

used to give him Katcha receipts for the rent paid by him. The statement made by the tenant was consistent with the case set up in the written statement filed by the tenant and was believed by the Rent Controller before whom the witnesses were examined.

Considering the evidence produced by both the sides in the circumstances I find myself in agreement with the Rent Controller that the landlord was not issuing receipts for rent received by him from the tenant and that the landlord was trying to take advantage of his own omission for purposes of getting the tenant ejected on the plea of alleged default in payment of rent. The landlord has failed to prove that the tenant committed default in payment of rent as was alleged by him and thus his application for ejectment was rightly dismissed by the Rent Controller.

4. The upshot of the above discussion is that this is a case of no evidence and even otherwise there is no merit in this appeal which therefore is dismissed.

The above are the reasons for the short order passed on 24-11-1985.

A.A.

Appeal dismissed.

1986 C L C 1123

[Karachi]

Before Abdul Qadeer Chaudhry and
Abdur Rehman, JJ

MUHAMMAD ALI and another--Petitioners

versus

GOVERNMENT OF SIND through
Chief Secretary and 2 others--Respondents

Constitutional Petition No. D-567 of 1985, decided on 22nd January, 1986.

(a) Foreigners Act (XXXI of 1946)--

---Ss. 2(a) & 3(1)--Province of West Pakistan (Dissolution) Order (1 of 1970), Arts. 2 & 19--"Foreigner", definition of--Entry of foreigner to Pakistan--Power to regulate--Foreigner, held, would mean a person who is not citizen of Pakistan--Central Government is empowered to provide for prohibiting, regulating or restricting entry of foreigners into Pakistan or departure therefrom or presence or continued presence therein--Central Government having delegated power with regard to entry, departure etc. of foreigner, to Provincial Government, same would be automatically empowered to exercise such power with respect to Karachi Division after dissolution of West Pakistan.--[Words and phrases]. [pp. 1125, 1126] A & B

P L D 1984 Kar. 392 rel.

Akhtar Khan v. Commissioner of Karachi P L D 1972 Kar. 132
and Muhammad Azhar v. Commissioner, Karachi P L D 1966 S C 253
distinguished.

(b) Foreigners Act (XXXI of 1946)--

---Ss. 3(2)(g) & 9--Repatriation of foreigner--Requirements--Before

passing order for repatriation under S.3(2)(g) of Foreigners Act, 1946, Authority, held, was not bound to form conclusion on basis of evidence or prima facie material that detenu was a foreign national--Detenu under S. 9 of Act XXXI of 1946 would be required to prove that he was not foreigner. [pp. 1126, 1128] C & D

Advocate-General of East Pakistan, Dacca v. Beney Bhusan Majumdar and 3 others P L D 1971 S C 179 **rel.**

Advocate-General of East Pakistan, Dacca v. Beney Bhusan Majumdar and 3 others P L D 1971 S C 179 **distinguished.**

(c) Constitution of Pakistan (1973)--

---Art. 199--Constitutional jurisdiction, exercise of--High Court, in exercise of constitutional jurisdiction, held, would not enter into disputed questions of facts--Party applying for writ would be required to show clean legal right free from reasonable doubt or controversy.

[p. 1128] E & F

Feroze Din v. Government of West Pakistan P L D 1961 Lah. 304; Raja and others v. Member, Board of Revenue P L D 1967 Lah. 329; Messrs Parbatipur Industries v. The Chief Secretary, Government of East Pakistan P L D 1960 Dacca 660; Tanbir Ahmed Siddiqui v. Province of East Pakistan P L D 1968 S C 185 and Pir Bux v. Member, Board of Revenue, West Pakistan and others P L D 1962 (W.P.) Kar. 712 **ref.**

K.M. Nadeem for Petitioner.

Muhammad Ibrahim Khan for A.A.-G. for Respondents.

Date of hearing: 13th January, 1986.

JUDGMENT

ABDUR REHMAN, J.--This constitutional petition has been filed to challenge a detention order passed under Foreigners Act.

