We are not aware whether the section incorporates any practice but we think that this contention is entirely unfounded for the section was applied only to a managing agency agreement made after the amending Act came into force, while the agreement in the present case was made before that date.

Lastly, we have to point out that nothing turns on the fact that at the date the agreement under consideration was made, Excess Profits Tax Act, had not come on the statute book nor perhaps been thought of, and, therefore, could not have been in the contemplation of the parties. If the net profits are the divisible profits, everything necessary to be excluded to arrive at the divisible profits has to be deducted whether it was in the contemplation of the parties or not. It is easy to imagine instances. Suppose after the agreement the Government imposed a licence fee on the payment of which alone the business could have been carried on and that licence fee was not in the contemplation of the parties when the agreement had been made. None-the-less it has clearly to be deducted in finding out the divisible profits. In the result we would answer the question framed in the affirmative.

The appeal is, therefore, allowed with costs in this Court and in the High Court.

B.R.T.

REVISIONAL CIVIL

Before Falshaw and Dua, JJ.

MANGAL SAIN,—*Appellant*

versus

SHRIMATI SHANNO DEVI,—*Respondent*

First Appeal from Order No. 131 of 1958.

1958

October 3rd

Representation of the People Act (XLIII of 1951)—Section 36—Order of Returning Officer accepting nomination papers—Whether final—Constitution of India (1950)—

Article 6—Person migrating from Pakistan before 19th July, 1948 and residing in India on 26th November, 1949—Whether can be said to be a citizen of India—Animus of a man in the matter of selecting his permanent home—How to be determined—Factors to be taken into consideration stated.

Held, that the order of the Returning Officer accepting the nomination papers of a candidate is not final and can be challenged in an election petition.

Held, that where it is proved that the person had migrated from his place of birth in the district of Sargodha (now in Pakistan) in 1944 to Jullundur in India and resided at various places in the Punjab since then upto December, 1949, it must be held that he became entitled to be considered a citizen of India at the commencement of the Constitution since Article 6 of the Constitution came into force on the 26th November, 1949.

Held further, that there is no positive rule laid down with respect to the evidence necessary to prove the animus of a man in the matter of selecting his permanent home. The bent of the man's mind, his ambitions, aspirations, prejudices, sentiments, conduct, habits, religion, his financial and other expectations, all have to be taken into account for determining his *animus* because they normally supply the key to his intention. No one fact is of constant value; every case is to be considered in its own peculiar circumstances and what is conclusive in one case may be of practically no importance in another. It is, therefore, almost impossible to formulate a precise rule specifying the value or importance to be attached to any particular piece of evidence.

First Appeal from the order of Shri Jawala Dass, Election Tribunal, Rohtak, dated the 10th July, 1958, declaring the respondent's election to be void.

U.M. TRIVEDI, D. C. GUPTA, MASTAN CHAND and J. V. GUPTA, for Appellant.

I. M. LAL, D. B. KHANNA and G. S. GIANI, for Respondent.

JUDGMENT

DUA, J.—This appeal is directed against the decision of the Election Tribunal, Rohtak, dated the 10th July, 1958, by which the election of Mangal Sain appellant to the Punjab Legislative Assembly from Rohtak constituency was set aside on the ground that he was not an Indian citizen either at the time when he was enrolled as a voter or at the time when his nomination papers were accepted or even at the time when he was elected. The learned Election Tribunal held that Mangal Sain appellant was in the circumstances not qualified to be chosen to the Punjab Legislative Assembly and that, therefore, his election was void. As the respondent before us, who was petitioner in the election petition, had failed to substantiate all the other allegations made by her in the petition, the parties were left to bear their own costs before the Tribunal. Dua, J.

Though there were 8 issues tried by the Tribunal, issue No. 1 alone was decided against Mangal Sain appellant, the returned candidate, and the counsel for both the parties have addressed us on appeal only on this issue. The respondent did not challenge in this Court the adverse findings on the remaining issues.

