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With this thought, we hereby present to you

***LawPublicus*** The Legal Portal

**Seventy Years of the**  
**Indian Constitution:**  
**Revising the Concept of**  
**Citizenship in Wake of**  
**the Citizenship**  
**Amendment Act**

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## **Seventy Years of the Indian Constitution: Revising the Concept of Citizenship in wake of the Citizenship Amendment Act**

*By: Smriti Pathak*

Those who are born in India or whose grandparents are born in India are known as citizens of India and this is explained in Part II of Indian constitution of India under Article 5 to 11. The Indian legislation says this matter as ‘The Citizenship Act, 1955’. According to this:

- **Article 5: CITIZENSHIP AT THE COMMENCEMENT OF THE CONSTITUTION**

This article says, at the commencement of constitution, any person who is domicile in India is that those who are born in Indian territory, those whose parents or grandparents are born in Indian territory, those who reside in India for more than five year or more are citizens of India.

- **Article 6: RIGHT OF CITIZENSHIP OF CERTAIN PERSONS WHO HAVE MIGRATED TO INDIA FROM PAKISTAN**

According to this article, any person who has been migrated to India from Pakistan shall be citizen of India in following cases:

1. Any person or his parents or his grandparents was born in India as defined in the government of India Act, 1935.
2. If any person has migrated on or nineteenth day of July, 1948, he has ordinarily resided in the territory of India since the date of his migration.
3. If any person has migrated on or nineteenth day of July, 1948, he has been registered as citizen of India by officer appointed in that behalf by the government of the dominion of India on an application made by him therefore to such officer before the commencement of this constitution in the form and manner prescribed by that government:

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

- **Article 7: RIGHT OF CITIZENSHIP OF CERTAIN MIGRANTS TO PAKISTAN**

A person who has migrated after the first day of March 1947, from Indian territory to Pakistan is not deemed as a citizen of India.

Nothing from this article shall apply on the person who has migrated to the territory of Pakistan and returned to India under a permit of resettlement or permanent return issued by or under the authority of any law and every such person shall for the purpose of clause(b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July,1948.

- Article 8: RIGHTS OF CITIZENSHIP OF CERTAIN PERSONS OF INDIAN ORIGIN RESIDING OUTSIDE INDIA

Any person or his parents or his grandparents was born in India which is defined in the government of India Act,1935, and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the government of India.

- Article 9: No person shall be a citizen of India by virtue of article 5 or be deemed to be a citizen of India by virtue of article 6 or article 8 if he has voluntarily acquired the citizenship of any foreign state.

- Article 10: CONTINUANCE OF THE RIGHTS OF CITIZENSHIP

Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of this Part shall, subject to the provisions of any law that may be Parliament, continue to be such citizen.

- