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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 22.09.2016

+ **W.P.(C) 3539/2016**

PHUNTSOK WANGYAL

..... Petitioner

versus

MINISTRY OF EXTERNAL AFFAIRS & ORS Respondents

Advocates who appeared in the case:

For the Petitioner : Mr Ankur Mittal, Advocate.

For the Respondent: Ms Sunieta Ojha and Mr Talish Ray, Advocates for R-1 to 3.

+ **W.P.(C) 4275/2016**

LOBSANG WANGYAL

..... Petitioner

versus

UNION OF INDIA & ORS

..... Respondents

Advocates who appeared in the case:

For the Petitioner: Mr Giriraj Subramaniam, Mr Simarpal Singh Sawhney and Mr Sidhant Krishan Singh, Advocates.

For the Respondent: Mr Akshay Makhija, Ms Abha Malhotra and Mr Gaurang Bindra, Advocates for Union of India.

+ **W.P.(C) 7983/2016**

TENZIN DHONDEN

..... Petitioner

versus

UNION OF INDIA & ORS

..... Respondents

Advocates who appeared in the case:

For the Petitioner: Mr Giriraj Subramaniam, Mr Simarpal Singh Sawhney and Mr Sidhant Krishan Singh, Advocates.

For the Respondents: Mr Vikram Jetley, Advocate for Union of India.

CORAM:-
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J (ORAL)

CM No.34827/2016 in W.P.(C) 3539/2016 (delay in filing counter-affidavit for 15 days)

For the reasons stated in the application, the application is allowed.

The delay in filing counter-affidavit is condoned and the counter-affidavit is taken on record.

W.P.(C) Nos.3539/2016, 4275/2016 & 7983/2016

1. In W.P.(C) No.7983/2016, Mr Jaitley, learned counsel for the respondent, has filed the counter-affidavit on behalf of respondent in court. The same is taken on record.
2. All these petitions seek a direction to the respondents to consider the petitioners, who are children of Tibetan parents and born in India on or after 26.01.1950 and before 01.07.1987, as citizens of India in view of Section 3(1) (a) of the Citizenship Act, 1955 (hereinafter referred to as 'the Act') and to issue Indian passports.
3. The petitioner – Phuntsok Wangyal in W.P.(C) No.3539/2016 was born on 17.09.1977 and the petitioner – Lobsang Wangyal in W.P.(C) No.4275/2016 was born on 25.05.1970. The petitioners, in

these two petitions, claim citizenship of India on the basis of Section 3(1)(a) of the Act.

4. The petitioner – Tenzin Dhonden in W.P(C) No.7983/2016 was born on 16.08.1992 and contends that his father was born in India on 01.01.1966 and claims citizenship of India by virtue of Section 3(1)(b) of the Act.

5. It is contended by the petitioners that the petitioners being citizens of India, cannot be discriminated against and cannot be denied the Indian passport by the respondents. It is also contended that the petitioners, being Indian citizens by virtue of the Citizenship Act, 1955, have no requirement of making any application with the respondents for being so declared and are entitled to all benefits and privileges, as are available to citizens of India.

6. Reliance is placed on the decision of a Coordinate Bench of this Court in **Namgyal Dolkar versus Government of India, Ministry of External Affairs**, dated 22.12.2010 in W.P.(C) No.12179/2009, wherein similar relief has been granted.

7. Learned counsel for the respondents rely on a letter dated 26.08.2011 issued by the Ministry of Home affairs to the Election Commission of India, whereby Minutes of inter-Ministerial meeting held on 30.03.2010 was conveyed, *inter alia*, to the following extent:-

“The children born to Tibetan Refugee in India will not be treated as Indian citizen automatically based on their

birth in India before 01.07.1987 under Section 3(1)(a) of the Citizenship Act, 1955. All such persons will have to submit an application individually under Section 9(2) of the Citizenship Act, 1955 to MHA and thereafter the nationality status of all such children born to Tibetan Refugees in India, will be determined by MHA as per prescribed procedure available under the Citizenship Rules, 2009. All such children, as and when their nationality status as an Indian is decided by this Ministry, will have to surrender their Tibetan Refugee Certificate and Identity Card before accepting Indian citizenship.”

8. It is contended that as per the said Minutes, all children born to Tibetan refugees in India would not be treated as Indian citizens based on their birth in India before 01.07.1987 and such persons shall have to submit applications individually under Section 9(2) of the Citizenship Act and thereafter the nationality status would be determined by the Ministry of Home Affairs, as per the procedure prescribed under the Citizenship Rules, 2009.

9. It is contended that the petitioners cannot be considered to be Indian citizens automatically and need to apply in terms of the decision of the respondent.

