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MASUD KHAN

v.

STATE OF UTTAR PRADESH

September 26, 1973

[H. R. KHANNA, A. ALAGIRISWAMI AND R. S. SARKARIA, JJ.]

B *Foreigners (Internment) Order, 1962—Proceedings under, if Criminal—Issue-Estoppel.*

Foreigners Act (13 *of* 1946), *s.* 9—*Person with Pakistani passport claiming to be Indian citizen—Burden of proof.*

The petitioner came to India from Pakistan on the basis of a Pakistani passport of July 1954 and Indian visa of April, 1956. On his arrest under the Foreigners (Internment) Order, 1962, he contended that he was an Indian citi-
C zen and that he had been illegally arrested and confined in jail.

HELD : (1) Under s. 9 of the Foreigners Act whenever a question arises whether a person is or is not a foreigner the onus of proving that he is not a foreigner lies upon him. If the petitioner had been in India on 26-1-1950 but had gone to Pakistan in 1951, it would be for the Central Government to decide whether he is a Pakistani national or an Indian citizen even though he may have come to India on a Pakistani passport in 1956. But, when he went to Pakistan is a matter peculiarly within his knowledge and he had not pro-
D duced any evidence in support of his statement that he went to Pakistan only in 1951. The burden is upon the petitioner to establish that he is a citizen of India in the manner claimed by him and this burden, not having been discharged by him, it should be held that he is a foreigner and his claim that he is an Indian citizen must be rejected. [794 C—H]

(2) The petitioner was prosecuted under s. 14 of the Foreigners Act and was acquitted on the ground that he was not a foreigner; but this finding would not operate as issue-estoppel. Issue-estoppel arises only if the earlier as well
E as subsequent proceedings were criminal prosecutions. In the present case, while the earlier one was a criminal prosecution, the latter is not a criminal prosecution, but merely action taken under the Foreigners (Internment) Order for the purpose of deporting the petitioner out of India. [794H; 795D—E; 796 H]

Pritam Singh v. *State of Punjab*, A.I.R. 1956 S.C. 415, *Manipur Administration* v. *Thokchom, Bira Singh* [1964] 7 S.C.R. 123, *Piara Singh* v.
F *State of Punjab* [1969] 1 S.C.C. 379, referred to.

Sambasivam v. *Public Prosecutor, Federation of Malaya* [1950] A.C. 458, *The King* v. *Wilkes* 77 C.L.R. 511 and *Marz* v. *The Queen* TF C.L.R. 62, applied.

ORIGINAL JURISDICTION : Writ Petition No. 117 of 1973.

Under Article 32 of the Constitution of India for issue of a writ in the nature of *haveas corpus.*

G *Uma Datta,* for the petitioner.

D. P. Uniyal and *O. P. Rana* for the respondent.

The Judgment of the Court was delivered by

ALAGIRISWAMI, J. Petitioner Masud Khan prays for his release on the ground that he, an Indian citizen has been illegally arrested and confined to jail under Paragraph 5 of the Foreigners (Internment)
H Order, 1962. He had come to India from Pakistan on the basis of a Pakistani passport dated 13-7-1954 and Indian visa dated 9-4-1956. In his application for visa he had stated that he had migrated to Pakistan in 1948 and was in Government service in Pakistan in P.W.D.

as a Darogha and had given his permanent address as Hyderabad (Sind). If these statements were correct the petitioner would clearly be a Pakistani national. When this fact was brought out in the counter affidavit filled on behalf of the respondent, the petitioner filed a further affidavit stating that he was appointed as a Police Constable in Hasanganj Police Station, District Fatehpur, U.P. in February 1947 and continued as a Police Constable till the middle of 1950 when he was dismissed from service, and that he went to Pakistan in the year 1951. In the reply affidavit filed on behalf of the respondent it is stated that one Md. Masood Khan son of Zahoor Khan was enrolled as Police Constable on 16-9-1947 and he was discharged from service on 20-5-1949. It is fairly clear that this information culled from the English Order Book from 1-10-1947 to 27-12-1951 refers to the petitioner. While, therefore, it is established that the petitioner did not go to Pakistan in 1948, it cannot be said that it has been established that the petitioner went to Pakistan only in 1951. When he went to Pakistan is a matter peculiarly within his knowledge and he has produced no evidence in support of that statement. Considering the frequent change of ground which the petitioner has resorted to, a mere statement from him cannot be accepted as true. Nor can we accept his contention that it is for the respondent to establish that he did not go to Pakistan in 1951 but that he went on some other date. The petitioner has also alleged that he was married in U.P. on 25th December, 1949. Even assuming that this statement is correct, the petitioner cannot establish that he is a citizen of India unless he succeeds in establishing that he was in India on 26-1-1950. If he had been in India on 26-1-1950 but had gone to Pakistan in 1951 it would be for the Central Government to decide whether he is a Pakistani national or an Indian citizen even though he may have come to India on a Pakistani passport in 1956 (See AIR 1963 SC 645; AIR 1962 SC 1052; AIR 1962 SC 1778; AIR 1961 SC 1467). That question does not arise here.

