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

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Date of Judgment: 9th March, 2017

+ **W.P. (Crl.) 545/2017**

MOHD. QAMAR @ MOHD. KAMIL & ANR Petitioners

Through Mr.N.D.Pancholi, Adv. with
Ms.Shalu Nigam, Adv.

versus

UOI & ORS

..... Respondents

Through Mr.Rajesh Gogna, CGSC for R-1 &
R-2 along with Insp. Dheeraj Singh,
PS Narela, in person.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. Petitioner No.2 has filed the present writ petition under Article 226 read with Article 21 of the Constitution of India and Section 482 Cr.P.C. seeking a writ of Habeas Corpus for release of petitioner No.1 from the unlawful custody/detention of respondent No.1.
2. With the consent of the parties, we set down this writ petition for final hearing and disposal.

3. As per the petition, petitioner No.1 was born sometime in the year 1959 at Meerut to his parents who were Indian Citizens. When petitioner No.1 was around 7/8 years of age, he was taken by his mother to Pakistan for visiting relations but before he could be brought back by his mother, she died in Pakistan leaving the petitioner No.1 at the mercy of his relatives. To enable him to return back to his motherland India, petitioner No.1 obtained a Pakistani Passport; returned to India, and married Shehnaaj Begum in Meerut in the year 1990. Out of their wedlock, 5 children were born including petitioner No.2 who is the eldest son.
4. On 08.08.2011 the petitioner No.1 was arrested and charged under Section 14 of the Foreigners Act. By a judgment of 02.09.2014 passed by the Trial Court, petitioner No.1 was convicted under Section 14 of the Foreigners Act and sentenced to undergo imprisonment for three years six months together with fine of Rs.500/-. On completion of his sentence on 07.02.2015, petitioner No.1 was sent to the Beggar's Home, a Detention Centre at Lampur, Narela and since then, he has been lodged there for the purpose of being deported to Pakistan.
5. The petitioners have prayed that petitioner No.1 be released from the Detention Home and allowed to join his family.
6. Mr.Gogna, learned counsel who appears for respondents No.1 & 2 submits that the petitioner No.1 has admitted that he is a Pakistani Citizen and since he overstayed in this country without valid documents for more than 20 years and during this period has applied

for various documents including opening of bank accounts, etc. all in contravention of various Acts, which facilities can only be given to an Indian Citizen. Counsel further submits that post his completion of the sentence, the Government has written to the Government of Pakistan to ascertain as to whether petitioner No.1 is their citizen or not. Mr.Gogna further goes on to explain that in case the Pakistani Government accepts petitioner No.1 to be their citizen, petitioner No.1 would be deported. However, in case they dispute or deny that petitioner No.1 is their citizen, then the officials of the Pakistani Government will not accept petitioner No.1 at the border. Resultantly, he would remain a person with no citizenship.

7. Mr.Gogna has further submitted that till date, the petitioner No.1 has taken no steps either to claim Indian Citizenship or to apply for a passport and in the absence thereof, the case of the petitioner cannot be considered by the respondents.
8. Learned counsel for respondents No.1 & 2 has placed strong reliance on a judgment rendered by the Apex court in the case of ***Bhanwaroo Khan and others v. Union of India and others***, AIR 2002 SC 1614, more particularly, paragraphs 12 to 16 which are reproduced below:-

“12. A Constitution Bench of this Court in Izhar Ahmad Khan v. Union of India, AIR 1962 SC 1052, considered the validity of Rule 3 of Schedule III of the Citizenship Rules and the order passed under Section 9(2) of the Citizenship Act where the person concerned had obtained a Pakistani passport and observed in para 34 as under:

