1961

The State of Andhra Pradesh v. Abdul Khader

Sarkar J.

Though we are upholding the decision of the High Court, we wish to observe that we do not do so for the reasons mentioned by it. It is unnecessary to discuss those reasons but we would like to point out one thing, namely, that the High Court seems to have been of the opinion that Art. 7 of the Constitution contemplates migration from India to Pakistan even after January 26, 1950. We desire to make it clear that we should not be taken to have accepted or endorsed the correctness of this interpretation of Art. 7. The reference in the opening words of Art. 7 to Arts. 5 and 6 taken in conjunction with the fact that both Arts. 5 and 6 are concerned with citizenship (at the commencement of the Constitution) apart from various other considerations would appear to point to the conclusion that the migration referred to in Art. 7 is one before January 26, 1950, and that the contrary construction which the learned Judge has put upon Art. 7 is not justified, but in the view that we have taken of the facts of this case, namely, that the respondent had never migrated to Pakistan, we do not consider it necessary to go into this question more fully or finally pronounce upon it.

In the result we dismiss the appeal.

Appeal dismissed.

1961

April 4.

UNION OF INDIA

v.

GHAUS MOHAMMAD

(B. P. SINHA, C. J., S. K. DAS, A. K. SARKAR, K. C. DAS GUPTA and N. RAJAGOPALA AYYANGAR, JJ.)

Externment Order—Foreigner or Indian Citizen—Burden of proof—Law applicable—Citizenship Act, 1955 (LVII of 1955), s. 9—Foreigners Act, 1946 (13 of 1946), ss. 3(2)(c), 9.

An order had been made under s. 3(2)(c) of the Foreigners Act, 1946, directing that the respondent, "a Pakistan national

shall not remain in India after the expiry of three days". The respondent moved the High Court of Punjab under Art. 226 of the Constitution to quash the order contending that he was not a Pakistan national. The High Court held that if there was *prima facie* material to show that a person was a foreigner, a civil court would not go into the question whether he was a foreigner for under s. 9 of the Citizenship Act, 1955, that question had to be decided by the prescribed authority which under the Rules framed under the Act, was the Central Government. The High Court came to the conclusion that there was no *prima facie* material on the basis of which an order under s. 3(2)(c) of the Foreigners Act could be passed against the respondent and in that view quashed the order. On appeal by the Union of India by special leave,

Held, that s. 9 of the Citizenship Act dealt with the termination of the citizenship of an Indian citizen and had no application to this case as the Union did not contend that the respondent had been an Indian citizen whose citizenship had terminated.

Section 8 of the Foreigners Act which made the decision of the Central Government on a question of the nationality of a foreigner who is recognised as its national by more than one foreign country or when it is uncertain what his nationality is final, also did not apply as the only question in this case was whether the respondent was a foreigner or an Indian Citizen.

The case was governed by s. 9 of the Foreigners Act under which when a question arises whether a person is or is not a foreigner, the onus of proving that he is not a foreigner is on that person.

The High Court was in error in placing on the Union of India the burden of proving that the respondent was a foreigner.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 37 of 1960.

Appeal by special leave from the judgment and order dated the April 7, 1958, of the Punjab High Court (Circuit Bench) at Delhi in Criminal Writ No. 57-D of 1957.

M. C. Setalvad, Attorney-General of India, B. Sen and *T. M. Sen*, for the appellants.

H. L. Anand and *Janardan Sharma*, for respondent.

1961. April 4. The Judgment of the Court was delivered by

1961

Union of India v. Ghaus Mohammad

Sarkar J.

SARKAR, J.—This is an appeal by the Union of India from a judgment of the High Court of Punjab allowing the respondent's application under Art. 226 of the Constitution for a writ quashing an order made against him on January 29, 1958, under s. 3(2)(c) of the Foreigners Act, 1946. That order was made by the Chief Commissioner of Delhi and was in these terms:

> "The Chief Commissioner of Delhi is pleased to direct that Mr. Ghaus Mohd.....a Pakistan national shall not remain in India after the expiry of three days from the date on which this notice is served on him....."

