
(1998) 08 DEL CK 0083
In the Delhi High Court
Case No : Criminal Writ No. 397/98

Yaro Khan @ Ahmad Shah

APPELLANT

Vs

Foreigners Regional Registration Officer

RESPONDENT

Date of Decision : 21-08-1998

Acts Referred:

Foreigners Act, 1946 — Section 3(2)

Citation : (1998) 47 DRJ 242

Hon'ble Judges : N.G. Nandi, J;Devinder Gupta, J

Bench : Division Bench

Advocate : G.D. Rustagi, for the Appellant; A.K. Vali and Sumeet Pushkarna, for the Respondent

Final Decision : Allowed

Judgement

Devinder Gupta, J.—The petitioner has challenged the order dated 5.5.1998 passed by respondent No.1 in exercise of powers conferred by Sub-section (2) of Section 3 of the Foreigners Act, 1946 directing that the petitioner shall not remain in India and shall depart from India as soon as possible and in any case latest by 15.5.1998.

2. It is claimed by the petitioner that he was born in Gauhati on 10.1.1950. His mother died when he was just 9 months old. His father came from Pakhtoonistan and left him to fend for himself. The petitioner took odd jobs to eke his existence and over the years made some savings and started money lending business firstly at Gwahati and then at Delhi. While at Gauhati he made an application before the Superintendent of Police and Registration Officer for the grant of Indian Citizenship on which Superintendent Police, Kamrup furnished a certificate on 25.4.1962 certifying that the petitioner was a Pakhtoonistan National and had applied to Government of Assam for Indian Citizenship and may not be disturbed from any quarter till receipt of orders from the Government. The petitioner claimed that on 25.7.1979 he married an Indian citizen, who is daughter of Yaqub Ali, Gali Ballimaran, Chandni Chowk, Delhi. There are two

children out of this wedlock. Conditions for Money Lending business being more conducive and profitable in Delhi, the petitioner obtained Money Lending license from the Collector, Money Lending, Delhi. There is also a ration card issued by the Civil Supply Department. The petitioner has also been issued identity card by the Election Commission of India. The petitioner is an Income Tax Payer. The petitioner was issued a passport, which was valid up to 5.7.1992 and the same was got renewed, which is now valid up to 11.10.2002. In this back ground the petitioner states that the impugned order served upon him on 6.5.1998 is bad in law as the same was passed without affording any opportunity of being heard or to clarify his position. The impugned order is malafide, arbitrary and prejudicial to him. He could not have been ordered to be deported since he was lawfully staying in India. It is also claimed that he was not having Citizenship or Nationality in any other country. He was born, brought up, nurtured and had grown up in India. In the event of his externment, he shall have no place to live.

3. The petition has been opposed by the respondents on the basis of reply filed on the affidavit of Shri Dharmendra Kumar, Foreigner Regional Registration Officer, New Delhi. The reply states that his office made discrete inquiries against the petitioner. "The inquiry revealed that the petitioner was holding Afghan passport dated 29.9.1992 issued at Kabul; that the petitioner succeeded in obtaining Indian passport fraudulently, which was issued at Guwahati. There is discrepancy in the name of the petitioner's father, as recorded in the passport issued at Kabul and the one issued in India. In the passport issued at Kabul his father's name is recorded as Nick Mohammad whereas in the Indian passport records his father's name as Alim Khan. It is further stated in the reply that as per the information received by the respondents from various sources, the petitioner is a kingpin in Hawala and smuggling business and has amassed wealth and properties through this illegal business. Because of the activities with which the petitioner is involved an opinion was formed by the respondent that the petitioner's continuing stay in India was detrimental to the National interest and rightly the impugned order was passed. The very fact that the petitioner had applied for citizenship would suggest that the petitioner is not an Indian citizen. The certificate of Superintendent of Passport Department Assam, does not confer any citizenship rights on the petitioner. The ration card and other documents relied upon also do not confer on him any right whatsoever, as the same have been obtained fraudulently and by misrepresenting facts. The petitioner is a Foreigner. He has not acquired citizenship of India, Therefore, he has no right to stay. He was neither born in India, nor brought up here.

