
(1966) 08 PAT CK 0013

In the Patna High Court

Case No : Misc. Judl. Case No. 934 of 1964

Shree Mohammad Yusuf

APPELLANT

Vs

Union of India(UOI) and Others

RESPONDENT

Date of Decision : 25-08-1966

Acts Referred:

Constitution of India, 1950 — Article 5, 7

Citation : AIR 1967 Patna 266

Hon'ble Judges : R.L. Narasimham, C.J;K.K. Dutta, J

Bench : Division Bench

Advocate : Basudeva Prasad, Karuna Nidhan Keshav, J.N.P. Verma, A.H. Matiur Rahman and Ravi Nandan Sahay, for the Appellant; A.G. and Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, C.J.—In this petition under Art. 226 of the Constitution the validity of the order of deportation of the petitioner passed by the Superintendent of Police, Monghyr (Annexure E) on 13-5-1964 in purported exercise of the powers conferred by Clause (c) of sub-sec (2) of Section 3 of the Foreigners Act, 1946 (Art XXXI of 1946) read with the Government of India, Ministry of Home Affairs, notification No. 1/32/61 (IV) F III, dated the 15th March, 1962, is under challenge. The order has been made on assumption that the petitioner is a national of Pakistan. But it was urged on behalf of the petitioner by Mr. Basudeva Prasad that the petitioner was a citizen of India at the commencement of the Constitution and that he did not lose that citizenship either by any act on his part or on the basis of any determination made by the Central Government u/s 9(2) of the Citizenship Act, 1955 read with Rule 30 of the Citizenship Rules, 1950. The learned Advocate General, however, urged that in consequence of his migration to Pakistan in 1947 he shall not be deemed to be a citizen of India in view of Article 7 of the Constitution and that he never acquired Indian citizenship according to law.

2. The admitted or unchallenged facts are these The petitioner was born in a village in Monghyr district sometime in 1932 or 1933. There is a controversy as to whether the petitioner was born in 1932 or 1933 and he has given different years as the year of his birth on two different occasions. But nothing material turns on this discrepancy. In 1947, when he was about 15 years, he entered service in the Eastern Railway and was posted at the Railway Workshop, Jamalpur. District Monghyr. After partition of India, sometime in September, 1947, the petitioner, though a minor opted for Pakistan and entered service in Said-pur Railway Workshop in East Pakistan. His parent and other members of his family, however, remained in India. He was married in due course and lived in Pakistan with his wife till about 1957.

While in Pakistan, he obtained a Pakistani Passport No 374049, dated the 2nd December, 1953, for his wife Akhtari Begam, and Pakistani Passport No. A-150457. dated the 22nd August. 1950, for himself and came to India in July, 1957. Later on 15-1-1959 he applied to the District Magistrate of Monghyr (Annexure A) for an Indian citizenship certificate. This application was rejected by the District Magistrate on 18-3-1963 (Annexure B). The petitioner then made a representation to the District Magistrate for reconsideration of his order (Annexure C) and prayed that till such reconsideration the Police may be restrained from taking action for deporting him. The District Magistrate appears to have been favourably impressed with his prayer and in his letter No. 363 dated 10-1-1954 (Annexure D) addressed to the Government of Bihar he requested that the Central Government may be approached for the purpose of granting Indian citizenship certificate to the petitioner.

In the meantime, however, the Superintendent of Police, Monghyr, by his order already mentioned directed deportation of the petitioner from India after the expiry of fifteen days from the date of service of his order. The petitioner then filed this application before this court and obtained stay of the operation of that order. In paragraph 16 of his petition he, however, stated that his application for grant of Indian citizenship was still pending with the Government. But from the counter-affidavit filed by the Government of Bihar (Annexure I) it appears that the Government of India by their letter dated the 6th October, 1964, rejected his application with the following observations:

"After careful consideration of the facts as reported the Government of India have decided that the action of the competent authority in not registering the above applicant as an Indian citizen u/s 5(1)(a) of the Citizenship Act, 1955, was in order".

This order was communicated to the petitioner by post (Annexure X), though according to the petitioner he never received the same, The Government of Bihar also took steps to issue a warning circular (Annexure Y) to all persons concerned stating that the petitioner should not be registered as a citizen of India without prior reference to the Government of India.

3. On these facts, the first question for consideration is whether the petitioner was a citizen of India at the commencement of the Constitution. Admittedly on that date he was serving in Pakistan. But it was urged that as he was a minor and his parents were in India, in the eye of law he must be deemed to be a citizen of India as the minor is under legal disability to change his domicile which follows that of his parents. But it was contended by the learned Advocate General that though the aforesaid view may be correct so far as the interpretation of Article 5 of the Constitution is concerned bearing in mind the general principle of private international law regarding the disability of a minor to change his domicile nevertheless by virtue of Article 7 of the Constitution the petitioner must be deemed not to be a citizen of India because he migrated to Pakistan after the 1st March, 1947.

It was further contended that for the purpose of applying Article 7 the only point to be considered is whether on the admitted or proved facts it can be held that the petitioner "migrated" from India to Pakistan and that for that purpose the fact that he was a minor will not be very relevant except for the limited purpose of showing that he did not have the requisite *animo manendi*. The learned Advocate General further urged that a boy of fifteen may be presumed to have attained sufficient maturity of mind to decide whether to stay permanently in Pakistan or not and that on the admitted facts of this case it must be held that the petitioner "migrated" to Pakistan. This is the main question for consideration here.

4. Article 5 of the Constitution is made subject to Article 7 by the use of the non-obstante clause "notwithstanding anything in Articles 5 and 6" in the opening words of Article 7. Hence the petitioner cannot rely merely on the general rule of Private International law which is incorporated in Article 5 to the effect that certain classes of dependant persons, namely, infants, married women etc., have no separate domicile of their own but their domicile is that of their father or husband as the case may be. Similarly, the principle that "before reaching full age an infant is utterly incapable of acquiring by his own act an independent domicile of choice" (See Private International Law by Cheshire, 6th edition, page 190) will not be of any avail if it could be held that the petitioner came within the scope of Article 7.

This point seems to have been concluded by the judgment of their Lordships of the Supreme Court in *The State of Bihar Vs. Kumar Amar Singh and Others*, , where the wife of a person of Indian domicile who had gone to Pakistan with the intention of permanently residing there nevertheless urged that by virtue of the rule of private international law her domicile was that of her husband during the subsistence of a marriage and that consequently Article 7 of the Constitution will not stand in the way of her retaining Indian citizenship. Their Lordships repelled this contention by the following words (page 285):

"Even if therefore Article 5 can be said to be applicable to her on the assumption that Captain Narayan Singh was her husband and that her domicile was that of

her husband, the facts bring her case under Article 7. Article 7 clearly overrides Article 5. It is peremptory in its scope and makes no exception for such a case, i. e., of the wife migrating to Pakistan leaving her husband in India. Even such a wife must be deemed not to be a citizen of India unless the particular facts bring her case within the proviso to Article 7".

Thus, it is well settled that the rule of private international law regarding the disability of certain classes of persons from changing their domicile must give way if on the facts found it can be held that there was in fact migration to Pakistan after the 1st of March, 1947 as required by Article 7. An attempt was made to distinguish that case from the present one on the ground that there the wife was a major who could always exercise independent judgment and move to Pakistan with the intention of permanently residing there, whereas a minor must in the eye of law be deemed to be incapable of having that intention during the period of his minority. There is, however, no universal principle that a minor, irrespective of his age, is incapable of having the necessary intention for purposes of the various Laws in force in India.

Thus, even in criminal law a minor above twelve years of age is not given absolute immunity from penal consequences for his acts and his intention can be inferred from the proved facts and circumstances of the case. Hence the rule of private international law cannot be blindly supplied in construing Article 7 and the court has to examine whether on the proved or admitted facts and circumstances the minor can be held to have migrated from the territory of India to Pakistan. The mere fact that he is a minor will not shut out the examination of this question, though it has undoubtedly some relevance in deciding whether he had the necessary intention.

5. The expression "migrate" occurring in Article 6 and Article 7 has been construed by their Lordships of the Supreme Court in *Smt. Shanno Devi Vs. Mangal Sain*, as follows:

"For all these reasons 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".

Can it be said that the petitioner went to Pakistan in September, 1947 with the intention of permanently residing there? He was then aged about 15 years and had attained sufficient maturity of mind to decide for himself. In his petition filed before this court he has stated in paragraph 3 that the petitioner, still a minor, provisionally offered to go to Pakistan, as Railway employee and left India for Pakistan".

The guarded word "provisionally" has deliberately been used with a view to show that he had no intention of permanently residing there, but in his own representation to the District Magistrate (Annexure C) he has used an entirely different language: "That on the persuasion of the others, I opted for Pakistan in the same year and went with them, though my father was not in favour of it.

Due to persuasion of other people. I left India in the year 1947, the year of my appointment, and went to Pakistan That in the year 1957, I realised that I have committed mistake and I should resign myself from service and so bark to India where all my relatives live." Here, it will be noticed that it was not the contention of the petitioner that in 1947 he merely "provisionally offered" to go to Pakistan. On the other hand, he has asserted clearly that he opted for Pakistan on the persuasion of other people against the wishes of his father and he realised the mistake committed by him in such option only in 1957.

