

State vs Mt. Dukhtari on 27 August, 1953

Equivalent citations: 1954CRILJ379

JUDGMENT

Malik, C.J.

1. The respondents were prosecuted under Section 5, Influx from Pakistan (Control) Act, 1949, (Act No. 23 of 1949) but were acquitted by the learned Magistrate. The State has filed these appeals and the point urged on behalf of the State is that the order of acquittal was incorrect.

2. The facts are really not in dispute. The respondents were all residents of various villages in Haldwani, district Naini Tal presumably of parents who were also residents there. In the year 1948 Samvat Dukhtari, who is the respondent in Government Appeal No. 374 of 1952, went from Haldwani to West Pakistan. She went with her parents and left behind her husband in Haldwani. The other respondents in the other six cases left in May 1950, except Nabi Raza Khan who left in July 1950. All the seven accused persons admittedly went to West Pakistan without a permit and then came back to India 'via' East Pakistan. Four of them, namely, Smt. Dukhtari, Natai Jan Khan, Abdul Rauf and Smt. Rais, wife of Abdul Rauf, returned to India on 8-11-1950, while three of them viz. Abdul Hamid, S. K. Ifran and Nabi Raza Khan returned to India in October, 1950. They were prosecuted on the ground that having entered Indian Union without a valid permit, as required by Section 3 of the Act and the rules framed thereunder, the respondents were guilty under Section 5 of the Act.

3. The learned magistrate acquitted them as he was of opinion that the accused were not persons domiciled in India to whom Clause (d) of Rule 31(2) applied. The magistrate's reasoning was that they were not persons domiciled in India as they had not acquired a domicile by residence but by birth. In other words, the learned magistrate was of the opinion that the words "persons domiciled in India" did not include persons whose "domicile of origin was India". On behalf of the State it is argued that there is no warrant for this interpretation and the decision of the learned magistrate is, therefore, wrong.

4. Section 3, Influx from Pakistan (Control) Act, 1949, hereafter called "the Act", provides:

No person shall enter India from any place in Pakistan whether directly or indirectly unless-

(a) he is in possession of a permit, or

(b) being a person not domiciled in India or Pakistan, he is in possession of a valid passport as required by the Indian Passport Act 1920, or

(c) he is exempted from the requirement of being in possession of a permit by or in accordance with rules made under this Act.

It cannot be disputed that the accused persons do not come under Clause (b) of the Act. Unless therefore it can be pointed out that the accused were exempted under some rule made under this Act, Clause (a) will apply to them and it will have to be held that they were not entitled to enter India from any place in Pakistan without the necessary permit.

5. Section 4 gives the Central Government power to make rules. Under the powers given under that section the Central Government has made certain rules which are known as Permit System Rules, 1949. Rule 31 is the only rule that need be referred to, the relevant portion of which is as follows:

Subject to the provisions of Sub-rule (2) a person entering India from any place in East Pakistan shall be exempt from the requirement of being in possession of a permit.

The accused person entered India from East Pakistan so they would be exempt from the requirement of a permit, if the provisions of Sub-rule (2) applied to them. The relevant portion of Sub-rule (2) is as follows:

Notwithstanding anything contained in sub-r, (1), the following classes of persons entering India from any place in East Pakistan, shall be required to be in possession of a permit, that is to say:

(a) persons whose domicile of origin is in West Pakistan : "

(It is not necessary to refer to the provisos under the sub-rule.) "(b) Persons whose domicile of origin is in East Pakistan but who are residing in West Pakistan by reason of any employment or in the exercise of any trade, profession or calling;

(c) Persons whose domicile of origin was in India but who have acquired a new domicile in West Pakistan;

(d) Persons domiciled in India, who after a temporary visit to, or stay in West Pakistan, return to India through East Pakistan.

It will be noticed that in this sub-rule the words "domicile of origin", "new domicile" and "persons domiciled in India" have been used. Sub-rule (3) of Rule 31 lays down that-

the expressions "domicile of origin" and "new domicile" have the same meaning respectively as these terms have in sections 7 and 10, Succession Act.

Section 7, Succession Act (Act 30 of 1925) lays down that -

The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the ' father's death.

while Section 10 lays down that-

A person acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile or origin".

It will be noticed that while Sub-rule (3) of Rule 31 provides that the expressions "domicile of origin." and "new domicile" have the same meaning as in the Indian Succession Act, no attempt has been made to define the word 'domicile' itself.

