CIVIL WRIT

Before I. D. Dua, J.

MISS SHANTI SINGH,—*Petitioner.*

versus

THE GOVERNOR OF PUNJAB AND ANOTHER,—*Respondents.*

Civil Writ No. 54 of 1958.

1959

Feb., 19th

Constitution of India (1950)—Article 5—Requirements of—Person born in the territories of India but living in territory now forming part of Pakistan since before partition and remaining there after partition—Whether can be considered as a citizen of India—Domicile—How acquire—Passport obtained from a foreign country—Evidentiary value of—Order purporting to be an order of the Governor communicated by Deputy Secretary—Whether valid.

Held, that in order to bring a person's case within the ambit of Article 5 of the Constitution of India, it is necessary for him to prove two things: (1) that he has his domicile in the territory of India at the commencement of the Constitution; and (2) that he was born in the territory of India. It is not correct to say that although British India has ceased to exist, a person who had originally a domicile of British India will continue to have the same. As a result of the provisions contained in the Indian Independence Act a person who had originally the domicile of British India, unless he had subsequently acquired the domicile of some country outside the ambit of the territories which were originally British India, would automatically acquire the domicile either of India or of Pakistan. Even if it were possible for a British Indian subject to retain (after 15th August, 1947) the British Indian nationality, a person who was not one habitually resident within that portion of British India which became the Indian Dominion and was subsequently declared to be the Indian Republic, cannot, even on the principles applied to cession of territories, acquire, after the 15th August, 1947, the nationality of the Dominion of India or the Republic that is Bharat. The domicile of origin could not possibly be resumed as it had ceased to exist on 15th of August, 1947, with the disappearance of British India as such. In so far as the acquisition of new domicile is concerned, it is for the petitioner to

establish by reliable evidence that she had acquired the domicile of the Dominion of India or the Indian Republic as the case may be.

Held, that in order to prove the existence of domicile it is necessary to prove (1) a residence of a particular kind, and (2) an intention of a particular kind. There must be the factum of residence, and there must be the *animus*. The residence need not be continued but it must be indefinite, not purely fleeting. The intention must be a present intention to reside for ever in the country where the residence has been taken up. It is also a well-established proposition that a person may have no home but he cannot be without a domicile and the law may attribute to him a domicile in a country wherein in reality he has not. In order to make the rule, that no body can be without a domicile, effective, the law assigns, what is called a domicile of origin to every person at his birth. This prevails until a new domicile has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicile of origin adheres to him until he actually settles with the requisite intention in some other country.

Held, that where it is proved that the petitioner was born in a village in the territories now forming part of India in 1928 but had gone to Lahore in 1946 and remained there ever since and for the first time came to India in 1953 on a Pakistani Passport and, thereafter, visited India off and on, it cannot be held that the petitioner is a citizen of India.

Held, that even though the securing of a passport from a foreign country be not considered to be conclusive proof of the nationality of the applicant, it certainly raises a strong presumption in favour of the citizenship asserted by him or her, as the case may be, for the purpose of securing the passport.

Held, that merely because an order purporting to be an order of the Governor is conveyed by the Deputy Secretary, it does not cease to be the Governor's order and does not on this account become invalid.

Petition under Article 226 of the Constitution of India praying that a proper writ or direction be issued quashing

the order of respondent No. 1, dated 17th of December, 1957.

PARTAP SINGH, for Petitioner.

L. D. KAUSHAL, for Respondents.

ORDER

I. D. Dua, J.

DUA, J.—This petition under Article 226 of the Constitution of India praying for quashing the order of the Governor of Punjab dated 17th of December, 1957, or for other writ or direction has been filed on the following allegations. The petitioner asserts that she was born in village Markhai, Tehsil Zira, district Ferozepore in India, on 2nd of February, 1928, from parents who were and are still residents of the aforesaid village; she studied in the Nurse and Mission School at Jagraon, district Ludhiana, till 1938, and from the year 1940 to 1942, she studied in the Government Girls High School, Ferozepore. Due to the death of her brother the petitioner went to village Markhai and in the year 1946, she proceeded to Lahore and joined the Lady Atchison Hospital for getting training as a nurse. While there she was awarded a stipend by the Government which she was getting at the time of the partition of the country. In the year 1947, according to the petitioner, the Government obtained option from the Government servants, and the prescribed form was issued to the petitioner whereupon she opted for coming to India. According to her, she waited for the Government orders, for a considerably long period for being deported to India but she did not receive any orders and as a last resort she approached the Deputy High Commissioner for India in Pakistan in the year 1950, and applied for being brought to India ; to this again no reply was received by her. The petitioner also alleges to have approached the

Camp Commandant of the abducted women's camp at Lahore to send her to India so as to join and look after her parents who are blind ; she was on every occasion given a hope that she would be sent to India but this promise never matured. At last in 1953, according to her petition, the petitioner managed to obtain a valid passport dated 9th of June, 1953, from the Passport Officer, Government of Pakistan, indicating her place and date of birth to be Ferozepore and 2nd of February, 1928, respectively ; she entered India on 19th of September, 1953, and afterwards visited Ferozepore several times, with long stays with her parents, till the date of the present petition. On 13th of January, 1958, she received the order of the Governor of Punjab, dated 17th of December, 1957; directing her to leave India within 15 days of the receipt of the order, failing which she was liable to be prosecuted and deported under the Foreigners Act, 1946. The petitioner has challenged the legality of this order on the ground that she is a citizen of India having been born in village Markhai, Tehsil Zira, district Ferozepore, and having been in the service of the Government of India. In para 9 of the petition, she has asserted that one Shri Pritam Singh, Head Constable, was deputed to make an enquiry in connection with her application for permission to stay in India permanently, but he has reported against the petitioner by stating that she has been creating factions in the Christian society. According to the petitioner, this report is *mala fide* and has been inspired by the petitioner's refusal to treat some male patients whom the Head Constable desired her to treat.

In the written statement filed by the respondents it is denied that she was in Government service at the time of the partition of the country,

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thus the question of option for service in India by her does not arise. The assertions with regard to her birth are neither admitted nor denied as the Government is stated to have no knowledge about them. It is, however, asserted that from the Pakistani passport obtained by the petitioner it is clear that she is a Pakistani national. Her status as an Indian citizen is specifically denied. It is also stated that she is a "foreigner" within the meaning of this word as defined in section 2(a) of the Foreigners' Act, 1946. It is also stated that there is no report by any Head Constable Pritam Singh on the record ; on the other hand the reports against her are from the Senior Superintendent of Police, and the Deputy Commissioner, Ferozepore. It may here be stated that the petitioner had also challenged the validity of the impunged order on the ground that the original order had not been communicated to the petitioner and that it was only the order of Shri Gurbux Singh respondent No. 2 which had been communicated and this order had no legal sanction behind it. This allegation is also denied in the written statement and it is maintained that the exit notice communicated to the petitioner is the original exit notice; this order as signed by Shri Gurbux Singh in the capacity of Deputy Secretary to Government, Punjab, Home Department, is perfectly valid and the officer is stated to be fully competent to sign and communicate ; it is further alleged that it was not necessary to mention the reasons in the notice itself. ,

Mr. Partap Singh, the learned counsel for the petitioner, has placed his principal reliance on Article 5 of the Constitution and has submitted that the petitioner is a citizen of India because she was born in India and has her domicile in the territory of India. It is obvious that Articles 6 and

7 have nothing to do with the case of the petitioner. In order, however, to bring her case within the ambit of Article 5, it is necessary for her to prove two things ; (1) that she has her domicile in the territory of India at the commencement of the Constitution ; and (2) that she was born in the territory of India. It is admitted that she fulfils the condition of her birth being in the territory of India. The question, however, remains whether it can be said that she has her domicile in the territory of India. In my opinion, the facts established on the record do not prove her case. Indisputably she left Ferozepore for Lahore in the year 1946, and continued to stay on in Pakistan right up to 1953. By virtue of Article 394 of the Constitution, Article 5 came into force on 26th of November, 1949. No material has been placed on the record to show that the petitioner had, on 26th of November, 1949, or even on 26th January, 1950, her domicile in the territory of India. Lahore, where she was residing since 1946, had gone to Pakistan and had thus become a foreign country. We do not find any documentary or other unimpeachable evidence suggesting that the petitioner had any *animus* to come to Ferozepore for permanent stay. She does not seem to have made a correct statement when she asserts that she was offered an option to opt for service in India. There is no proof even of her ever being in the service of the Government of India. Mr. Partap Singh wants me to infer that because the petitioner's parents are residing in Ferozepore, therefore, she must be assumed to entertain an *animus* to retain her domicile of origin. It may in this connection be stated that as observed in *Mrs. Rosetta Evelyn Attaullah* v. *Justin Attaullah and another* (1), it is not correct to say that although British India has ceased to exist, a person who had originally a