10. Section 3 of the Act reads as under:-

“3. Citizenship by birth- (1) Except as provided in sub-section (2), every person born in India, -

(a) on or after the 26th day of January, 1950, but before the 1st day of July, 1987;

- (b) *on or after the 1st day of July , 1947, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth;*
- (c) *on or after the commencement of the Citizenship (Amendment) Act, 2003, where*
- (i) *both of his parents are citizens of India; or*
- (ii) *one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth.*
- (2) *A person shall not be a citizen of India by virtue of this section if at the time of his birth –*
- (a) *either his father or mother possesses such immunity from suits and legal process as is accorded to any envoy of a foreign sovereign power accredited to the President of India and he or she, as the case may be, is not a citizen of India; or*
- (b) *his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy.”*

11. As per section 3(1) of the Act, there are three categories of persons who are citizens of India by birth: (i) those born, on or after the 26th day of January, 1950, but before the 1st day of July, 1987 or (ii) those born on or after the 1st day of July , 1947, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth or (iii) those born on or after the commencement of the Citizenship

(Amendment) Act, 2003, where both of his parents are citizens of India or one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth.

12. However a person, who though satisfies the criteria of section 3(1) of the Act, would still not be a citizen of India if at the time of his birth (i) either his father or mother possesses such immunity from suits and legal process as is accorded to any envoy of a foreign sovereign power accredited to the President of India and he or she, as the case may be, is not a citizen of India or (ii) his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy.

13. The petitioner – Phuntsok Wangyal in W.P.(C) No.3539/2016 was born on 17.09.1977 and the petitioner – Lobsang Wangyal in W.P.(C) No.4275/2016 was born on 25.05.1970. Both of them satisfy the requirement of section 3(1) (a) of the Act i.e. born, on or after the 26th day of January, 1950, but before the 1st day of July, 1987.

14. The petitioner – Tenzin Dhonden in W.P(C) No.7983/2016 was born on 16.08.1992 and his father was born in India on 01.01.1966. Since the father of the petitioner – Tenzin Dhonden was born in India and satisfies the requirement of section 3(1) (a) of the Act, he would be an Indian Citizen and thus the petitioner satisfies the requirement of section 3(1) (b) of the Act i.e. those born on or after the 1st day of July, 1947, but before the commencement of the Citizenship

(Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth.

15. None of the Petitioners admittedly suffer from the disqualification of section 3(2).

16. In **Namgyal Dolkar** (Supra) the learned Judge held as under:-

“24. A plain reading of the above provision shows that a cut-off date was introduced by the Parliament for recognition of citizenship by birth. Except as provided by Section 3(2), "every person born in India on or after the 26th January 1950 but before the 1st day of July 1987" shall be a citizen of India by birth. Admittedly, in the present case, none of the prohibitions contained in Section 3(2) CA are attracted. The case of the Petitioner is within the ambit of Section 3(1)(a) since she was born in India on 13th April 1986, i.e., after 26th January 1950 but before 1st July 1987. The SOR accompanying the amendment Bill of 1986, by which the above provision was introduced and discussed in the Lok Sabha and Rajya Sabha, makes it clear that the change brought about by the amendment was to be prospective. The rationale behind introduction of a 'cut-off' date was that the position prior to 1st July 1987 was not intended to be disturbed.

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28. In the considered view of this Court, the above ground for rejection of the Petitioner's application for passport is untenable. As already noticed, the concept of 'nationality' does not have legislative recognition in the CA. The Petitioner's describing herself to be a Tibetan 'national' is really of no legal consequence as far as the CA is concerned, or for that matter from the point of view of the policy of the MEA. The counter affidavit makes it

clear that the MEA treats Tibetans as 'stateless' persons. Which is why they are issued identity certificates which answers the description of travel documents within the meaning of Section 4(2)(b) PA. Without such certificate, Tibetans face the prospect of having to be deported. They really have no choice in the matter. It must be recalled that when her attention was drawn to the fact that she could not hold an identity certificate and a passport simultaneously, the Petitioner volunteered to relinquish the identity certificate, if issued the passport. That was the correct thing to do, in any event. The holding of an identity certificate, or the Petitioner declaring, in her application for such certificate, that she is a Tibetan national, cannot in the circumstances constitute valid grounds to refuse her a passport.

29. *The policy decision of the MHA not to grant Indian citizenship by naturalisation under Section 6(1) CA to Tibetans who entered India after March 1959 is not relevant in the instant case. Having been born in India after 26th January 1950 and before 1st July 1987, the Petitioner is undoubtedly an Indian citizen by birth in terms of Section 3(1)(a) CA. The fact that in the application form for an identity certificate the Petitioner described herself as a Tibetan national will make no difference to this legal position. There cannot be waiver of the right to be recognized as an Indian citizen by birth, a right that is expressly conferred by Section 3 (1) CA. The Petitioner cannot be said to have 'renounced' her Indian citizenship by birth by stating that she is a Tibetan national. Renunciation can happen only in certain contexts one of which is outlined in Section 8 which reads as under:-*

"8. Renunciation of citizenship: (1) If any citizen of India of full age and capacity, makes in the prescribed manner a declaration renouncing his Indian citizenship, the declaration shall be

registered by the prescribed authority, and, upon such registration, that person shall cease to be a citizen of India.

