

(1972) 03 GAU CK 0009

In the Gauhati High Court

Case No : Civil Revision No. 5 (H) of 1971

The Union of India

APPELLANT

Vs

Md. Ayub

RESPONDENT

Date of Decision : 30-03-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Foreigners Act, 1946 — Section 3(2)(c)

Citation : AIR 1972 Guw 56

Hon'ble Judges : R.S. Bindra, J

Bench : Single Bench

Advocate : D. Pathak, for the Appellant; B.M. Goswami and M.K. Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Bindra, J.—This Revision petition by the Union of India under Rule 36 of the Rules for Administration of Justice and Police in the Khasi and Jaintia Hills arises out of a suit instituted by Md. Ayub on 27-4-1962 claiming a declaration that he is a citizen of India. The suit was dismissed by Shri S. N. Phukan, Assistant to the Deputy Commissioner, Shillong, by judgment dated 31-8-1965. However, an appeal filed by Md. Ayub against that judgment and decree founded on it succeeded in the Court of the Additional Deputy Commissioner, Shillong who held by his judgment dated 28-9-1970 that Md. Ayub was a citizen of India. The Union of India having felt aggrieved with the decree made by the Additional Deputy Commissioner has come up in revision to this Court.

2. Mr. Ayub had pleaded that he was born at Shillong on 2-12-1933 of the parents Makdum Baksh and Amina Khatun, who are original residents of Thulrai. District Rai Bareilly, Uttar Pradesh, that he was brought up and educated at Shillong, that he was married in 1952 at Shillong with the daughter of his uncle Hazi Kammu Mia, and that he was in business at Shillong for a long time. In the year 1961, the plaintiff pleaded further, the Superintendent of Police, United

Khasi and Jaintia Hills. Shillong, served him with a notice under clause (c) of sub-section (2) of S. 3 of the Foreigners Act, 1946, directing him to leave India on or before 30-9-1961. That order of the Superintendent of Police was challenged in a Writ Petition filed under Art. 226 in the High Court but the High Court suggested to him that since disputed questions of fact were involved he better pursue his remedy by a regular suit. It is thereafter that the plaintiff served a notice u/s 80 of the CPC on the Union of India and having received no response was left with no alternative but to file the suit for a declaration that he was a citizen of India and as such the order of the Superintendent of Police was untenable in law. It was admitted in the plaint that the plaintiff's father and other members of his family had left for Pakistan some time in 1950 but it was added that the plaintiff had continued to reside in Shillong with his uncle Kammu Mia whose daughter he ultimately married. In para 20 of the plaint it was alleged that the plaintiff applied for and secured Indian Passport on 23-11-1953 for a visit to Pakistan as he wanted to meet his parents who were putting up in Sylhet and that he had actually gone to Sylhet on the basis of that passport. It was specifically denied that the plaintiff had ever forsaken his Indian citizenship or had migrated to Pakistan.

3. The suit was resisted by the Union of India. The defence set up by it was that plaintiff's father after selling his properties at Shillong in 1947 had left for Pakistan along with his wife, two daughters and three sons including the plaintiff, and that subsequently in October 1952 "the plaintiff stealthily crossed the Border and came to India without valid Travel document or Permit and married the daughter of Kammu Mia". It is after his return to India, it was pleaded further, that the plaintiff began to assert his Indian citizenship and in the year 1953 managed to secure an Indian Passport on false representation that he was an Indian national and that his father was also an Indian citizen.

4. As many as seven issues were settled by the trial Court but the parties concentrated themselves only on Issue No. 6 which was: "Whether the plaintiff is an Indian citizen?" The plaintiff examined six witnesses inclusive of himself besides relying on several documents while the Union of India rest contented by placing reliance on the document Ext. A. The trial Court held that the plaintiff, who was then a minor, must have gone over to Pakistan along with his father where the latter wanted to settle permanently, and that as such he was no longer an Indian citizen. The learned Additional Deputy Commissioner was of the opinion that there was no presumption that the plaintiff had left for Pakistan when his father went to that country and that there was sufficient evidence to establish that the plaintiff had continued to remain in Shillong after his father and other relations had gone over to Pakistan.

5. Shri D. Pathak primarily urged two points on behalf of the Union of India. In the first instance, he submitted that the evidence on the record does not justify the conclusion that the plaintiff had remained behind in Shillong during his minority when his father went to Pakistan soon after the partition of the country.

