
(1953) 05 MAD CK 0006
In the Madras High Court
Case No : Writ Petition No. 158 of 1953

V.G. Row

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 01-05-1953

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 226
Passports Act, 1967 — Section 5

Citation : AIR 1954 Mad 240 : (1954) ILR (Mad) 399 : (1953) 2 MLJ 413

Hon'ble Judges : Rajamannar, C.J.; Venkatarama Ayyar, J

Bench : Division Bench

Advocate : Mohan Kumaramangalam, for the Appellant; A.G. for Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Rajamannar, C.J.—The petitioner in this application is an Advocate of this court. He is also an elected member of the Madras Legislative

Council. On or about 23-10-1952, he applied for the issue of a passport to him for travelling to the countries mentioned in the application which

included the Union of Soviet Socialist Republics and other countries in Europe. On 12-1-1953, he received a communication from the Deputy

Secretary to Government, Home Department enclosing a passport endorsed for the United Kingdom, Egypt; Iran, Iraq and Afghanistan. On page

7 of his passport, there was a (sic) as follows :

The passport should not be endorsed for additional countries without prior reference the office of issue.

On receipt of this, the petitioner wrote the Secretary to Government, Home Department, stating that he had applied for a (sic)port to travel to all

the countries in Europe including the U. S. S. R., as he wanted to consult Ear Specialists in those countries. He sent back the passport for further

endorsement. He also protested against the note OP page 7 of the passport. On 2-3-1953, he received back his passport with a further

endorsement for the following countries, namely, Norway, Sweden, Finland, Western Germany, Switzerland) Netherlands, Belgium, Luxembourg,

France, Austria, Spain, Portugal) Italy, Greece, Eire, and Turkey. The petitioner's request to delete the note made at page 7 of the passport and

for an endorsement for the remaining countries in Europe and for the U. S. S. R. was refused. The petitioner therefore prays that this court may

issue directions or orders or a Writ of Mandamus directing the respondent, namely, the State of Madras represented by the Home Secretary, to

endorse his passport as valid for travelling to the U.S.S.R. and other countries in Europe in addition to the countries for which an endorsement had

already been made and to cancel the observation made at page 7 of his passport.

2. The petitioner complains (1) that the refusal of an endorsement of the passport to any country is a violation of the fundamental right granted to

him under Article 19(1)(d) of the Constitution, and any restrictions on that right must be reasonable and in the interests of the general public, and

(2) that the refusal of an endorsement to the U.S.S.R. and to the Eastern Democracies is mala fide and is a discrimination which is both arbitrary

and unjust and in violation of Article 14 of the Constitution. In support of his complaint, he alleges that the refusal was really due to the fact that he

was a member of the Communist Legislature party in the Madras Legislature & as such consistently opposing the Party in power and relies also on

the fact that passports endorsed to the said countries had been given to other persons. He states that a passport without any restriction was issued

to him on 30-1-1928 which expired after a period of five years.

3. The Secretary to Government, Home Department, has filed a counter-affidavit on behalf of the State, stating that the petitioner had no legal

claims to the issue of a passport which was in the nature of the grant of a special facility and it was in the discretion of the Executive to give or not

to give it. It was denied that the endorsement to the U. S. S. R. and some other countries was refused to the petitioner because he was a member

of the Communist party. It was further alleged that the petitioner's request was

carefully and closely scrutinised and the decision of the Government was based on public interests and policy.

It was submitted that it was not a valid or correct test to take the names of other persons who had been granted passports. The petitioner filed a reply affidavit which does not carry the matter further.

4. The only statutory provisions relating to passports which were brought to our notice (sic) the Indian Passport Act (Act 34 of 1920) (sic) the rules framed thereunder on 25-4-1950 and published in the Gazette of India on 29-4-1950.

