

Jit Singh
and others
v.
The State

Kapur, J.

- (5) the conviction of Bahadur Singh under section 302 of the Indian Penal Code, is set aside and he is acquitted of that charge;
- (6) the convictions and sentences of the accused Dharam Singh, carpenter, Jit Singh Mazhabi, Gurmej Singh, Jat, Sohan Singh Mazhabi, Jogindar Singh, Daya Singh, Jit Singh, Jat, Bhagat Singh, Gaura Singh, Kartar Singh, Surjan Singh and Dharam Singh Mazhabi who assaulted Indar Singh, Mahbub Singh, Upar Singh P.Ws. and Bawa Singh as ordered by the Court below are upheld.

I agree that the sentences of all the accused for the different offences committed by them would be concurrent. The State appeal is, therefore, dismissed except as to Sadhu Singh's sentence.

Passey, J.

PASSEY, J.—I agree.

APPELLATE CRIMINAL

Before Kapur and Passey, JJ.

THE STATE,—Appellant

versus

ABDUL HAMID, ETC.,—Accused-Respondents.

Criminal Appeal No. 459 of 1956.

1957

Jan., 9th

Indian Evidence Act (I of 1872)—Section 86—Provisions of, whether mandatory—Certified copy of a foreign judgment—Copy not authenticated as required by section 86, whether admissible in evidence—Code of Criminal Procedure—Sections 591 and 537—Jurisdiction—Territorial defect of—No objection taken at the trial and no prejudice caused—Whether defect curable.

Held, that the provisions of section 86 of the Evidence Act are imperative and must be complied with. In the absence of the certificate referred to in the section, a foreign record is not admissible.

Held, further that the principle of Criminal Law in regard to jurisdiction when the defect sought to be set up is one of territoriality is that unless prejudice is shown the proceedings cannot be held to be null and void. This is the principle which is laid down in section 531 of the Criminal Procedure Code and section 537 lays down that in order to determine whether an irregularity in any proceedings has occasioned failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at the earlier stage in the proceedings.

Murli Das v. Achut Das (1), *Ganee Mahomed Sarkar v. Tarini Charan Chucherbati* (2), *In Re Rudolf Stallmann* (3), *Uttem Chand v. The Emperor* (4), *Lakhmi Chand v. The Emperor* (5), followed.

State Appeal against the acquittal of the respondent by Sh. V. D. Kakar, Magistrate 1st Class, Rohtak, Camp Sonapat, dated the 26th June, 1956, acquitting the respondents.

HAR PARSHAD, Assistant Advocate-General, for Appellant.

B. S. CHAWLA, for Respondents.

JUDGMENT

KAPUR, J. This appeal is brought against a judgment of acquittal passed by a Magistrate of the First Class, Rohtak, dated the 26th June, 1956, acquitting the respondents of an offence under the Indian Passport Act, 1920, read with Rule 6 of the Indian Passport Rules, 1950. Kapur, J.

The respondents claim to be husband and wife. They are Abdul Hamid, aged 25 years, a weaver,

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- (1) I.L.R. 5 Lah. 105.
 - (2) I.L.R. 14 Cal. 546.
 - (3) I.L.R. 39 Cal. 164.
 - (4) 2 P.R. 1902.
 - (5) 24 P.R. 1901.

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who claims to be a resident of Tanda (District Meerut), and Mst. Latifan, who is a daughter of Asmail, weaver and is aged 22 years and has been described as resident of Kirana in the district of Muzaffar Nagar (Uttar Pradesh). The question put to Abdul Hamid was that he was a national of Pakistan, having settled in Jhang Maghiana in West Punjab and that he had entered India without being in possession of a passport and had thereby contravened rule 3 of the Indian Passport Rules, 1950, made under section 3 of the Indian Passport Act, 1920, and had thereby committed an offence. His reply was that he never visited Pakistan, that he was living in Tanda and was an Indian National and that Latifan was his wife and was residing with him at Purkhas where they had been residing for a month prior to the arrest. Mst. Latifan was similarly put this question and she stated that she originally belonged to Tanda in the district of Meerut and had come to Purkhas about a month before the arrest. She also stated that she was married to the co-accused Abdul Hamid about the time of partition, i.e., 1947, that she had never been to Pakistan, that her parents had migrated from Panipat to Maghiana in the district of Jhang in West Pakistan and that they were Pakistan nationals.