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

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domicile of British India will continue to have the same. As a result of the provisions contained in the Indian Independence Act a person who had originally the domicile of British India, unless he had subsequently acquired the domicile of some other country outside the ambit of the territories which were originally British India, would automatically acquire the domicile either of India or of Pakistan. Even if it where possible for a British Indian subject to retain (after 15th August, 1947), the British Indian nationality, a person who was not one habitually resident within that portion of British India which became the Indian Dominion and was subsequently declared to be the Indian Republic, cannot, even on the principles applied to cession of territories, acquire, after the 15th August, 1947, the nationality of the Dominion of India or the Republic of India that is Bharat. We have thus to see whether after the 15th of August, 1947, it can be said that the petitioner had acquired the domicile of the Indian Dominion and the domicile of the Republic of India at the commencement of the Constitution. There is absolutely no reliable and trustworthy material which can show that the petitioner acquired such domicile. Mr. Partap Singh submits that the petitioner's statement that she wanted to acquire the domicile of the Indian Dominion in 1947, and of the Indian Republic should be considered to be sufficient and that it would then be for the Government to establish that this is not the petitioner's intention or *animus*. I wholly disagree with this contention. No authority in support of his submission has been quoted by the learned counsel. He has, however, placed reliance on rule 8 contained at page 97 of Dicey's Conflict of Laws, 6th edition which says—

> "(1) The domicile of origin is retained until a domicile of choice is in fact acquired.

(2) A domicile of choice is retained until it is abandoned, whereupon either—

(i) a new domicile of choice is acquired ; or

(ii) the domicile of origin is resumed."

This passage, in my opinion, is of no assistance to the counsel on the facts of the present case. The domicile of origin could not possibly be resumed as it had ceased to exist on 15th of August, 1947, with the disappearance of British India, as such. In so far as the acquisition of new domicile is concerned it is for the petitioner to establish by reliable evidence that she had acquired the domicile of the Dominion of India or the Indian Republic as the case may be. In the absence of such evidence it can legitimately be assumed, on the facts of the present case, that she had acquired domicile of Pakistan. Mr. Partap Singh has referred me to *Winans and another* v. *Attorney-General* (1), in support of his submission that the onus of proving, that a domicile has been chosen in substitution for the domicile of origin, lies upon those who assert that the domicile of origin has been lost. The domicile of origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as the sole domicile is clearly shown. In this connection I must emphasise that the rules of Conflict of Laws or of Private International Law as adumberated by various writers do not have any statutory force of universal application in all countries. These rules have been deducted, from certain decided cases, as they arose from time to time in different countries. What actually happened in our country, at the time of partition in 1947, is unprecedented and two Dominions were carved out of the erstwhile

(1) (1904) A.C. 287

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British India; one of the Dominions professed to be an Islamic theocratic State and the other a secular democratic social welfare State. All those whose permanent home was in the territory which became the territory of India and who did not believe in the ideology of the Islamic theocratic State crossed over and came to reside in the territory included in the territory of India ; other continued to stay on in Pakistan. In this background it is rather difficult for me to impute to the petitioner, who voluntarily continued to stay in Pakistan, an *animus* to acquire the domicile of the Indian Dominion at the time of the partition. In the circumstances disclosed on this record there is no question of retention of the British Indian domicile because British India, as a territorial unit having a uniform system of law, had ceased to exist. For these reasons, *Winans's case* (1), is of no real guidance in the decision of the present controversy. Mr. Partap Singh next relied upon *Syeeda Khatoon* v. *The State of Bihar* (2), but the facts of the reported case are wholly different and distinguishable and cannot possibly be of assistance in the case before me ; in any case, what little support the learned counsel could derive from this decision, is completely lost to him because this decision was reversed by the Supreme Court in *State of Bihar* v. *Kumar Amar Singh and others* (3), The order directing the lady, in the reported case, to leave India, which had been set aside by the Patna High Court, was upheld as valid by the Supreme Court.