The Indian Passport Act is a very short enactment. The object of the Act as recited of the preamble is ""to take power to require passports of

persons entering British India"". passport is defined as ""a passport for the time being in force issued or renewed by the prescribed authority and

satisfying the conditions prescribed relating to the class of passports to which it belongs."" Section 3(1) confers on the Central Government power

to make rules requiring that persons entering British India shall be in possession of passports, and for all matters ancillary or incidental to that

purpose; Sub-section (2) of the same section mentions particularly what the rules might provide for, namely, (a) to prohibit the entry into British

India or any part thereof of any person who is not in possession of a passport issued to him, (b) to prescribe the authorities by whom passports

must have been issued or renewed and the conditions with which they must comply for purposes of the Act, and (c) to provide for the exemption

of any person or class of persons from any provision of such rules. Section 3(3) says that rules may be made providing for punishment for the

contravention of any of the rules or any order issued under the authority of such rules. u/s 5 of the Act, the Central Government may direct the

removal of any person from British India who had entered therein in contravention of any of the rules prohibiting his entry.

5. The Indian Passport Rules, 1950, superseded the Indian Passport Rules, 1921. These rules were amended in 1952 but we are not concerned

with the amendments. Rule 3 runs as follows :

Save as provided in Rule 4, no person proceeding from any place outside India shall enter or attempt to enter, India by water, land or air unless

he is in possession of a valid passport conforming to the conditions prescribed in

Rule 5.

Explanation: A person entering India by land, water or air shall not be deemed to be proceeding from a place outside India by reason only of the

fact that he has traversed extra-territorial waters or land in the course of his journey.

Rule 4 enumerates the classes of persons exempted from the provisions of Rule 3. Rule 5 prescribes the conditions of a valid passport. The

conditions which have any material bearing on the question in issue in this case are the following:

(i) that it shall have been issued or renewed by or on behalf of the Government of the country of which the person to whom it relates is a national,

and shall be within the period of its validity;

... ..

(iii) that when issued by or on behalf of the Government of any country in the Commonwealth (other than India) or of any colony or the

Government of the Republic of Ireland, it shall be specifically valid for entry into any part of the Commonwealth (including India) or shall have been

specifically endorsed by a competent authority as valid for entry into India;

(iv) that, when issued by or on behalf of the Government of a foreign country it shall have been endorsed by a proper Indian or British diplomatic,

consular or passport authority by way of visa for India and

(v) that it shall not have been obtained by misrepresentation or fraud.

Rule 6 contains the penal provision.

6. It is obvious that both the Passport Act, and the rules made thereunder relate to passports in connection with the entry of a person into India.

The Act is quite clear on the point and it is manifestly designed to prevent persons from entering into India without a passport, and certainly the

rules cannot enlarge the scope of the Act. There is no provision in the Act or in the rules for the grant or issue of passports to persons leaving

India.

7. Mr, Mohan Kumaramangalam who argued the case for the petitioner with his usual fairness and ability sought to build up a contention on the

language of Rule 3. That rule prevents any, person from entering India. Any person would include an Indian citizen leaving India for foreign

countries and returning to India, a person in the position of the present petitioner. As the rule stands, such a person could not be permitted to enter

India without a passport. Indirectly, therefore, a person leaving India will be compelled to secure a passport to enable him to return to India. So

the argument ran. This contention which looks plausible on a mere reading of Rule 3 alone becomes untenable when the rules are read with the Act

and when regard is had to the object of the Act. We have no doubt whatever that the Act was not intended to prevent British Indian subjects from

entering India. Even under the Government of India Act, 1935, entry 17 in List I of Schedule VII excluded British subjects from the scope of

legislation regarding admission into India. That entry is as follows:

Admission into, and emigration and expulsion from India, including in relation thereto the regulation of the movements in India of persons who are

not British subjects domiciled in India, subjects of any Federated State, or British subjects domiciled in, the United Kingdom;

8. The corresponding entry in the Constitution is wider and unqualified. Entry 19 is as follows: ""Admission into, and emigration and expulsion from

India; passports and visas."" But there has been no legislation since the Constitution in exercise of the powers conferred by this Entry.