On the 12th March, 1957, election was held to fill the seat in the Punjab Legislative Assembly from the Rohtak Assembly Constituency. Nomination papers had been scrutinised on the 1st February 1957, as a result of which 6 candidates were left in the field to contest the election viz. (1) Mangal Sain (2), Ch. Ram Sarup (3), Har Gopal, (4), Shanno Devi and two others. The counting of votes was completed on the 14th March, 1957, and on that very day the Returning Officer declared Mangal Sain to have been duly elected. Shrimati

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Shanno Devi respondent, one of the defeated candidates, filed the present election petition on the 20th April, 1957, seeking to set aside the election of the returned candidate (now appellant) before us on a large number of grounds but for our present purposes the grounds stated in para 5 of the petition alone are relevant. In this para it is alleged as follows:—

"5. (a) that the said Returning Officer has improperly accepted the nomination paper of the respondent on the 1st February, 1957, who was not qualified to stand for election as not being a citizen of India as defined in Article 173 of the Constitution and thus was not even eligible to become an elector under section 5(c) of the Representation of the People Act, 1951. The respondent hails from Burma and he never acquired the citizenship of India. His parents still reside at 24C Block, Zeago Bazar Mandlay (Burma).

"(b) that under Article 191 of the Constitution a person shall be disqualified for being chosen as and for being a member of the Legislative Assembly as he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State and thus the respondent is disqualified to remain a member of the Legislative Assembly under section 100(a) of the Representation of the People Act.

"(c) that the said improper acceptance of the nomination paper of the respondent has materially affected the result

of the election in this constituency as the electorate has been deprived of the exercise of its rights to vote for the rightful, eligible candidates and the election is, therefore, liable to be declared as void on that score."

In the written statement Mangal Sain in reply to para 5 of the petition stated as follows :—

Para (5) (a) of the petition is wrong and the contents thereof are denied. The Returning Officer rightly accepted the nomination papers of the respondent. The respondent was a citizen of India at the time of the commencement of the Constitution of India as he had his domicile in the territory of India, and has been ordinarily residing in the territory of India for more than 5 years immediately preceding the commencement of the Constitution of India, and has continued to be a citizen of India ever since and uptil now. Even otherwise he, his parents and grand-parents were born in India as defined in the Government of India Act 1935 (as originally enacted), and the respondent after his migration sometime in 1944 from the territory now included in Pakistan has been ordinarily resident of the territory of India since the date of his migration some time in 1944. It is entirely incorrect that the respondent hails from Burma though his parents have been residing there, but they too are not the citizens of Burma, nor have they acquired the citizenship of Burma. The respondent was duly qualified to

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stand for election and to be an elector and he was duly registered as an elector, and nobody raised any objection to the respondent's entry in the electoral roll, which is final. The respondent was not and is not subject to any of the disqualifications mentioned in section 16 of the Representation of People Act, 1950 (Act XLIII of 1950).

Para 5(b) is wrong and the contents thereof are denied. In the first part of this para the petitioner only reproduced the provisions of section 191 of the Constitution and towards the end of the para states "that the respondent is disqualified to remain a member of the Legislative Assembly under section 100 (a) of the Representation of People Act." This para is thus irrelevant and unnecessary and is likely to delay the trial and may kindly be ordered to be struck off under Order 6 rule 16 C.P.C. In an election petition only the election of a candidate can be challenged and questioned, and not the factum of his being disqualified to remain a member of the Legislative Assembly which is the only prayer sought for in this para.

"Even otherwise the respondent is a citizen of India. He never voluntarily acquired the citizenship of any foreign State and is not under acknowledgment of allegiance or adherence to a foreign State. The respondent was on the date of election (and even long before that and is also now duly qualified to be chosen a member of the Legislative

Assembly, and is not disqualified to remain a member of the Punjab State Assembly.

Para 5(c) is wrong Moreover the objection that the result of the election has been materially affected cannot be taken in this case under section 100(1) (d), which does not apply to the facts of this case. The respondent's nomination papers were properly and validly accepted, and the result of election has not been affected in any way. Moreover, no objection whatsoever was taken at the time of the scrutiny of nomination papers before the Returning Officer either by the petitioner, who was present herself or by anybody else. The respondent is estopped from raising the objection at this stage.

"The respondent's name was rightly included in the Electoral rolls which was validly prepared and remained unchallenged, with the result that this document has become final and conclusive for all purposes."

