Md. Elahi Vs State of West Bengal

Court: Calcutta High Court

Date of Decision: Nov. 12, 2008

Acts Referred: Citizenship Act, 1955 â€" Section 9, 9(2)
Citizenship Rules, 2009 â€" Rule 30
Constitution of India, 1950 â€" Article 5, 7, 9
Criminal Procedure Code, 1973 (CrPC) â€" Section 321
Foreigners Act, 1946 â€" Section 14, 3(2), 8

Citation: (2009) 1 CALLT 597 : (2009) CriLJ 1335

Hon'ble Judges: Ashim Kumar Roy, J

Bench: Single Bench

Advocate: Amitava Ghosh, for the Appellant; Swapan Kumar Mullick, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Ashim Kumar Roy, J.
In this criminal revision, the petitioner invoking inherent jurisdiction of this Court, challenged his prosecution u/s 14

of the Foreigners Act, in connection with the G. R. Case No. 44/08 now pending before the Learned Metropolitan Magistrate, 14th Court,

Kolkata arising out of Burrabazar Police Station Case No. 8 dated January 9, 2008 and prayed for quashing of the said proceedings.

2. Mr. Amitava Ghosh, the learned advocate, appearing in support of this application vehemently urged before this Court that the petitioner has

been falsely implicated in the aforesaid case by the police. He further urged that the impugned proceeding u/s 14 of the Foreigners Act, having

been initiated against the petitioner without determination of the question of his citizenship in accordance with Section 9(2) of the Citizenship Act

read with Rule 30 of Citizenship Rules by the Central Government, the competent authority is patently illegal and not tenable. In support of his

submission Mr. Ghosh vehemently relied on a decision of our High Court in the case of Haridas Roy and Anr. v. State of West Bengal reported in

2000 Cri LR 418. He draws the observation of this Court in Paragraphs 8 and 10 of the said decision and same are quoted below;

I find that the petitioners have faced the Trial in connection with G.R. Case No. 80 of 1999 u/s 14 of the said Act and at the conclusion of the trial

just on the eve of pronouncing the Judgment, the learned Sub-Divisional Judicial, Magistrate found that there is no determination of the citizenship

of the accused by the competent authority and accordingly directed them to apply before the Central Government for the said purpose.

I find in view of the decision of this Court in the case of Mrs. Raushan Ara alias Suraiya (supra) it is incumbent upon the prosecution to ascertain

the determination by the Central Government is a condition precedent before initiating a proceeding under the said Act. In such view of the matter,

since the learned Sub-Divisional Judicial Magistrate at the terminal point of the trial had passed this order, the ratio of the said decision in the case

of Mrs. Raushan Ara alias Suraiya (supra) squarely applies and the order passed by the learned Magistrate cannot be sustained.

Similarly Mr. Ghosh relied another decision of our High Court in the case of Mrs. Raushan Ara alias Suraiya v. State of West Bengal reported in

1996 Cri LR 223 for our case the observation of the Court in paragraphs 9 and 11 of the said decision and same is quoted below;

I have heard the learned Advocate appearing for the petitioner and also the learned Advocate appearing for the State. On the point of fact learned

Advocate appearing for the petitioner has produced xerox copies of number of documents to show that since her birth in Calcutta, she is pursuing

her studies in Calcutta till she left the same for Karachi on her marriage on 9-10-1993. It has been argued that the petitioner being an Indian

citizen, the citizenship was not lost merely by her migrating to Pakistan after her marriage. It is contended that mere acquisition of a Pakistani

passport under compulsion by her in-laws cannot take away her citizenship in India. It is also argued that the question of petitioner continuing to

remain an Indian citizen or acquiring citizenship of another country in this case Pakistan can be determined by the Central Government alone in

accordance with Section 9(2) of the citizenship Act read with Rule 30 of the Citizenship Rules. It is contended that such determination has not

been made as yet and as such initiation of a case u/s 14 of the Foreigners Act is bad in law. In support of his contention the learned Advocate

amongst others has relied on decisions reported in State of U.P. Vs. Rehmatullah, and also 1963 Supreme Court Appeals, 649 on the basis of the

said decisions it has been argued that in the absence of a determination in accordance with Section 9(2) of the Citizenship Act read with Rule 30 of

the Citizenship Rules, it cannot be stated that she has lost her citizenship in India or she has acquired citizenship of Pakistan. It has also been

contended that she came to India on the basis of a valid passport and visa and before the expiry of the period mentioned in the visa she applied to

the proper authority for extension of the same and in spite of repeated sittings no decision was taken or communicate by the enquiring authority to

her. On the other hand, she was put under arrest after she was called to attend the Office of a Police Officer and a Criminal Case u/s 14 of the

Foreigners Act was started against her. It is contended on the basis of Articles 7 and 9 of the Constitution of India that her citizenship cannot

automatically come to an end in the facts and circumstances of the case.

