

(1999) 12 KL CK 0015

In the High Court Of Kerala

Case No : O.P. No's. 4690/93 and connected cases

Moosa and Others

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 01-12-1999

Acts Referred:

Citizenship Act, 1955 — Section 5, 5(1)(a), 5(l)(c), 5(l)(e), 9
Constitution of India, 1950 — Article 10, 11, 21, 5, 5
Foreigners Act, 1946 — Section 14, 3(2)(c)
Penal Code, 1860 (IPC) — Section 15

Citation : (2000) 1 KLJ 417

Hon'ble Judges : K.S. Radhakrishnan, J

Bench : Single Bench

Advocate : S. Abdul Salam, O.V. Mustafa Zafee, M.A. Fayaz and Muhammed Ravuf, for the Appellant; K. Ramakumar (SCGSC), K.P.G. Menon, Thomas Mathew Nellimoottil and Mathews J. Nedumpara (ACGSC), for the Respondent

Judgement

K.S. Radhakrishnan

1. Petitioners in all these cases are of Indian origin, except the petitioner in O.P. No. 5441 of 1995, who was born in Mane in 1935, which was part of Pondicherry, a French Settlement. Petitioners left India for employment to countries like Pakistan," Britain, Malaysia, some of which are still commonwealth countries. Petitioners went for employment to Pakistan, except the petitioner in O.P. No. 53 of 1998 who left for United Kingdom and is holding a British passport. Petitioner in O.P. No. 171? of 1999 is holding a Malaysian passport. Petitioners are now in India taking up the stand that they are Indian citizens and left India on compelling circumstances, and had to acquire foreign passport. Since their status as Indian citizen was disputed and authorities took steps to arrest and deport them, they preferred applications before the Central Government for determination of their status under Sec. 9(2) of the Citizenship Act, which says that if any question arises as to whether, whenor how any person has acquired the citizenship of another country, it shall be determined by such authority, in

such manner, and having behalf. Contentions were raised before the Government Of India stating that some of the petitioners left India to secure employment abroad-leaving their parents, wife and children in India. Petitioners claimed that they were Victims of the vagaries of Travel Agents and had to leave the country without proper Travel documents, and without holding any Indian passport. Passports of other countries were obtained for better job opportunities and not voluntarily. According to them, passports of other countries were obtained so as to facilitate them to return to India. Those contentions were considered by the Government of India. Petitioners were given an opportunity of being heard. Government of India rejected those contentions and held that petitioners are not Indian citizens. Petitioners have challenged those orders on various grounds. According to the petitioners, they have no intention whatsoever to renounce the Indian citizenship, and to acquire passports of Pakistan, Britain or Malaysia. According to them, the mere fact that they have obtained Pakistani, British or Malaysian passport, would not necessarily mean that they have voluntarily acquired those passports. Reliance was placed by petitioners on the decision of the Supreme Court in Mohd. Ayub Khan Vs. Commissioner of Police, Madras and Another, . The Supreme Court held that if a plea is raised by a citizen that he had not voluntarily obtained the passport, the citizen must be afforded an opportunity to prove that fact. Cases may be visualised in which on account of force a person may be compelled or on account of fraud or misrepresentation he may be induced without any intention of renunciation of his Indian citizenship to obtain a passport from a foreign country. Petitioners submit the same would not give rise to a conclusive presumption that they had voluntarily obtained the citizenship of other country.

2. The Citizenship Act, 1955 was enacted by the Parliament to provide for the acquisition and determination of Indian Citizenship, Provisions of Constitution of India, particularly Arts. 5 to 9, determines as to who are citizens of India at the commencement thereof. Art. 10 of the Constitution of India provides for continuance of such citizenship subject to provisions of any law that may be made by Parliament. Art. 11 of the Constitution of India leaves it to the law-makers to deal with the cases of acquisition of citizenship after the commencement of the Constitution, which led to the enactment of the Citizenship Act, 1955. Section 9 of the Citizenship Act provides for determination of Indian Citizenship in case a person voluntarily acquires citizenship of another country. Art. 9 of the Constitution of India deals with a person voluntarily acquiring citizenship of any foreign State. Section 9(1) of the Citizenship Act provides for termination of citizenship of an Indian citizen, if he has by naturalization registration, or otherwise, voluntarily acquired the citizenship of another country; Subject to the exceptions in the proviso thereto, naturalisation, registration or acquisition of citizenship of another country operates to terminate the citizenship of India., Sub-section (2) of Sec. 9 provides for setting up an authority to determine the question where, when and how citizenship of another country has been acquired, and Rule 30 of the Citizenship Rules the Central

