
(1973) 09 BOM CK 0006

In the Bombay High Court

Case No : Letters Patent Appeal No. 31 of 1971

Sayed Ahmed Kabuli

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 18-09-1973

Acts Referred:

Citizenship Act, 1955 — Section 9(2)
Citizenship Rules, 2009 — Rule 30
Constitution of India, 1950 — Article 10, 11, 5, 6, 7
Limitation Act, 1908 — Article 120, 28

Citation : AIR 1975 Bom 176 : (1974) 76 BOMLR 258

Hon'ble Judges : Rege, J;Deshpande, J

Bench : Division Bench

Advocate : A.A. Omer, for the Appellant; S.C. Pratap, Asst. Govt. Pleader, for the Respondent

Judgement

Deshpande, J.—The plaintiff, appellant in this letters Patent Appeal, Instituted a suit in the City Civil Court at Bombay for - (a) declaration that the plaintiff was a citizen of India. and (b) for permanent injunction restraining the defendant i.e. the State of Maharashtra, the provisions of the Foreigners Act. The suit was instituted on 23rd January 1963. It was pleaded that he was born in Afghanistan, but has made India his domicile since his arrival in Bombay in the year 1941. He never left India since then. However on the pressure of the police officers, he was constrained to register himself as a foreigner on 12th July 1956, and also to receive Afgan passport thereafter through Afghanistan Consulate to enable him to continue his stay in India. After the expiry of the passport period on 11.4.1961, the Afghanistan Consulate declined to renew his passport. Defendants, police officers, on the other hand, threatened to serve "leave India" notice if passport was not renewed within two months from their notice dated 11.12.1961. Finally such notice was served on 18.7.1962. The plaintiff instituted this suit after serving notice on the defendant u/s 80 of the CPC dated 2nd October 1962.

2. The State of Maharashtra denied that the plaintiff was a citizen of India and that he was entitled to the relief's prayed. The jurisdiction of the Court to entertain or try the suit was also questioned in view of the provisions of the Citizenship Act of 1955, hereinafter referred to as "the Act".

3. On evidence, the trial Judge held that the plaintiff was a citizen of India at the commencement of the Constitution. The suit filed after six years from the date of registration as foreigners was however, found to have been barred by limitation under article 120 of the Limitation Act of 1908, and consequently has been dismissed. While so holding the trial Judge followed a judgment of the trial Judge followed a judgment of the Division Bench of this Court dated 3rd October 1962 in First Appeal No.295 of 1960 delivered by Patel J. His First Appeal was dismissed by a Single Judge of this Court on 25th March 1970 holding that even if the suit was held to be within time, the plaintiff would not succeed in getting the relief's in view of the plaintiff being alleged to be a foreigner and the Trial of such an issue being barred by Section 9(2) and Rule 30 of the Citizenship Act. Correctness of this judgment is challenged in this Letters Patent Appeal by the plaintiff.

4. We are afraid the dismissal of the appealed the suit by the Single Judge does not appear to have been warranted. The trial Judge has found that the plaintiff had roved his being a citizen of India on 26th January 1950. This finding does not appear to have been challenged in appeal and he has not considered it fit to reverse the same. Even before us. Mr. Pratap, the learned Assistant Government Pleader, had very little to say while challenging this finding of fact. It was not disputed that the plaintiff came to India in the year 1941, while he was still a boy of 14 years, he having been born in Afghanistan in the year 1926. He appears to have become major in the year 1944 and has not left India at any time during the period from 1941 till the institution of the suit on 23rd January 1962. He declined to accompany his uncle. who left India in the year 1946. He has been married in India and has been married in India and has been doing business in India. He registered as a voter and has exercised franchise. These undisputed tell-tale facts are by themselves sufficient to hold that the plaintiff has adopted India as a domicile of his choice notwithstanding he having been born in Afghanistan in the year 1926.

5. A person found to be a citizen at the commencement of the Constitution possesses certain fundamental rights including freedom of movement and protection against unwarranted interference therewith. It is difficult to resist his claim for protection against unlawful interference if such case is made out. Reliance by the learned Judge on the judgment in Shan Mohammad's case of the judgment in Shah Mohammad's case of the Supreme Court reported in State of Uttar Pradesh and Others Vs. Shah Mohammed and Another, does not appear, to us to be well founded. In Shah Mohammad's case the High Court had remitted the issue as to the acquisition of the citizenship of Pakistan by Shah Mohammad to the District Judge on the assumption that provisions of the Citizenship Act of

1955 did not apply to the proceedings instituted prior to the enforcement thereof, and on receipt of the finding in favour of Shah Mohammad, proceeded to decree his suit for permanent injunction against the State of U. P. Grover J. speaking for the Supreme Court held that the Act of 1955 did apply even to the question arising in such pending suits and consequently the District Judge or the High Court was not competent to decide such an issue. The case was remanded to the High Court to pass appropriate orders for determination of the question in dispute. The Supreme Court presumably had the procedure hinted by the Supreme Court in the case of Akbar Khan Alam Khan and Another Vs. The Union of India (UOI) and Others, in mind, while in derive any support for dismissal of the appellant's suit in this manner from the Shah Mohammad's case.