9. in modern times, a passport is never understood as a document enabling a citizen of any country to enter that country. Nor is it understood to be

a document under which a citizen of a country is permitted to leave the country. The accepted modern notion of a passport is to be found in the

judgment of Lord Alverstone C. J., in -- "Rex v. Brailsford", (1905) 2 KB 730 (A), where it is set out thus :

It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the

Crown to a named individual intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a

British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the

respectability of the person named.

10. See also Wharton's Law Lexicon, 14th Edn. page 741. By its terms, it requests and requires in the name of the Sovereign all those whom it

may concern to allow the bearer to pass freely without , let or hindrance and to

afford him every, assistance and protection of which he may stand

in-need (Vide -- "Joyce v. Director of Public Prosecutions", (1946) AC 347 (B). A passport issued by the Indian Government after the

Constitution is in the following terms:

These are to request and require in the name of the President of the Republic of India all those whom it may concern to allow the bearer to pass

freely without let or hindrance, and to afford him or her every assistance and protection of which he or she may stand in need.

11. Historically, the original meaning of the term "passport" appears to have been different from the modern sense. It was evidently a rule of

common law in the 14th and 15th centuries in England that no subject could leave the realm without a licence or passport. This was founded on the

theory that by a person leaving the realm the King was deprived of his service. This doctrine was apparently not universally acknowledged,

because according to Stephen's Commentaries on Blackstone every one at the common law was at liberty to leave the realm without licence. The

41st clause of the Magna Carta which allowed all merchants to depart freely from England in time of peace was really embodying an exception to

the common law rule that no person could leave the realm with out a licence or passport. As the common law rule would not "apply to aliens, it

was found necessary to pass statutes for the aliens not to leave the country without a passport". (38 Geo. III, C. 50, 43 Geo. III, c. 155).

12. Generally, passports are issued in times Of peace and as between nations and States whose relations are friendly. But sometimes, passports

are also given by a belligerent State to subjects of an enemy State to allow them to travel without special restrictions. (Vide the Article on "The

Passport system" by N. W. Sibley in Journal of Comparative Legislation, New Series Vol. VII, page 26).

13. in Halsbury's Laws of England, Vol. & at page 519 we have the following about pass ports :

Passports may be granted by the Crown at any time to enable British subjects to travel with safety in foreign countries, but such passports would

clearly not be available so as to permit travel in an enemy's country during war.

A footnote adds the following:

The possession of a passport is now almost always required by the authorities to

enable a person to enter a country.

14. The position in America is not different. The nature and purpose of an American passport have been described as follows :

The American passport is a document of identity and nationality issued to persons owing allegiance to the United States and intending to travel or

sojourn in foreign countries. It indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and

consular officers abroad and requests on the part of the Government of the United States that the officials of foreign Governments permit the

bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection. It has no other purpose." (Hackworth's

Digest of International Law, Vol. III) at page 435.

In an early case in -- "Urtetiqui v. D'Arcy (1835) 9 Law Ed 276 (C) the Supreme Court decided that a passport by itself was no legal evidence to

establish the fact of the citizenship of the person in whose favour it was given. Thompson J. who delivered the opinion of the Court, observed as

follows on the nature and effect of a passport.

There is no law of the United States in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or

declaring their legal effect It is a document which, from its nature and object, is addressed to foreign powers; purporting only to be a request

that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is

recognised in foreign countries as an American citizen; and which, by usage and the law of nations, is received as, evidence of the fact."

"Browder v. United" States of America", (1941) 85 Law Ed 862 (D) is an interesting case. A person was prosecuted for violating a statute which

made it an offence to wilfully and knowingly use a passport, the issue of which was obtained by a false statement. Actually, the purpose for which

he Used the passport was to facilitate re-entry into the United States. He was convicted of the offence, though (1) the use was made to show what

was in fact true, namely, that the person was a citizen of the United States, (2) it did not involve any misuse of the privilege of travelling through

foreign countries, and (3) passports were not required for re-entry by American citizens. The decision really turned on the plain meaning of the

words of the Statute, but the following observations are instructive:

""It is quite true that passports are used chiefly in foreign travel. There is no limitation, however, to that field and surely the close connection

between foreign travel and reentry to this country is obvious It is entirely clear from the record that passports were customarily used to

prove the bearer's citizenship on re-entry into the United States at the time of this alleged offence. The use of a passport for re-entry is now

routine, although neither at "the time of the passage of the act nor at present are passports required of citizens On re-entry.

