

(1960) 05 GAU CK 0004

Gauhati High Court

Case No: None

Abdul Jalil

APPELLANT

Vs

The State

RESPONDENT

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 the 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 "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 the 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 trial 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 contained 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 of 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 Yamdn 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.