He resided in Pakistan for full ten years, continued in service in the railway there and was also married and lived with his wife. It is also admitted by him that he left Pakistan for India with a Pakistani Passport of himself and his wife which would show prima facie at any rate, that he declared himself and his wife to be Pakistani citizens and obtained those passports. Thus, on the facts stated by the petitioner himself in Annexure C it may be reasonably inferred that when he left India for Pakistan in September, 1947, his intention was to reside permanently there and hence be "migrated" to Pakistan as required by Article 7. The use of the word "opt" in Annexure C shows that the choice was made by him deliberately notwithstanding the advice of his father. He was not so young as to be incapable of making any choice. It is not necessary here to discuss why the word "domicil" was not used in Articles 6 and 7 of the Constitution, though that word has been used in Article 5. This has been fully dismissed in *Smt. Shanno Devi Vs. Mangal Sain*, .

The petitioner cannot rely on the general rule of private international law regarding the disability of a minor to change his domicile. I must, therefore, hold that he shall not be deemed to be a citizen of India from September, 1947 by virtue of Article 7 and was not a citizen of India at the commencement of the Constitution.

6. *Mr. Basudeva Prasad* relied on *Government of Andhra Pradesh v. Syed Mohd Khan* AIR 962 SC 1778. *State of Madhya Pradesh v. Peer Mohd.* AIR 1063 SC 645 *Abdul Sattar Haji Ibrahim Patel Vs. State of Gujarat*, and *Mohd. Ayub Khan Vs. Commissioner of Police, Madras and Another*, in support of his contention that until a decision is given by the Central Government u/s 9 of the Citizenship Act read with Rule 30 of the Citizenship Rules, 1956, the petitioner cannot be held to have acquired the citizenship of Pakistan. In all these cases, however, the admitted position was that at the commencement of the Constitution the party concerned was citizen of India. It was on that assumption that their Lordships held that citizenship will not be lost unless there is a decision by the Government of India u/s 9 of that Act read with Rule 30 of the Rules. This was made clear in *State of Madhya Pradesh Vs. Peer Mohd. and Another*, at page 648 in the following words:

"Migrations to Pakistan which took place after January 26, 1950, are not specially provided for. They fall to be considered and decided under the provisions of the Citizenship Act."

Their Lordships further observed that while Article 7 of the Constitution refers to migration which had taken place between 1st of March, 1947 and 26th January, 1950, migration which took place after the commencement of the Constitution must be decided in accordance with the provisions of the Citizenship Act and the rules made thereunder. The clear finding in that case was that the petitioner migrated from India to Pakistan sometime after the 26th January, 1950. In *Abdul Sattar Haji Ibrahim Patel Vs. State of Gujarat*, the case was remanded with a view to enable the petitioner concerned to show that he remained in India until 1954, that is, long after the commencement of the Constitution, though it was contended against him that he left India sometime in 1948. In *Mohd. Ayub Khan Vs. Commissioner of Police, Madras and Another*, , the clear finding was that at the commencement of the Constitution the petitioner was an Indian citizen. Some reliance was also placed on *Kedar Pandey Vs. Narain Bikram Sah*, but that case has absolutely no application here because that deal with construction of Article 5 only.

7. Mr. Basudeva Prasad also relied on *Mukhtar Ahmad Vs. State of U.P. and Others*, . The facts of which case are very similar to the present case. There also a minor went to Pakistan before the commencement of the Constitution. The learned Judge held that the mere fact that he was a minor or the date of his going to Pakistan was sufficient to show that he could not change his domicile and they followed the principle of Private International Law, mentioned above. With great respect, I am unable to accept this view for the purpose of construing Article 7 for the reasons already mentioned. In that case their Lordships did not consider the principle laid down by the Supreme Court in *Mohd. Ayub Khan Vs. Commissioner of Police, Madras and Another*, , which is, I think, decisive of this question.

8. It was further contended by Mr Basudeva Prasad for the petitioner that the order of the Government of India (Annexure I) dated the 6th October, 1964 was passed without giving the petitioner an opportunity of being heard and that it should be quashed on account of violation of the principles of natural justice. An application was made at a belated stage for amendment of the prayer portion of the original petition for this purpose. Objection was however, taken by the Advocate General to this amendment on the ground that order was passed on the 6th October, 1964 and was sent by post to the petitioner (Annexure X) as early as 24th November, 1964 and he must have received it in due course. If the petitioner felt aggrieved at that order, he should have applied long ago for cancellation of that order. The due receipt of this order was denied by the petitioner.

It is not necessary for me to discuss this point here in view of my holding that the petitioner was not a citizen of India at the commencement of the Constitution. Admittedly, he has not acquired Indian citizenship subsequently by virtue of any order passed by a competent authority acting under the provisions of the Citizenship Act or rules made thereunder. Hence, in the present case it will

be academic to consider whether the order of the Government of India dated the 6th October, 1964 should be struck down as having been passed without giving the petitioner an opportunity of being heard. The prayer of the petitioner dated 17-8-1966 must, therefore, be rejected.

9. For these reasons, the application is dismissed with costs. Hearing fee Rs. 100 payable to Respondent No. 2.

Dutta, J.

10. I agree.