In the replication filed by the respondent, who was the petitioner in the election petition, the reply to paras 5(b) and (c) of the written statement runs as follows :—

"5(b). This para of the written statement is wrong and the relevant para of the petition is correct. The said para is neither irrelevant nor unnecessary. The position taken by the respondent is not correct and the factum of his qualification can be challenged in the petition

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and there is nothing to be struck off in this para. The fact of his citizenship is hotly contested. "5(c). The written statement is wrong and the relevant para of the petition is correct. The question of estoppel does not apply and it is wrong to suggest that electoral roll is final."

It appears that Shrimati Shanno Devi, petitioner, filed an application before the Election Tribunal under Order 12, rule 4, Code of Civil Procedure, requiring Mangal Sain, the returned candidate, to admit certain facts. Notice under Order 12, rule 5, C.P.C., was sought to be served on him. The following facts were required to be admitted or denied :—

"(1) That Shri Sain Ditta Mal (father of Mangal Sain) is resident of Mandlay (Burma) since 1926 and is residing now at 24C Block, Zeago Bazar, Mandlay (Burma).

(2) That the respondent was born in Burma.

(3) That the two brothers of the respondent have acquired Burmese citizenship.

(4) That the respondent has been living in Burma from 1948 to 1952.

(5) That the respondent was deported from Burma in the year 1952.

(6) That the respondent filed an appeal to the Supreme Court of Burma, that he had fulfilled the conditions to acquire citizenship rights.

(7) That the respondent in his grounds of appeal elected voluntarily to acquire Burmese citizenship rights.

(8) That the respondent obtained a passport for India from Burma in 1952.

(9) That the respondent was not an elector in electoral rolls prepared for the elections held in the year 1952 in India.

(10) That the respondent was not holding any ration card for the years 1948 to 1952 in India.

(11) That the respondent has been residing in Rotak since 1953.

(12) That the respondent did not get himself registered as a citizen of India with the diplomatic or Consular Representative of India in Burma."

Mangal Sain put in his reply to the above-interrogatories on the 12th December, 1957, and stated as follows:—

"(1) No. My father is residing at Mandlay (Burma) as a foreign National of India and not as a citizen of Burma. An affidavit of the respondent is attached herewith.

(2) It is denied that the respondent was born in Burma. The respondent was born in Jhawarian village in Shahpur District (now in West Pakistan) on 3rd September, 1927. An affidavit of respondent's mother, who is also an Indian National is attached herewith.

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(3) The respondent has no knowledge if his two brothers have acquired Burmese citizenship rights.

(4) No. It is wrong that the respondent had been living in Burma from 1948 to 1952.

(5) No. It is absolutely incorrect that the respondent was deported by Burmese Government in 1952. The respondent had left Burma in the last week of October, 1951. On the other hand, the respondent was registered as a foreigner in Burma and he surrendered his foreigners' registration certificate to the Registration Officer, Foreigners Registration Department ,Rangoon, on 29th October, 1951, and he was allowed to stay on in Burma for a temporary period of 15 days from that date. The temporary certificate granted by Burmese Government is attached herewith.

(6) No appeal was lodged by the respondent to the Supreme Court of Burma, nor can any appeal be legally lodged under the provisions of the Union Citizenship Act, 1948 (Act No. LXVI of 1948).

(7) In view of the answer to question No. 6 the question of grounds of appeal does not arise.

(8) It is denied that the respondent obtained any passport for India from Burma in 1952.

(9) The respondent has no knowledge, nor has he studied all the electoral rolls in India to say if his name appears in any of the electoral rolls prepared for elections held in the year 1952 in India.

(10) I do not remember whether I was holding any ration card or not during the years 1948-52.

(11) No. The respondent has been residing at Rohtak long before 1953.

(12) I do not recollect whether I got myself registered with the Consular or diplomatic representative of India in Burma and whether it was even essential for me to do so."

"I may here make it clear that District Shahpur and District Sargodha mean the same thing as the headquarters of District Shahpur were located at Sargodha."

On the pleadings with respect to the question of the appellant's citizenship, the Tribunal framed the following issue, which is issue No. 1:—

Whether the respondent is not a citizen of India as alleged by the petitioner?

Objection was taken to the onus of this issue whereupon the Tribunal passed an order that the parties should produce all available evidence in support of this issue so that eventually neither party may be prejudiced by the placing of onus.

It appears that on the 16th June, 1958, the petitioner filed another application praying for framing of a number of additional issues. In this application it was stated that Mangal Sain had his domicile of origin in a village in Pakistan and it was for him to prove that he had given up his original domicile in Pakistan and had acquired the Indian domicile instead. This petition was resisted by Mangal Sain and the Tribunal does not appear to have framed any additional issues. It is

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noteworthy that up till 16th June, 1958, the petitioner's case was that Mangal Sain had hailed from Burma, was born there and was, therefore, of Burmese domicile and not a citizen of India.

On the evidence led by the parties the learned Tribunal held that it was proved that Mangal Sain was born of Indian parents sometime in 1927 in village Jhawarian, District Sargodha, and that when he was only two years old he was taken by his parents from Jhawarian to Mandlay in Burma, wherefrom the entire family returned to Jullundur (Punjab) in 1942 when Burma was occupied by the Japanese forces during the Second World War. After having stayed for a few days in Jullundur, Mangal Sain, his parents and his brothers went to their home district Sargodha where they stayed for about two or two and a half years. During this period Mangal Sain passed Matriculation examination from the Punjab University and after having thus matriculated he again returned to Jullundur, where he was employed in the Field Military Accounts Office from 8th December, 1944, to 7th August, 1946, when his services were terminated because of his continuous absence from duty. Mangal Sain's parents and his brothers, according to the findings of the learned Tribunal, also returned from Sargodha to Jullundur and lived there for about two and a half years from sometime in 1945 onwards before they again went over to Burma, which country they had left in 1942 due to its occupation by the Japanese forces. While Mangal Sain was in service in the Field Military Accounts Office, he joined Rashtriya Swayam Sewak Sangh movement and became its active worker. Some time after his services were terminated, he shifted the scene of his activities to Hissar and Rohtak Districts, where he moved from place to place to organise the Rashtriya Swayam

Sewak Sangh movement. During this period apparently he had no fixed place of residence and he used to reside in the office of the Jan Sangh and took his meals at various *dhabas*. For about 4 months from June to September in the year 1948, Mangal Sain served as a teacher in Arya Lower Middle School, Rohtak. In July, 1948, Mangal Sain submitted to the Punjab University his admission form for the University Prabhakar examination, which form was duly attested by Prof. Kanshi Ram Narang of the Government College Rohtak. Sometime in January, 1949, he was arrested in connection with the Rashtriya Swayam Sewak Sangh movement and was detained in Rohtak District Jail from 10th January, 1949, till 30th May, 1949. In August, 1949, he again appeared in Prabhakar examination and was placed in compartment; he also appears to have organised Rashtriya Swayam Sewak Sangh in the districts of Rohtak and Hissar during the year 1948-49 and he used to move about from place to place without having any fixed place of abode. The Tribunal further found that it was sometime in the end of 1949 or in January, 1950, that Mangal Sain left India and went to Burma where his parents and other brothers were already residing. In that country he tried to secure permission to stay there permanently, but the Government of Burma did not agree and directed him to leave that country, in this connection he applied for a writ to the Supreme Court of Burma but his petition was disallowed. On the 29th October, 1951, Mangal Sain deposited with the competent authority in Burma the registration certificate granted to him under the Registration of Foreigners Act, 1948, and a few days later he came back to India and since then he has been living in this country and has been organising Rashtriya Swayam Sewak Sangh movement in the districts of Hissar and Rohtak. In 1953, he was again arrested and

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detained in Rohtak Jail as detenu from the 8th February to the 8th May, 1953, when he was transferred to Ambala Jail.

These findings have not been successfully assailed by the learned counsel for the respondent; indeed he did not make any serious effort to dislodge them. All of these conclusions are, in my opinion, supported by unimpeachable evidence on the record. The question that arises for consideration is whether or not on these facts it can be held that Mangal Sain appellant was a citizen of India at the relevant time and whether his election to the Legislative Assembly can be assailed on the ground that he was disqualified from being elected to the Punjab Legislative Assembly.

The learned Election Tribunal has, as stated above, held that Mangal Sain appellant has not been proved to be a citizen of India and was, therefore, on the date of his election, not qualified to be chosen to fill the seat in question; on this finding the election petition has been accepted and the appellant's election set aside. From this order of the election Tribunal Mangal Sain has preferred the present appeal.

The learned counsel for the appellant has, in the first instance, submitted that the order of the Returning Officer accepting the nomination papers of the appellant is final and cannot be challenged in the election petition. He has referred to section 36 of the Representation of the People Act, (Act 43 of 1951) where in sub-section (7) it is laid down that for the purposes of that section a certified copy of an entry in the electoral roll for the time being in force of the constituency is to be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency unless it is proved that he is subject to

disqualification mentioned in section 16 of Act 43 of 1950. The counsel next referred to section 5 of the Representation of the People Act, 1951, which provides for the qualifications for membership of a Legislative Assembly. It lays down that a person shall not be qualified to be chosen to fill a seat in a Legislative Assembly of a State unless:—

(a) * * * * * * * *

(b) * * * * * * * *

(c) in the case of any other seat, he is an elector for any Assembly constituency in that State."

Reading these two sections together, the learned counsel submits that the appellant should be considered to be fully qualified to be chosen to fill a seat in the Legislature of a State. I do not think that the learned counsel is right and I am unable to sustain his contention. Section 100(1) (a) of the same Act clearly provides that if the Tribunal is of the opinion that on the date of his election a returned candidate was not qualified or was disqualified to be chosen to fill the seat under the Constitution or under the Representation of the People Act, 1951, then the Tribunal shall declare the election of a returned candidate to be void. In section 32 it is laid down that any person may be nominated as a candidate for election to fill a seat if he is qualified to be chosen to fill that seat under the provisions of the Constitution and the Representation of the People Act, 1951. The overriding provision of law, which controls the provisions of this statute, however, is contained in Article 173 of the Constitution of India. It lays down that a person who is not a citizen of India shall not be qualified to be chosen to fill a seat in

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the Legislature of a State. This Article of the Constitution, in my opinion, completely negatives the contention raised by the learned counsel for the appellant.

The learned counsel next submitted that his client was a citizen of India by virtue of the provisions of Article 5 of the Constitution inasmuch as he was both domiciled in the territory of India as well as ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the Constitution which, by virtue of Article 394 of the Constitution of India, means the 26th of January, 1950. He submits that the learned Tribunal is wrong in considering that for the purposes of Article 5 the commencement of the Constitution should be considered to be the 26th of November, 1949. I agree with the learned counsel that Article 394 of the Constitution specifically lays down that twenty-sixth day of January, 1950, is the day referred to in this Constitution as the commencement of this Constitution and the learned Tribunal was not right in holding to the contrary. The language of Article 5 has, in my opinion, to be construed in the light of what is laid down in Article 394 of the Constitution. The question to be seen, however, is whether the appellant has establised on the record of this case that he had his domicile in the territory of India and as to whether he had been ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the Constitution, i.e., the 26th of January, 1950. Both these conditions must co-exist before he can claim to be a citizen of India under Article 5. I propose to consider this part of the case a little later after I have dealt with the next contention.

The learned counsel for the appellant also claims citizenship rights for his client under Article 6 of the Constitution. He submits that the appellant had migrated from Pakistan before the 19th day of July 1948 and had been ordinarily resident in the territory of India since the date of his migration up to December, 1949, or January, 1950. Artice 6 of the Constitution came into force on the 26th of November, 1949. As soon as this Article came into force, so the counsel argues, his client became entitled to be considered to be a citizen of India at the commencement of the Constitution, namely, 26th of January, 1950. The counsel particularly emphasises that the right to be considered a citizen of India on the establishment of the Republic of India on the 26th of January, 1950, became vested in the appellant on the 26th of November, 1949, when Article 6 of the Constitution came into force. There seems to be force in this contention provided it can be shown that the appellant migrated to the territory of India from the territory now included in Pakistan before the 19th of July, 1948. I have already stated that the findings of the learned Tribunal which I have mentioned in the earlier part of the judgment have not been successfully dislodged by the learned counsel for the respondent. To recapitulate the relevant portions of those findings for the purposes of the present argument, it has been held that the appellant was born in village Jhawarian, district Sargodha (now in Pakistan) in September, 1927. Two years thereafter he was taken by his parents to Burma from where they returned in 1942 because of the Japanese occupation. On their return to Sargodha the appellant's parents stayed there nearly two years or so when the appellant came to Jullundur and took up service in the Field Military Accounts Office on the 8th of December, 1944. His parents, as well, came to Jullundur and stayed