Government is designated as the authority which is invested with powers to determine the question in such manner, and having regard to such rules of evidence as may be prescribed. Provision for prescribing rules of Evidence, having regard to which the question of acquisition of citizenship of another country has to be determined, clearly indicates that the order is not to be made on the mere satisfaction of the authority without enquiry as to how the citizen concerned has obtained a foreign passport.

3. Supreme Court in *MD. Ayub Khan (supra)* held that the question as to whether, when and how foreign citizenship has been acquired has to be determined having regard to the rules of evidence prescribed, and termination of Indian citizenship being the consequence of voluntary acquisition of foreign citizenship, the authority has also to determine that such latter citizenship has been voluntarily acquired. Determination of the question postulates an approach as in a quasi-judicial enquiry, the citizen concerned must be given a reasonable opportunity to convince the authority that what is alleged against him is not true. Supreme Court interfered with the order passed by the Government of India in the above mentioned case, since no opportunity was given to the citizen to prove his case.

4. Government of India in the cases at hand have given opportunities to the petitioners to establish that they had not voluntarily acquired the foreign citizenship. Para. 1 of Schedule III of the citizenship Rules raises a rebuttable presumption that when it appears to the Central Government that a citizen has voluntarily acquired foreign citizenship, it casts burden of proof upon the citizen to disprove such acquisition. Para.2 which authorises the Central Government to make enquiries for the purpose of determining the question raised, strongly supports the view that the Central Government must arrive at a decision that the Indian citizen has voluntarily acquired foreign citizenship before action can be taken against him on the footing that his citizenship is terminated. Para.3 raises a conclusive presumption that a citizen of India who has obtained a passport from a foreign country on any date has before that date voluntarily acquired citizenship of that other country. By the application of the rule in para.3, the authority must regard obtaining of a foreign passport on a particular date as conclusive proof that the Indian citizen has voluntarily acquired citizenship of another country before that date. The burden of proof is on the person who alleges that he had not voluntarily acquired the citizenship of another country to prove the same.

5. Central Government though in these cases have given opportunities to the petitioners to discharge their burden, they were not successful. On the other hand, the fact reveals that many of the petitioners after obtaining passport of foreign countries have come to India on several occasions and left India which would indicate that they had voluntarily acquired foreign passports. Para.4A of Schedule III of the Citizenship Rules envisages that if a citizen of India leaves or has left India without travel documents issued by the Central Government and

resides outside India for a period exceeding three years, he shall be deemed to have voluntarily acquired the citizenship of the country of his residence. I am of the view, in none of the cases, petitioners could establish that they had acquired passport of Pakistan, Britain, Malaysia, etc. not voluntarily.

6. It is well settled by a catena of decisions of the Supreme Court, earlier of which was *State of Andhra Pradesh Vs. Abdul Khader*, that under Sec. 9(2) of the Act read with Rule 30 of the Rules, the authority to decide the question whether a citizen of India has acquired a foreign passport voluntarily or not is the Central Government, and the question cannot be decided by courts, since the statute has specifically authorised the Central Government to decide the said question. That being the mandate of law, if the Central Government, in exercise of its power conferred under Sec. 9(2) of the Citizenship Act, determined that question and made a declaration to that effect, court must give effect to that and court cannot sit in judgment over the decision taken by the Central Government, unless there is clinching evidence that such a determination was made mala fide or in violation of principles of natural justice. It is after considering all relevant aspects that the Government determined the question of their status. I therefore uphold these orders of the Central Government issued under Sec. 9(2) of the Act.

7. After the issuance of orders of the Central Government, State authorities have issued orders for arresting and deporting the petitioners in exercise of the powers under Sec. 3(2)(c) of the Foreigners Act read with Sec. 14 of the said Act and notification No. I/77/62/F-3 dated 29-7-1963 of the Government of India, Ministry of Home Affairs. Some of the petitioners have submitted applications under Sec. 5(1)(a) of the Citizenship Act for registration of Indian citizenship. In certain cases applications were preferred under Sec. 5(1)(c) as well as under Sec. 5(1)(e) of the Citizenship Act. Applications were also preferred by some of the petitioners before the State as well as Central Governments for getting long term stay facilities. Since applications were preferred under Sec. 5(1)(a), (c) and (e) it is necessary to examine the scope of those provisions and their relevance for determination of the applications so preferred. It is profitable to extract the relevant provisions:

5. Citizenship by registration:-- (1) Subject to the provisions of this section and such conditions and restrictions as may be prescribed, the prescribed authority may, on application made in this behalf, register as a citizen of India any person who is not already such citizen by virtue of the Constitution or by virtue of any of the other provisions of categories:

(a) persons of Indian origin who are ordinarily resident in India and have been resident for (five years) immediately before making an application for registration;

(b)....

(c) persons, who are, or have been, married to citizens of India and are

(d)....

(e) persons of full age and capacity who are citizens of a country specified in the First Schedule;

Provided that in prescribing the conditions and restrictions subject to which persons of any such country may be registered as citizens of India under this clause, the Central Government shall have due regard to the conditions subject to which citizens of India may, by law or practice of that country, become citizens of that country by registration.

Explanation:-(1) For the purposes of this sub-section, a person shall be deemed to be of Indian origin if he, or either of his parents, was born in undivided India.

We may test the above mentioned statutory provisions in the light of Arts. 5 to 9 of the Constitution of India. The following persons became the citizens of India at the commencement of the Constitution of India:

(1) a person born as well as domiciled in the territory of India.

(2) a person domiciled in the territory of India either of whose parents was born in the territory of India.

(3) a person who or whose father was not born in the territory of India, but who has his domicile in the territory of India and who has been ordinarily residing within the territory of India for not less than 5 years immediately preceding the commencement of the Constitution of India.

(4) a person who has migrated from Pakistan, provided:

(i) he or either of his parents or grand parents was born in India defined in the Government of India Act; and

(ii) (a) if he has been migrated before July, 1948 - he has ordinarily resided within the territory of India since the date of migration.

(b) if he has migrated on or after July 19, 1948 he further makes an application before the commencement of the Constitution of India for registering himself as a citizen of India to an officer appointed by the Government of India; and is registered by that officer, being satisfied that the applicant has resided in the territory of India for at least 6 months before such application.

(5) A person who migrated from India to Pakistan after 1st March 1947 but has subsequently returned to India under a permit issued under the authority of the Government of India for resettlement or permanent return or under authority of any law provided he gets himself registered in the same manner as under Arts. 6 and 7.

(6) a person who or any of whose parents or grand parents was born in India as defined in the Government of India Act, 1935 but who is ordinarily residing in any country outside India provided he gets himself registered as a citizen of

India on application in the prescribed form, to the consuler or diplomatic representative of India in the country of his residence.

Emphasis is on the word "domicile" occurring in Art. 5 of the Constitution of India. Every Indian has his domicile in the territory of India by birth or domicile of origin. These conditions will apply until he acquires new domicile. Section 5(1) (a) of the Citizenship Act, emphasises the words "persons of Indian origin".

Therefore, if they are of Indian origin, they had their domicile in India before renouncing the same. Domicile is a jural concept used for the purpose of establishing the connection of a person with the law of the country with which he or she is most intimately connected. Domicile connects a person with a system of law and his connection with the place is only in the sense that his *lex domicilii* prevails there. Domicile of a person is determined on his birth. On his birth a person acquires the domicile of his father. This domicile sticks to him till he adopts another domicile so "that if a person leaves his country of origin with an intention to live in another, nevertheless, his domicile or origin adheres to him until he actually acquires another. Once he acquires another domicile, his domicile - the domicile of choice - sticks to him, unless he again acquires another domicile. If he abandons his domicile of choice, his domicile of origin revives till he acquires another domicile. Therefore, every independent person must have a domicile, either of origin or of choice.