After giving my careful consideration to the submissions of both the side and having regard to the law as laid down by the cited decisions it can at

once be said without going into the merit of rejection of an application u/s 321, Cr.P.C. In this particular case, that the initiation of a proceeding

under the Foreigners Act against the petitioner is not at all tenable in law. That the petitioner is originally a citizen of India by birth cannot be

disputed. It is true, that in October, 1993 she migrated to Pakistan to her matrimonial home following her marriage with a Pakistani national. During

her stay in the matrimonial home she visited Calcutta on the strength of a Pakistani passport and visa allowed by the Government of India and

stayed in India for six (6) months. In the present case her entrance to India is not a clandestine affair but she came on the strength of a valid

Pakistani passport and a visa granted by the Government of India. She applied for extension of the visa before its expiry and fully cooperated with

the enquiring authority by producing documents including Ration Cards in her favour. The said authority neither rejected nor allowed the prayer for

extension but started a case under the Foreigners Act against'' her and put her behind the bar. There being no determination by the Central

Government being the only authority in accordance with Section 9(2) of the Citizenship Act read with Rule 30 of the Citizenship Rules that she has

lost Indian Citizenship and that she is a Foreign national, her Indian Citizenship stands good and as such no criminal prosecution can lie against her

in accordance with the Foreigners Act. As such the continuance of such a proceeding is absolutely an abuse of process of the Court.

3. On the other hand, Mr. Mullick strenuously resisted the submission of Mr. Ghosh and submitted that the present petitioner is a foreign national,

a Bangladeshi Citizen he without any valid authority of law entered into the territory of India and as such he is very correctly prosecuted u/s 14 of

the Foreigners Act. He further submitted the aforesaid decisions has no manner of application in the instant case.

4. Considered the rival submissions of the parties and the materials on record as well as the case laws relied upon by them.

5. It appears both the aforesaid two decisions, viz. Haridas Roy and Anr. v. State of West Bengal (supra) and Mrs. Raushan Ara alias Suraiya v.

State of West Bengal (supra), rendered by our High Court based on the law as laid down by the Hon''ble Apex Court in the case of State of U.P.

Vs. Rehmatullah, . It appears tome that for just decision of this case it would be apposite to refer a few of the observations made by the Apex

Court in Paragraphs 9, 10, 11, 12, and 13 in the case of State of U.P. v. Rahamatullah (supra) and same is quoted below;

As will presently be shown the real question which arises for our decision lies in a short compass and the relevant facts essential for the decision

are no longer in dispute. When the respondent entered India on April 1, 1955, he was in possession of a Pakistani passport and a visa to which no

objection was taken by the Indian authorities. He did not enter India clandestinely, and he is not being tried for having entered India in violation of

any law. Indeed his visa was admittedly extended by the appropriate authority up to May 22, 1965. As he was clearly a citizen of India at the

commencement of the Constitution and the question arose whether he had lost Indian citizenship thereafter, the Central Government had to

determine u/s 9 of the Citizenship Act the question of the acquisition of Pakistan nationality by the respondent. This Court in The Government of

Andhra Pradesh Vs. Syed Mohd. Khan, after referring to its earlier decision in Izhar Ahmad Khan Vs. Union of India (UOI), made the following

observation:

Indeed, it is clear that in the course of the judgment, this Court has emphasized the fact that the question as to whether a person has lost his

citizenship of this country and has acquired the citizenship of a foreign country has to be tried by the Central Government and it is only after the

Central Government has decided the point that the State Government can deal with the person as a foreigner. It may be that if a passport from a

foreign Government is obtained by a citizen and the case falls under the impugned Rule, the conclusion may follow that he has acquired the

citizenship of the foreign country; but that conclusion can be drawn only by the appropriate authority authorized under the Act to enquire into the

question. Therefore, there is no doubt that in all cases where action is proposed to be taken against persons residing in this country on the ground

that they have acquired the citizenship of a foreign State and have lost in consequence the citizenship of this country, it is essential that that question

should be first considered by the Central Government. In dealing with the question, the Central Government would undoubtedly be entitled to give

effect to the impugned R. 3 in Sch. III and deal with the matter in accordance with the other relevant Rules framed under the Act. The decision of

the Central Government about the status of the person is the basis on which any further action can be taken against him.

In that case an argument was raised on the authority of Izhar Ahmad Khan Vs. Union of India (UOI), that as soon a person acquired a passport

from a foreign Government his citizenship of India automatically came to an end, but it was repelled.

