

Ataur Rahman Sarkar Vs Deputy Secretary, Home Department, Passport, Writers' Buildings, Calcutta and Others

Court: Calcutta High Court

Date of Decision: Sept. 25, 1961

Acts Referred: Citizenship Act, 1955 " Section 14, 3(2)(c), 3(3), 9, 9(2)

Constitution of India, 1950 " Article 11, 19, 226, 5, 6

Criminal Procedure Code, 1898 (CrPC) " Section 245

Citation: 66 CWN 108

Hon'ble Judges: Sinha, J

Bench: Single Bench

Advocate: C.F. Ali and Kazi Mohammed Ali, for the Appellant; J. Mazumdar and P.K. Banerjee for Opposite Parties 1 to 3 and Mrs. Archana Sen Gupta for the Opposite Party No. 4, for the Respondent

Judgement

Sinha, J.

The petitioner in this case is Ataur Rahman Sarkar. According to the petitioner, he was born in a village called Ghosepara, within

Police Station Raninagor, in the District of Murshidabad. He states that his father was also born in the said village and that he inherited property

there. He further states that he is the sitting Vice-President of the local Rajapur Union Board. He states that his father had some landed properties

at a village called Premtali in the district of Rajshahi, from before the Partition of Bengal. After Partition, the district of Rajshahi, having been

included in Eastern Pakistan, the petitioner decided not to keep any connection with Pakistan and, with this end in view, he went to Rajshahi and

exchanged the properties at Premtali with his relations who are there. He does not say with which properties the exchange was made. He then

came back to India and in 1957, it is stated, that a case was filed against the petitioner under sec. 3(3) of the Indian Passport Act being N. G. R.

Case No. 1267 of 1957 and C.R. 2013 of 1957. This case was tried before the Sub-Divisional Officer, Lalbagh, and was dismissed on July 19,

1958, u/s 245 of the Code of Criminal Procedure. On June, 1959 an order was served on the petitioner, under sec. 3 of the Foreigners Act, dated

May 19, 1959 asking him to leave India within 15 days. It is against this order that this application is directed. In the affidavit - in - opposition filed

by Shiba Kinkar Mitra who describes himself as the Superintendent of Police, Murshidabad, all the said facts are disputed. It is stated that the

petitioner was born in Murshidabad, but he left for Pakistan in 1949. What happened was that after partition he opted for Pakistan and exchanged

his properties in India with those in Pakistan, belonging to Shri Nagendra Nath Sarkar of Rajshahi. He paid taxes for his lands in India upto 1949

and thereafter ceased to do so. Having migrated to Pakistan, he came back in 1954 and thereafter started living here, although he had no passport

and no documents whatsoever and did not register himself as a citizen of India. It is pointed out that between 1949 to 1954, the petitioner had

neither paid any rents nor taxes. Also it is pointed out that all his properties are there in Rajshahi where his brother is now managing the same.

2. That being so, the question is whether in an application like this, I can grant the petitioner any relief. The position with regard to persons served

with notice under sec. 3 of the Foreigners Act read with the Foreigner's Order, has now been the subject-matter of several decisions of the

Supreme Court, so that the position has been clarified. In the State of Andhra Pradesh v. Abdul Khader (i) (Criminal Appeal No. 192 of 1959,

judgment dated the 4th day of April, 1961) [Since reported AIR (1961) S.C. 1467-Ed.] the facts were as follows: The respondent had been born

at Adoni in Andhra Pradesh and was carrying on business there, having rented a shop. About the end of 1954 and early in 1955, he went to

Pakistan for a short time and then came back, having taken a Pakistani Passport. He was served with a notice under sec. 3(2) (c) of the

Foreigners Act and was prosecuted for breach thereof, as he did not leave India although so directed. The learned Judicial Magistrate found that,

by obtaining the passport from the Pakistan authorities, he had disowned his own nationality and had ceased to be an Indian national and was

therefore a foreigner. The Supreme Court held that Section 9(2) of the Citizenship Act, 1955, applied to the facts of the case. It provides that, if

any question arises as to whether an Indian citizen has acquired the citizenship of another country, it shall be determined by such authority and in

such manner as may be prescribed. Under Rule 30 of the Rules framed under the Act, the authority prescribed to determine that question is the