2. Briefly stated the petitioner's case is that he is a Pakistan National. His father Rasool Ali, the detenu had migrated to Karachi, after 1947 from the former East Pakistan and is presently settled at Karachi, for the last about 36 years. The detenu was rounded-up by the Police in a general raid on or about 1-2-1980 on the allegation that he is a foreign national putting up in Pakistan in violation of Foreigners Act. Subsequently the detenu was confined in Central Prison Karachi, under the orders of respondent No.2, the Secretary of Home Department, Government of Sind for a period of 60 days. The detention order was served upon the detenu while he was in custody but it did not show any grounds for such detention nor such grounds were delivered in the form of memorandum or communicated to the detenu subsequently. This detention order was extended for an additional period of 60 days. Thereafter from time to time the detenu was informed by the Superintendent, Central Prison that his detention was being extended by the Secretary to the Government of Sind, Home Department after the expiry of each duration of 60 days but no such order was served upon the detenu, in spite of his repeated requests/except a copy of the order extending his detention from 27-7-1984 to 22-9-1984. It has been complained by the detenu that he is continuously confined in Central Prison, Karachi and has not been produced before any Court or Tribunal to show cause against his such confinement. He has contended that the detenu is citizen of Pakistan but having been born in former

East Pakistan, he was being illegally detained/punished for being a Bangladeshi, inspite of the fact that he has already migrated to this part of Pakistan after partition and permanently domiciled herein and continuously residing at Karachi even after the cessation of former East Pakistan from the area which is now called Pakistan. He was made a desperate approach to the Embassy of Bangladesh for securing his release through the authorities concerned. The Embassy of Bangladesh refused to intervene in the matter as they could not render assistance in securing the relief for a Pakistani to remain in Pakistan. He has further prayed that the detention of the detenu be declared null and void and without any legal effect and such order be issued to the respondents to set the detenu at liberty.

3. A counter-affidavit has been filed by S.M. Nazir, Section Officer (Passports), Home Department, Government of Sind wherein it has been stated that the averments made by the petitioner that the detenu abovenamed is a Pakistani national are not correct and are not supported by any material whatsoever. It is claimed that the detenu has been detained under provisions of Section 3 (2) (g) of the Foreigners Act, 1946 as he was found purchasing and selling Bangladeshi girls in Pakistan. He was implicated by some of the abductee girls, who had been secured by police. The detenu has been sent up in criminal cases under the provisions of Zina Hudoob Ordinance, 1979 in the Court of Sessions, Nawabshah and also Military Court, Nawabshah. He was arrested in these cases by Sakrand Police, District Nawabshah. It has been alleged that enough material is available to show that the detenu is a Bangladeshi national and has been dealing in smuggling and selling of Bangladeshi girls into Pakistan and as such his activities are likely to prejudice the relations between the two countries and therefore, he has been detained under the Foreigners Act for the purpose of repatriation to Bangladesh. It has been reiterated in the affidavit that the detenu is a Bangladeshi national and has not furnished any material evidence to show that he is a Pakistani citizen. It is therefore, prayed that the petition may be dismissed.

4. We have heard Mr. K.M. Nadeem, Advocate for the Petitioner and Mr. M.I. Memon, A.A.-G. for the State at length.

5. It was contended by Mr. K.M. Nadeem that by virtue of a notification issued on 14-3-1959 the Commissioner of Karachi, was the competent authority to issue the detention order under the Foreigners Act and not the Provincial Government through the Home Secretary.

6. In reply Mr. M.I. Memon, learned A.A.-G. rightly referred us to section 2 (a) of the Foreigners Act (XXXI of 1946) which defines, "foreigner" to mean, a person who is not a citizen of Pakistan. Subsection (1) of section 3 of Foreigners Act (XXXI of 1946) gives power to the Central Government by order to provide for prohibiting, regulating or restricting the entry of foreigners into Pakistan, or their departure therefrom or their presence or continued presence therein. Section 3 (2) (c) gives express powers to the Central Government to pass order directing that a foreigner shall not remain in Pakistan, or in any prescribed area therein. Clause (g) thereof gives powers to the Central Government to pass order directing that a foreigner shall be arrested and, in the interest of the defence or the external affairs or security of Pakistan detained or confined. This power, he submitted was delegated by the Central Government to the Sind Government. In this connection

A.A.-G. relied upon the case of *Essa v. Government of Sind* through the Home Secretary, Government of Sind, Karachi and another reported in PLD 1984 Kar. 392 where our learned brother Ajmal Mian, J. after tracing the history of larger qua powers of Chief Commissioner, Commissioner and Provincial Government for Karachi area, came to the conclusion that Provincial Government of Sind, after the dissolution of West Pakistan had become competent to exercise powers under the Foreigners Act even in respect of Karachi Division. In the above ruling Ajmal Mian, J. had taken into consideration *Akhtar Khan v. Commissioner Karachi* P L D 1972 Kar. 132 and *Mohammad Azhar v. Commissioner Karachi* P L D 1966 S C 253 and distinguished both the authorities which had held that Commissioner of Karachi, was the competent authority to exercise the powers under the Foreigners Act notwithstanding the merger of Karachi, with the West Pakistan by virtue of President's Order No.9 of 1961 by pointing out, as we have understood, that Articles 19 and 2 of Province of West Pakistan (Dissolution) Order, 1970 (President's Order No.1 of 1970) by virtue of which the Provincial Government of Sind, which already had such powers in respect of other areas of Sind automatically became competent to exercise the same for Karachi Division, were not taken into consideration by the Division Bench in the above Karachi case while the above SC decision was given before the dissolution of one unit, and therefore both these rulings were distinguishable. We find ourselves in full agreement with the view expressed by our brother Ajmal Mian, J. in the ruling referred to above and come to the conclusion that this power of the Central Government has been subsequently delegated to the Provincial Government and is now within its competence. B