The following which occurs in the notice to bearers of passports issued by the State Department of the United States is interesting:

22. An American citizen leaving the United States for a country where passports are not required is nevertheless advised to carry a passport,

except in travel to Canada or Mexico. The passport may later save the time and inconvenience of applying for one abroad should the holder desire

to travel in countries where passports are required. It will also enable the holder to establish his American citizenship upon his return to the United

States and thus facilitate his entry.

15. It appears to have been assumed, at any rate in the United States, up-to-date, that the issue of a passport rests entirely within the discretion of

the State Department and is not subject to court review. There were several instances in which it was clear that the denial of passports was based

entirely on the political activities or association of the applicants. The nearest approach to judicial interference was in the two suits which were

instituted in the District Court of Columbia in 1952 wherein the Court ruled that the State Department must grant a hearing before revoking or

refusing to renew a passport. (Emerson and Haber on Political and Civil Rights in the United States, page 522),

The case in -- "Perkins v. Elg", (1939) 83 Law Ed 1320 (E) also proceeds on the footing that the State Department has got a discretion with

respect to the issue of passports. The plaintiff there was refused a passport solely upon the ground that though she was a natural born citizen of the

United States, she had lost her United States citizenship by reason of certain events. The Supreme Court gave a declaration that she had not lost

her citizenship. This declaration was granted also against the Secretary of State

with the following comment:

The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would

simply preclude the denial of a passport on the sole ground that Miss Elg (the plaintiff) had lost her American citizenship.

It may be mentioned that in the United States the authority of the Secretary of State with reference to the grant and issue of passports is at present

defined by a statute. Section 1 of the Act of 3-7-1926 (22 USCS 211a) provides that the Secretary may grant and issue passports: and cause

passports to be granted, issued and verified in foreign countries by diplomatic representatives of the United States and others who may be

designated by the Secretary of State, and a few others. The use of the word ""may"" has been understood to vest the discretion in the Secretary of

State. ""It certainly vests no right in the applicant for a passport."" Nevertheless, the Department of State has been anxious to impress on the people

that passports are not refused except in the interests of the country. On 24-5-1952, the Secretary of State; issued a formal statement explaining the

position of the Department in which he said,

A passport certifies to foreign Governments not only the citizenship and identity of the bearer, but requests them to permit him safely and freely to

pass, and, in case of need, to give all lawful aid and protection. Possession of the passport indicates the right of the bearer to receive the protection

and good offices of American diplomatic and consular officers abroad. The right to receive the protection of this Government is correlative with the

obligation to give undivided allegiance to the United States. A person whose activities, either at home or abroad, promote the interests of a foreign

country or a political faction therein to the detriment of the United States or of friendly foreign countries should not be the bearer of an American

passport. Passports are refused only on the basis of very clear and definite reports from the investigative and security offices of this department and

of other Government departments and agencies and from foreign Governments containing a well-authenticated information concerning past and

present activities and associations of the applicant ..."".

15a. There has been legislation in the United States prohibiting any person to depart" from the United States unless he bore a valid passport; but

such legislation has been temporary and only during the existence of a national emergency.

16. There was such legislation both at the; time of the first World War (1918) and in the Second World War (1941).

17. So far as India is concerned, there is no statutory provision which prohibits a person from leaving India without a passport. Nor is there any

provision forbidding an Indian citizen from entering India without a passport. These facts have to be borne in mind in dealing with the petitioner's

contentions founded on Arts. 14 and 19 of the Constitution. In paragraph 14 of the affidavit in support of the application, the petitioner stated that

he would be prevented from boarding any plane or ship leaving for the U. S. S. R. without an endorsement in, his passport for that country, and

that the embarkation authorities will not allow him to board the ship or plane inside the territory of India if that ship or plane is leaving for the U. S.