The order was served on the respondent on February 3, 1958. The respondent did not comply with that order but instead moved the High Court on February 6, 1958, for a writ to quash it.

The High Court observed that "There must be *prima facie* material on the basis of which the authority can proceed to pass an order under s. 3(2)(c) of the Foreigners Act, 1946. No doubt if there exists such a material and then the order is made which is on the face of it a valid order, then this Court cannot go into the question whether or not a particular person is a foreigner or, in other words, not a citizen of this country because according to Section 9 of the Citizenship Act, 1955, this question is to be decided by a prescribed authority and under the Citizenship Rules, 1956, that authority is the Central Government." The High Court then examined the materials before it and held, "in the present case there was no material at all on the basis of which the proper authority could proceed to issue an order under Section 3(2)(c) of the Foreigners Act, 1946." In this view of the matter the High Court quashed the order.

It was contended on behalf of the Union of India that s. 9 of the Citizenship Act, 1955, had no application to this case. We think that this contention is correct. That section deals with the termination of citizenship of a citizen of India in certain circumstances. It is not the Union's case nor that of the respondent that the latter's citizenship came to an end

for any of the reasons mentioned in that section. The reference to that section by the High Court for the decision of the case, was therefore not apposite. That section had no application to the facts of the case.

Section 2(a) of the Foreigners Act, 1946, defines a "foreigner" as "a person who is not a citizen of India". Sub-section (1) of s. 3 of that Act gives power to the Central Government by order to provide for the presence or continued presence of foreigners in India. Sub-section (2) of s. 3 gives express power to the Government to pass orders directing that a foreigner shall not remain in India. It was under this provision that the order asking the respondent to leave India was made.

There is no dispute that if the respondent was a foreigner, then the order cannot be challenged. The question is whether the respondent was a foreigner. Section 8(1) of the Foreigners Act to which we were referred, deals with the case of a foreigner who is recognised as its national by more than one foreign country or when it is uncertain what his nationality is. In such a case this section gives certain power to the Government to decide the nationality of the foreigner. Sub-section (2) of this section provides that a decision as to nationality given under sub-sec. (1) shall be final and shall not be called in question in any court. We entirely agree with the contention of the Union that this section has no application to this case for that section does not apply when the question is whether a person is a foreigner or an Indian citizen, which is the question before us, and not what the nationality of a person who is not an Indian citizen, is.

Section 9 of this Act is the one that is relevant. That section so far as is materlal is in these terms:

> *Section* 9. "If in any case not falling under section 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.....the onus of proving that such person is not a foreigner .....shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person."

1961

Union of India
v.
Ghaus Mohammad

Sarkar J.

It is quite clear that this section applies to the present case and the onus of showing that he is not a foreigner was upon the respondent. The High Court entirely overlooked the provisions of this section and misdirected itself as to the question that arose for decision. It does not seem to have realised that the burden of proving that he was not a foreigner, was on the respondent and appears to have placed that burden on the Union.. This was a wholly wrong approach to the question.

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 and to this course neither party seems to have any serious objection. As we propose to leave the respondent free to file such a suit if he is so advised, we have not dealt with the evidence on the record on the question of the respondent's nationality so as not to prejudice any proceeding that may be brought in the future.

We think, for the reasons earlier mentioned, that the judgment of the High Court cannot be sustained and must be set aside and we order accordingly. On behalf of the Union of India the learned Attorney-General has stated that the Union will not take immediate steps to enforce the order of January 29, 1958, for the deportation of the respondent so that in the meantime the respondent may if he so chooses, file a suit or take any other proceeding that he thinks fit for the decision of the question as to whether he is a foreigner.

In the result the only order that we make is that the order and the judgment of the High Court are set aside.

Appeal allowed.