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there. He remained in service of the Military Accounts Office till sometime in August, 1946. Thereafter the appellant began to move about from place to place in the districts of Hissar and Rohtak organising the Rashtriya Swayam Sewak Sangh movement. These findings, in my opinion, clearly establish that the appellant had in December, 1944, moved away from village Jhawarian (now in the territory of Pakistan) to Jullundur (now in the territory of India) and his parents also left that village almost permanently. The surrounding circumstances considered in the light of the previous history of the family, clearly suggest that the appellant had almost abandoned Jhawarian village and he was trying to find a suitable place of abode in the eastern districts of the Punjab in which area he was concentrating his activities. The Rashtriya Swayam Sewak Sangh indisputably was a militant organisation of the Hindus which had become extremely popular during the fateful days of the partition of the country in 1947 as a counterblast to the anti-Hindu and anti-Sikh activities of the Muslim League in the Punjab. On the 15th of August, 1947, the fateful day—there came about the partition of the country dividing the British Indian United Punjab into two parts, the western districts of this Province, including the district of Sargodha, going into the territory now known as Pakistan—a new Muslim theocratic State. Considering all these circumstances together it is, in my opinion, idle to contend that the appellant could at least after the 15th of August, 1947, have possibly retained any animus or intention, and could reasonably speaking have cherished any idea or desire, of ever going back to Jhawarian village in Pakistan for the purpose of settling down there. Keeping in view the background in which the partition of the country came about and the conditions and circumstances which prevailed

in the Punjab, (I think it is open to me to take judicial notice of the historical facts which formed the basis of the partition) it is difficult for me to conceive that the appellant could ever have any *animus revertendi* and could ever for a moment entertain the idea of going back to Sargodha District for living in Pakistan. The British India, the territorial unit possessing its own system of law, had ceased to exist. In its place two Dominions had come into being, India and Pakistan. Whereas India openly condemned the two-nation theory based on religious distinctions and professed to frame a Constitution for a democratic social welfare State in which there is to be no place for discrimination based on religious faith, Pakistan on the other hand owed its existence to the same two-nation theory and professed to grow and develop basically on the ideology of Muslim domination in the State. In this situation I can safely conclude that at least from the 15th of August, 1947, onwards, the appellant could have one and only one *animus*, namely, that of not going back to Pakistan but of staying on in the Dominion of India in preference to the former. There is no positive rule laid down even in the decided cases or in the commentaries of the various renowned writers on the Conflict of Laws or on Private International Law with respect to the evidence necessary to prove the *animus* of a man in the matter of selecting his permanent home. Each case has to be decided on its own facts and I have not found any parallel situation which can guide us as a precedent for coming to decision in the background as it existed in India in 1947. The bent of the respondent's mind, his ambitions, aspirations, prejudices, sentiments, conduct, habits, religion, his financial and other expectations, all have, in my opinion, to be taken into account for determining his *animus* because they normally supply the key to his intention. No one fact is of constant value; every

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case is to be considered in its own peculiar circumstances and what is conclusive in one case may be of practically no importance in another. It is, therefore, almost impossible to formulate a precise rule specifying the value or importance to be attached to any particular piece of evidence. Considering, therefore, the circumstances under which Pakistan came into existence and the manner in which particularly the Hindu and Sikh inhabitants of what is now known as West Pakistan were compelled to leave their hearths and homes and also considering the fanatic, aggressive Muslim League ideology which dominated the entire social fabric in West Pakistan, which territory promised to become an Islamic theocratic State, it is not easy for me to impute to the appellant an intention of ever cherishing a desire to go back to Pakistan for permanently settling there. I am fortified in this opinion by the appellant's bent of mind which is manifest from the kind of missionary zeal with which he was taking part, at the relevant time, in the Rashtriya Swayam Sewak Sangh movement.

In this ground we have to consider whether it can be said that the appellant had migrated to the territory of India. It is clear that he did move from the district of his birth, i.e., Sargodha, to Jullundur. It is true that he did so in 1944, when there was no question of partition of the country. His parents, who had returned from Burma in 1942, do not seem to have decided to stick to their home district, i.e., Sargodha, with the result that when the appellant who was barely 17 years old in 1944 got service in the Military Accounts Office at Jullundur, they all appear to have left their home district and come to Jullundur to live with the appellant. After waiting for a couple of years, it seems, his parents again went to Burma (and not to Jhawarian) leaving the appellant, who was

yet in his teens, at Jullundur presumably because he was, at that period of time, more interested in the Rashtriya Swayam Sewak Sangh movement, than in anything else. In this background I can draw but only one conclusion from the evidence on the record that the appellant who had moved from his home district to Jullundur, had, after the 15th of August, 1947, no other intention than of making the Dominion of India as his place of abode. On the 15th of August, 1947, therefore, the appellant's migration from Jhawarian to the territory of India was clearly complete, whatever doubts there may have been before that date, though I would be prepared even to hold that he had moved away from his village in 1944 and had migrated to the eastern districts of the Punjab. The appellant could certainly not think of going back to Sargodha for living permanently in the newly created Dominion of Pakistan; the question of his going to Burma at that time hardly arises on the evidence on the record; he did not care to accompany his parents when they went back to Burma in 1947. It is true that he did not physically move from Pakistan to India after the 15th of August, 1947, for the purpose of settling down in this country but, as stated above, keeping in view the background of the happenings in the United Punjab in 1947, and the communal frenzy and holocaust which gripped this territory at that time, I am inclined to take the view that the framers of the Constitution of India used the word "migrate" in a wider sense and it should, in my humble opinion, receive a beneficial, broad, and liberal construction so as to cover cases like the present one. To place a narrow and strict construction on this word, as the learned Tribunal has done, would result in making persons, similarly placed as the appellant (and there may be quite a large number of such persons) stateless. I am extremely doubtful if

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such consequences were intended or countenanced by the Constitution makers, and I have not been able to persuade myself to impute to them such an intention. The appellant is not a citizen of Burma, even his parents are still registered as foreigners in that country (*vide* Exhibit R. 7 and Exhibit R. 8), he cannot in my view be considered to be a citizen of Pakistan; and by placing a narrow construction on the word "migrate" in Article 6, as has been done by the learned Tribunal, he would certainly be rendered stateless. If the word "migrate" as used in Article 6 is capable of two interpretations, I should prefer, unless compelled by a clear binding provision of law to the contrary, to adopt a construction which would avoid such consequences. Our attention has not been drawn to any principle or precedent suggesting that this view is incorrect.

The learned counsel for the respondent then submitted that it was not proved on the record that the appellant was in India on the 26th November, 1949, he contended that from May, 1949 to 1953 there appears to be no trace of the appellant in India. The learned counsel, in my opinion, is not right in his submission. We have in evidence, which I would unhesitatingly believe, that in August, 1949, the appellant appeared in Prabhakar Examination of the Panjab University (*vide* Exhibit R. 12). The appellant also organised the Rashtriya Swayam Sewak Sangh movement in the year 1949. The copy of the judgment of the Supreme Court of Burma (Exhibit R. 14) also clearly shows that the appellant had gone to that country in January, 1950. On this material I would certainly be prepared to hold that the appellant was in India up to the end of the year 1949 and he was without doubt in India on the 26th of November, 1949. I may at this stage also refer to

certain affidavits produced by the parties before us on appeal. Arguments in this case were first heard on the 16th and 17th of September, 1958. At the conclusion of the arguments a question arose whether there was reliable evidence showing the precise time when the appellant went to Burma on the second occasion. The learned counsel for the respondent suggested that perhaps the appellant had left India along with his parents. The learned counsel for the appellant on the other hand, asserted that it was somewhere in January, 1950, that he went to Burma. After hearing the arguments on the 17th of September, 1958, we suggested to both the counsel to produce (if they so liked) any further material in the form of affidavits or otherwise of unimpeachable character which would throw some more light on this point. Both the counsel agreed to this suggestion and welcomed the opportunity of producing more material on the record. The case was thus adjourned to the 3rd of October, 1958, for this purpose. On the 3rd of October, 1958, the learned counsel for the appellant placed before us a copy of a duly authenticated affidavit dated the 23rd of May, 1951, sworn by Mr. U. Maung Gyi, officiating Deputy Secretary, Foreign Office, Government of the Union of Burma, which had been filed in the Supreme Court of the Union of Burma on behalf of the respondent (Minister of Foreign Affairs, Burma), in a writ petition filed by Mangal Sain appellant. In this affidavit it was clearly stated that Mangal Sain appellant had gone to Burma in January, 1950, on the strength of the *Temporary Immigration permit* issu- by the Union of Burma Immigration Officer at Calcutta and that he had arrived at Rangoon by the SS. "Verela" on the 22nd of January, 1950. It is further stated in this affidavit that the appellant had gone to Burma as an organiser of the Rashtriya Swayam Sewak Sangh, a militant communal Hindu

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organisation. It was on this ground that the Government of Burma did not permit the appellant to stay in that country and sent him back to India. It may be remembered that the Supreme Court of Burma has also held, presumably on the basis of this affidavit, that the appellant had gone to Burma in January, 1950 (*See* Exhibit R. 14).