It is admitted that the petitioner entered India on a Pakistani passport. Mr. Partap Singh has, however, in this connection relied on *Mohammad*

(1) 1904 A.C. 287
(2) A.I.R. 1951 Pat. 434
(3) A.I.R. 1955 S.C. 282

Khan and others v. *Government of Andhra Pradesh* (1), in support of the contention that securing of a passport from a foreign country cannot be so construed as to deprive a person of his true nationality. The facts of the reported case are, however, peculiar and the observations contained in this judgment are confined to the peculiar facts and circumstances of that case. It appears that one Mohammad Khan who had been born in village Thukhayi, Tehsil Barshore, Taluk Pishin, Quetta District in Baluchistan (British India), which is now a part of Pakistan, had left his native place in 1940, and had settled down at Kavvur which was then part of Madras State and later became part of Andhra Pradesh. He started business in that place and was eking out his livelihood. He also married at Kavvur one Amirunnisa, whose father was a permanent resident of that place and was employed in Government service, and his two children were also born and bred up there. Mohammad Khan purchased a site at Kavvur and constructed a house worth about Rs. 10,000 and had also been doing lorry transport business. After the division of India, under pressure from the local police and without proper guidance and appreciation of his citizenship rights, he applied in India for a passport and received one under the seal of the High Commissioner for Pakistan in India, New Delhi, dated 7th of March, 1953. It was on these facts that Subha Rao, C.J., observed that this did not affect the true nationality of Mohammad Khan. It need hardly be stated that this decision can be of little or no guidance to me in deciding the question of the petitioner's domicile. The next authority to which reference has been made is *Dawood Ali Arif and others* v. *The Deputy Commissioner of Police and others* (2), but the ratio of this decision, to a con-

(1) A.I.R. 1957 A.P. 1047
(2) 62 C.W.N. 729

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siderable extent, goes against the petitioner's contention. It lays down that a passport by itself is not a conclusive proof of nationality; it is, however, accepted as a proof of the fact, by international agreement and comity of nations. But whatever the probative value of it, a person who has deliberately applied for a passport, affirming himself to be a Pakistani national, cannot be heard to say that he did so under false pretences. The last case, on which reliance has been placed by the counsel for the petitioner, is *Central Bank of India Ltd.* v. *Ram Narain* (1), where the principles for determining domicile have been laid down. This decision speaks of two constituent elements to be necessary by English Law for the existence of domicile : (1) a residence of a particular kind, and (2) an intention of a particular kind. There must be the factum of residence, and there must be the *animus*. The residence need not be continuous but it must be indefinite, not purely fleeting. The intention must be a present intention to reside for ever in the country where the residence has been taken up. It is also a well established proposition that a person may have no home but he cannot be without a domicile and the law may attribute to him a domicile in a country wherein in reality he has not. In order to make the rule, that nobody can be without a domicile, effective, the law assigns, what is called a domicile of origin to every person at his birth. This prevails until a new domicile has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicile of origin adheres to him until he actually settles with the requisite intention in some other country. In this case a man, who had his domicile of origin in Multan, was held to continue to have the domicile of origin when

(1) A.I.R. 1955 S.C. 36

he continued to stay in Multan after the partition of the country till the time he expressed his unequivocal desire of giving up that domicile and of acquiring Indian domicile and also took up his residence in India. His domicile was not determined, by the Supreme Court, by his family coming to India and without a finding that he had established a home for himself in India. The facts of the reported case are obviously very much different from those with which I am dealing in the instant case. It may, however, be borne in mind that the petitioner has no residence in the Dominion of India or in the Republic of India from the time of their creation up to the year 1953, when she entered the Indian Republic on a Pakistani passport, and there is absolutely no reliable or disinterested and trustworthy evidence that she ever expressed an unequivocal desire to acquire Indian domicile or Indian nationality during the span of six years from 1947 to 1953 or even up to 1956. At this stage I refer to the form of application filed by the petitioner on 2nd of June, 1956, for the purposes of securing permission for indefinite stay in India. In this application, which is signed by the petitioner, who is literate in English language, she has described, her national status and domicile to be Pakistani. She has also mentioned that she was a civilian Government servant in Pakistan. She secured a passport from the Passport Officer of the Government of Pakistan, Lahore, on 9th of June, 1953, on the authority of which she had entered the Indian Republic. It is true that she stated that she had been trying to apply for permanent passport but could not get it, but this bare assertion, unsupported as it is by independent evidence, is of little value in establishing the petitioner's Indian domicile. It is interesting to note that from September, 1953, up to February, 1956, she had come to India off