4. We have heard learned counsel for the parties and have been taken through the entire record.

5. The very fact that the petitioner claims that he did apply for Indian Citizenship is sufficient to repel the petitioner's contention that he is entitled to stay in India. His contention is that his uninterrupted habitation till date in India ought to have been considered as sufficient for conferring status of Indian Citizenship

on him. Grant of status of citizenship on him is evidenced by the very fact of issuance of two passports in his favour. This contention is also without any merit and deserves rejection. The basic condition for applicability of Article 5 of the Constitution of India is that the person must have his domicile in India at the commencement of the constitution. On satisfaction of this condition, it must be shown further that the person comes within any of the three clauses of the said Article 5, namely, (a) he was born in the territory of India; at (b) either of his parents were born in India; or (c) he has been ordinarily residing in India for not less than five years immediately proceeding the commencement of constitution. The burden to prove each condition is on the person who claims right of citizenship. There is no material brought on record to show that the petitioner was born in India. Rather the material brought on record is to the effect that in 1962 he did apply as a Pakhtoon National seeking permission to stay in India. Pending consideration of such a request he was allowed to stay in India. There being no other material brought on record, there is no question of having acquired citizenship by mere prolonged stay on the basis of certificate dated 25.4.1962, which reads:-

"OFFICE OF THE SUPERINTENDENT OF POLICE; D.I.B.KAMRUP

This is to certify that the holder of this card Mr. Yaro Khan Pathan s/o Alim Khan is reported to be a Pakhtoonistan National. He has applied to the Govt. of Assam for Indian citizenship which is under consideration of the Govt. He may not be disturbed from any quarter till receipt of any order from the Govt.

(Seal)

Signed

Supdt. of Police &R.O.

Kamrup. 25.4.62

(Seal)"

6. The petitioner did apply seeking permission to stay in India, as is evident from the certificate produced by him, which says:-

"Yaro Khan

Gauhati

His application for stay in India is hereby acknowledged. It is under consideration of Government after enquiry and he will be intimated in due course. He may be allowed to stay in India pending disposal of his petition.

Sd/-

Superintendent Passport Department Assam Secretariat (Civil)"

7. It is not shown that till date the petitioner's request was acceded to or not.

The petitioner claims to have shifted his residence to Delhi. The very fact that the petitioner sought permission as a Foreigner (Pakhtoon National) to stay in India falsifies his stand about his being an Indian citizen. The aforementioned certificates on the face of it suggest that the petitioner as a Pakhtoon National and as a Pakhtoon National he applied to the Government of Assam seeking permission to stay in India. Mere residence for a considerable period thereafter will not confer on him the status of a citizen. He will continue to be a Foreigner.

8. Proceeding on the basis that the petitioner is a foreigner and has no right to stay in India, in the facts and circumstances of this case when there is an Indian Passport issued in his favour, it would have been but proper to afford an opportunity to the petitioner to place his case before the respondent. In *Louis De Raedt and Others Vs. Union of India and others*, , it was held that so far as the right to be heard is concerned there cannot be any hard and fast rule about the manner in which a person concerned has to be given an opportunity to place his case. In our judgment delivered today in *Cr.W.405/98, Mohd.Sedq v. Union of India and others* also, it has been held that power of the Government in India to expel foreigners is absolute and unlimited but Article 21 guarantees protection of personal liberty to citizen and foreigner alike, which cannot be deprived except according to procedure established by law. Reasonable opportunity, as may be considered appropriate in the facts and circumstances must be afforded. It is not shown that in this case respondent No. 1 ever apprised the petitioner before passing the impugned order about the nature of complaints against him and the manner in which he had procured Indian Passport, so as to enable him to explain his position. Had the petitioner been apprised of the allegations, he might have produced some relevant material in support of his claim. Not informing the petitioner of the nature of complaints and not getting his Explanation renders the order bad in law.

9. Consequently, the writ petition is allowed and the impugned order is set aside leaving it open to the respondents to pass fresh order in accordance with law and in the light of the observations made by us in *Cr. W.No.405/98*, titled as *Mohammad Sedq v. Union of India and others*, decided today.