Central Government. So the question whether the respondent, an Indian citizen, had acquired Pakistani Citizenship, could not be decided by the

Courts. Sarkar, J., however, said this:

The question whether a person is an Indian citizen or a foreigner, as distinct from the question whether a person having once been an Indian citizen

has renounced that citizenship and acquired a foreign nationality, is not one which is within the exclusive jurisdiction of the Central Government to

decide. The courts can decide it and, therefore, the learned Magistrate could have done so. He however, did not decide that question, that is, find

that the respondent had been a Pakistani national all along. On the evidence on the record such a finding would not have been warranted. For all

these reasons we think that the conviction of the respondent by the learned Magistrate was not well founded..... The evidence shows that the

respondent did go to Pakistan, but the only evidence with regard to that is that he went there about the end of 1954 or the beginning of 1955. This

evidence also indicates that he stayed there for a short time. He was all along paying the rent for his shop in Adoni. His family had always been

there. Therefore, it can be said that he had never migrated to Pakistan. Clearly, a short visit to Pakistan would not amount to migrating to that

country.

3. The learned Judge then proceeded to hold that when the respondent had discharged the initial onus upon him as provided for in sec.8 of the

Foreigners Act, to prove that he was not a foreigner, by proving that he was born and domiciled in India on or about January 26, 1950 and other

facts, then the question as to whether he had lost his Indian Citizenship, is a question which could only be decided by the Central Government and

not by a court of law. The conviction was set aside.

4. The next case to be considered is that of Akbar Khan Alam Khan and another v. The Union of India and others, (2) (Civil Appeal No. 18 of

1961, judgment dated April 5, 1961). In this case, the appellants were served with a notice under sec. 3(2) of the Foreigners Act, asking them to

leave India. They then filed a suit for a declaration that they were citizens of India and for an injunction restraining the defendants from removing

them from this country. The appellants stated that they were citizens of India and it was only in the beginning of 1953 that they went to Pakistan for

a temporary visit without a passport, but when they wanted to return, they were compelled to obtain Pakistani passports which they procured only

as a device for their return to India under compulsion.

5. The defendants in the suit were the Union of India, the State of Madhya Pradesh and the District Magistrate of Jhabua in Madhya Pradesh. In

the written statement filed by the defendants, it was stated that the appellants had left India between March and May, 1948, and they returned for

the first time on temporary Pakistani passports sometime in the early part of 1955. The permits granted to them to remain in India were extended

from time to time up to October 1955. After this date, they were served with orders to quit India.

6. It was contended that the appellants were not citizens of India and they had voluntarily acquired Pakistani citizenship by obtaining passports

from that country. The suit was dismissed as it was held not to be maintainable in view of the provisions of sub-section (2) of sec. 9 of the

Citizenship Act. The Supreme Court held that sub-section (2) of sec. 9 of the Citizenship Act bars the jurisdiction of the Civil Court to try the

question there mentioned, namely, as to when or how any person has acquired the citizenship of another country. Sarkar, J. observed as follows:

The only question, however, which a civil court is prevented by s. 9(2) of the Citizenship Act from determining is the question whether a citizen of

India has acquired citizenship of another country or when or how he acquired it. The civil courts are not prevented by this provision from

determining other questions concerning nationality of a person. There is no doubt that the suit by the appellants raised the question whether they

had lost their Indian citizenship by acquiring the citizenship of Pakistan..... To that extent, it has to be held that the appellants' suit was barred. It

seems to us however that the suit raised other questions also. The appellants' claim to the citizenship of India was resisted on the ground that

having migrated to Pakistan in 1948, they had never acquired Indian citizenship. That might follow from Art. 7 of the Constitution. The jurisdiction

of a civil court to decide that question is not in any way affected by s. 9(2) of the Citizenship Act. Therefore, it seems to us that the entire suit

should not have been dismissed. The Courts below should have decided the question whether the appellants had never been Indian citizens. If that

question was answered in the affirmative, then no further question would arise and the suit would have to be dismissed. If it was found that the

appellants had been on January 26, 1950, Indian citizens, then only the question whether they had renounced that citizenship and acquired a

foreign citizenship would arise. That question the Courts cannot decide. The proper thing for the court would then have been to stay the suit till the

Central Government decided the question whether the appellants had renounced their Indian citizenship and acquired a foreign citizenship and then

dispose of the rest of the suit in such manner as the decision of the Central Government may justify.