6. Mr. Pratap, the learned Assistant Government pleader, appearing for the State, contends that such a suit is liable to be dismissed as being time barred. In addition to the judgment relied on by the trial Judge, he also relied on yet another judgment of Division Bench by Patel, J., in appeal No.140 of 1968 with L.P.A. No.9 1968 delivered on 20th June 1968. He, secondly contended that the plaintiff's suit cannot be decreed till the plaintiff moves the Central Government and gets a declaration under Sec.9(2) of the Act that he has not renounced his citizenship. He thirdly, proposed that hearing of the appeal be stayed till the question of limitation referred by nain, J to the Full Bench by his order dated 14.1.1972 in Appeal No.144 of 1968 is decided. He also urged that the issue of renunciation of citizenship by the plaintiff be referred to the Central Government u/s 9(2) of the Act and the appeal be stayed still the receipt of the finding, as is done by Kantawala, J (as he then was) in First Appeal No.393 of 1965 by his order dated 12th March 1969.

7. The contention raised by Mr. Pratap can be better dealt with after ascertaining the true effect of the possession of foreign passport by a person found to be a citizen on 26.1.1950 and effect of Section 9(2) of the Act. In the case of Government of The Government of Andhra Pradesh Vs. Syed Mohd. Khan, , the Supreme Court was dealing with writ applications of 22 persons who had come to India from Pakistan on the passport of the Government of Pakistan and were asked to remove themselves from out of India on account thereof. Their being citizens of India at the commencement of the Constitution was not in dispute. The only question was with regard to the effect of their entering India on Pakistani passports, Gajendragadkar, J.. as he then was speaking for the Court first overruled the view the possession of such passport operated as automatic cesser of the Indian citizenship and observed follows (paragraph 6):

"Therefore, there is no doubt that in all cases where action is proposed to be taken against persons residing in this country on the ground that they have acquired the citizenship of a foreign State and have lost in consequence the citizenship of this Country, it is essential that that question should be first considered by the Central Government The decision of the Central Government about the status of the person is the basis on which any further

action can be taken against him."

In the case of Mohd. Ayub Khan Vs. Commissioner of Police, Madras and Another, the appellant was sought to be deported from India by the Commissioner of Police, Madras on the ground of he having acquired Pakistan passport on 1.4.1953. It appears that his application dated 9th August 1957 to the Collector of Madras for registration as a citizen of India and subsequent application to the Central Government u/s 9(2) of the Act was rejected without giving any opportunity to produce evidence. His writ application before the Single Judge of the Madras High Court and also his appeal to the Division Bench was dismissed on the ground that the very fact of his obtaining such passport was by itself sufficient to raise irrefutable presumption of his having acquired the citizenship of Pakistan as per the Rules under the Act. After making reference to its earlier judgment and the scheme of Articles 5 to 11 of the constitution and Section 9 of the Citizenship Act and the rules made thereunder. Shah, J. speaking for the Court or other authority to raise such presumption and observed:

"Paragraph 2 (of the Schedule to the Rules) which authorises the Central Government to make enquires for the purpose of determining the question raises strongly support 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."

State of U.P. Vs. Rehmatullah, was an appeal by the State against the acquittal by the High Court of respondent-accused who the Foreigners Act, 1946, on the ground of his having entered India on 1.4.1955 on Pakistan passport and having over-stayed in India illegally. That he was a citizen Constitution was not disputed. During the pendency of the Criminal Proceedings inquiry u/s 9(2) of the Citizenship Act read with Rule 30 of the Rules thereunder was held and by an order of the Central Government dated 5th November 1964 he was held to have acquired January 1950 and before 15th March 1955. Rahmatullah's acquittal by the High Court was based on the fact that question of his acquisition of Pakistani citizenship was not determined before the date of the prosecution. Dua J., speaking for the Court, after the referring to its some reported and unreported judgments made the following observations:

"In view of these decisions it seems to us to be obvious that till the Central Government determined the question of the respondent having acquired Pakistan nationality and had thereby lost Indian nationality, he could not be treated as a foreigner and no penal action could be taken against him on the basis of his status as a foreigner, being a national of Pakistan."

8. Now the plain implications of the ratio of these judgments and the facts discussed therein are that (1) A person found to be a citizen of India under Article 5 of the Constitution on 26.1.1950 cannot be treated as foreigner as long as the Central Government does not record a decision to that effect u/s 9(2) of the Act. (2) The Central Government is alone competent to decide such an issue

and the Civil Court is barred from so deciding. (3) While it is open for a party affected to move the Central Government for the required declaration, other interested party such as State Government or its police officers can also take the initiative. (4) Such a decision being the basis and the condition precedent for his treatment as foreigner order of deportation or directing any such person to leave India, is invalid ineffective and inoperative. (5) Ordinarily the date of the acquisition of foreign passport by any one should have been the date of cesser of his Indian citizenship. But on interpretation of Act and Rules the date of the order u/s 9(2) is considered to be the determination factor.

9. If this is the true scheme of Article 5 to 11 of the Constitution and the Act of 1955 and the Rules thereunder, it is difficult to see how the defendant and its officers can legally compel the plaintiff to leave India without any decision u/s 9(2) of the Act. If prosecution of such citizen and his proposed deportation without decision u/s 9(2) is held as ineffective and incompetent, the notice of the defendant calling upon the plaintiff to leave India without such decision also is equally invalid and liable to be quashed. The difference in approaches in criminal and writ matters, as distinct from ones in a suit, was strongly relied on by Mr. Pratap. That the approaches in certain respect are different can hardly be disputed. Even so, it is difficult to see what difference it can make to the application of the above ratio whether Court is exercising criminal or writ jurisdiction or ordinary civil jurisdiction. Court is bound to follow the law i.e. not the acquisition of the passport but the order of the Central Government operates as cesser of the citizenship notwithstanding the irrebutable presumption raised by the passport under the Rules. It is difficult to understand how a Civil Court can afford to ignore such immunity and protection to a citizen against such unwarranted threat of deportation without his being found to have ceased to be such citizen: either because of impediment in granting declaratory relief or his failure to approach the Central Government for decision u/s 9(2) of the Act, when the relief and protection can be claimed by him from the High Court under art. 226 of the constitution in spite of such hurdles. In fact High Court itself invariably directs the litigants to seek relief by suit when case involves disputed questions of facts as in the present case.

10. Now it is true that in the above referred two cases (First Appeal No.295 of 1960 (Bom) and First Appeal No.140 of 1968 (Bom)) such declaratory suits are held to have been barred by Article 120 of the Limitation Act, 1908 and suits were consequently dismissed having been instituted six years after the first threat to plaintiffs rights. On the other hand in Appeal No.7 of 1968 against dismissal of such suit at motion stage on the preliminary point of limitation another Division Bench, however, observed that invasion on the Citizenship right was a continuing wrong and every invasion furnished fresh cause of action and as such limitation would commence from the date of each such invasion. The Bench also held that suit for injunction could be still maintainable even if declaratory relief was barred. The learned Judge, however referred the question of limitation for declaratory relief to the Full Bench in Spite of the above opinion

at the instance of the Appellant's Advocate presumably because the point was raised at the threshold of the litigation. The Full Bench thought that the issues arising out of the reference cannot be decided unless the case is tried on merits on all issues, including one as to limitation. The reference thus proved to be abortive. But in First Appeal No. 144 of 1968 Nain J. again referred the same question to the Full Bench by his order dated 14.1.1972. The reference is still pending and we would refrain from Patel, J. however, appears to us open to doubt in view of the implications of the above discussed three judgments of the Supreme Court.

11. But the questions as to whether suit for injunctions simpliciter in the event of declaratory relief becoming time - barred could be maintainable or not was not conjectured in the three of these four cases. Tarkude, J., in his order dated 11th June 1969 did consider the question and held in the affirmative. But neither his order nor the order dated 14-1-1972 contemplated referring this question of to the Full Bench. We have already indicated how Tarkunde, J appears to have referred the question of limitation to have referred the question of limitation to the Full Bench the suit for injunction could still be entertained. We do not see why the reliefs of injunction cannot be granted in the present case even if the suit for declaratory reliefs is held to the suit for declaratory relief is held to have become time-barred. It is well settled that Limitation Act only bars remedy and does not destroy the substantive rights, excepting as provided u/s 28 (of 1908 Act) with regard to the rights in immovable properties. Status of a person as a citizen of India cannot be said to have been extinguished merely because his remedy for getting declaration to that effect is lost due to the bar of limitation. A suit for possession by a rightful owner filed within 12 years of dispossession cannot be held as time barred merely because his remedy for declaration of his title had become barred due to the expiry of six years. Such rightful owner can still establish his title and succeed in getting the possession, if the suit for possession is within time. We are not here dealing with cases where relief of injunction is claimed by way of consequential relief and grant of which relief is dependent on the relief for declaration. Suits for declaratory reliefs on voidable transactions are illustrative of such cases. We have already made reference to the decisions of the Supreme Court to indicate the nature of right of a citizen in such matter. In our opinion, the relief for declaration in such kinds of suits is not only ancillary as held by Calcutta High Court in *Gowardhandas Rathi Vs. Corporation of Calcutta and Another*, , *Gowardhandas v. Calcutta municipality* in a different context but is superfluous indeed. Every citizen is entitled to protection against deportation and the investigation of his being a citizen under Article 5 of the Constitution is implicit in the claim for relief for injunction without regard to whether declaratory suit for the same has become barred by limitation. Such investigation of title or status does not depend on claiming declaratory relief. See *The Vishnu Pratap Sugar Works (P) Ltd. Vs. The Chief Inspector of Stamps, U.P.*, . *V.P. Sugar Works v. C.I. of Stamps*. Implications of the above three judgments of the Supreme Court also go to fortify this conclusion of ours.

12. It is true that while disposing of First Appeal No.140 of 1968 (Bom) Patel and Chitale. JJ held that the suit for both the reliefs for declaration and injunction was barred by limitation. They have, however, not decided the point of time when the limitation for injunction suit starts, and no difference of opinion exists on this point. The learned Judges were dealing with a case where cause of action for injunction suit had also become time-barred. The plaintiff in the said case was not only asked to leave India but was tried and convicted in 1952 for overstaying in India. The suit obviously was instituted long after expiry of six years from such conviction. This apart, it was a case of a plaintiff who had entered India in 1946 on Afghan passport and was allowed to stay in India throughout only as such foreigner. It shall have to be borne in mind that causes of action for declaratory relief and the one for relief of injunction may not necessarily always coincide. In the present case, cause of action for declaratory relief can be said to have accrued on 12.7.1956. when the plaintiff was required to be registered as a foreigner even according to the ratio of the two judgments of Patel, J. But the cause of action for relief of injunction cannot be said to have arisen till the threat to leave India was hurled at him on 11.12.1961. The suit for injunction cannot be said to have been barred on any tests whatsoever.

13. It is true in Akbar Khan Alam Khan and Another Vs. The Union of India (UOI) and Others, the Supreme Court did suggest staying of suit pending decision of the issue by the Central Government u/s 9(2) of the Act. This appears to have been found convenient in that case in view of the concession made by the learned Counsel for the Union. The same procedure is hinted at in State of Uttar Pradesh and Others Vs. Shah Mohammed and Another, . This, however is not what the Act requires. The Supreme Court cannot be said to have laid down any law to that effect. What is convenient depends after all on facts and facts of each case. Secondly, implications of Section 9(2) had not come up for consideration directly till The Government of Andhra Pradesh Vs. Syed Mohd. Khan, was decided. In view of the interpretation of Section 9(2) of the Act, since Mohammad Khan's case we do not see why suits like these cannot be finally disposed of by restraining the State from deporting the plaintiff till the decision u/s 9(2) of the Act. This rids the litigant of (2) of the Act. This ride the litigant of the botheration implicit in any prolonging of the litigation and also the Court of purposeless arrears. This also leaves the concerned State officials free to move the Central Government of their own with such urgency as the facts of the case warrant. There is also no reason why the Court be saddled with the responsibility of making the reference to the Central Government, when statute does not require so. Our attention was not drawn to any other case of the Supreme Court of our High Court where these aspects were considered, though we were informed that the procedure suggested in Akbar Khan's case is followed as a matter of rule. In our opinion, public money and the time can better be saved. if the State administration itself moves the Central Government for decision whenever any citizen is found to have acquired the nationality of any foreign country. This meets all the points raised by Mr. Pratap for the State. Appeal

deserves to be allowed.

14. We accordingly set aside the orders of the two Courts below and decree the plaintiff's suit for injunction restraining the State Government from deporting the plaintiff till Central Government records its decision as required u/s 9(2) of the Citizenship Act.

15. In the circumstances of the case, there will be no order as to costs all throughout.

16. Appeal allowed.