
(1965) 12 AHC CK 0006

In the Allahabad High Court

Case No : Criminal Miscellaneous Habeas Corpus Petition No. 2977 of 1965

Rashid Hasan Roomi

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-12-1965

Acts Referred:

Constitution of India, 1950 — Article 5

Citation : AIR 1967 All 154 : (1967) CriLJ 309

Hon'ble Judges : T. Ramabhadran, J; H.C.P. Tripathi, J

Bench : Division Bench

Advocate : S.H.S. Abdi and M. Asif Ansari, for the Appellant; H.N. Seth, for the Respondent

Final Decision : Allowed

Judgement

Tripathi, J.—By this petition u/s 491 of the Code of Criminal Procedure a challenge is raised to the validity of the petitioners' detention in the district jail, Fatehpur, in pursuance to an order purporting to be under Foreigners Internment Order, 1962, and it is prayed that he be set at liberty.

2. Having heard learned counsel for the parties at some length, we directed yesterday that the petitioner be set at liberty forthwith. We now propose to give our reasons for the order.

3. The undisputed facts which are relevant to the questions in controversy are of somewhat unusual nature and raise interesting questions of law.

4. The petitioner was born of Indian parents in the district of Fatehpur and has been living since his birth in this country. He was here on 26th January, 1950, when the Constitution of India came into force. The petitioner's father Syed Siddiq Hasan migrated to Pakistan in 1948 leaving behind the petitioner who was then a minor and his younger brothers and sisters in India. It is admitted that the petitioner has been living in Kasba Kara Jahanabad District Fatehpur since after the migration of his father to Pakistan and has been carrying on cultivation.

According to the petitioner his permanent home is at Jahanabad where he owns considerable cultivable land and practises as a registered Homoeopathic Doctor. The petitioner has filed certified copies of the extracts from the final Assembly electoral rolls for 1957 and 1962 for Kara Jahanabad Town Area which indicate that he is entered as a voter at serial Nos. 667 and 36 respectively of the aforesaid electoral rolls. The petitioner's allegation that he contested the election of the Town Area for the office of Chairman in 1958 has not been denied. His further allegation that he contested for the aforesaid office again in the year 1964 and was elected as the Chairman of the Town Area Committee and has been continuing in that office too has not been denied in the counter affidavit. The petitioner has annexed certified copies of the result sheets of the aforesaid two elections which indicate that in the election which was held in 1957 the votes polled by him were 1011 as against 1131 of the successful candidate while in the election which was held in 1964 he polled the highest number of votes and was declared elected as Chairman of the Town Area Committee. It is admitted that he at the time of his arrest also was occupying the office of the Chairman of the Town Area Committee of Kara Tahanabad. The petitioner has also obtained an India-Pakistan passport before 1961. It appears however that his application for obtaining another India-Pakistan passport in 1961 has not been granted by the State Government as is evident from annexure I to the counter affidavit.

The petitioner was arrested on 13th of October, 1965, in pursuance to an order of the civil authority, Fatehpur, purporting to be under para 5/8 of the Foreigners' Internment Order, 1962, and since then he is confined in the district jail, Fatehpur.

5. It is urged on behalf of the petitioner that he is an Indian citizen and his detention as a Pakistani national is not sustainable in law.

6. Mr. H. N. Seth, learned counsel for the opposite party has contended that as the petitioner's father had migrated to Pakistan in the year 1948 when the petitioner was still a minor his domicile is linked with that of his father and therefore he cannot be held to have domiciled in India on the 26th January, 1950, when the Constitution came into force and as such cannot be held to be a citizen of India. Reliance was placed by the learned counsel on the decisions reported in *Mst. Allah Bandi and Another Vs. Govt. of Union of India (UOI) and Others*, 1954 All LJ 156 : AIR 1954 All 456) : AIR 1955 Nag 6, *The State Vs. Abdul Hamid and Another*, and *Mohammad Umar Vs. The State*, Learned counsel also cited a passage from G. C. Cheshire "Private International Law" in support of his contention that the domicile of an infant automatically changes with any change that occurs in the domicile of the father.

7. The argument raised by the learned counsel though ingenious is based on a fallacy and the cases cited by him do not apply to the facts of the present case.

8. In the case of *Mst. Allah Bandi and Another Vs. Govt. of Union of India (UOI) and Others*,) the two minor married girls who happened to be with their parents

at the time of the disturbances of 1947 also went to Pakistan when their parents left for that country while their husbands who were citizens of India continued to reside in India. It was held that the girls being minors could not legally change their domicile of origin and shift to Pakistan with the intention of settling there in the absence of their husbands and therefore it could not be said that they migrated to Pakistan when they left India with their parents.

9. In the case of AIR 1955 6 (Nagpur) it was held that in the case of a dependent his domicile is the same and changes with the domicile of the person on whom he is, as regards his domicile, legally dependant and the domicile of an infant is determined by that of his father. In this case the infant had migrated to Pakistan along with his father.

10. In The State Vs. Abdul Hamid and Another, also their Lordships were dealing with a case where a minor had migrated to Pakistan along with his father and in that setting of facts it was held that the minor also must be taken to have acquired the nationality of his father.

11. In the case of Mohammad Umar Vs. The State, the court was concerned with a case where the minor had migrated to Pakistan along with his father in the year 1949.