7. The next case to be considered is Union of India (UOI) Vs. Ghaus Mohammad, . In that case, one Ghaus Mohammad was served with notice

under sec. 3(2) (c) of the Foreigners Act, to the effect that he was a Pakistan national, and that he should not remain in India after the expiry of

three days from the date of service of notice on him. He did not comply with the order but moved the High Court of Punjab for a writ under Article

226 of the Constitution, for quashing the said order. The High Court examined the materials before it and held that there was no material at all on

the basis of which the proper authority could proceed to issue an order u/s 3(2) (c) of the Foreigners Act. The order was, accordingly, quashed. It

was further held that in such matters, the question as to whether a particular person was a foreigner or not should be determined by the Central

Government u/s 9 of the Indian Citizenship Act. From this, there was an appeal to the Supreme Court. The Union of India contended that section

9 of the Indian Citizenship Act had no application to the facts of this case. The Supreme Court upheld this contention, remarking that there was no

question in the case of deciding as to whether the citizenship of Ghaus Mohammad came to an end for any of the reasons mentioned in that section.

That section had no application to the facts of the case, and it does not apply when the question is whether a person is a foreigner or an Indian

citizen, the onus of proving which is upon the person served with the notice. The question then arose as to whether such issues could appropriately

become the subject-matter of a proceeding under Article 226 of the Constitution. That of course is a question with which we are interested in this

case, Sarkar, J. stated as follows :

The question whether the respondent is a foreigner is a question of fact on which there is a great deal of dispute which would require a detailed

examination of evidence. A proceeding under Art. 226 of the Constitution would not be appropriate for a decision of the question. In our view, this

question is best decided by a suit..... The judgment of the High Court was set aside.

8. Mr. Ali, appearing on behalf of the petitioner, has cited before me another Supreme Court decision, namely, Fida Hussain Vs. State of Uttar

Pradesh, . In that case the appellant, who had earlier left India, returned on a passport granted by the Government of Pakistan on May 16, 1953.

He was convicted for breach of section 14 of the Foreigners Act and paragraph 7 of the Foreigners Order, 1948. It was held, however, that

before the amendment of the definition of "foreigner" in the Foreigners Act, by Act 11 of 1957, which came into effect from January 19, 1957, the

word "foreigner" included a person who was not a natural-born British subject etc. By the amendment in 1957 a ""foreigner"" now means a person

who is not a citizen of India. It was held that at the date relevant for the prosecution of the appellant, a natural-born British subject was not

necessarily a foreigner. On this technical point, the appeal succeeded. However, this decision is not relevant, upon the facts of the present case,

because the cause-of-action here arose much later than 1957. As far as I can see, the result of the Supreme Court decisions can be summarised as

follows:

(1) If a person can prove himself to be a citizen of India, which he can only do if he satisfies the provisions of Article 5, 6 or 8 of the Constitution,

and/or any statute as envisaged in Article 11 of the Constitution, and if the question arises as to whether such a person, being a citizen of India has

acquired the citizenship of another country, then under sec. 9(2) of the Citizenship Act 1955, such a question must be determined by such authority

in such manner and having regard to such rules of evidence as may be prescribed in this behalf. By Rule 30 of the Citizenship Rules, it is the

Central Government which has been vested with jurisdiction to decide this point. Consequently, the jurisdiction of the Courts is excluded.

(2) Barring this narrow point, the jurisdiction of a court of law is not ousted. It has, for example, jurisdiction to decide as to whether a person is or

ever became, a citizen of India. and in this connection decide as to the place of his birth or the fact of his migration from India, as contemplated in

Article 7 of the Constitution, and so forth.