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and on, on no less than twelve occasions, but had each time gone back to Pakistan. This clearly shows that on no occasion, before the 2nd June, 1956, did she care to apply to the authorities concerned in the Republic of India either for becoming a citizen of India or for permanently staying here. It is, in the circumstances, almost impossible to place any reliance on her bare assertion that she had all along been trying to come over to India and to stay here permanently as an Indian citizen, and that the Pakistan authorities did not permit her to come away. Mr. Partap Singh laid great emphasis on the assertion made by his client that her father and mother are old and blind and there is no one to look after them. This assertion is belied by the statement contained in the above form signed by the petitioner on 2nd of June, 1956. It is stated therein that her elder sister is staying with her parents and that her uncle is also living in district Ferozepore. The false assertions made by the petitioner have not created any favourable impression on my mind and I am inclined to think that the petitioner is not incapable of making false statements when it suits her. Mr. Kaushal has drawn my attention to *Nisar Ahmed* v. *Union of India* (1), for the proposition that, that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom. Mr. Kaushal has also referred me to *Vijay Transport Co. and others* v. *Appellate Tribunal of State Transport Authority, Jaipur and others* (2), and *Ghaurul Hasan and others* v. *The State of Rajasthan and another* (3), The former case, however, deals with the power of the High Court to interfere under Article 226 and the latter case lays down that according to rule 3 of schedule 3 of the Citizenship Rules, 1956,

(1) A.I.R. 1958 Raj. 65
(2) A.I.R. 1958 Raj. 165
(3) A.I.R. 1958 Raj. 172

the acquirement of a passport of another country is conclusive proof that the person acquiring that passport, even though he might be of Indian origin before the partition, was a citizen of the country from which he acquired the passport. The learned Judges in this connection dissented from the law as laid down in *Mohammad Khan and others* v. *Government of Andhra Pradesh* (1), After giving my most anxious thought to the arguments advanced by the counsel, in my opinion, even though the securing of a passport from a foreign country be not considered to be conclusive proof of the nationality of the applicant, it certainly raises a strong presumption in favour of the citizenship asserted by him or her, as the case may be, for the purpose of securing the passport. In the present case the petitioner secured a passport from Pakistan and entered the Republic of India under the protection of the Pakistan Government ; in addition she also asserted herself to be a Pakistani national when she applied to the Government of India on 2nd of June, 1956, for securing permission to reside permanently in the Indian Republic ; there is absolutely no suggestion that the statements contained in the application dated 2nd of June, 1956, are incorrect or were made under pressure or misapprehension. Indeed Mr. Partap Singh was not able to offer any cogent or plausible explanation for these statements. Coupled with the complete absence of any independent, disinterested and trustworthy evidence showing her genuine intention to permanently stay in India before 2nd of June, 1956, though admittedly she had come here on at least a dozen occasions, the above statements conclusively show that she had never before entertained any real desire to acquire Indian citizenship or even Indian domicile. The

(1) A.I.R. 1957 A.P. 1047

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petitioner has thus hopelessly failed to show that she is a citizen of India.

Lastly, Mr. Partap Singh has submitted that the impugned order is invalid because it has not been passed by the Governor and has merely been passed by the Deputy Secretary. This contention is wholly devoid of force. The order purports to be an order of the Governor and merely because the Deputy Secretary has conveyed this order to the petitioner it does not cease to be the Governor's order and does not on this account become invalid.

For the reasons given above, this writ petition fails and is hereby dismissed with costs.

B.R.T.

LETTERS PATENT APPEAL

Before G. D. Khosla and S. B. Capoor, JJ.

SHIVJI NATHUBHAI,—*Appellant*

versus

THE UNION OF INDIA AND OTHERS,—*Respondents.*

Letters Patent Appeal No. 47-D of 1955.

1959

Feb., 25th

Mines and Minerals (Regulation and Development) Act (LIII of 1948)—Section 5—Rules framed under—Mineral Concession Rules, 1949—Right to obtain mining lease under—Whether a fundamental right—Constitution of India (1950)—Article 19(1)(f) & (g)—Mineral Concession Rules—32, 57 and 59—State Government and the Central Government acting under—Whether act as quasi-judicial bodies and bound to afford a hearing to the applicant—Rule 29—Deposit to be made under—Amount not determined by the State Government—Whether maximum amount to be deposited.

Held, that the right to work a mine upon another's land does not exist before the licence or lease is granted to him.