His second submission was that since the plaintiff was minor when his father had left for Pakistan, the plaintiff's domicile shall be presumed to be Pakistan and not India with effect from the day his father acquired domicile in Pakistan, and that as such the plaintiff could not have availed of the provisions of Art. 5 of the Constitution: Shri B. M. Goswami, who appeared for the plaintiff-respondent, joined issue with Shri D. Pathak on both the points. His stand was that there is voluminous evidence in proof of the fact that the plaintiff had never quitted his residence in India and that since he had domicile in India at the time the Constitution came into force and since he and both of his parents had been born in India, he retains his Indian citizenship in terms of Art. 5.

6. The statements of all the six witnesses examined by the plaintiff were read in Court by Shri D. Pathak to enable this Court to formulate its own opinion whether or not the plaintiff had accompanied his father when the latter went over to Pakistan. After a careful study of the oral evidence I feel satisfied that the plaintiff had not gone to Pakistan along with his father. The trial Court rested its finding that the plaintiff had gone to Pakistan with his father on the assumption that the plaintiff being aged only 14 years in 1947 it is natural that he should have accompanied his father. Shri Pathak was fair enough to concede that this assumption on the part of the trial court was not justified, and there are good reasons for it. The Union of India did not mention in the written statement any specific, or even approximate date when the father of the plaintiff had left for Sylhet in Pakistan, nor it led any evidence to prove that the plaintiff had actually accompanied his father. The plaintiff had specifically pleaded that his father had gone to Pakistan in the year 1950, and in his Court statement as P. W. 4 he affirmed that his father went to Pakistan some time in 1949-50. This later statement of the plaintiff was not challenged in cross-examination. We have the concordant testimony of Md. Ishaq (P. W. 1), Abdul Sukkur (P. W. 3) and Badri Prasad Bawari (P. W. 5) that the plaintiff has been continuously living in Shillong and that he did not go to Pakistan along with his father. The plaintiff's uncle Hazi Kammu Mia (P. W. 2) also affirmed likewise and in addition we have the statement of the plaintiff himself to the same effect. The statements of P. W. 1, P. W. 3 and P. W. 5 sound credible and Shri Pathak was unable to point out his accusing finger against any of them.

7. The oral evidence is considerably reinforced by the certificate Ex 3, dated 28-9-1961, issued by the Myntri Incharge of the Office of the Syiem of Myllem Barabazar, Shillong, to the effect that the plaintiff "is dealing in shoe business at Barabazar, Shillong, since the year 1950". The Indian passport Ext. 1 issued to the plaintiff on 23-11-1953 for a visit to Pakistan also lends support to his contention that he had been residing in India. It is correct that the passport may not be said to be conclusive on the point of plaintiff's Indian citizenship. However, that document does raise a presumption, though rebuttable, in his favour for it is legitimate to assume that before the passport was issued to him some enquiry must have been made by the police or other competent authority on the subject of his Indian citizenship, a fact which admittedly inserted in the

application made by the plaintiff for the purpose, and that nothing suspicious had been found. The two documents Ext. 3, the certificate issued by the Syiem and Ext. 1, the Indian passport, coupled with oral evidence, in my opinion, constitute formidable evidence to support the plaintiff's contention that right from the date of his birth he had been residing in what is now known as India and that he had gone to Pakistan only on the authority of the passport issued to him. The Union of India, it may be added, examined no witness nor produced any other evidence to establish that the plaintiff had furtively entered India from Pakistan in October, 1952.

8. The trial court utilised the recitals in Ex. A. document executed by Kammu Mia. the plaintiff's father-in-law, at the time of plaintiff's marriage with his daughter. It is mentioned in Cl. (1) of this document that Mohammed Ayub (the plaintiff) shall come to the house of Kammu Mia after marriage with his daughter and live there as his son. In the opinion of the Munsiff this recital in the document negatives the contention of Mahammed Ayub that he had been putting up with his uncle Kammu Mia ever-since his own father left for Pakistan. I cannot subscribe that view of the Munsiff. The residence of Mahammed Ayub in the house of Kammu Mia before the former's marriage with the latter's daughter was altogether in different capacity, and the recital in clause (1) only shows that after the marriage when Mahammed Ayub comes to the house of Kammu Mia he shall live there as his son. Therefore, it is not possible to conclude from the recitals in the document that Mahammed Ayub had not been living at Shillong before his marriage with Kammu Mia's daughter in 1952.

9. This takes me to the consideration of the crucial question that falls for determination in the present appeal, namely, whether the plaintiff is an Indian citizen. Sri Goswami urged on the authority of provisions of Art. 5 of the Constitution that there is no scope for argument on plaintiffs claim of his Indian citizenship. That Article reads as under:

At the commencement of this Constitution, every person who has his domicile in the territory of India- (a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

On its plain reading the Article states that every person who had his domicile in the territory of India on the commencement of the Constitution and who was either born in the territory of India, or either of whose parents was born in that territory, or who had been ordinarily resident in the territory of India for not less than five years immediately preceding the date of commencement of the Constitution, shall be a citizen of India. The Constitution of India came into force on 26-1-1950. I have held above that the plaintiff was living in India on 26-1-1950, and as such he had his domicile in India on that date. It was not denied by the Union of India either in the written statement or in either of the

two courts below or in this Court that the plaintiff was born in India and that both of his parents also had their nativity in India. Therefore, all the ingredients of Art. 5 are clearly proved and so there is no difficulty in holding that Mahammed Ayub is an Indian Citizen.

10. Shri Pathak, however, contended that the plaintiff being a minor on the date the Indian Constitution came into force, he could not have any domicile of his own and so his domicile shall be determined on the basis of the domicile of his father. Shri Pathak submitted further that since the plaintiff's father had left India by the date the Constitution came into force, the plaintiff cannot be said to have his domicile in India on 26-1-1950 with the consequence that he cannot avail himself of the provisions of Art. 5. *Mukhtar Ahmad Vs. State of U.P. and Others*, , was cited by Shri Pathak in support of his contention. It was held in that case that a minor is unable to acquire a domicile by his own act and that therefore when the minor, whose father was domiciled in and was citizen of India, left India for Pakistan after 1-3-1947 and continued to be a minor when the Constitution of India came into force, cannot be said to have acquired a domicile of choice in Pakistan by his own act, and hence he continued to retain his domicile of origin in India on 26-1-1950 and Art. 7 of the Constitution would have no application to his case.

11. The postulates on which Shri Pathak rested his submissions are that plaintiff's father had left India for Pakistan before 26-1-1950 and had acquired domicile in that country immediately thereafter. However, the Union of India led no evidence to prove either of the two postulates. The plaintiff affirmed While in the witness box that his father had left for Pakistan sometime in 1949-50, but that statement is obviously neither here nor there, and so it is not possible to hold with any definiteness that the plaintiff's father had left for Pakistan on 26-1-1950 or before that date. Apart from that uncertainty, there are legal impediments in holding that the plaintiff had lost his domicile in India by 26-1-1950 or thereafter. If plaintiff had his domicile in India on 26-1-1950 then his contention of being an Indian citizen will prevail in terms of Art. 5 of the Constitution for undeniably he and his parents were born in India and he had been living in India for more than five years by 26-1-1950.

12. Cheshire states at page 171 of his *Private International Law*, Sixth Edition, that it is a settled principle that nobody shall be without a domicile, and in order to make this effective the law assigns what is called a domicile of origin to every person at his birth, namely, to a legitimate child the domicile of the father, to an illegitimate child the domicile of the mother. At page 173 Cheshire states further that there is a presumption in favour of the continuance of an existing domicile and therefore the burden of proving a change lies in all cases upon those who allege that a change has occurred. This presumption, the author opines, may have a decisive effect, for if the evidence is so conflicting or indeterminate that it is impossible to elicit with certainty what the resident's intention is, the court will decide in favour of the existing domicile. Another proposition outlined by the

author on the same page is that the two requisites for the acquisition of a fresh domicile are residence and intention, that such an intention, however, unequivocal it may be, does not per se suffice and that the two elements of factum et animus must concur, though it is not necessary that there need be unity of time in their concurrence. Yet another principle stated by Cheshire is that before reaching full age, an infant (minor) is utterly incapable of acquiring by his own act an independent domicile of choice - vide page 190. The correctness of these principles was not disputed by Shri Pathak. Indeed, those principles were recognised by the Supreme Court in the case of Kedar Pandey Vs. Narain Bikram Sah, . The Supreme Court observed that the law attributes to every person at birth a domicile which is called domicile of origin, that this domicile may be changed and a new domicile, called a domicile of choice, acquired. However, the two kinds of domicile, the Supreme Court pointed out, differ in one respect, namely, that the domicile of origin is received by operation of law at Birth, while the domicile of choice is acquired later by the actual removal of the individual to another country accompanied by his animus manendi. The Supreme Court observed further that the domicile of origin of an individual is determined by the domicile, at the time of his birth, of the person upon whom he is legally dependent, and that a legitimate child receives that domicile of the father at the time of the birth. Another proposition enunciated by the Supreme Court was that as regards the change of domicile any individual who is not under disability may at any time change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country other than of his domicile of origin, with intention of continuing to reside there indefinitely. The onus of proving that a domicile has been chosen in substitution for the domicile of origin is upon those who assert that the domicile of origin has been lost, and that the domicile of origin continues till a fixed and settled intention of abandoning the same and acquiring another as the sole domicile is clearly established.