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We are not prepared to assume that the petitioner should be deemed to have been present in India on 26-1-1950, as was urged on behalf of the petitioner. There is no room for any such presumption. Under s.9 of the Foreigners Act whenever a question arises whether a person is or is not a foreigner the onus of proving that he is not a foreigner lies upon him. The burden is therefore upon the petitioner to establish that he is a citizen of India in the manner claimed by him and therefore he is not a foreigner [See [1962] 1 SCR 744; [1963] Supp. SCR 560]. This burden not having been discharged by the petitioner it should be held that he is a foreigner and his claim that he is an Indian citizen cannot be dealt with under the Foreigners (Internment) Order, 1962 must be rejected.

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It appears, however, that in 1960 he had been prosecuted before the Sub-Divisional Magistrate, Fatehpur under s. 14 of the Foreigners Act and was acquitted on the ground that he was not a foreigner. It was therefore contended that the question whether the petitioner is a foreigner or not is a matter of *issue estoppel*. The decision that he

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A was not a foreigner seems to have been based on the decision of the Allahabad High Court in *Mohd. Hanif Khan* v. *State* (AIR 1960 All. 434). It was held there that a Pakistani national who entered into India before the amendment to the Foreigners Act in 1957, when he could not be considered to be a foreigner, could not be so held because of that amendment. That decision was that of a learned Single Judge. On the point at issue he differed from an earlier decision of a learned B Single Judge of the same Court in *Ali Sher* v. *The State* (AIR 1960 All. 431). But he decided that case before him on a different point and did not think it necessary to refer the case before him to a Bench for considering which of the two decisions was correct on the question regarding the nationality of a person who came to India on a Pakistani passport before 1957. There are thus two conflicting decisions of the C same court on the same point and the Magistrate who decided the petitioner's case followed one of them.

But that apart, this matter could be decided on another point. The question of *issue-estoppel* has been considered by this Court in *Pritam Singh* v. *State of Punjab* (AIR 1956 SC 415), *Manipur Administration* v. *Thokchom, Bira Singh* (1964 7 SCR 123) and *Piara* D *Singh* s. *State of Punjab* (1969 1 *SCC* 379). *Issue-estoppel* arises only if the earlier as well as the subsequent proceedings were criminal prosecutions. In the present case while the earlier one was a criminal prosecution the present is merely an action taken under the Foreigners (Internment) Order for the purpose of deporting the petitioner out of India. It is not a criminal prosecution. The principle of *issue-estoppel* is simply this : that where an issue of fact has been tried by E a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an *estoppel* or *res judicata* against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence F which might be permitted by law. *Pritam Singh's* case (supra) was based on the decision of the Privy Council in *Sambasivam* v. *Public Prosecutor, Federation of Malaya* (1950 A.C. 458). In that case Lord MacDermott speaking for the Board said :

> "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial G is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication."

It should be kept clearly in mind that the proceeding referred to herein H is a criminal prosecution. The plea of *issue-estoppel* is not the same as the plea of double jeopardy or *autre fois acquit*. In *The King* v. *Wilkes* (77 C.L.R. 511) Divon, J. referring to the question of *issue-estoppel* said.

"....it appears to me that there is nothing wrong in the view that there is an issue *estoppel*, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoners..... There must be prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of *issue-estoppel* should not apply..... *Issue-estoppel* is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation."

The emphasis here again would be seen to be on the determination of criminal liability. In *Marz* v. *The Queen* (96 C.L.R. 62) the High Court of Australia said :

"The Crown is as much precluded by an estoppel by judgment in criminal proceedings as is a subject in civil proceedings..... The laws which gives effect to *issueestoppel* is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the process of reasoning by which the finding was reached in fact..... It is enough that an issue or issues have been distinctly raised or found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding, may be made by one of them against the other."

Here again it is to be remembered that the principle applies to two criminal proceedings and the proceeding with which we are now concerned is not a criminal proceeding. We therefore hold that there is no substance in this contention.

The petition is dismissed.

V.P.S. *Petition dismissed.*