

Abdul Jalil Vs The State

Court: Gauhati High Court

Date of Decision: May 10, 1960

Acts Referred: Constitution of India, 1950 " Article 226, 258, 5
Foreigners Act, 1946 " Section 12, 14, 2, 3, 8

Citation: (1962) CriLJ 13

Hon'ble Judges: G. Mehrotra, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

G. Mehrotra, J.

The petitioner has been convicted by the Magistrate, First Class, Cachar, Silchar u/s 14 of the Foreigners Act (hereinafter

called "the Act") and sentenced to six months rigorous imprisonment. On appeal to the Sessions Judge the conviction and sentence were

confirmed.

2. The facts as set out in the judgment of the court below are that on the 26th November 1957 an order was issued by the Superintendent of

Police, Cachar directing the petitioner to leave the limits of the District of Cachar within one month of the receipt of the order. The order was

served on the petitioner on the 1st December 1957. The order purports to have been issued u/s 3(2)(c) of the Act in the exercise of the powers

delegated to the Superintendent of Police, Cachar u/s 12 of the Act by the Governor of Assam. The petitioner is described as a Pakistan national

in the order. There is no dispute that the order was issued by the Superintendent of Police, Cachar and was duly served on the petitioner. The

petitioner failed to comply with the said order and on the face of it, he is liable to be prosecuted u/s 14 of the Act.

3. The contention raised by the petitioner is that the order issued by the Superintendent of Police u/s 3(2)(c) of the Act is illegal inasmuch as the

petitioner is not a foreigner. The expression "foreigner" was defined by Section 2(a) of the Foreigners Act 31 of 1946 as modified by Act 38 of

1947 as follows:

Foreigner"" means a person who-

(i) is not a natural-born British subject as defined in Sub-sections (1) and (2) of Section 1 of the British Nationality and Status of Aliens Act 1914,

or

(ii) has not been granted a certificate of naturalisation as a British subject under any law for the time being in force in India, or

(iii) is not ruler or subject of an acceding State, or

(iv) is not a native of the Assam tribal areas; provided that any British subject who, under any law for the time being in force in India ceases to be a

British subject shall thereupon be deemed to be a foreigner.

By Act 11 of 1957 Section 2 Clause (a) of the Foreigners Act, 1946 quoted above, has been amended and a "foreigner" is defined as a person

who is not a citizen of India. The order was issued on the ground that the petitioner is a Pakistan national and is not a citizen of India. The order

was issued after the coming in force of the amending Act of 1937. The petitioner's contention is that as when he came to India he was not a

foreigner within the meaning of the word under the then existing provision of Section 2(a) of the Act, his rights as a non-foreigner cannot be taken

away by the subsequent amendment. Reliance has been placed on the case of State Vs. Ibrahim Nabiji, . This case to my mind does not support

the contention of the petitioner. It was held in this case that ""Persons who before the date on which the Foreigners Laws (Amendment) Act of

1957 was enacted, were entitled as British subjects to claim that they were not foreigners in India, must, since the date on which the Act came into

force, be deemed to be foreigners if they are not citizens of India. Since the amendment of the Act, a person who was not a foreigner has to

establish that he holds the status of a citizen of India before he can resist enforcement of an order validly passed against him in exercise of the

authority conferred u/s 3 of the Foreigners Act."" The petitioner however, was acquitted on the¹ ground that he did not contravene the provisions of

rule 7 of the Foreigners Order. In that case the Superintendent of Police had served a notice on the respondent on 20th August 1957 that the

respondent being a foreigner and having entered India on the 31st January 1956 on Pakistan passport dated 3rd December 1955, was

unauthorised staying in India after the expiry of the period of his passport and should leave it within a month of the service of the notice. The

contention of the respondent that the amended provisions will not govern him was repelled. The High Court however affirmed the order of the trial

court acquitting him on the ground that the Superintendent of Police was not authorised to issue an order u/s 3 of the Act.