(3) As regards passports, a passport obtained by a person in Pakistan would be evidence that he was a Pakistani national. If a person was initially

an Indian citizen, it would show that he had renounced Indian citizenship and acquired Pakistani Nationality.

(4) Where there is no question of deciding whether a person was initially a citizen of India or not, that is to say, where the issue is as to whether a

person is a foreigner or a citizen of India, there can be no question that a Court of law has jurisdiction to decide this point. In fact, it has exclusive

jurisdiction.

(5) Where an action is brought in a Court of law and the only question raised is covered by Section 9(2) of the Citizenship Act, then the action

should be dismissed or, alternatively, it may be stayed until the point is decided by the Central Government. Where such an action is a composite

proceeding, consisting of this question and other questions, then it cannot be dismissed. The proper procedure in that case, is to stay the action

until the point appropriately raised under sec. 9 has been decided by the Central Government and thereafter proceed with the hearing.

(6) Where the questions raised involve disputed questions of fact, they should not be decided in an application under Article 226 of the

Constitution. The appropriate procedure is to file a suit.

9. Those being the principles laid down by the Supreme Court, let me apply them to the facts of this case. The petition in this application is a simple

one, stating that the petitioner was born in India and had gone to Pakistan for a short while, after which he came back and has remained in India

throughout his life. It is further stated that the petitioner has properties in India and he has been elected as a Vice-President of a Union Board. In

answer to this, a completely different picture is given in the counter-affidavit. It is stated therein that he had migrated to Pakistan in 1949. He had

opted for Pakistan, and exchanged all his properties in India with other properties in Pakistan, belonging to one Nagendra Nath Sarkar of Rajshahi

It is stated that he had only come back in 1954, without any passport or other documents and the properties which are still in Rajshahi are being

managed by his brother. If a person in 1949 left India for taking service in Pakistan and disposed of all his properties here by exchanging them with

Pakistan properties, surely there is strong evidence of migration and, if proved, the petitioner never became a citizen of India under the

Constitution. Therefore, this is a matter which is not covered by the case of Abdul Khader (1) (supra). It is covered by Ghaus Mohammad's case

(3) (supra). Such a question is to be decided by a Court of law and not by the Central Government. Lastly, every fact in this case is disputed and,

therefore, cannot appropriately be the subject-matter of an application under Article 226 of the Constitution.

10. Before I conclude I must deal with a point raised by Mr. Ali. He says that the petitioner was charged under sec. 3(3) of the Indian Passport

Act before the Sub-Divisional Officer, Lalbagh. By order dated July 19, 1958, he was acquitted. Mr. Ali submits that, after this, it is no longer

possible to say that the petitioner is a foreigner and not a citizen of India. A copy of the order of the learned Magistrate is Annexure ""B"" to the

petition. I have taken the precaution of looking at a certified copy and I do find that the charge was under sec. 3(3) of the Indian Passport Act.

Section 3(3) of the Indian Passport Act runs as follows:

3. Power to make rules.(3) Rules made under this section may provide that any contravention thereof or of any order issued under the authority of

any such rule shall be punishable with imprisonment for a term which may extend to three months, or with fine or with both.

11. Thus, this sub-section merely empowers the Central Government to provide for punishment in Rules made under sub-sections (1) and (2). I do

not see how a charge could be sustained under sec. 3(3) of the Indian Passport Act at all. I could understand if he was charged with violation of

any Rule framed under sec. 3. But that is not the charge, and the proceedings do not make any sense. It shows how, without further evidence, it is

impossible to determine the issues raised in this application.

12. A Constitutional point has been taken in this case, namely, that the provisions of the Foreigners Act are violative of the fundamental rights of

the petitioner under Article 19 of the Constitution. Until the matter of citizenship is decided, no claim can arise under Article 19 of the Constitution.

13. The result is that for these reasons I must hold that this application is misconceived and does not lie in this jurisdiction.

14. The Rule is, therefore, discharged. The interim order, if any, is vacated. It will, however, be without prejudice to the petitioner's right to file a

suit or take any other legal proceeding.

15. The operation of this order will remain in abeyance till the 27th November, 1961 in order to enable the petitioner to prefer an appeal, as

prayed for. There will be no order for costs in this Rule.