“In dealing with this question, it may also be relevant to consider the practical aspect of the rule; and that takes us to the procedure which has to be followed in Pakistan in obtaining a passport from the Government of that country for travel to India. One of the objects which the Act was incidentally intended to achieve was to meet the emergency which arose as a result of the partition of the country into India and Pakistan, and the relevant rules are also primarily applicable to Indian nationals who on going to Pakistan obtained passport from the Government of that country. Now, it is not disputed that according to the laws prevailing in Pakistan a person is not entitled to apply for or obtain a passport unless he is a citizen of Pakistan under its Citizenship Act. Besides, the prescribed form of the application requires that the applicant should make a declaration to the effect that he is a citizen of Pakistan and the said declaration has to be accepted by the Pakistan authorities before a passport is issued. In the course of the enquiry as to the citizenship of the applicant, declaration by officials of Pakistan about the truth of the statement of the applicant are also required to be filed. Thus, the procedure prescribed by the relevant Pakistan laws makes it abundantly clear that the application for the passport has to be made by a citizen of Pakistan, it has to contain a declaration to that effect and the truth of the declaration has to be established to the satisfaction of the Pakistan officials before a passport is granted. When a passport is obtained under these circumstances, so far as the Pakistan Government is concerned, there can be no doubt that it would be entitled to claim the applicant as its own citizen. The citizen would be estopped from claiming against the Pakistan Government that the statement made by him about his status was untrue. In such a case, if the impugned rule prescribes that the obtaining of a passport from the Pakistan Government by an Indian national, (which normally would be the result of the prescribed application voluntarily made by him) conclusively proves

the voluntary acquisition of Pakistani citizenship, it would be difficult to hold that the rule is not a rule of evidence. In our opinion, it would be pedantic and wholly unrealistic to contend that the rule in question does not purport to assess the probative value of fact A in the matter of proving fact B but imports considerations which are relevant to substantive law. Our conclusion, therefore, is that the impugned rule is a rule of evidence and falls within the scope prescribed by Section 9(2). The challenge to its validity on the ground that it is a rule of substantive law must, therefore, fail.”

The Supreme Court held that the conclusive presumption could be raised of the fact that a citizen of India who has obtained on any date a passport from the Government of another country of having voluntarily acquired the citizenship of that country before that date.

13. *In the present case, the Government of India in its order dated 21st July, 1995 passed under Section 9(2) of the Citizenship Act (which has been impugned in the writ petition) held:*

“....There is no dispute in this case that the applicants went to Pakistan and acquired the Pakistani passport voluntarily. They stayed there for three years, which is not a short period. They obtained Pakistani passport after applying for it and after declaring themselves as Pakistani nationals. Further, the applicants have failed to adduce any documentary evidence to show that the Pakistani passport was obtained by fraud or under compelling circumstances, there may not be any hesitation whatsoever in declaring them Pakistani nationals.

Now, therefore, the Central Government in exercise of the powers conferred on it under Section 9(2) of the

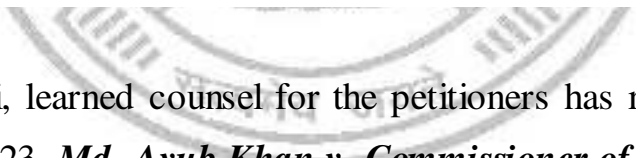
Citizenship Act, 1955 and the Rules made thereunder and consideration of all the facts and circumstances of the case and relevant material on records, has come to a conclusion that the acquisition of a Pakistani passport and visa for visit to India by the applicants were voluntary acts and there was no compulsion on them. The applicants acquired the Pakistani citizenship voluntarily and, therefore, their claim to be Indian citizens deserves to be rejected and is hereby rejected.”

