Supreme Court of India
Abdul Sattar Haji Ibrahim Patel vs State Of Gujarat on 17 February, 1964
Author: C Gajendragadkar
Bench: P.B. Gajendragadkar (Cj), A.K. Sarkar, K.N. Wanchoo, K.C.D. Gupta, N.R.

CASE NO.:
Appeal (crl.) 153 of 1961

PETITIONER:
ABDUL SATTAR HAJI IBRAHIM PATEL

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT: 17/02/1964

BENCH:
P.B. GAJENDRAGADKAR (CJ) & A.K. SARKAR & K.N. WANCHOO & K.C.D. GUPTA & N.R. AYYANGAR

JUDGMENT:

JUDGMENT 1965 AIR (SC) 810 The Judgment was delivered by :

GAJENDRAGADKAR, C. J. :

This is an appeal by Abdul Sattar Ibrahim Patel by which he challenges the correctness and validity of the order passed by the High Court of Gujarat, convicting him under S. 14 of the Foreigners Act (XXXI of 1946) and sentencing him to suffer rigorous imprisonment for one year and to pay a fine of rupees one thousand, in default rigorous imprisonment for one year. The appellant was charged before the Judicial Magistrate (Ist Class) at Godhra with having committed an offence under S. 14 of the Foreigners Act. The case against him was that he was a foreigner and a national of Pakistan, and as such had obtained Passport No. 351544 from the Government of Pakistan on August 11, 1955, and had secured a 'C' Visa No. 22144, on October 5, 1957. It was alleged that with the said passport and 'C' Visa the appellant entered India on October 13, 1957, and obtained residential permit No. 322/57 valid upto December 12, 1957. The said permit was extended from time to time until April 12, 1958. Since the appellant did not leave India even though the residential permit issued in his favour had expired, he was alleged to have contravened the provisions of cl. 7 of the Foreigners Order, 1948, and thereby rendered himself liable to be punished under S. 14 of the Foreigners Act, 1946.

2. In resisting the charge thus framed against him, the appellant urged that he had not gone to Pakistan at all till the month of August, 1954. He pleaded that his parents were born in Godhra and they and all his brothers were and are living in Godhra all the time. He claimed the status of an Indian citizen and denied the charge against him that he was a foreigner. According to him, his marriage had taken place in Godhra, and preceding his marriage he had also been educated in Godhra. In the month of March, 1948 his father-in-law, Yusuf Haji Ismail; went to Pakistan and along with him went his wife. In 1954 the appellant had to go to Pakistan to bring back his wife to India, and in order to travel to Pakistan he made an application for a passport and obtained an

Indian Passport No. C. 041323 bearing the date April 8, 1954, Having travelled to Karachi with the Indian Passport, the appellant wanted to return with his wife to India, but his passport was deliberately taken away or destroyed by his father-in-law with a view to compel him to stay at Karachi, and that made it necessary for the appellant to obtain a Pakistani passport in order to come back to his country. He was advised that unless he obtained a Pakistani passport, he would not be able to return to India. That is how the main point raised by the appellant in defence against the charge framed by the learned Magistrate was whether he was and continued to be an Indian citizen at all material times.

3. The prosecution sought to prove its case mainly by relying on the passport obtained by the appellant, after making statements in his application for the said passport. The prosecution case was that the appellant had specifically admitted that he was a Pakistani citizen and had obtained a passport as such, and this, according to the prosecution, had happened long before 1954. The appellant led evidence to show that he was in India until 1954 and, as we have already indicated, he explained his conduct in obtaining a Pakistani passport on the ground that circumstanced as he was in Karachi, be was helpless and he adopted a course which appeared to him to be the only course available for coming back to India.

4. The learned Magistrate who tried the case was not satisfied that prosecution had proved the charge against the appellant beyond reasonable doubt. Having regard to the evidence produced before him, the learned Magistrate held that the case against the appellant under S. 14 could not be said to be established. In the result, the appellant was acquitted under S. 251-A (11) of the Criminal Procedure Code. The respondent, the State of Gujarat, then preferred an appeal against the said order of acquittal. It was urged by the appellant before the High Court that the High Court would not be justified in interfering with the order of acquittal passed by the learned Trial Magistrate. But the High Court took the view that the question raised for its decision was of some importance; and having considered the point of law argued before it and having examined the evidence on which the parties relied, the High Court held that the charge had been proved against the appellant and so it set aside the order of acquittal and convicted him under S. 14. The appellant then applied for and obtained a certificate from the High Court to come to this Court, and it is with the said certificate that the present appeal has been brought before us.