Provided that if any such declaration is made during any war in which India may be engaged, registration thereof shall be withheld until the Central Government otherwise directs.

(2) *Where a person ceases to be a citizen of India under sub-section (1) every minor child of that person shall thereupon cease to be a citizen of India:*

Provided that any such child may, within one year attaining full age, make a declaration in the prescribed form and manner that he wishes to resume Indian citizenship and shall thereupon again become a citizen of India."

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31. *The Petitioner was born in India on 13th April 1986, i.e. after 26th January 1950 and before 1st July 1987, and is an Indian citizen by birth in terms of Section 3(1)(a) CA. She cannot therefore be denied a passport on the ground that she is not an Indian citizen in terms of Section 6(2)(a) PA."*

17. This Court in **Namgyal Dolkar** (*supra*) has very categorically laid down that the persons like the petitioners are covered under Section 3 of the Citizenship Act, and cannot be denied a passport on the ground that they are not Indian citizens in terms of Section 6(2)(a) of the Passport Act, 1967. I am in complete agreement with the view taken by the coordinate bench in the said judgment.

18. Learned counsel for the respondents do not contend that the said decision has either been set aside or stayed by any higher forum.

19. Even the Election Commission of India, to whom the said letter dated 26.08.2011 of the Ministry of Home Affairs, was addressed, has issued a letter dated 07.02.2014, which reads as under:-

“No.30/ID/2010-ERS Dated – 7th February, 2014

To,

The CEOs of all States/UTs

*Subject: Registration of Tibetan Refugees and their
offspring in the electoral roll-clarification – regarding*

Sir/Madam,

I am directed to refer to the Commission's instruction dated 27th September, 2011, on the subject cited and to state that in the light of decision dated 7th August, 2013 of Karnataka High Court in WP No. 15437/2013 Tenzin Choephag Ling Rinpochwe Vs Union of India and others, the Commission has reconsidered its stand communicated by the aforesaid letter. (A copy of the HC order is enclosed as Annexure-1)

As per Section 3(1) (a) of the Citizenship Act, 1955, the children born to Tibetan Refugees in India shall be treated as Indian citizens based on their in India, on or after 26th January, 1950 and before 1st July, 1987. Hence, notwithstanding anything contained in Union Home Ministry letter number 26027/08/1994-S-I dated 26th August, 2011 conveyed to all CEOs vide ECI letter dated 27th September, 2011, the Commission clarifies that the EROs concerned should not deny enrolment to the children of Tibetan Refugees where they are satisfied

that(1) the applicant was born in India, (2) he/she was born on or after 26th January, 1950 but before 1st July, 1987, and (3) he/she is ordinarily resident in the constituency in which the application for enrolment has been made.

Please bring this into the notice of all concerned EROs and other stakeholders for information and compliance.

Yours faithfully,

*(R.K. Srivastava)
Principal Secretary”*

20. The Election Commission of India, by the said letter dated 07.02.2014, has stated that notwithstanding anything contained in the communication dated 26.08.2011, the Electoral Return Officers (EROs) are not to deny enrolment to the children of the Tibetan refugees where they satisfy the requirement of Section 3 of the Act.

21. Furthermore, Section 3 of the Act very categorically lays down the conditions under which a person acquires citizenship by birth. By a mere correspondence or an inter-Ministerial meeting, the statutory provisions cannot be defeated. No decision taken in an inter-ministerial meeting can override a statutory provision. The petitioner have been given rights under the Act, those rights cannot be taken away by a mere inter-ministerial decision.

22. The communication dated 26.08.2011 of the Ministry of Home Affairs notices the decision of this Court in **Namgyal Dolkar** (*supra*),

but, records that the same may not be applicable *per se* in other cases. It is not understandable as to how such a view could be taken by the Respondents in view of the clear findings of this court in **Namgyal Dolkar** (*supra*). The action of the respondents is clearly unsustainable. The communication dated 26.08.2011 and the minutes of meeting dated 30.03.2010, being contrary to the Act, are quashed.

23. The writ petitions are allowed holding that the petitioners are Indian citizens and entitled to all benefits and privileges, as are available to Indian citizens. The respondents cannot require the petitioners to make any application under section 9 of the Act. The Petitioners cannot be denied Indian passport by the respondents on that ground.

24. The respondents are directed to issue the India passports to the petitioners, who have been declared to be Indian citizens, within a period of four weeks in accordance with the Rules.

25. The writ petitions are disposed of in the above terms. There shall be no order as to costs.

26. *Dasti* under signatures of the Court Master.

SANJEEV SACHDEVA

SEPTEMBER 22, 2016/ 'sn'