S. R. We asked Mr. Kumaramangalam who, and on what authority, would so prevent the petitioner. But he was unable to give a definite answer.

We also asked the learned Advocate-General if there was any provision of law under which a person could be prevented from leaving India by

land, sea or air without a passport. But he was unable to draw our attention to any such provision. It follows that as the law stands at present the

State cannot prevent the petitioner from leaving for the U. S. S. R. merely on the ground that he does not hold a passport endorsed for that

country. Nor is there any provision of law under which a citizen like the petitioner can be prevented from re-entering India after travelling to foreign

countries except with a passport.

18. in this view, we do not see much substance in the contentions of the petitioner's learned counsel. Art. 14 guarantees equality before the law

and equal protection of the laws. Equal protection of the laws has been construed to mean the protection of equal laws. It is this Article which

prohibits discriminatory Legislation and arbitrary classification. But this Article can have no application to a matter like the issue of passports which

consists in the exercise of a purely political function.

19. Article 19(1)(d) was invoked. That provision guarantees to all citizens the right to move freely throughout the territory of India. It was

contended by Mr. Kumaramangalam that this right would include the right to

leave and enter India without restriction, unless the restrictions are reasonable and in the interests of the general public. It is not necessary for us to decide whether this construction is right, because in our opinion even assuming that the right should be understood as comprising the right to leave and re-enter India, there has been in the present case no restriction of that right. The petitioner has not been prevented from leaving India nor from re-entering India.

20. We are also of the opinion that the reliefs which the petitioner seeks at our hands are not founded on any legal right. The passport gives to the recipient the benefit of the protection of the Government issuing it. But can it be said anyone has got a right to obtain a passport to any particular country? We think not. Even when a passport has been granted to an individual, the State cannot be compelled to exercise its protection over that individual in a foreign country. "The matter is absolutely in the discretion of every State and no citizen abroad has by International law a right to demand protection from his home State, although he may have such a right by Municipal law" (Oppenheim's International Law, 7th Edn., Vol. I, page 626). There is no such municipal law in this country. All that may be said is that a passport gives a person certain facilities to travel in foreign countries. The Government issuing the passport "requests" the foreign Government to allow the bearer free passage and also to afford every assistance and protection necessary. No citizen can compel the State to make such a request on his or her behalf. In the absence of legislation, it would be open to the Government to decide on each application whether or not to make such a request in respect of the concerned individual. If the Government think that it would not be in the best interests of the country that such a request should be made on behalf of any particular individual, it would be open to them to refuse to issue a passport.

21. One other argument of Mr. Kumaramangalam deserves very brief notice. He contended that after the Constitution all the powers of the State should be found within the four corners of the Constitution and it cannot be presumed that the Government has any residual powers, and the issue of passports is not a power which is vested in the Executive. The short answer to this contention is that in granting the passport the Government does not purport to exercise any power at all. By reason of its status as a

sovereign State, it purports to address other foreign States to give certain facilities to one of its citizens. Moreover, the rights which are recognised in a sovereign State under well-established rules of International law cannot obviously be found contained in the Constitution.

22. Learned counsel for the petitioner complained that by refusing a passport endorsed to U. S. S. R. and other countries the petitioner is precluded from getting visas from the authorities of those countries. Here again) the question to be posed is, what legal right has the petitioner to obtain a visa?

23. Learned counsel conceded that his argument regarding the validity of delegated legislation would not arise unless the right to issue of passports is traced to the provisions of the Passport Act and the rules thereunder. As we have decided to the contrary, the contention need not be dealt with:

24. We very well realise that by refusing to issue a passport the Government can effectively prevent any citizen from going to a particular country which the Government may not like the person to visit purely on political grounds and on account of ideological differences. There have been protests in the United States against the policy pursued by the Government of that country in refusing passports for purely political reasons. Appeal has been made to Article 13, paragraph 2 of the Universal Declaration of Human Rights which runs thus:

Everyone has the right to leave any country, including his own, and to return to his country.