5. The true legal position in regard to the status of a citizen like the appellant is not in doubt. Article 5 of the Constitution provides that any person who has his domicile in the territory of India at the commencement of the Constitution and who satisfies one of the three conditions specified by cls. (a), (b) and (c) of the said Article shall be a citizen of India. The three conditions are alternative and not cumulative, and so, if any one of those conditions is satisfied, a person would be deemed to be a citizen of India if he had his domicile in the territory of India on January 26, 1950. It is, however, important to bear in mind that the basic condition is that the person must have his domicile in India on the date when the Constitution came into force. If that condition is satisfied, the person must show that he was either born in India; or either of his parents were born in India or he had been ordinarily resident in India for not less than five years immediately preceding such commencement.

6. Article 7 with which we are concerned in the present appeal provides that notwithstanding anything contained in Articles 5 and 6, a person who has after the first day of March 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India. There is a proviso to this Article but that proviso is not relevant for our purpose. This article says that if a person is shown to have migrated after the 1st of March, 1947, from India to Pakistan he could not claim the status of an Indian citizen, notwithstanding the fact that he may satisfy the three conditions prescribed by Article 5. It has been settled by the decisions of this Court that the migration to which Art. 7 refers must have taken place between March 1, 1947 and January 26, 1950 (vide State of Madhya Pradesh v. Peer Mahomed, 1963 AIR(SC) 645.)

7. Cases in which migration has taken place after January 26, 1950, fall to be considered under Art. 9 of the Constitution. Article 9 provides that no. person shall be a citizen of India by virtue of Art. 5, or be deemed, to be a citizen of India by virtue of Ad. 6 or Art. 8 if he has voluntarily acquired the citizenship of any foreign State.

8. It is necessary to emphasize in this connection that the requirement of migration postulates that the person must have left India with the intention of residing permanently in Pakistan. Leaving India casually for a specific purpose without intending to settle down permanently in Pakistan would not amount to -migration (vide Smt. Shanno Devi v. Mangal Sain, 1961 AIR(SC) 58 ).

9. In dealing with the cases falling under Art. 9 it is necessary to take recourse to the relevant provisions of the Citizenship Act, 1955, and the rules framed thereunder. In lzhar Ahmad Khan v. Union of India, 1962 AIR(SC) 1052 it has been held by this Court that R. 3 of Sch. III, framed under S. 9 (2) of the Citizenship Act is valid, and so, whenever a question as to whether a person has acquired the citizenship of a foreign State falls to be considered, the jurisdiction to decide that question vests exclusively in the Government of India, and in determining the said question the Government of India may exercise its powers as prescribed by the relevant rules and may reach its decision in the light of R. 3 of Sch. III. It has also been held that if the question about the acquisition of citizenship of a foreign country has not been determined, in respect of any person, by the Government of India as prescribed by the relevant rules, it would not be open to any State to prosecute the said person on the basis that he has lost his citizenship of India and has acquired the citizenship of a foreign country. A decision by the Government of India is a condition precedent in that behalf vide Government of Andhra Pradesh v. Mohd. Khan, 1962 AIR(SC) 1778 ).

10. There is one more point which deserves to be mentioned before dealing with the merits of the case. The appellant is being prosecuted under S. 14 of the Foreigners Act, 1946 (XXXI of 1946). In determining the question as to whether he is a foreigner within the meaning of the said Act or not, S. 9 of the Act will have to be borne in mind. Section 9 applies to all cases under the Act which do not fall under S. 8, and this case does not fall under S. 8, and so , S. 9 is relevant. Under this section, the legislature has placed the burden of proof on a person who is accused of an offence punishable under S. 14. This section provides inter alia that where any question arises with reference to the said Act, or any order made, or direction given thereunder whether any person is or is not a foreigner, the onus of proving that such a person is not a foreigner, shall notwithstanding anything contained in the Indian Evidence Act, lie upon such, person; so that in the present proceedings in deciding the

question as to whether the appellant was an Indian citizen within the meaning of Art. 5, the onus of proof will have to be placed on the appellant to show that he was domiciled in the territory of India on January 26, 1950 and that he satisfied one the three conditions prescribed by cls. (a), (b) and

(c) of the said Article. It is on this basis that the trial of the appellant will have to proceed.

11. Reverting then to the material facts in this case, the main issue which had to be decided was whether the appellant satisfies the requirements of Art. 5. His case was that he had his domicile in India on January 26, 1950, and he satisfies the tests prescribed both by cls. (a) and (b) of Art. 5. There is no. dispute that the appellant was born at Godhra and that his parents also were born at Godhra. In fact, it is common ground that the family of the appellant is still domiciled in India and his brothers and parents continue to enjoy the status of Indian citizens. The prosecution, however, alleged that he had left India sometime in 1948, and so, Art. 5 was inapplicable to him, and his case had to be determined under Art. 7. If the appellant is shown to have lost his domicile in India on January 26, 1950, there would be no. doubt that Art. 5 would be inapplicable to him and the case may have to be decided under Art. 7. On the other hand, if the appellant is able to show that he did not leave India until 1954, the case would fall under Art. 5. and if the prosecution desires to treat the appellant as a foreigner it would be necessary for the prosecution to take action under the relevant provisions of the Citizenship Act, read with Art.

