India. Section 9 (2) provides that if any question arises as to whether, when or how

any person has acquired the citizenship of any 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.

12. The petitioners have invoked extraordinary jurisdiction of this Court to seek the reliefs reproduced in this judgement. The petitioner no. 1

besides referring to circumstances which lead to his acquisitions of Pakistani citizenship has also placed on record some documents showing him to

be hereditary state subject of J&K State and citizen of India. The petitioner as already stated in this judgement, for maintaining this petition and

seeking reliefs from this court, has referred to Mohsin Shah's case. I he writ petition filed by the petitioners deserves to be dismissed for the

following reasons:

a. Admittedly petitioners have traveled to India on Pakistani passport and petitioners were granted visa to visit Delhi that too for a limited period.

The petitioners as on date continue to be Pakistani citizen and cannot seek in the attendant facts and circumstances of this case seek writ of

certiorari to quash the notice requiring them to leave India within a particular period, as that would tantamount to removing section 3 (2) (c) pf the

Act of 1946 from the statute book. The petitioners continued stay in any part of India is against the constitutional scheme and other laws of the

land.

b. The judgement in Mohsin Shah's case has turned on its own facts. Mohsin Shah had come from that part of the Kashmir, which continues to be

constitutionally and legally part of the Indian domain. On the basis of evidence placed on record of the writ petition by the petitioners themselves

they are residents of Rawalpindi Pakistan, so no benefit can be derived by them from Mohsin Shah's case.

c. The petitioner has filed application for restoration of his citizenship, but it appears has not pursued the same. If it is a fact that petitioner has filed

an application seeking restoration of his Indian citizenship then the authorities are duty bound to consider same and in accordance with the statute.

This Court cannot enter into this thicket as serious disputed question of fact are involved which cannot be adjudicated upon under the extra

ordinary writ jurisdiction.

d. The plea of the petitioners that they have been subjected to double jeopardy as petitioner no. 1 having been acquitted by the learned magistrate

no action could be initiated against him 'on same charges again. This argument of the learned counsel for the petitioner fails on twin grounds, firstly,

that initiation of penal action would not debar the authorities to initiate action for deportation of the petitioners. And, secondly, even the learned

Judicial Magistrate has provided liberty to the competent authority to proceed against the petitioners in case authorities are not satisfied with the

status of the petitioner as claimed by him of being state subject and citizens of India. The petitioner has not challenged this part of the order which

accordingly binds him.

e. The documents placed on the writ record viz. ration card, state subject certificate electronic voter ICard issued in favour of the petitioner no. 1

by the competent authorities may constitute the ground for the concerned authority to consider the claim of the petitioner for restoration of his

Indian citizenship and may also enable him to project his claim that only under compelling circumstances, he gave up his Indian citizenship. The

court cannot substitute itself for statutory authority. The writ petition is not maintainable. The writ petition is burdened with some irrelevant,

unnecessary and unwarranted pleadings.

13. This writ petition is accordingly dismissed. The dismissal of this writ petition shall not prevent the competent authority(s) to consider the claim

of the petitioner about his non voluntarily surrender of India citizenship as also for restoration of his Indian citizenship. The competent authority, if

approached by the petitioners, will not be precluded to take a decision in this behalf in accordance with the statute which may include conducting

of enquiry and passing of the orders thereon.

14. The petitioners are at liberty to approach the authorities concerned and seek there continuation in India till a decision is taken by the authorities,

and authorities may consider the request for such continuation on the fact situation of the case.