4. The next case referred to is the case of Nasir Ahmed Vs. The Chief Commissioner, Delhi and Another, In this case on 19th May 1957 a notice

on behalf of the Delhi state was issued u/s 3(2)(c) of the Foreigners Act directing Nasir Ahmad and his wife and minor daughter not to remain in

India after the expiry of three days from the date on which the notice is served on them. This notice was issued on the ground that they were

Pakistan nationals. A petition was filed under Article 226 of the Constitution challenging the validity of this order on the ground that the petitioner

and his wife and daughter were not Pakistan Nationals. They claimed to be citizens of India. The petition was allowed on the ground that on the

assertion that they were citizens of India they would not be foreigners within the meaning of the Act. The Foreigners Act provides no machinery for

determination of the fact whether a person is a citizen of India or not. The Indian Citizenship Act provided a machinery for the determination of the

question as to whether a person is a citizen or not, of India. In this case three days' time within which the petitioner, and his wife and daughter were

asked to leave India was not sufficient for them to get a decision from the Central Government as to whether they were or were not citizens of

India. The Petition therefore, under Article 226 of the Constitution was allowed. In present case the petitioner is not challenging the validity of the

order under Article 226 of the Constitution. He was given a notice to quit India within a month. If his case was covered by Section 9 of the Indian

Citizenship Act, he had sufficient time to get a decision from the Central Government. He had violated the order and in his case u/s 14 of the Act

the question as to whether the petitioner is a citizen or not is examinable by the Magistrate and it cannot be said that the notice issued was illegal.

This case does not lay down that the petitioner will not be governed by the definition of the word "foreigner" under the amending Act.

5. The next case is State Vs. Abdul Majid and Others, In this case the accused came to India with a passport and visa on the 14th March 1956

and had to leave India by 31st January 1957. Having over-stayed in India he was prosecuted u/s 14 of the Foreigners Act for contravention of

Rule 7 of the Foreigners Order 1948 issued by the Central Government Rule 7 of the Foreigners Order of 1948 reads as follows:

Every foreigner who enters India on the authority of a visa issued in pursuance of the Indian Passport Act, 1920 (XXXIV of 1920) shall obtain

from the Registration officer having jurisdiction either at the place at which the said foreigner enters India or if he has entered India otherwise than

on the authority of a transit visa or as tourist as defined in the Registration of Foreigners Rules, 1939, at the place at which he resides in India a

permit indicating the period during which he is authorised to remain in India and shall, unless the period indicated in the permit is extended by the

Central Government, depart from India before the expiry of the said period; and at the time of the foreigner's departure from India the permit

shall be surrendered by him to the Registration Officer having jurisdiction at the place from which he departs:

Provided that this requirement shall be deemed to have been complied with if a foreigner who enters India as a "tourist" is granted a Certificate of

Registration in Form D as provided for in the Registration of Foreigners Rules, 1939.

The contention on behalf of the prosecution was that the word "foreigner" used in this rule will have to be interpreted in accordance with the

amended provisions of the Act and as the accused became a foreigner under the amended Act, he had to obtain the permit for residing in India as

soon as this change occurred. This contention was not accepted. It was held that the pronoun "he" in the words "or if he has entered India

otherwise than" refers to the term "foreigner" appearing in the opening line of the rule. If he therefore, did not enter as a foreigner, it was not

necessary for him under Rule 7 to get any permit. This case does not lay down that the petitioner will not be governed by the amended provisions

of the Act.

6. The next point urged is that the Superintendent of Police had no power to issue the order in question. Before the Magistrate the competency of

the Superintendent of Police to issue the order was not challenged. The Magistrate remarked as follows:

No, has the defence impugned the competence of the authority which issued the order. It is however, urged here that the order is without

authority. Sub-section (1) of Section 3 of the Act provides that

the Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner

or any prescribed class Or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure

therefrom or their presence or continued presence therein.

Sub-section (2)(c) of Section 3 of the Act provides that-

In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner shall not

remain in India or in any prescribed area therein.

Section 12 of the Act lays down that-

any authority upon which any power to make or give any direction, consent or permission or to do any other act is conferred by this Act or by any

order made thereunder may, unless express provision is made to the contrary, in writing authorise, conditionally or otherwise, any authority

subordinate to it to exercise such power on its behalf and thereupon the said subordinate authority shall, subject to such conditions as may be

container in the authorization, be deemed to be the authority upon which such power is conferred by or under this Act.