Prosecution relied on the testimony of five witnesses and the defence produced three witnesses. The first witness for the prosecution is Mst. Subee, who is now residing in Chiniot in the district of Jhang (West Punjab). She stated that the mother of Latifan, accused and the mother-in-law of the witness were cousins and, therefore, Latifan was known to her. She also deposed that the maternal-uncle of Abdul Hamid, accused, was a relation of her mother-in-law. She herself had migrated to West Pakistan and so had Latifan's father, Asmail, and he had settled in Maghiana in West

Pakistan. He had taken his daughter Latifan with all the other members of his family at the time of the partition and was residing with his other members of the family in Pakistan. Latifan had been married at Chiniot to one Sabbir, but as the latter was a student in a college Mst. Latifan was living with her parents. She also stated that both the accused were nationals of Pakistan. There was no cross-examination on any important point of her first statement in examination-in-chief excepting that Sabbir, the first husband of Mst Latifan, is the son of the witness' younger brother and that the accused had entered India stealthily which is hardly admissible in evidence.

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The next witness is Samma, son of Subee, who also resides in Chiniot. He deposed that he knew both the accused and they were nationals of Maghiana, district Jhang, where they had been residing since the partition, and that Mst. Latifan had been married to Sabbir, who was his first cousin, about three years before the occurrence. She lived with him (Sabbir) for about a month or so and then went back to live with her parents as Sabbir was studying at a college. He also stated that about two months before the date he was making his statement, i.e., 27th April 1956, Latifan was in Chiniot with them and then she went to Maghiana with her brother. He then stated that Latifan was not married to Abdul Hamid who had abducted her. In cross-examination he stated that he was surprised to see the accused in Purkhas, and that Nur Mohammad, uncle of Mst. Latifan, had made a report. He further stated Abdul Hamid was closely related to him but was not related through marriage.

The most important witness for the prosecution is the father of the girl, Asmail, who is living in Jhang Maghiana, in West Pakistan. He stated

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that before the partition he was residing at Panipat, but he migrated to Pakistan at the time of the partition. Abdul Hamid also had migrated to Pakistan but he used to return to India occasionally. For about a year before Abdul Hamid came back to India he had been working with him at a *khadi* (loom) at Maghiana. Latifan had been married off about three years before to Sabbir, resident of Chiniot, and Abdul Hamid had abducted his daughter (Latifan) about 1½ months before. He had searched for her at Lahore and other places in Pakistan and then wrote to his brother at Kirana in Muzaffar Nagar District and he was informed by Nur Ahmad, his brother, that both his daughter Mst. Latifan and Abdul Hamid had been arrested by Ganaur Police. He had made a report at Maghiana about the abduction of his daughter Latifan. He produced a judgment of a Lahore Magistrate (Exhibit P.W. 3/A), to the admissibility of which objection was taken by the defence, but the Magistrate gave no decision on that question. In cross-examination he denied that Latifan had been married to Abdul Hamid previously and stated that Abdul Hamid could not be married to his daughter because Abdul Hamid was in relationship "his brother", meaning his cousin. He further deposed that Abdul Hamid's father used to live in Pakistan but he also had come away about three days previous to Abdul Hamid accused and that before that he was living at Maghiana with the witness.

The next witness is Ch. Bishan Singh, Lambardar of Purkhas. All he stated was that the accused were living in Purkhas but none of their other relatives was. The next witness is Sub-Inspector Iqbal Singh, but he cannot throw any light on the question now before us. All that he stated was that he investigated the case after getting necessary permission of the Magistrate and

that he lodged a complaint under section 3 of the Indian Passport Act.

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When examined after the close of the prosecution case the two accused persons had nothing to add.

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The defence have produced three witnesses. The first is Safi Ulla, who is a Pathan who described himself as a cultivator and resident of Tanda in district Meerut, although he was at the time a constable in Saharanpur Police, his number being 266, but was on leave. He stated that he knew the accused who were husband and wife and were married before the partition and since the partition they were living in India and did not migrate to Pakistan. When cross-examined he stated that the marriage took place a year before the partition but he was not invited to the marriage as he was a Pathan and the accused are weavers, nor was he present at the time of the marriage. He had been posted at Saharanpur and he knew nothing about the whereabouts of the accused. He also stated that he did not know whether "Abdul Hamid goes to Pakistan and comes back or not". In regard to Mst. Latifan he stated that she belonged to Kirana and he had seen her with Abdul Hamid, accused, in village Tanda, but on further question he stated "She observes purdah before me. Whenever I saw her with the accused Abdul Hamid, I saw her in purdah". He could give no particulars as to who the parents of Mst. Latifan were and he does not know when they migrated to Pakistan. In my opinion, this witness is unworthy of credit. He was not prepared to give his proper occupation nor did he say where he was residing and anything he stated in regard to Abdul Hamid seems to be absolutely false.