6. The contention of the learned Counsel for the accused is that the word "domicile" in "persons domiciled in India" means a "new domicile", as defined in Section 10, Succession Act, 1925. There is absolutely no warrant for this argument. In fact, a reference to Section 7 itself of the Indian Succession Act makes it clear that the contention of learned Counsel has no force. The section lays, down that -

the domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled;.

The words 'father was domiciled' cannot mean, that his father had acquired his domicile by residence only and not by birth. The words 'father was domiciled' in Section 7, Succession Act, must clearly include both 'domicile of origin' i.e. a 'domicile by birth' or a 'domicile by acquisition' by giving up the domicile by birth and acquiring a fresh domicile by residence.

7. The learned magistrate fell into the error of thinking that the expression "persons domiciled in India" in Clause (d) of Sub-rule (2) of Rule 31 was confined only to cases of persons who had acquired a new domicile and did not apply to cases of persons whose "domicile of origin" was India. It is now well settled and it is not necessary to give any authority for the proposition, that a man cannot have more than one domicile. His domicile by birth is regulated in India by various provisions of the Indian Succession Act. Sections 7 and 8 apply to the cases of legitimate & Illegitimate children. Section 9, Succession Act provides that 'the domicile of origin prevails until a new domicile has been acquired', and Section 10 makes a provision how a new domicile can be acquired.

In the various clauses of Sub-rule (2) Rule 31, separate provision has been made for cases where it was intended that the rule should apply to persons whose 'domicile of origin' or 'new domicile' was in India or Pakistan. Having used the words 'new domicile' in Clause (c) there was no reason why the same word or similar words should not have been used in Clause (d) if it was intended that the words "persons domiciled in India" should not include persons born here but only those who were born outside India and acquired a new domicile in India. In our view the words "persons domiciled in India" in Clause (d) of Sub-rule (2) of Rule 31 include both, persons who had acquired domicile by

birth and had retained that domicile and persons who were not of Indian domicile by birth but had acquired Indian domicile as defined in Section 10, Succession Act. We are, therefore, of the opinion that the accused were not granted exemption under Rule 31 and they were guilty under Section 5 of the Act.

8. Two arguments have been advanced by the learned Counsel - one is that Section 7 of the Act is 'ultra vires' and the Central Government has no power to direct by a general or special order the removal of a citizen of India from India even if he might have committed an offence under Section 5. It is not necessary for us to go into this question as the question does not arise. The question of removal would not arise till the conviction has been made and at present there is no order directing the deportation of any of these accused persons. Moreover, Mr. Sri Ram, Deputy Government Advocate, has stated on behalf of the State that the State has no intention of deporting any of the accused persons outside India and these appeals were filed merely for the clarification of the law.

9. Learned Deputy Government Advocate has pointed out that the word "migration" in the charge as also in the judgment of the lower court has been loosely used. It was not the case of any of the accused that they had migrated in the sense that they had left India without any intention of coming back to India and with the intention of settling in West Pakistan. Their case was that they had gone on a temporary visit with the intention of coming back to India when the conditions were more peaceful

10. The last point urged by the learned Counsel for the accused is that the Act is ultra vires, as the legislature had no right to pass such an enactment. Reliance is placed on the Government of India Act, 1935, Seventh Schedule, List I, Paragraph no. 17 which is as follows-

Admission into, and emigration and expulsion from India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India, or subjects of any Acceding State; pilgrimages to places beyond India.

Section 100 of the Government of India Act gave the Dominion Legislature power to make laws with respect to any of the matters enumerated in List I. It is said that correctly interpreted this paragraph does not give any power to the Dominion Legislature to pass an enactment controlling the admission into and emigration and expulsion from India of British subjects domiciled in India.

We do not think that this argument has any force. The punctuation given in the paragraph clearly indicates that after giving the general power of admission into and emigration and expulsion from, India, the Act goes on to provide that this power will include the regulation of the movements in India of persons who are not British subjects domiciled in India, or subjects of any Acceding State. These words do not control the general power given in the first sentence of the paragraph.

11. The result, therefore, is that these appeals are allowed and the orders passed by the lower courts are set aside. The respondents are convicted under Section 5 of the Act and are sentenced to pay a fine of Rs. 10/- each. In case of default in the payment of fine, the applicants shall undergo rigorous imprisonment for a period of 14 days.