

1962

November, 27.

FATEH MOHD, SON OF NATHU

v.

DELHI ADMINISTRATION

(S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA
 AYYANGAR and J. R. MUDHOLKAR, JJ.)

Foreigner—Definition—Amendment, Effect of—Offence committed by foreigner after amendment—Onus of proof—Foreigners Act, 1946, (31 of 1946), ss. 3, 14—The Foreigners Laws (Amendment) Act, 1957 (11 of 1957), s. 2 (a)—Constitution of India, Art. 5.

The appellant entered India on May 9, 1956, on a Pakistani passport. He had a visa permitting him to stay in India for three months. He had to leave India on or before August 8, 1956. As he failed to do so, a notice under s. 3 (2) of the Foreigners Act, 1946, as amended in 1957, was served on him on November 19, 1959, by the Delhi Administration. As he did not comply with the requirements of the notice, he was prosecuted under s. 14 of the Foreigners Act and convicted. His appeal and revision were dismissed. He came to this court by special leave. His contention was that he was not a foreigner within the meaning of the definition of a foreigner as it existed at the time he entered India, and he was not a foreigner even under the amended definition.

Held, that the appellant was a foreigner under the amended definition and he had committed a breach of the order served on him after the amended definition of foreigner came into force. In disobeying the directions given to him by the Delhi Administration, he had committed an offence within the meaning of s. 14 of the Foreigners Act. Before the amendment of the definition in 1957, a person born within His Majesty's Dominion and owing allegiance was a citizen of India, but after the amendment in January, 1957 a person who was not a citizen of India became a foreigner. After that date, if an order was issued by the Central Government in exercise of powers conferred on it under s. 3 of the Act, it was the duty of such a foreigner to obey that order and if he did not do so, he committed an offence within the meaning of s. 14 of the Act. The appellant was certainly not a foreigner when he entered India, but in view of the amendment of the definition, he became a foreigner after January 19, 1957. He could not be convicted for an offence for an act done by him before the amendment on the

basis that he was a foreigner, but in the present case he had been punished for not complying with an order passed after the amendment.

The burden of proving that he was not a foreigner was on the appellant and he had failed to discharge that burden. The legality of an act done by a person must be judged on the basis of the existing law at the time the act is done.

Union of India v. Ghaus Mohammad, [1962] 1 S.C.R. 744 followed *Fida Hussain v. State of Uttar Pradesh* [1962] 1 S.C.R. 776, distinguished.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 121 of 1961.

Appeal by special leave from the judgment and order dated May 26, 1961 of the Punjab High Court, Circuit Bench at Delhi in Criminal Revision No. 159-D of 1961.

Nur-ud-din Ahmed and *Naunit Lal*, for the appellant.

V. D. Mahajan and *P. D. Menon* for *R. N. Sachthey*, for the respondent.

1962. November 27. The Judgment of the Court was delivered by

SUBBA RAO, J.—This appeal by special leave is directed against the order of the Punjab High Court dismissing the Revision petition filed against the order of the Additional Sessions Judge, Delhi.

The appellant entered India on May 9, 1956, on a Pakistan passport dated February 11, 1956. He had a visa endorsed on the said passport permitting him to stay in India for three months. Under that visa he had to leave India on or before August 8, 1956. As he failed to do so, a notice under s. 3 (2) of the Foreigners Act, 1946, as amended in 1957, hereinafter called the Act, was served on him on

1962

Fateh Mohd
Son of Nathu

v.

Delhi Administration

Subba Rao, J.

1962

Fateh Mohd
Son of Nathu

v.

Delhi Administration

Subba Rao, J.

November 19, 1959, by the Delhi Administration. By that notice he was asked to report his presence personally to the Foreigners Regional Registration Officer, Taj Barracks, Janpath, New Delhi, between 11 A. M. to 12 noon daily and enter into a personal bond in the amount of Rs. 5,000/- with two sureties in the amount of Rs. 10,000/- each for the due observance of the restriction imposed on his movements. The appellant did not comply with the requirements of the notice. Therefore he was prosecuted under s. 14 of the Act for violating the provisions of s. 3 in the Court of the Sub-Divisional Magistrate, Delhi. The appellant pleaded in defence that the said notice was not served on him and that he was a citizen of India. The learned Magistrate held on the evidence that the said notice was served on him and that he was not a citizen of India but a foreigner within the meaning of that Act and that he had committed an offence, inasmuch as he did not comply with the provisions of the said notice. On those findings he convicted him under s. 14 of the Act and sentenced him to six months' rigorous imprisonment. On appeal the Sessions Judge, Delhi confirmed the findings of the Magistrate and dismissed the appeal filed by him. He held that the burden was upon the appellant to prove that he was not a foreigner and that he had failed to discharge the same. He also rejected the plea of the appellant viz. that as on the date he entered India, he was not a foreigner within the meaning of the definition of 'foreigner' as it then stood he could not be convicted, on the ground that he was prosecuted for an offence committed after the definition was amended. The High Court confirmed the conviction of the appellant and the sentence passed against him. Hence the appeal.