13. The propositions which clearly emerge from the excerpts reproduced above from Cheshire and the principles enunciated by the Supreme Court in the case of Kedar Pandey may be summarised as under:-

- (1) That there can be no person without a domicile; (2) That the law assigns domicile of origin to every person at his birth and that to a legitimate child the domicile of the father is assigned and to an illegitimate child that of the mother;
- (3) Before reaching full age an infant is utterly incapable of acquiring by his own act an independent domicile of choice, or, in other words, his domicile until he attains majority is governed by the domicile of his parents;
- (4) That there is a presumption in favour of the continuance of the existing domicile;
- (5) That the burden of proving a change in domicile rests upon him who alleges that the change has occurred; and
- (6) That the two requisites for the acquisition of a fresh domicile, namely,

residence and intention, must concur, though there need not be unity of time in their concurrence. In other words, the intention may either precede or succeed the establishment of the residence.

14. Now I proceed to apply these principles to the facts of the case to determine whether or not the plaintiff Mohammed Ayub is a citizen of India. As stated earlier, the parties were not in dispute on the points that the plaintiff as well as his parents were born in what is now known as India. Therefore, the law will assign the plaintiff a domicile in India. The Union of India wants this Court to presume a change in his domicile in India because his father had migrated to Pakistan. Mere migration would not assign new domicile to the plaintiff's father because until the two elements of residence and intention concur, a domicile of choice is not acquired. Cheshire states at page 186 that there is strongest possible presumption in favour of domicile of origin and according to proposition No. 4 (supra) the burden of establishing change in domicile rests on him who alleges it. It was therefore for the Union of India to establish by positive evidence that the father of the plaintiff had acquired a domicile in Pakistan on a particular date in substitution of his domicile of origin in India. We have no date on the record to take us to a definite conclusion that the father of the plaintiff has acquired a new domicile in Pakistan and if so on what date. Actually we are not sure, as pointed out earlier, on what particular date the plaintiff's father left India for Pakistan, nor when he reached that country. The plaintiff would acquire the new domicile of his father not earlier than the date his father acquires the domicile of his choice. Therefore, on the present record it is not possible to agree with Shri Pathak that the plaintiff's father had acquired domicile of choice in Pakistan in substitution of his domicile of origin and that the plaintiff also should be presumed therefore to have acquired the new domicile in Pakistan. The burden of proving that the plaintiff had lost his domicile in India and that he acquired a domicile in Pakistan has clearly not been discharged by the Union of India.

15. If there was no change in the domicile of the plaintiff until the date he attained majority, then his domicile of origin, which beyond doubt was in India, will have to be assumed to have continued. And if the plaintiff's domicile was in the territory of India on 26-1-1950 then he is a citizen of India because he was born in India, his parent were born in India, and he had been ordinarily residing in India for not less than five years immediately preceding 26-1-1950.

16. Some argument against the plaintiff's contention might have been raised on the footing of Article 7 of the Constitution which provides that notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India. However, such an argument, I believe, has not even the veneer of plausibility. Article 7 is a Constitutional provision which has nothing to do with the principle of private International Law relating to change in domicile of the father of a minor. Article 7 comes into play on its own strength and it applies to the person who migrates. Mere migration in

International Law does not tantamount to change in domicile and the plaintiffs citizenship shall be determined, before he attained majority on 2-12-1951, by the domicile of his father. Therefore, the plaintiff could have acquired domicile in Pakistan only if his father had done so by 2-12-1951. However, all that we know is that the plaintiff's father had migrated to Pakistan before 2-12-1951 and had thereby lost his citizenship in India in view of Article 7. But until his father had acquired domicile in Pakistan by 2-12-1951. the plaintiff could not have lost his domicile in India.

17. No other point was urged in support of the revision petition.

18. In the result, the petition fails and is dismissed, but I make no order as to costs.

Petition dismissed.