There is a very learned and interesting article in the Yale Law Journal for February 1952 on ""Passport refusals for political reasons; Constitutional

issues and judicial review."" The starting point for the discussion is thus stated:

Freedom to leave one's country temporarily for travel abroad is important to individual, national and international well being. But today this right

of exit depends, for the great majority of the world's people, on ability to secure passports. An individual denied a passport may be unable either

to leave his nation or to enter others.

The writer was evidently interested primarily in the United States, where since 1941 it has been illegal for United States citizens to travel outside

America without a passport. It appears, however, that there are countries where their nationals are allowed to leave their country, without a

passport. These include Great Britain, Australia) Canada, New Zealand, Belgium, Norway, Greece, etc. We have already mentioned that there is

no law now in India under which an Indian citizen is not permitted to leave the country without a passport.

The writer sets out to examine the problem of judicial review of a refusal by the State Department to issue a passport. He is aware that there are

many major hurdles in the way of a person who has been refused a passport. He concedes that upto now no court has ever considered the merits

of a refusal by the State Department, and the general presumption is that the refusal is non-reviewable. The further discussion is not much helpful so

far as it turns on the special enactments in the United States under which the Secretary of State may issue passports. But what is of interest and to

an extent supports our conclusion is that the issuing of a passport is part of the State Department's Foreign Affairs function which is generally

beyond any judicial review. Policy decisions are not governed by Statute, and because of the complex political considerations entering into such

decisions, they have long been considered a purely executive function, and courts have generally refused to interfere. There is also another hurdle in

the way of the citizen. That is that the issue of passports belongs to a class of Government actions which the courts decline to review.

25. It is pointed out by the learned author that though originally the function of a passport was to request foreign Governments to aid and protect

the bearer of the passport, today the most crucial function of the passport is control over exit is exit a protected right? A powerful plea is put

forward in support of the thesis that exit is a right and part of "liberty", and liberty is not confined within the borders of the United States. The due

process clause is sought to be brought in aid.

26. As already pointed out, so far as India is concerned, there is at present no restriction on exit as such. Nor is there any restriction on entry to an

India citizen. It is true that by refusal to issue a passport the Government may prevent a person from visiting a particular country. The question is,

however, whether there is anything in the Constitution or in any law in force which confers on a citizen a right to visit another country. As

Frankfurter, T. observed in a recent case, -- "Joint Anti Fascist Refugee Committee v. McCrath", (1951) 341 US 123 (F), "Justiciability depends

on the existence of a right protected under common law, statutes, or the Constitution."" We cannot discover such a right in the petitioner to obtain a passport to any particular country.

27. Nevertheless, it is well to ponder the following passage with which the article in the Yale Law Journal concludes :

The denial of passports to its citizens has long been one of the principal instruments of intimidation and of control used by totalitarian

Governments; of intimidation, since the individual is virtually imprisoned at home without a passport; of control, in that the Government can thus

determine what information and opinion about conditions abroad reach its people. The Government of the United States has protested the refusal

of totalitarian Governments to allow their citizens freely to travel abroad as a denial of fundamental human rights, and has repeatedly urged a policy

of enlarged human interchange as a step towards international understanding and the relief of international tension. It is the thesis of this comment

that under the circumstances of modern international life every American citizen has a constitutional right to a passport, and that the protection of

that right has become an urgent matter of national policy as well as of civil liberty. If our preaching is to accord with our practice, that right should

be curtailed only for good cause and with that regard for fairness embodied in the phrase "due process." Nothing less will achieve the objective

envisioned in the Universal Declaration society.

28. For the reasons mentioned earlier on, this petition is dismissed. No order as to costs.