7. The main contention of Mr. K.M Nadeem was that it was the duty of the respondents to prove that the petitioner was a foreigner and not a Pakistan national, as claimed by them. He was of the view that there must be prima facie material on the basis of which the authorities can proceed to pass an order under the above provisions. In the absence of such evidence detenu could not have been detained under the provisions of the Foreigners Act referred to above. He further contended that if the petitioner was a foreigner, then the proper course was to repatriate him to Bangladesh rather than to keep him in confinement indefinitely as a detenu.

8. We are afraid that we cannot agree with the contention of the petitioner's counsel that there must be evidence or prima facie material on the basis of which the authority should be able to form its conclusion that the detenu was a foreign national before it could proceed to pass an order under section 3 (2) (g) of the Foreigners Act, 1946.

9. We do not find any substance in the above contention. First of all we will refer to section 9 of the Foreigners Act which reads as under:-

"Burden of proof. 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 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 Evidence Act, 1872, lie upon such person." C

The plain reading of section 9 would show that onus of showing that he is not a foreigner was upon the detenu. The petitioner's counsel entirely overlooked the provisions of this section when he contended that it was the duty of the respondents to prove that the detenu was a foreigner. He does not seem to have realised that the burden of proving that the detenu was not a foreigner was upon the petitioner himself and he had incorrectly claimed that the burden was on the respondent. This was, therefore, a clearly wrong approach to the question.

10. Mr. K.M. Nadeem cited the case of Advocate-General of East Pakistan, Dacca v. Beney Bhusan Majumdar and 3 others reported in PLD 1971 S C 179 where it was held that the burden under section 9 of the Foreigners Act to prove that the detenu is not foreigner shifts on prosecution to prove that accused lost his Pakistan citizenship.

11. The ruling PLD 1971 S C 179 cited by Mr. Nadeem does not apply to the present case.

The facts of the ruling were that during communal disturbances in the country, respondents, Beney Bhusan Majumdar and others who were Pakistanis, entered India for a month or two. On the return of normal condition, they entered Pakistan and resumed their normal occupation. Subsequently they were prosecuted and convicted under section 14 of the Foreigners Act, 1946 that having gone to India on the strength of a migration certificate they had lost Pakistan citizenship and could not have entered Pakistan without valid travel documents nor could they stay in the country without acquiring Pakistan citizenship over again. The Supreme Court held that it was true that section 9 of the Foreigners Act, 1946 throws the burden of proof on the respondents to prove that they are not foreigners but section 9 was held to be inapplicable in the case. It was pointed that admittedly the respondents were the citizens of Pakistan on the 13th April, 1951. They were thus the citizens of Pakistan till the time of their entry into the Indian territory on the 9th November, 1964 on the strength of the Migration Certificate. This Pakistan citizenship being admitted, it is for the prosecution to prove that they lost the Pakistan citizenship after entry into the Indian territory on the said date.

In the case under ruling the Pakistan citizenship of Beney Bhusan Majumdar and others was admitted while it was not so in the present case. It has not been admitted by the respondents that the detenu was a Pakistan national at any time. Hence he cannot take advantage of the above Supreme Court ruling. We may point out that the above laws having been enacted before Independence are common to India and Pakistan and still continue to have parallel provisions. Reference was, therefore, made before us to a ruling of the Indian Supreme Court in case of The Union of India and others v. Ghous Mohammad reported in A I R 1961 S C 1526 where an order under section 3 (2) (c) of the Indian Citizenship Act asking the respondent to leave India was challenged. The question that came before it for determination was whether the respondent is a foreigner or an Indian citizen. The Indian Supreme Court held that section 9 of the Foreigners Act applies to the case and the onus of showing that he is not a foreigner is upon the person and not on the Union of India. It was also held that Section 8

of the Act had no application to the case. The Indian Supreme Court further clarified that the question whether the respondent is a foreigner is a question of fact and where there is a great deal of dispute on the question which would require a detailed examination of evidence a proceeding under Article 226 of the Indian Constitution would not be appropriate for a decision of the question. The question is best decided by a suit.