9. Such a course has not been adopted, and it is, therefore, unnecessary to consider any facts which would be relevant in that behalf.

12. So the narrow question is : does the appellant show that he was domiciled in India and was residing in India on January 26, 1950 ? On this point, the appellant led oral and documentary evidence which has been considered by the Trial Judge as well as the High Court. The Trial Judge was to some extent impressed by the said evidence, but the High Court has rejected that evidence and has made a definite finding that the appellant had failed to establish that an Indian Passport had been issued to him in 1954 or at any time. In dealing with this question the High Court has no. doubt made some observations as to the true scope and effect of the provisions contained in Arts. 5, 7 and 9, which do not correctly represent the true legal position in that behalf. But it is unnecessary for us to comment on those observations because we are satisfied that the appellant is entitled to have an opportunity to prove his case that he was staying in India until 1954, and left India on an Indian Passport issued to him in that year. Therefore, we do not propose to express any opinion on the evidence adduced by the respective parties, at this stage. In view of the conclusion that we have reached, we would prefer to leave the matter to be decided by the learned Magistrate afresh in the light of the additional evidence which we propose to permit the appellant to produce before him.

13. It appears that during the course of the trial the appellant wanted to prove his case that he had obtained an Indian passport in 1954 by examining certain witnesses, and in that behalf he filed a list of witnesses on January 21, 1960. Amongst these witnesses was witness No. 6, clerk of the D. F. O, of the assistant Secretary, Political and Services Department, and he was called upon to produce the original or copy of the Indian Passport No. C. O. 41323 dated April 8, 1954, given to the appellant and all applications made by the appellant in regard to it. The list contained the names of other

witnesses also, some of whom were examined. Summons to the 6th witness was sent through the Chief Secretary to the Government of Bombay. For no. fault of the appellant, the witness did not turn up and the passport was not produced, and as we have already stated, the other evidence adduced by the appellant was not accepted by the High Court.

14. When the matter was argued before us, Mr. Bishan Narain stated that as a result of an earlier order passed by this Court, the record in regard to the appellant's Indian Passport had been sent for and he wanted an opportunity to satisfy us that the said record fully established his case. That is why though the appeal was argued elaborately before us on December 17, 1963, we ordered that it should be treated as part-heard, and gave opportunity to Mr. Bishan Narain to mention, it to us again after the record was received. Thereafter part of the record has been received and the matter has been further argued before us. This record does not contain the Indian passport issued to the appellant on which he has relied. But it prima facie seems to support his case. The documents which have been sent to this Court indicate that the appellant had applied for a passport in March 1954, and after the said application was received by the District Magistrate, Panchmahal, the usual enquiry was made. The questions on which the enquiry was made are set out in the document sent to this Court, and the endorsement made in respect of the said items of enquiry is also to be found on the document. These endorsements read in the light of the questions tend to show that on March 13, 1954, the police sub-inspector of Godhra was satisfied from his own enquiry that the appellant wanted to go to his aunt and to his father-in-law, who was staying in Pakistan where he had gone before the Godhra riots. The endorsements further show that, according to the sub-inspector, the appellant was a citizen of India at the relevant date, which is March 13, 1954. The sub-inspector also said that he saw no. objection or reasons to refuse an Indian passport to the appellant. If the contents of this document are proved, there would be no. difficulty in establishing the identity of the appellant with the person to whom the said contents refer. In that case the appellant's version that he was an Indian citizen upto March 1954 and had obtained a passport about that time would receive considerable corroboration. Documentary evidence of this type, coming from official custody, would undoubtedly go a long way in favour of the appellant when the Court considers the other evidence already adduced by him. We are, therefore, inclined to take the view that the appellant should be given a chance to prove this evidence and the issue in question should be determined afresh in the light of this evidence and such other evidence as may be adduced by the parties hereafter, as well as the evidence already on record. The appellant has been struggling to assert his status as a citizen of India during all these years, and it in fact he applied for Indian passport in March 1954, we see no. reason why he should not be given an opportunity to prove his case, particularly when the failure of the official witness to appear before the Court in time cannot be said to be the result of any default on the part of the appellant. We would accordingly set aside the order of conviction and sentence passed by the High Court against the appellant and remand the case to the Court of the Judicial Magistrate, First Class, at Godhra, with the direction that he should give opportunity to the appellant and the prosecution to lead further evidence on the points at issue and should consider the whole of the evidence, and then make his findings.

15. The result is : the appeal is allowed, the orders of conviction and sentence are set aside, and the case is sent back to the trial Magistrate to be dealt with according to law, in the light of this judgment.

Appeal allowed.