12. Thus it will be noticed that none of the aforesaid cases cited by the learned counsel deal with a case where the infant or the minor had been left at the place of his birth by his father who had deserted him and then had migrated to a foreign country. Here we are concerned with a case where the petitioner was deserted by his father who migrated to Pakistan leaving him to stand on his own in the land of his birth.

13. G. C. Cheshire in his "Private International Law" says :--

"The primary rule is that the domicile of an infant automatically changes with any change that occurs in the domicile of the father. As between a living father and his infant child there is a necessary unity of domicile, even though they may reside in different countries. This unity is not destructible at the will of the father. It is not terminated if he purports to create a separate domicile for his son, for instance, by entrusting his future care and maintenance to a relative domiciled in another country or by setting him up in business abroad. This doctrine, that a change in the father's domicile is necessarily communicated to the child, is generally laid down in absolute terms, but it is to be hoped that should the occasion arise it will not be pressed to its logical conclusion.

Suppose, for instance, that .1 father deserts his son, leaves him in his domicile of origin and himself acquires a fresh domicile elsewhere. Or suppose that he is divorced for adultery and the custody of the children is given to his wife. In such cases as these it is scarcely credible that a court would affirm the inevitability of a common domicil."

14. We are, therefore, of opinion that on the facts of the present case it will not

be reasonable to hold that although the petitioner was domiciled in India on the date when Constitution came into force because he happened to be a minor of about 13 or 14 years on that date his domicile must be linked with that of his father who had migrated to Pakistan in the year 1948 after deserting him in India.

15. The petitioner was born of Indian parents in the territory of India. He had his domicile here and at the commencement of the Constitution had been ordinarily a resident in the territory of India for more than five years immediately preceding such commencement. He has been enrolled as a voter in his country. He contested the election for the office of the Chairman of the Town Area Committee twice once in the year 1957 and then again in the year 1964. He has been occupying that office since November 1964. For instance of this application therefore it must be held that he is a citizen of India.

16. Mr. Seth contends that even if the applicant is held to be a citizen of India, as his father is admittedly a national of Pakistan the petitioner comes under the wide sweep of Section 3 of the Foreigners' Internment Order which provides that any person who, or either of whose parents, or any of whose grand parents was at any time a citizen or subject of any country at war with, or committing external aggression against India, can be arrested under paragraph 5 of the said order.

17. Para 3 of the order as it originally stood reads as follows:

"3. Application of chapter--This chapter shall apply to and in relation to any foreigner who is, and any person not of Indian origin who was at birth, a citizen or subject of any country at war with, or committing external aggression against India .

18. It was amended by Foreigners (Internment) Amendment Order dated 26th November 1962 and the aforesaid paragraph was substituted by the following paragraph :--

"3. Application of chapter--This chapter shall apply to and in relation to any foreigner who is, and any person who, or either of whose parents, or any of whose grand parents was at any time a citizen or subject of any country at war with, or committing external aggression against India Then there was another amendment being Foreigners' Internment Amendment Order 1965 which came into force on the 6th of September, 1965, which provided inter alia that "in the Foreigners Internment Order, 1962, in paragraph 3, for the words" in relation to any foreigner "the words" in relation to any national of Pakistan and to any other foreigner shall be substituted.

19. It will be observed that originally paragraph 3 of the Order applied to any foreigner but by the amendment of 1965 the nationals of Pakistan were placed in a separate category for the application of chapter 2 of the Order, than other foreigners.

20. It is true that in view of the provisions of paragraph 3 of the Order as it

stands today any person who, or either of whose parents, or any of whose grand parents was at any time a citizen or subject of any country at war with India can also be arrested and detained under the Foreigners" Internment Order, 1962. If is also true that as the petitioner"s father is admittedly in Pakistan he falls in one of the categories mentioned in paragraph 3 of the Order. But the impugned order passed by the civil authority makes it clear that the petitioner has been detained on the supposition that he was a Pakistan national and not because his father happened to be in Pakistan. In order to appreciate the point it is necessary to quote the order :

"In exercise of the power conferred upon me as Civil Authority of district Fatehpur, I Sheo Pujan Singh do hereby order that Sri Rashid Hasan Roomi a Pakistan National son of Syed Siddiq Hasan Roomi r/o vill. Kora Tahanabad P. O. Jahanabad district Fatehpur holding Pakistani Passport No. Nil dated Nil and India Visa No. Nil dated Nil be arrested under para 5/8 of the Foreigners" (Internment) Order, 1962, as applicable to Pakistani Nationals in India vide Government of India Notification No. 1/ 61/65-F. III dated September 7, 1965 and further that he be confined in District Jail. Fatehpur as provided in para 6 of the said order.

Sd/- S. P. Singh 12. X. Civil Authority Foreigners" Registration Officer.

Dated October, 12, 1965.

21. It will be noticed that the impugned order describes the petitioner as a Pakistani national and says that he be arrested under para 5/8 of the Foreigners" Internment Order, 1962, as applicable to Pakistani nationals in India. It is, therefore, obvious that the impugned order was passed by the civil authority on the supposition that the petitioner was a national of Pakistan and not because he fell under the third category i.e. one of his parents was residing in Pakistani territory. As the supposition on which the order is based has proved to be illusory in law the order must be held to be invalid.

22. It was for these reasons that we had directed yesterday that the petitioner be set at liberty.