14. *We do not find any infirmity in the order dated 21st July, 1995 determining the national status of the appellants under Section 9(2) of the Citizenship Act. Before us as well, the appellants failed to prove by any evidence whatsoever that they had not voluntarily migrated to Pakistan and had obtained the Pakistani passports under compelling circumstances. Rather their conduct after coming to India also shows that they had voluntarily migrated to Pakistan and obtained the passports from the then Government of Pakistan after declaring themselves to be citizens of Pakistan. Soon after coming to India as per rules they got themselves registered with the registration authority concerned. On 7th May, 1995, on the expiry of the visa period they again went to Police Station Ratangarh and declared that they would be going back to Pakistan by the evening train. Instead of returning back to Pakistan they illegally stayed in India. Had the intention of the appellants been that they had not acquired the citizenship of Pakistan and the passport from that country voluntarily, as has been projected before us then they would not have declared their intention of returning to Pakistan on the expiry of the visa period on 7th May, 1995. Further, they would not have gone underground. Efforts would have been made by them way back in the year 1955, to acquire the citizenship of India afresh. The order passed by the Union of India is factually correct and in accordance with law.*

15. *We agree with the High Court that a case for interference with the order of deportation is not made out. Long stay in the country and enrolment in the voters’ list would not confer any*

right on an alien to continue to stay in the country. We do not find any infirmity either with the reasoning adopted or the conclusion arrived at by the High Court or even by the Government of India in its order dated 21st July, 1995 passed under Section 9(2) of the Citizenship Act, 1955.

16. After the conclusion of the cases, counsel for the appellants contended that the application of the appellants under Section 5 of the Citizenship Act is pending with the authorities concerned and the observations made in this case might prejudice the claim made by the appellants under Section 5 of the Citizenship Act. We have decided the civil appeal against the order passed by the High Court of Rajasthan arising from the civil writ petition filed by the appellants in the said Court and the claim made thereunder. Similarly, we have decided the writ petition filed in this Court directed against the order passed by the Government of India under Section 9(2) of the Citizenship Act. No opinion on the merits or demerits of the application filed by the appellants under Section 5 of the Citizenship Act has been expressed. It would be open to the authorities to proceed and decide the application, if any, filed by the appellants under Section 5 of the Citizenship Act and decide the same (if not already decided) in accordance with law.”

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9. Mr.Pancholi, learned counsel for the petitioners has relied upon AIR 1965 SC 1623, ***Md. Ayub Khan v. Commissioner of Police, Madras and others***, in support of his contention that the petitioner No.1 did not acquire citizenship of Pakistan voluntarily and in view thereof, he would be deemed to be an Indian Citizen.
 10. We have heard the learned counsel for the parties; given our thoughtful consideration to the matter. The undisputed facts which emerge from the writ petition are that the petitioner No.1 entered India somewhere in the year 1989-90 on a passport issued by the

Government of Pakistan. The judgment in the case of **Bhanwaroo Khan** (supra) has drawn a distinction and made it abundantly clear that in the case of Pakistan, no person can acquire a Pakistani Passport without making a categorical assertion that he is a citizen of Pakistan, which in this case would also hold true. Thus, it leaves no room for doubt that at the relevant time when the petitioner entered India, he was a citizen of Pakistan.

11. We find that since 1989 up to the period the petitioner No.1 was arrested and thereafter convicted and, in fact, till date no steps have been taken by petitioner No.1 to apply for an Indian Citizenship. We also find that there is no document on record to show that the petitioner No.1 was born to parents who were Indian Citizens. In the absence thereof, no ground is made out to allow the petitioner No.1 to stay in this country without valid documents.
12. At this stage, the learned counsel for the petitioners submits that petitioner No.1 would, at the first instance, apply for Indian Citizenship in accordance with law and also make a representation to the respondents giving particulars of all the family members who would stand surety in case petitioner No.1 is released from the Detention Home. We have no hesitation in saying that in case petitioner No.1 applies and/or makes a representation, it would be considered in accordance with law. Mr.Pancholi submits that the petition may be disposed of in the above terms.
13. The writ petition is accordingly disposed of.

Crl. M.A. Nos.2980/2017 & 2981/2017

14. The applications also stand disposed of.

G. S. SISTANI, J.

VINOD GOEL, J.

MARCH 09, 2017/ka