The next witness is Jalil Khan, who also belongs to Tanda. He stated that the marriage of

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Abdul Hamid was performed about a year or two before the partition and that neither of the accused had migrated to Pakistan. He is a Pathan and he was also not invited to the marriage. He did not know who solemnized the marriage of the two accused nor whether there was any document in regard to dower. When further asked as to whether the names of the accused persons existed in the electoral rolls he stated that he did not know. Although he stated that he was a Lambardar he was no longer a Lambardar as the post itself had been abolished.

The next witness is Munshi, who is a boatman. He deposed that he knew both the accused and that they were married before the partition and they never migrated to Pakistan. When cross-examined he stated that both the accused went away to Kirana after they married. He has never been to Kirana. He is a member of the Panchayat and did not know that the names of the accused persons were on the list of voters on the ground that he was illiterate. He also stated that the accused had left Tanda long ago and he did not know where the uncle of Mst. Latifan was living.

Both Jalil Khan and Munshi are unsatisfactory witnesses and their statement in regard to the marriage of the two accused persons is incredible, and in the case of Munshi it is worse still. Both the accused, according to him, had gone away to village Kirana, after the partition but he himself had never gone to Kirana and he has not told us as to how he knows anything about the two accused.

On this evidence it appears that the father of Latifan, Asmail P.W. 3, had gone away to Pakistan at the time of the partition. Latifan is now about 22 years of age and she must have been about 12 when her father states he took her. According to

defence witnesses she got married a year or two years before the partition when she must have been about 10 or 11. I do not think that the defence evidence has proved marriage of the accused because none of the witnesses has any personal knowledge and both Abdul Hamid and Latifan were so young that they could not have been married at that age. Abdul Hamid must have been 14 or 15 and Latifan 10 or 11. The defence have brought out that the father of the accused Abdul Hamid has also come out to this country, though "stealthily". He has not been produced as a witness to prove that there was any such marriage. On the other hand Asmail has denied that his daughter was ever married to the accused Abdul Hamid. He has also deposed that his daughter was abducted by Abdul Hamid.

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Asmail has also stated that the father of Abdul Hamid had gone away to Pakistan and was living in Jhang Maghiana and had come away quite recently into this country. The father of Abdul Hamid has not appeared as a witness although counsel inform us that he was in this country. He has neither come forward to say that he never went to Pakistan taking Abdul Hamid with him nor has he stated that Abdul Hamid did not go to Pakistan and was left behind with some other relation.

That Abdul Hamid did go to Pakistan is also in the statement of Mst. Subee, P.W. 1, who has stated that he was living in Pakistan with the father of Mst. Latifan. P.W. 2, Samma, has also supported the story of the prosecution who has stated that both the accused were living in Jhang since after the partition and that Mst. Latifan was married to Sabbir, which is also the statement of P.W. 1, Subee and Asmail, the father, Samma went further and stated that Latifan was in Chiniot living with her husband.

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From this evidence it is clear that after the partition both the father of Latifan, i.e., Asmail, and the father of Abdul Hamid went away to Pakistan. Both the accused at that time were minors of the ages of 15 and 12 and ordinarily they would have gone with their parents unless there is some evidence to show that they were left behind with some relations. There is no doubt that Latifan, who was of a very young age at the time of the partition, was in Pakistan throughout till she by some means or another came away to this country. About Abdul Hamid also I hold that he did go to Pakistan at the age of 15 and was living there. He might or might not have come to this country occasionally is irrelevant to the issue because there is nothing to show that, after his migration with his father to Pakistan, he gave up his Pakistan nationality to come back to live in this country.

Since September 1948, there have existed Permit System Rules which were made under section 3 of the Influx from West Pakistan (Control) Ordinance, as a result of which no refugee as defined in rule 2(iv) could come from Pakistan without a permit and it has not been shown that Abdul Hamid came with a permanent permit as defined in those rules, nor has any permit been produced before us.

Rules in regard to passports had been made under section 3 of the Indian Passport Act, since the 25th April, 1950, which were amended on the 14th October, 1952. Under these rules any person proceeding from a place outside India was prohibited from entering India without a passport and even a person domiciled in India if he was proceeding from any place excepting those mentioned in rule 4 could not enter without such a passport and the words "or from Pakistan" in sub-rule (c)

of rule 4 had been omitted by modification of the rules made on the 14th October, 1952.