The learned counsel for the respondent on the other hand filed an application dated the 16th of September, 1958, along with a copy of Mangal Sain's letter addressed to the District Magistrate, Rangoon, seeking permission to reside permanently within the Union of Burma. In this application the appellant seems to have stated that he had returned to Burma with his mother in 1947. I need hardly mention that the value of the declaration of the type which has been produced by the respondent is to be assessed in the context and in the circumstances in which it is made. We cannot ignore, and indeed it has been established on the record by unimpeachable evidence, that the appellant served as a teacher for four months from June to September, 1948, in Arya Lower Middle School, Rohtak, and he also received his salary for the months of June and July as is clear from Pay Register, Exhibit P.W. 10/1. He also appeared in the Panjab University Prabhakar Examination for which he submitted his University Admission Form in July, 1948 (Exhibit R.W. 33/1). This form was duly attested by Professor Kanshi Ram Narang who has appeared as a witness. In January, 1949, the appellant was actually arrested in connection with the Rashtriya Swayam Sewak Sangh movement and was detained in the Rohtak District Jail from 10th January, 1949 to 31st May, 1949; he again appeared in the aforesaid University Examination in August, 1949, and was placed in compartment. In the presence of such strong and almost incontrovertible evidence I cannot but hold that the copy

of the letter produced by the respondent contains a wholly false assertion that the appellant had gone to Burma with his mother in 1947. The evidence led in the present case on the other hand fits in with the facts contained in the affidavit filed by the Government of Burma in reply to the writ petition filed in the Supreme Court of that country in which it has been stated that Mangal Sain had gone to Burma in January, 1950, for the purpose of organising the Rashtriya Swayam Sewak Sangh movement there. On this material I am convinced, and I have not the slightest hesitation in holding, that the appellant arrived in Burma on the 22nd of January, 1950 and that he was in India on 26th November, 1949. On this finding I am inclined to hold that the petitioner has established on this record to be a citizen of India under Article 6 of the Constitution at all relevant stages of time and that the view taken by the learned Tribunal is not quite correct.

In the view that I take of Article 6 of the Constitution it is hardly necessary to express any opinion on the earlier argument of the learned counsel for the appellant, namely, that he had his domicile in the territory of India at the commencement of the Constitution and had been ordinarily resident in the said territory for not less than five years immediately preceding such commencement. My finding that the appellant had arrived in Burma on 22nd January, 1950, would, however, also negative the earlier contention of the learned counsel for the appellant with respect to the acquisition of

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citizenship rights under Article 5 of the Constitution. Whether or not the appellant had his domicile in the territory of India, he could certainly not be said to have been ordinarily resident in the said territory for not less than five years *immediately preceding* the 26th of January, 1950. On this short ground alone I feel that Article 5 of the Constitution is of no avail to the learned counsel. It is not necessary for me, in this view of the matter, to decide whether or not the appellant had his domicile in the territory of India on the 26th of January, 1950, though it is rather difficult for me to hold that he ever intended to revert to his domicile of birth or that he ever acquired Burmese domicile; and if under the law a person can never be without a domicile then by process of elimination the appellant may well be considered to have adopted or acquired Indian domicile. Indeed in the most peculiar circumstances which existed in this country in 1947, in my opinion, it is highly probable that the appellant did intend to make the Indian Dominion his permanent home. But in view of my decision upholding the other contention raised by the learned counsel for the appellant on the construction of Article 6 of the Constitution, I refrain from finally deciding this somewhat difficult point.

For all the reasons stated above, I would allow this appeal, reverse the order of the learned Election Tribunal setting aside the election of the appellant, and dismiss the election petition. In the circumstances of this case, however, there will be no order as to costs in this Court.

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FALSHAW, J.—I agree.

B.R.T.