8. The House of Lords as early as in 1904 in *WINAS V.A.G.*, (1904) AC 287 took the view that domicile of origin continued to exist till the end. The presumption in favour of continuance of an existing domicile may be rebutted in the same manner as a presumption can be rebutted in a civil action. *Prandas Vs. The State*, ; *Thorn as v. Morgas*, (1935) 62 Cal. 869; *Somerville v. Somerville*, (1801) 5 Ves. 750; and *Huntley v. Gaskell*, (1906) AC 56 all have taken the view that even if a person with a view acquiring another domicile gives up his domicile of original, it will continue to exist so long as he does not acquire a new domicile. *Udny v. Udny*, (1869) LR 1 and *Someryille*, (1801) 5 Ves. 750 held that the moment a person gives up his domicile of choice, his domicile of origin revives. Lord Cranworth in *Whicker v. Hume* (1858) 7 H.L. Cas. 124 held as follows:

By domicile we mean home, the permanent home. But then what is home?...: If you do not understand your permanent home I am afraid that no illustrations drawn from foreign writers will very much help you to it.

Later in the year 1863 Lord Cranworth condescended and observed:

The present intention of making a place of person's permanent home can exist only, where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this event a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent:

(Moorhouse v. Lord, (1863) 10 H.L. Cas. 272.).

The four general principles which govern both Indian and English Private International Law are as follows:

- (1) No person can be without a domicile.
- (2) No person can have simultaneously two domiciles;
- (3) Domicile denotes the connection of a person with a territory system of law; and
- (4) The presumption is in favour of continuance of an existing domicile.

The Indian Constitution recognizes only one domicile: see Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, .

9. In all these cases, it is not disputed that petitioners are of Indian origin. That means that they had their domicile of origin in India. Since all the petitioners are of Indian origin, and had their domicile by birth in India, they could maintain an application under Sec. 5(1)(a) of the Citizenship Act. If those applications are allowed, their domicile of origin would revive. The Central Government would therefore take expeditious steps to dispose of those applications. Section 5(I)(c) also permits a person to apply for Indian citizenship if he has married a citizen of India, and is ordinarily resident in India and has been so resident for five years immediately before making an application for registration. Therefore the factum of marriage as well as continued residence in India for a certain period were also recognised as a ground for acquiring Indian citizenship. Marriage involves a transfer of domain of the transferor from the father to the decendant which has always been the phenomenon in a civilised society which forms part of Indian culture. In Indian society marriage is a sacrament and the Indian legal system always lean in favour of holding marital relationship so as to have peace and certainty in the society at large. Blackstone in 1765 in his Commentaries, Vol.1, Ch.15, P.442 observed as follows:

By marriage the husband and wife are one person in law, ie., the very being or legal existence of a woman is suspended during the marriage, or atleast is incorporated and consolidated into that of the husband, under whose wing of protection and cover she performs everything.... Upon this principle of union of person in husband and wife, depends almost all the legal rights, duties and disabilities that either of them acquire by the marriage.

Section 15 of the Indian Succession Act, 1925 says that by marriage a woman acquires the domicile of her husband, if she had not the same domicile before. It is taking into consideration all those social aspects that the Legislature has incorporated Sec. 5(I)(c) which enables a person to submit an application to become Indian citizen on marriage, provided he satisfies all other conditions. India is a member of commonwealth, some of the Indians left for employment to other commonwealth countries, though Pakistan is not a member of

commonwealth now. I notice in very many cases all the persons of Indian origin left behind their wife, and children in India and in some cases their properties in India. Therefore, in the interest of society at large, it is necessary for the Govt. of India to consider all those aspects while dealing with those applications. Petitioners in some cases made applications under Sec. 5(l)(a) and some others under Sec. 5(l)(c). Some of the petitioners made applications for longterm stay facilities in India, when action was taken by the authorities to arrest and deport them from India.

10. Power to arrest and deport a person from a country originates from the concept of State sovereignty. *United States v. Wong Kim Ark*, 169 US 649 and *Oppenheimer v. Cattermole*, (1973) Ch. 264 highlighted the fact that it is the prerogative of each State to determine for itself and according to its own Constitution and laws that what classes of persons shall be entitled to its citizens. Supreme Court in *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 622 stated that in cases involving violation of human rights the courts for ever remains alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. Supreme Court in *National Human Rights Commission Vs. State of Arunachal Pradesh and Another*, dealt with the rights of Chakma refugees for rehabilitation in the light of Art. 21 of the Constitution of India, as well as under the Protection of Human Rights Act. The court held our country is governed by rule of law, held that the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise. Supreme Court reminded that the State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of every human being whether he is a citizen or not. The court permitted the parties to file proper application under Sec. 5 of the Citizenship Act for registration as Indian citizens.

11. The importance of following International Law in Domestic Laws is gaining momentum. Art. 15 of the Universal Declaration of Human Rights states that every person has a right to a nationality. No one shall be arbitrarily deprived of his nationality or denied the rights to change his nationality. Art. 13 of the International Covenant on Civil and Political Rights provides that aliens lawfully in the territory of a State, party to the covenant may be expelled only pursuant to a decision reached by law, and except where compelling reasons of national security otherwise require, are to be allowed to submit the reasons against their expulsion and to have their case reviewed by and to be represented for the purpose before the competent authority. The Judicial Colloquium on International Human Rights violations, in its meeting held at Bangalore in December, 1998 pointed out that the fundamental human rights of freedom are universal and they find expression in the Constitution and Legal System throughout the country.

12. UN Charter does not give details of what are all human rights. Subsequent instruments to some extent filled up the gaps. The Universal Declaration of

Human Rights adopted by General Assembly on 10th July 1948, defines certain human rights and fundamental freedom to be protected. Covenant on Civil and Political Rights and its Operational Protocol, Government Economic and Social and Cultural have also given importance. Covenant on Civil and Political Rights was concerned with basic individual rights, ie. right to life, freedom from torture, and inhuman treatment, right to liberty and security of person, freedom of movement, right to fair trial, expression, association, privacy, right to religion and equality before law. To a greater extent, those rights find expression in Art. 21 of the Constitution of India as well.

13. Petitioners in many of these cases are married and have got wife and children staying in India. So also their aged parents and relatives in none of the cases, there is an allegation that they are in anyway involved in anti-national activities or they are a threat to the security of the nation. If these persons are arrested and deported from India, same will have considerable social impact, in the sense that they have to part with their wife, children and parents leaving them destitute. Many of the petitioners have crossed the age of 70. Arresting and deporting these elderly person of Indian origin would be an affront to human dignity and rule of law and would violate basic human right to which our country is embedded. It is heartening to note that the Government of India, Ministry of Home Affairs vide its letter dated 11-7-1-998 had later addressed the Addl. Chief Secretary, Home (SS.B) Department, Government of Kerala, to send the longterm (VISA proposals in respect of 312 Pak Nationals for consideration of various applications, preferred by them under Sec. 5(I)(a) of the Citizenship Act. Government of India is the authority to consider the application for longterm stay facilities. Government of India had earlier directed the State Government to be very selective in forwarding the applications for longterm stay facilities received from Pak Nationals, and they had issued specific directions in the matter as per their letter No. I2011/20/87/F.III dated 13-7-1987. Therefore applications from Pak Nationals were not usually entertained by the State. Now in view of the letter dated 11-7-1998 by the Ministry of Home Affairs it is the responsibility of the State Government to forward those details to the Government of India for consideration of the applications. Some of the petitioners have applied for longterm stay facilities in India. Some others have already completed 5 years which enable, their applications to be considered by the Government of India under Sec. 5 of the Citizenship Act for giving citizenship by registration. In those cases where petitioners have not satisfied the condition of five years" stay in India, before submitting their applications, it is open to the Central Government to grant them long-term stay facilities, till their applications are considered.

Under the above mentioned circumstances, all the Writ Petitions are disposed of with a direction to the State Government-to forward the details of the petitioners to the Central Government at the earliest. The Central Government is further directed to consider the applications for longterm stay facilities, as well as the applications for citizenship by registration under Sec. 5 of the Citizenship Act, in the light of what has been stated hereinbefore. Till a decision is taken by the

Central Government, petitioners shall not be arrested and deported from India, unless situation warrants, due to violation of any other laws of this country.