Article 7 of the Constitution of India provides—

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“7. Notwithstanding anything 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 :

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.”

According to the evidence both the children Abdul Hamid as well as Latifan migrated to Pakistan after the 1st day of March, 1947, and their case does not fall within the proviso as they have not come under a permit for resettlement or permanent return.

According to International Law a child acquires the nationality of a parent and as both Abdul Hamid and Latifan as minors went to Pakistan and under Article 7 of the Constitution the respective fathers of the two accused did not have Indian nationality their children also must be taken to have acquired the nationality of their fathers, whatever it was. Apparently they cannot

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retain Indian nationality unless according to the rules made under the Influx from West Pakistan Laws they have come to this country with a permit for permanent settlement or residence.

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It was then submitted that Abdul Hamid was an Indian national and by marriage Latifan has also become an Indian citizen. On this evidence I am unable to hold that there was any marriage between Abdul Hamid and Mst. Latifan. On the other hand evidence all leads to the conclusion that Latifan was married to a different person in Pakistan and, therefore, this argument is not available to the respondents.

Counsel then relied on a judgment of a Lahore Magistrate in which he held that Abdul Hamid is an Indian national. A foreign judgment is not binding on this Court particularly in a case of this kind where conviction was based on Abdul Hamid's pleading guilty. The judgment on which the defence rely was produced by P.W. 3, Asmail and objection was taken to its admissibility. It is not shown on the record that it was admitted into evidence and, therefore, it is hit by section 86 of the Indian Evidence Act which provides—

“86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of India or Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Central Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

An officer who, with respect to any territory or place not forming part of India or Her Majesty's dominions, is a Political Agent, therefor, as defined in section 3, Clause (43) of the General Clauses Act, 1897, shall, for the purposes of this section, be deemed to be a representative of the Central Government in and for the country comprising that territory or place."

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The document is not authenticated. It was held in *Murli Das v. Achut Das* (1), that the provisions of section 86 of the Evidence Act are imperative and must be complied with, and in the absence of the certificate referred to in the section the statements of witnesses taken in a foreign Court are not admissible in evidence. That is a very strong case against the admission of this document because in that case the record was sent by the Resident, Jaipur State, himself. Similarly in *Ganee Mahomed Sarkar v. Tarini Charan Chucherbati* (2), the same view was taken. That seems to have been the view of a Full Bench of the Calcutta High Court also in *In re: Rudolf Stallmann* (3), where it was held that records of the Berlin Court which are authenticated in the manner prescribed by law can be properly admitted in evidence. No doubt the section is not exhaustive of the modes of proof of foreign judicial records, but in the present case no other mode of proving the foreign judicial record has been shown. The learned Magistrate in his judgment no doubt has stated that the copy of the judgment was accepted in evidence by the prosecution and as such it was admissible according to law. It is not what the prosecution stated, but the question was whether the copy could be held to be authentic in accordance with

(1) I.L.R. 5 Lah. 105.

(2) I.L.R. 14 Cal. 546.

(3) I.L.R. 39 Cal. 164.

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section 86 of the Evidence Act. The authentication by the Indian representative in Pakistan would have been presumptive proof and in the absence of it other proof was necessary, but even if one were to hold that it had been rightly admitted, a foreign judgment cannot confer Indian nationality on a non-Indian national, and indeed it would be a dangerous proposition if adjudication by foreign tribunals could confer on a non-Indian the status of an Indian national. At any rate no principle has been quoted or precedent brought to our notice by which this can be a means of acquiring nationality. I am, therefore, of the opinion that any judgment of the kind produced in this case is wholly irrelevant to the issue.

Counsel for the respondents has relied upon certain cases which have been decided by other Courts as to the meaning of the word "migration". In *Shabbir Hussain v. The State of U.P. and another* (1), it was held that the words "migrated from the territory of India" must be taken in the sense of departure from one country to another with the intention of residence or settlement in another country, but the facts of that case were wholly different and have no application to the present case. *Sayeedah Khatoon and others v. The State of Bihar and others* (2), was the case of temporary residence in Pakistan for medical treatment and whether in those circumstances Kumar Rani Sayeedan Khatoon was or was not an evacuee was the question to be decided in that case. This again is inapplicable to the facts of the present case. Another case relied upon is *S. M. Zaki v. The State of Bihar and others* (3). In that case also the word "migration" was held to have an element of permanent change of residence.