The learned counsel Mr. Nur-ud-Din appearing for the appellant raised before us the following two points: (1) the appellant was not a foreigner

within the meaning of the definition of a foreigner as existed at the time he entered India, i. e. on May 9, 1956, and therefore the High Court went wrong in convicting him, and (2) the appellant is not a foreigner even under the amended definition.

To appreciate the first contention it will be convenient to read the relevant provisions of the Foreigners Act, 1946 :—

Section 3 :

“The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein.

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner.....

(a) x x x

(b) x x x

(c) x x x

(d) x x x

(e) shall comply with such conditions as may be prescribed or specified—

(i) requiring him to reside in a particular place;

(ii) imposing any restrictions on his movements;

1962

Fateh Mohd
Son of Nathu

v.
Delhi Administration

Subba Rao, J.

1962

Fateh Mohd
Son of Nathu
v.
Delhi Administration
Subba Rao, J.

(iii), (iv), (v), (vi), (vii), (viii), (ix), (x)

- (f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of any or all prescribed or specified restrictions or conditions:

The definition of a foreigner as it stood in 1953 was : 'Foreigner' means a person who is not a natural born British subject as defined in sub-sections 1 & 2 of s. 1 of the British Nationality and Status of Aliens Act, 1914.

Section 1 (1) of the British Nationality and Status of Aliens Act, 1914, is in these terms :

'The following persons shall be deemed to be natural-born British subjects, namely, —

- (a) any person born within His Majesty's Dominion and allegiance.'

The definition of a foreigner was substituted by the Foreigners Laws (Amendment) Act, 1957 (II of 1957) S. 2 (a). This amendment came into force with effect from January 19, 1957. Under the said definition, 'foreigner' means a person who is not a citizen of India. Section 14 is : 'If any person contravenes the provisions of this Act or of any order made thereunder, or any direction given in pursuance of this Act or such order, he shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if such person has entered into a bond in pursuance of clause (f) of Sub-s. (2) of s. 3, his bond shall be forfeited; and any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting Court why such penalty should not be paid.'

The gist of the foregoing provisions relevant to the present inquiry may be stated thus: Under the definition of a foreigner as it stood in the Act in 1953 before the amendment of 1957, any person born within His Majesty's Dominion and allegiance was a citizen of India but after the amending Act II of 1957 which came into effect from January 19, 1957, a person who is not a citizen of India is a foreigner. After that date if an order is issued by the Central Government in exercise of powers conferred on it under s. 3 of the Act directing a foreigner so defined and prescribing certain conditions for his stay, it is the duty of such a foreigner to obey the said order. If he did not, he would be committing an offence within the meaning of s. 14 of the Act.

In the light of the said provisions let us look at the facts of the present case. As aforesaid the appellant entered India in 1956 on a Pakistan passport, the visa endorsed on it enabled him to stay in India till August 8, 1956. The Delhi Administration made an order and served on him on November 19, 1959, imposing the restrictions on his stay. Admittedly the appellant did not comply with the said restrictions and therefore he committed an offence within the meaning of s. 14 of the Act.

It is contended that as the appellant was not a foreigner at the time he made his entry into India, he could not be convicted on the basis he was a foreigner within the meaning of the definition of a foreigner as subsequently amended. There is a fallacy underlying in this argument. The appellant was certainly not a foreigner when he entered India under the definition of a foreigner as it then stood. In view of the amendment of the definition he became a foreigner after January 19, 1957. He could not be convicted for an offence for an act done by him before the amendment on the basis he was a

1962

Fateh Mohd
Son of Nathu
 v.
Delhi Administration
Subba Rao, J.

1962

Fateh Mohd
Son of Nathu

v.

Delhi Administration

Subba Rao, J.

foreigner ; for instance an act done by him such as his entry into India or his non-compliance with the conditions of an order issued on him before the amendment on the foot that he was a foreigner. But the offence for which he is now charged is an act done by him in derogation of an order issued to him after the amendment. On the date when the Delhi administration served on him the notice imposing certain restrictions and directing him to comply with certain conditions for his stay he was a foreigner within the meaning of amended definition. On the basis of the existing law he committed an offence and it will be futile for him to contend that he was not a foreigner under the original definition. The legality of the act done by him must be judged on the basis of the existing law as the act was done subsequent to the amendment. Reliance is placed upon the decision of this court in *Pida Hussain v. State of Uttar Pradesh* ⁽¹⁾ in support of the contention that as the appellant was not a foreigner when he made the entry, he could not be convicted on the ground he was a foreigner. But the facts of that case are different from those in the present appeal and that decision is clearly distinguishable. There a person was born at Allahabad at the time when it was his Majesty's Dominion. He had left India to Pakistan but returned on a passport granted by the Government of Pakistan on May 16, 1953. He had a visa endorsed on his passport by the Indian authorities permitting him to stay in India for three months and this permission was later extended up to November 1953. Under Paragraph 7 of the Foreigners Order 1948 issued under s. 3 of the Foreigners Act, every foreigner entering India on the authority of a visa shall obtain from the appropriate authority a permit indicating the period during which he is authorised to remain in India and shall, unless that period is extended, depart from India before its expiry. As the appellant stayed after November 15, 1953, without permission given