Under Article 258 of the Constitution the President with the consent of the Government of a State can entrust to that Government or to its officers

function In relation to any matter to which the executive power of the Union extends. The President acting under the aforesaid provision issued an

order on the 21st May 1955 entrusting the State of Assam and other States to discharge the function of the Central Government in regard to the

orders specified in Clause (e) of Sub-section (2) of Section 3 of the Foreigners Act. Mr. Choudhuri therefore, could not contend that the State

Government could not issue an order u/s 3(2) of the Act, He has however, urged that there was no valid delegation by the State Government of

the said power to the Superintendent of Police, Cachar. On the 2nd September 1957 Notification No. HMI. 27/57/24 was issued and published

in the Assam Gazette of 4th September 1957 by the State of Assam in the exercise of the powers conferred by Section 12 of the Foreigners Act

under which the power to issue orders u/s 3(2)(c) was delegated to the Superintendents of Police and Deputy Commissioner in charge of Police

within their respective jurisdictions. There was therefore a valid delegation of power to the Superintendent of Police and there is no substance in

this contention.

7. Lastly it was urged that the prosecution has failed to prove that the petitioner is not an Indian citizen and that the court below has given no

reason to discard the evidence of the witnesses produced on behalf of the defence to establish the fact that the petitioner was an Indian citizen.

Section 9 of the Act lays down that-

if in any case not falling u/s 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person. is

or is not a foreigner or is not a foreigner of a particular Class or description the onus of proving that such person is not a foreigner or is not a

foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872, lie

upon such person.

The petitioner contended that he was an Indian citizen at commencement of the Constitution by virtue of Article 5(1) of the Constitution which

provides that at the commencement this Constitution every person who has his domicile in the territory of India and 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. He did, not claim

Indian citizenship by birth. He urged that he had been resident in India for not less than five years immediately preceding the commencement of the

Constitution. The Magistrate after consideration of the evidence has come to the conclusion that the petitioner failed to prove that he was residing

in India for five years immediately preceding the commencement of the Constitution. The petitioner produced three witnesses to prove that he had

been residing within the Indian territory for more than five years immediately preceding the commencement of the Constitution. The Magistrate

considered that one Yamin Ali was a man of status and the other two witnesses did not possess the status which inspired any confidence. As

regards Yamin Ali he stated that the accused person to his knowledge was living at his present address for the last seven years. The statement

was made on 4th July 1958 and even if his statement is accepted to be true, the residence of the petitioner within the Indian territory is proved to

have been since 4th July 1951. If the statement of Yamin Ali is believed, the petitioner does not satisfy the requirement of Article 5(c) of the

Constitution. The other two witnesses have not been believed by the court below. Mr. Choudhuri contends that no reasons have been assigned by

the Magistrate for discarding the testimony of Seraj Uddin and Deneswar Singh and there was no material on the record for the Magistrate to

remark that Deneswar Singh is a man of indeterminate status. As regards Serajuddin the Magistrate has given reasons as to why his statement

cannot be accepted. As regards Deneswar Singh the Magistrate was in a position to mark the demeanour of the witness and this Court in revision

will not disagree on the appraisal of the evidence made by the court of fact. As regards Yamin Ali's statement Mr. Chaudhuri contended that his

statement was only based on his personal knowledge and does not necessarily exclude the possibility of the petitioner's presence in India prior to

1951. Yamin Ali was the petitioner's own witness. He has categorically stated that he saw the accused residing at his present address for the last

seven years. His evidence therefore, at the least, is of no assistance to the petitioner. If his evidence is ruled out and the other two witnesses are

considered not reliable by the court of fact, there is no evidence on the record to prove that the petitioner is an Indian citizen and thus not a

foreigner within the meaning of the Act. There is therefore no force in this contention either. In the result therefore the petition is rejected and the

conviction and sentence passed against the petitioner are maintained. The accused petitioner should be called upon to surrender forthwith to his

bail bond to serve out the period of imprisonment imposed upon him.