(1) A.I.R. 1952 All. 257.

(2) A.I.R. 1951 Pat. 434.

(3) A.I.R. 1953 Pat. 112.

That was a case under the Evacuee Property Ordinance of 1949, and whether in those circumstances S. M. Zaki could be held to have migrated to Pakistan or not depended upon the facts of that case and, therefore, that has no application to the present case. The next case relied upon is *Mrs. Rosetta Evelyn Attaullah v. Justin Ataullah and another* (1), but that appears to be under Article 5 of the Constitution of India and dealt with the question of domicile and nationality. In my opinion, this case too has no application to the facts of the present case and, therefore, is of very little assistance.

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Although the question has never been raised before, counsel for the respondents raised the plea that as the Magistrate had no jurisdiction to try the case the proceedings in appeal cannot go on. This argument was based on an assumption that the breach of the Passport Rules was committed at Amritsar, i.e., at the Wagha Border. There is nothing to indicate as to where the offence was committed nor is it shown how the two accused persons entered the territory of India and as no objection was taken in the Court of the Magistrate, I do not think it is open to the respondents to take that objection at this stage. As long ago as 1902, it was held by the Punjab Chief Court in *Uttam Chand v. The Emperor* (2), that the trial of a case in a district which had not local jurisdiction is not a defect of jurisdiction but only of venue and can be cured by section 531 of the Criminal Procedure Code. A similar view was taken by a Full Bench of that Court in the judgment of Chatterji, J. in *Lakshmi Chand v. The Emperor* (3). The principle of criminal law in regard to jurisdiction where the defect sought to be set up is one of territoriality is

(1) A.I.R. 1953 Cal. 530.

(2) 2 P.R. 1902.

(3) 24 P.R. 1901.

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that unless prejudice is shown the proceedings cannot be held to be null and void. That is the principle which is laid down in section 531 of the Criminal Procedure Code and section 537 lays down that in order to determine whether an irregularity in any proceeding has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. It was admitted by counsel that if there had been a conviction no objection could have been taken at this stage because of section 531, but he submits that as this is an appeal against acquittal, the objection is open to him. Counsel has not referred to any authority and I do not think that either on principle or on precedent this objection can be raised at this stage. In the Civil Procedure Code, there is an express provision in section 21 that no objection can be taken if it is not taken at the earliest stage and the principle of that is contained in section 537 of the Criminal Procedure Code, read with section 531. No case of prejudice has been shown and I would, therefore, overrule this objection at this stage. I would, therefore, hold—

- (1) that both the accused are non-Indian nationals;
- (2) that Abdul Hamid is not a national of India, and, therefore, by marriage (even if it is proved) Latifan has not become a national of India;
- (3) that even if the accused are nationals of India, they have committed an offence against the rules under the Passport Act as they entered India without a passport; and
- (4) that Article 7 of the Constitution of India applies to this case and they have been wrongly acquitted.

I would, therefore, set aside the order of acquittal and convict the accused for the offence they are charged with. It is a flagrant case and I would, therefore, sentence the accused Abdul Hamid to three months' imprisonment. He is also sentenced to a fine of Rs. 50 in default of payment of which he will undergo a sentence of a fortnight's further imprisonment. As to Mst. Latifan, it is not a case in which so serious punishment should be imposed. I would, therefore, fine her Rs. 30 and in default a week's imprisonment.

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As to what is to be done with the accused after their release, the matter is entirely for the Executive Government to whom the law has given the necessary authority.

PASSEY, J.—I agree.

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SUPREME COURT

Before Sudhi Ranjan Das, C.J. and N. H. Bhagwati, T. L. Venkatarama Ayyar, Bhuvaneshwar Prasad Sinha and Sudhanshu Kumar Das, JJ.

THE NIEMLA TEXTILE FINISHING MILLS LTD., AND
OTHERS,—Appellants

versus

THE SECOND PUNJAB TRIBUNAL AND OTHERS,—Respondents

Civil Appeals Nos. 333 to 335 of 1955
with
Petitions Nos. 203, 182, and 65 of 1956.

Industrial Disputes Act (XIV of 1947)—Whether intra vires the Constitution of India—Sections 10 and 19, whether infringe Articles 14 and 19(1)(f) and (g) of the Constitution—Industrial Tribunals—Powers of—Whether of legislative character—Industrial Courts—Functions of—Awards—Whether pieces of legislation or delegated legislation—Section (2)—Definition of “Industry”—Whether

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