13. In the present case also there is no dispute that if the detenu was a foreigner then the order could not have been challenged. The material question that has arisen before us is whether the detenu was a foreigner or not? Section 8 of Foreigners Act, 1946 (XXXI of 1946) deals with the case of a foreigner who is recognised as a national by the law of more than one foreign countries or where for any reason it is uncertain what nationality, if any, is to be ascribed to him. In such a case this section gives certain power to the Government to decide the nationality of the foreigner. Subsection (2) of this section provides that a decision as to nationality gives under subsection (1) shall be final and shall not be called in question in any Court. We entirely agree with the learned A.A.-G. that this section has no application to this case for it would not apply when the question before the Court is whether the person is foreigner or a Pakistani citizen which is the question before us and not as to what is the nationality of one who is not a Pakistani citizen. Section 9 of the Foreigners Act is relevant to determine such a case. We have already reproduced section 9. We have also made it quite clear that on plain reading of section 9 of the Foreigners Act it would appear that the onus of showing that the detenu was not a foreigner is upon the petitioner and not upon the respondent.

14. We are also of the clear view that since the question whether the detenu is a foreigner or a Pakistan national is question of fact and there is great deal of dispute on this question which would require a detailed examination a proceeding under the writ jurisdiction would not be appropriate for a decision of such question.

15. It is well settled that in a writ petition the Court will not generally enter into disputed questions of facts. Some Courts have gone so far as to say that where facts are disputed the Court should not exercise this extraordinary jurisdiction. It is incumbent upon a party applying for a writ to show that he has a clear legal right and that the right is so clear as not to admit of a reasonable doubt or controversy.

16. Reference in this connection may be made to *Feroze Din v. Government of West Pakistan* P L D 1961 Lah. 304, *Raja and others v. Member, Board of Revenue* P L D 1967 Lah. 329 and *Messrs Parbatipur Industries v. The Chief Secretary, Government of East Pakistan* P L D 1960 Dacca, 660. This view has also been approved by the Supreme Court in *Tanbir Ahmed Siddiqui v. Province of East Pakistan* P L D 1968 S C 185, where it is held that disputed questions of facts requiring investigation are not a suitable subject for investigation under the writ Jurisdiction. This Court has also held in *Pir Bux v. Member, Board of Revenue, West Pakistan and others* P L D 1962 (W.P.) Kar. 712 that on the finding of fact.

17. We are therefore of the clear view that there is no merit in the

petition and the same requires to be dismissed with no order as to costs. The above are the reasons for which we had dismissed the above petition by a short order, dated 13-1-1986.

A.A.

Petition dismissed.

1986 C L C 1129

[Karachi]

Before Saeeduzzaman Siddiqui, J

Qazi MAIRAJ-UD-DIN--Appellant

versus

BADRUDDIN--Respondent

First Rent Appeal No. 454 of 1982, decided on 5th May, 1985.

Sind Rented Premises Ordinance (XVII of 1979)--

---Ss. 15 & 21--Ejectment--Bona fide personal requirement--Proof of--Acceptance of enhanced rent in previous case, held, would have no relevancy in subsequent rent proceedings filed by landlord for bona fide personal requirement--Plea of personal requirement not taken in previous litigation would not bar taking such plea in subsequent rent proceedings--Landlord would not be bound to take all available grounds in one ejectment case--Appreciation of evidence by appellate Court would indicate that landlord had succeeded in establishing personal bona fide requirement of premises--Evidence of landlord with regard to bona fide requirement would be sufficient in view of safeguard, provided against mala fide action by landlord under S. 15-A of Ordinance XVII of 1979. [p. 1131] A

S. Abbas Zia for Appellant.

Muhammad Ibrahim Abbasi for Respondent.

Date of hearing: 23rd April, 1985.

JUDGMENT

This appeal under section 21 of the Sind Rented Premises Ordinance, 1979 is filed by the appellant/ landlord against the order of Rent Controller whereby he rejected Rent Case No.6807/80 instituted by the appellant on the ground of personal and bona fide requirement.

The personal and bona fide requirement pleaded by the appellant in his application is as follows:-

- "(5) That the said son has permanently returned and intends to start his business of tyres and tubes at Karachi in the disputed shop as there is neither any shop belonging to the applicant nor in possession of both the father and the son.
- (6) That behind the disputed small accommodation which is used by the applicant as office and about 12' x 12' godown for his business of import and export which the applicant and his son wants to extend which can only be done by occupying the shop in dispute which exist on the main road.
- (7) That the said shop premises are required bona fide good faith by the applicant for his own as well as for the business of his son who has permanently returned from U.K.