In State of Andhra Pradesh Vs. Abdul Khader, a the respondent there was born in India in 1924 and had lived in this country all along till about

the end of 1954. At the end of 1954 or the beginning of 1955 he went to Pakistan from where he returned on January 20, 1955 on a passport

granted by the Pakistan Government which had a visa endorsed on it by the Indian authorities permitting him to stay in this country upto April

1955. He applied to the Central government for extension of the time allowed by the visa, but there was no material to show what orders, if any,

were made on it. The respondent having stayed in this country beyond the time specified in the visa, on September 3, 1957 he was served with an

order u/s 3(2)(c) of the Foreigners Act, requiring him to leave India. On his failure to comply with this order he was prosecuted u/s 14 of the

Foreigners Act. His defence was that he was an Indian national. The Magistrate trying him rejected his defence and convicted him holding that he

had disowned Indian nationality by obtaining a Pakistan passport and that by refusing to extend the time fixed by the visa the Central Government

had decided that the respondent was a foreigner u/s 8 of the Foreigners Act and that such a decision was final. He was convicted by the Trial

Court and the conviction was upheld by the Sessions Judge. The High Court in revision set aside his conviction. On appeal this Court held that

neither the Magistrate nor the Sessions Judge was competent to come to a finding of his own that the respondent, an Indian national had disowned

his nationality and acquired Pakistan nationality for u/s 9(2) of the Citizenship Act that decision could only be made by the prescribed authority.

The respondent in that case, according to this Court, had become an Indian citizen under Article 5(a) of the Constitution when it came into force

and there being no determination by the Central Government that he had lost his nationality thereafter, the order of the High Court acquitting him

was upheld.

In Shuja-Ud-Din v. Union of India C.A. No. 294 of 1962, D/- 30-10-1962 (SC) this Court speaking through Gajendragadkar, J., as he then

was, said:

It is now well settled that the question as to whether a person who was a citizen of this country on January 26, 1950, has lost his citizenship

thereafter, has to be determined under the provisions of Section 9 of the Citizenship Act, 1955 (No. LVII of 1955). There is also no doubt that

this question has to be decided by the Central Government as provided by Rule 30 of the Rules framed under the Citizenship Act in 1956. The

validity of Section 9 as well as of Rule 30 has been upheld by this Court in the case of Izhar Ahmad Khan Vs. Union of India (UOI), . It has also

been held by this Court in State of Madhya Pradesh v. Peer Mohd. Cri Appeal No. 12 of 1961 decided on 28-9-1962 : Reported in State of

Madhya Pradesh Vs. Peer Mohd. and Another, that this question has to be determined by the Central Government before a person who was a

citizen of India on January 26, 1950, could be deported on the ground that he has lost his citizenship rights thereafter u/s 9 of the Citizenship Act.

Unless the Central Government decides this question, such a person cannot be treated as a foreigner and cannot be deported from the territories of

India.

In Abdul Sattar Haji Ibrahim Patel v. State of Gujarat Cr. A. No. 153 of 1961, D/- 17-2-1964 (SC), Gajendragadkar, C.J., speaking for a

Bench of five Judges approved the decisions of the cases of Izhar Ahmad Khan Vs. Union of India (UOI), and The Government of Andhra

Pradesh Vs. Syed Mohd. Khan, it being emphasized that the decision of the Government of India is a condition precedent to the prosecution by

the State of any person on the basis that he has lost his citizenship of India and has acquired that of a foreign country. That an inquiry u/s 9 of the

Citizenship Act can only be held by the Central Government was again re-affirmed by this Court in Mohd. Ayub Khan Vs. Commissioner of

Police, Madras and Another, .

In view of these decisions it seems to us to be obvious that till the Central Government determined the question of the respondent having acquired

Pakistan nationality and had thereby lost Indian nationality, he could not be treated as a foreigner and no penal action could be taken against him

on the basis of his status as a foreigner, being a national of Pakistan.

6. In view of the decision of the Apex Court in the case of State of U.P. Vs. Rehmatullah, till the Central Government, being the competent

authority u/s 9(2) of the Citizenship Act read with Rule 30 of the Citizenship Rules, determined the question of any person being a citizen of India

having acquired the citizenship of a foreign country, had thereby lost Indian Citizenship, no prosecution can be initiated against him as foreigner. In

other words, no prosecution u/s 14 of the Foreigners Act against any Indian Citizen, when according to prosecution he has lost his citizenship by

acquiring the citizenship of a Foreign Country can be initiated, without termination of his Indian Citizenship by the Central Government being the

competent authority u/s 9(2) of the Citizenship Act read with Rule 30 of the Citizenship Rules. Thus, the Section 9 of the Citizenship Act applies to

a situation where the question is whether an Indian Citizen lost his citizenship by acquiring the citizenship of a foreign, not where a foreigner

clandestinely entered India and as staying there. So far as this case is concerned the petitioner who is a Bangladeshi national, a foreigner, having

illegally crossed the International Border has taken shelter in the State. The question of loss of Indian citizenship on account of acquisition of

citizenship of a foreign country is not an issue in the instant case as such the question of decision of the Central Government u/s 9(2) of the

Citizenship Act read with Rule 30 of the Citizenship Rules is not at all called for.

It is nobodies case that the petitioner was originally an Indian Citizen and allegedly lost his Indian Citizenship upon acquisition of citizenship of a

foreign country.

This criminal revision has no merit and stands dismissed.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible.