

It is thus clear that the judgment of the lower appellate Court cannot be supported in law. The appeal is therefore allowed with costs, the judgments and decree of the lower appellate Court are set aside and that of the Munsif is restored, though for reasons different from those assigned by him.

Appeal allowed.

P L D 1967 Dacca 627

Before A. S. Chowdhury, J

SUPERINTENDENT AND REMEMBRANCER OF
LEGAL AFFAIRS, GOVERNMENT OF EAST
PAKISTAN—Appellant

versus

KIRAN CHANDRA DUTTA—Respondent

Appeal from Acquittal No. 1 of 1963, decided on 23rd June 1964.

(a) *Pakistan (Control of Entry) Act (LV of 1952), S. 4 read with S. 3 (6)*—Passport, though prima facie raises strong presumption about its holder being national of country of passport yet such presumption rebuttable and not conclusive—Person, Pakistan citizen by birth, entering Pakistan on Indian Passport and visa obtained from Pakistan High Commission at time when passport system was newly introduced—Mere possession of Indian Passport not conclusive evidence of change of nationality—Conviction, under circumstances, held, not maintainable. [p. 630] A et seq

Abida Khatoon and another v. State of U. P. and others AIR 1963 All. 260 rel.

(b) *Domicile*—Domicile of origin remains attached to person till such time as he not only manifests but carries into execution his intention of abandoning same and acquiring another—Loss of domicile of origin—Burden lies on person alleging—Pakistan (Control of Entry) Act (LV of 1952), S. 4 read with S. 3(6). [p. 632] B

Winans and another v. Attorney General (1904) A C 287 ref.

Naimuddin Ahmad for Appellant.

T. Talukdar for Respondent.

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This is an appeal under section 417 of the Code of Criminal Procedure preferred by the Provincial Government against an order of acquittal made by Mr. M. E. Ali, Additional Sessions Judge, Khulna on 27-6-62, reversing an order of conviction and sentence passed by Mr. M. A. Subhan, Magistrate, 1st Class, Khulna.

The accused respondent Kiran Chandra Dutta was placed on trial under section 4 read with section 3 (6) of the Pakistan (Control of Entry) Act, 1952 on the allegation that he was an Indian Citizen residing at 3, South Central Road, Calcutta, and that he entered East Pakistan through Darsana Checkpost with Visa granted by Pakistani High Commission in Calcutta and an Indian Passport. It is claimed that he had been overstaying in Faridpur and Khulna since his entry to this country.

Defence case is that the respondent Kiran Chandra is a citizen of Pakistan by birth and that his parents, brothers, wife and wife's people are permanent residents of Pakistan and he has his homestead here. It is further claimed that he never intended to give up his Pakistani citizenship and that he went to Calcutta for a short stay for treatment.

The prosecution examined four witnesses in support of its case and the defence one.

The learned Magistrate convicted the accused under section 4 read with section 3 (6) of the Pakistan (Control of Entry) Act, 1952, and sentenced him to pay a fine of Rs. 300 in default to undergo rigorous imprisonment for three months. He was further directed to be pushed out of Pakistan after payment of fine or suffering the sentence. On appeal, the learned Judge set aside the order of the trial Court and acquitted the accused respondent of the offence alleged against him. Mr. Naimuddin Ahmed, learned Advocate who appears for the State, has placed the entire recorded evidence before me and founded his prayer for conviction on the Indian Passport held by the accused.

P. W. 1 Md. Fazle Ali is a Sub-Inspector of Police attached to the District Intelligence Branch at Khulna. He deposed to the defect that he searched out the accused from a Jewellery shop and arrested him. He has also stated that the accused is an Indian National having no valid visa or passport in his possession. He proved the visa granted by Pakistan High Commission in Calcutta and the same was marked as Exh. 1. In cross-examination this witness denies any knowledge as to whether the father of the accused was a Pakistani citizen or not. He is also not aware if Kiran's parents, brothers and parents of her wife are Pakistani citizens. He also admits that he made no inquiry in this behalf. He also stated that he did not make any enquiry about the accused in the Moslem Guinea House at Khulna in which firm the accused claims to be an employee. It appears from the reading of the deposition of this witness that he merely proves that the accused obtained a visa from Pakistan High Commission. On a reference to

visa Exh. 1, it appears, that the accused mentioned therein "unemployed, dependant on my elder brother Jugal Chandra Dutta." It is also found in the same that he held an Indian Passport number being B. 321603.

P. W. 2 Kazi Nurul Islam is a dealing assistant in the office of the Intelligence Branch at Kbulna. He is a formal witness and merely proves that he received Exh. 1 from the Superintendent of Police District Intelligence Branch, Faridpur.

P. W. 3 Muzaffar Hossain describes himself as an Assistant Sub-Inspector of Police, Faridpur he also deposes to the effect that he received this visa Exh. 1 from the office of the Deputy High Commissioner for Pakistan in Calcutta and that he went to the house of the father of the accused, Raghu Nath Dutta, where the accused had gone to see his father. In cross-examination this witness has deposed as follows:—

"I saw parents of the accused in their house at Chandhat. The parents live there from the time of their ancestors. I do not know whether the wife and children of the accused are also Pakistani and live in Pakistan. I did not examine any witness."