(1) [1962] 1 S.C.R. 776.

under that order, he was prosecuted for breach of the said order. It would be seen from the said facts that the appellant therein was prosecuted for an offence committed by him before the Amending Act of 1957 came into force on January 19, 1957. This court on the said facts held that the appellant therein could not be convicted for the breach of Paragraph 7 of the Foreigners Order as he not being a foreigner at that time could not have committed a breach thereof, but clearly this decision cannot apply to an offence committed by a person who falls within the amended definition of 'foreigner', after the Amending Act came into force. Indeed this court in express terms left open that question at page 1523 "No question as to the effect of the amended definition on the appellant's status fell for our decision in this case, for we were only concerned with his status in 1953. We would also point out that no order appears to have been made concerning the appellant under s. 3(2) (c) and we are not to be understood as deciding any question as to whether such an order could or could not have been made against the appellant." What has been left open in that decision is to be considered in the present case. The appellant who is a foreigner under the amended definition has committed a breach of an order served on him after the amended definition of a foreigner came to hold the field. The appellant therefore in disobeying the directions given to him by the Delhi Administration has committed an offence within the meaning of s. 14 of the Act.

Even so it is contended that the appellant is an Indian citizen and therefore is not a foreigner within the meaning of the amended definition of a foreigner under the Act. Some of the relevant provisions of the Constitution and the Citizenship Act 57 of 1955 may conveniently be extracted. Article 5 of the Constitution says :—

"At the commencement of this Constitution,

1962

*Fateh Mohd
Son of Nathu*

*v.
Delhi Administration*

Subba Rao, J.

1962

Fateh Mohd
Son of Nathu

v.
Delhi Administration

Subba Rao, J.

every person who has his domicile in the territory of India and—

- (a) who was born in the territory of India; or
- (b) either of whose parents was born in the territory of India; or
- (c) who has been ordinarily resident of the territory of India for not less than five years immediately preceding such commencement,

shall be a citizen of India.”

Section 9 of the Indian Citizenship Act, 1955 is in these terms :—

“If in any case not falling under s. 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner..... the onus of proving that such person is not a foreigner.....shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) lie upon such person”.

Under Art. 5(a) of the Constitution the appellant cannot be a citizen of India unless he was born in the territory of India and had his domicile in the territory of India at the commencement of the Constitution. In this case the appellant claimed to be a citizen under Art. 5(a) of the Constitution. By reason of s. 9 of the Foreigners' Act whenever a question arises whether a person is or is not a foreigner, the onus of proving that he is not a foreigner lies upon him. The burden is therefore upon the appellant to establish that he is a citizen of India in the manner claimed by him and therefore he is not a foreigner. This court in *Union of India v. Ghaus Mohammad* ⁽¹⁾ accepted this legal position and laid down at page 748 thus :—“It does not seem to have

(1) [1962] 1 S. C.R. 744.

been realised that the burden of proving that he was not a foreigner, was on the respondent and appears to have placed that burden on the Union. This was a wholly wrong approach to the question." Rightly throwing the onus on the appellant the Magistrate considered the evidence and came to the conclusion that the appellant had failed to prove that he was a citizen of India and therefore not a foreigner. The learned Additional Sessions Judge after noticing that the onus was on the appellant considered the evidence both oral and documentary and came to the conclusion that the appellant had failed to discharge the onus. It cannot be and indeed is not suggested that the said finding is vitiated by any error of law, but it is contended that the Additional Sessions Judge was not justified in ignoring the evidence of respectable witnesses who spoke to the fact that the appellant was born in India and continued to reside in India at the date of the commencement of the Constitution and thereafter. The learned Additional Sessions Judge as a Judge of fact considered the evidence in the light of probabilities and the documentary evidence and rejected the same as unworthy of credence. The High Court in revision refused to interfere with that finding. We do not see any permissible ground for interference with that finding in an appeal under Art. 136 of the Constitution.

1962

*Fateh Mohd
Son of Nathu**v.
Delhi Administration**Subba Rao, J.*

*No other point is raised before us.
The appeal fails and is dismissed.*