P. W. 4 Md. Sikandar Ali is an Assistant Sub-Inspector of Police attached to Darsona Check Post in the District of Kushtia. He proves that Kiran Chandra Dutta entered Pakistan on 20-1-54 with an Indian Passport and gives the same number as is found in the Pakistani visa. The statement made by this witness has not been challenged. The entry of the accused with an Indian Passport and a Pakistani visa on 20-1-54, has, therefore been proved by the prosecution. But the prosecution has not adduced any evidence to show that he was not a citizen of Pakistan by birth although it was suggested that the parents and brothers of the accused are Pakistani citizens. P. W. 3 Mozaffar Hossain has admitted that the parents of the accused live at Chandhat in Pakistan from the time of their ancestors. This statement tends to corroborate the defence claim that the accused is a Pakistani citizen by birth. In this state of Evidence adduced by the prosecution, the defence evidence to the effect that the accused is a Pakistani national is to be considered. D. W. 1 Amulya Bhusan Dutta is an elder brother of the accused. He has made a straightforward statement to the effect that his father Ragunath Dutta is a Pakistani National by birth and holds a Pakistani Passport which has been produced in Court and marked as Exh. A. He further asserts that the accused is a Pakistani citizen by birth and his parents live at Chandhat. He has also stated that the accused is a voter of the Union Council Chandosardi and has properties in Pakistan. Neither the accused nor any of them sold any property in Pakistan. The accused married a Pakistani girl. According to this witness "the accused went to India for medical treatment before introduction of Passport." The statements made by this witness have not been challenged by the prosecution in cross-examination nor any contrary evidence has been given challenging the claim of the accused being a citizen of Pakistan by birth. Moreover, the definite assertion made by Amulya Bhusan Dutta to effect that

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they had not sold any properties in Pakistan and the entire family is staying in this country, have also not been challenged. On a scrutiny of the evidence it appears that Amulya is a witness of truth and his statement to the effect that his brother is a Pakistani citizen by birth and that the entire family is living in Pakistan, must be accepted. Amulya has not denied that his brother had gone to India for treatment and on sudden introduction of Passport system during his stay there, he returned to Pakistan with an Indian Passport. This admission regarding Indian Passport indicates that the statement of Amulya bears the imprint of truth. Moreover, he is corroborated by P. W. 3 Mozaffar Hossain in his claims that the entire family lives at Chandhat.

Now having found that the accused was a Pakistani citizen by birth, the next point to be considered is as to whether he became Indian National by his holding an Indian Passport. The statement of Amulya to the effect that the accused had gone to India for treatment, has not been challenged in cross-examination. Therefore, I must accept this statement of Amulya as well. Mr. Naimuddin who appears on behalf of the State has conceded that if it is accepted the accused had gone to India merely for treatment he has no case at all.

He has of course, argued that the holding of the Indian Passport raises a very strong presumption to the effect that the holder is the citizen of the country of the Passport and although it is not conclusive evidence of nationality, it must be considered to be a strong evidence.

But in the facts and circumstances of the case, I find that the accused was a Pakistani citizen by birth and before it is claimed that he became citizen of another country, it must be shown that he lost citizenship of Pakistan. He will lose the citizenship of this country if he goes to another with the intention of permanently residing in that country. In this case the prosecution has miserably failed to give any evidence of any such intention. No evidence has been given to the effect that his near relations have left Pakistan and family properties had been liquidated. On the contrary I find that his father, mother, brothers and his wife and children are staying in Pakistan. In these circumstances, it is impossible for me to attribute to the accused any intention of his permanently leaving this country. Lack of this intention is also found in Exh. 1, the visa. It should be noticed in this connection that the accused has categorically stated in his visa that he is unemployed and is dependant on his brother.

In the peculiar facts and circumstances of the case, I am, therefore, of opinion that the presumption arising out of the holding of Indian Passport, has been rebutted by the evidence adduced on behalf of the defence to the effect that he never intended to leave Pakistan permanently. A person may hold a Passport of another country owing to a variety of reasons and it cannot be deemed to be a conclusive proof of the nationality of the country of which he holds the passport although a strong presumption arises to that effect.

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The view expressed above finds full support in the case of *Abida Khatoon and another v. State of U. P. and others* (1). In that case Abida and her husband, Abdul Shakoor, Indian citizens by birth, instituted a suit as plaintiffs for declaration that they were Indian citizens. That was Civil suit and as plaintiffs the burden to prove their case would be on them. But it was held in that case that after the plaintiffs proved their Indian citizenship by birth, it was for the State to prove that they lost their Indian Citizenship. An attempt was made on behalf of the State of U. P. to prove the same on the basis of a statement made in a petition by the husband of Abida in the following terms:—

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"I was compelled to cast a lingering look behind my native country and cherished home and to bid adieu to all that was dear to me."

Next point made against the plaintiffs was that they held Pakistani Passports when they returned to India. The plaintiffs' case was to the effect that Abida had a brother at Karachi and she, along with her husband, had gone to stay for sometime with her brother who died after about 10 months and thereafter Abida and her husband returned to their country. Dhawan, J. held that the State failed to prove that in these circumstances the plaintiffs lost their citizenship of India and the learned Judge further observed that merely because they held Pakistani Passports they could not be declared citizens of Pakistan.

The position of the accused before me is much stronger. That was a civil suit in which the plaintiffs were to prove all their allegations. This is a criminal case in which the State has to prove all the allegations to bring home the charge made against an accused. It is true that he holds an Indian Passport but that is not enough. The prosecution has also to prove that he lost citizenship of Pakistan. Dealing with the question of intention Dhawan, J. of Allahabad High Court observed in the aforesaid case as follows:—

"Citizenship does not evaporate with the passing of time, it clings to a person wherever he may roam. It cannot be taken away from him unless he voluntarily renounces it or is guilty of some conduct involving loss of citizenship. The onus of proving that a citizen of India has lost his citizenship is on the party seeking to deprive him of his rights as a citizen."

He has further observed:—

"In my opinion an Indian Citizen could not migrate to Pakistan without a conscious desire to abandon, and actually abandoning, his domicile of origin."

Referring to the question of Passport, the learned Judge observed as follows:—

"A passport does not confer citizenship of that state and does not necessarily explain how or when he acquired it. The

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holder may be the citizen of that State by birth or naturalisation, or by any other manner permitted by Law. A passport is *prima facie* evidence that the person in possession of it acquired at sometime prior to its issue, the citizenship of the country whose Government issued it. But the presumption is not conclusive but rebuttable."

Referring to the Pakistani Passports the learned Judge observed:—

"But there is no evidence that they applied for a Pakistani Passport for any purpose other than returning to India."

The learned Judge has clearly said that even in a civil suit onus was on the party which seeks to deprive them of their rights of a citizen to prove that citizenship was in fact lost. He has further observed that a mere intention to leave India would not be enough to lose Indian Citizenship. He has said that intention must be fulfilled. If the intention is frustrated by some reason or other the loss of citizenship is not effected. Dhawan, J. expressed himself on this point as follows:—

"To every adult person the law assigns a domicile which is called the domicile of origin and which remains attached to him until a new and different domicile takes its place. The domicile of origin must prevail until the party has not only manifested but carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile."

He accordingly declared the plaintiffs Abida and her husband to be citizens of India.

These observations fully apply to the case before me as well. No evidence has been adduced by the prosecution that the accused had any other intention to hold Indian Passport than returning to Pakistan.

The views expressed by me find support from the common law of England. In the case of *Winans and another v. Attorney General* (1), it was held that the onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost. The domicile of origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as the sole domicile is clearly shown.

The prosecution in the instant case has totally failed to prove that the accused left Pakistan with the intention of permanently settling in India or that he subsequently lost citizenship of Pakistan. The question of frustrated intention of settling in India does not arise in this case as there is no proof that he had even initially any such intention.

In the facts and circumstances of the case, I must hold that the accused continues to be a citizen of Pakistan and, therefore, he committed no offence under the Pakistan (Control of Entry) Act.

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For the reasons stated above, the appeal is dismissed. The order of acquittal made by the learned Additional Sessions Judge of Khulna is affirmed.

K. B. A.

Appeal dismissed.

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Before Sikandar Ali, J

MUHAMMAD MANIKUDDIN—Appellant

versus

SAMIRAN BIBI AND OTHERS—Respondents

Second Appeal No. 874 of 1961, decided on 2nd February 1966.

(a) Civil Procedure Code (V of 1908), O. IX, r. 3; O. IX, r. 6; O. XVII, r. 2; O. XVII, r. 3 & O. XXVI, r. 8—Plaintiff examined on commission under O. XXVI, r. 8—Both parties failing to make appearance on next date fixed for hearing—Court nonetheless proceeding with suit and passing decree on basis of deposition of plaintiff under O. XXVI, r. 8—Held: provisions of O. XVII, r. 3 not applicable and Court, in circumstances, not justified in passing ex parte decree either under O. XVII, r. 3 or O. IX, r. 6—Only provision applicable in such case would be that of O. IX, r. 3. [p. 637] *C et seq & D*

Abed Ali Shaikh v. Sadek Ali Biswas and others 9 D L R 128 ref.

(b) Civil Procedure Code (V of 1908), O. XVII, rr. 2 & 3—Provision of r. 3 applicable only where time has been granted to party on his own application to do certain specified act—Default of appearance in case of other adjournments—Provision of rule 2 applies—Civil Procedure Code (V of 1908), O. IX.

Rule 3 of Order XVII of the Civil Procedure Code, 1908 is really in the nature of an exception to the general provision embodied in the preceding rule 2 of O. XVII of the Code. Rule 3 is applicable only to cases where a party to whom time has been granted on his own application to do some specified act necessary for his case and fails to take

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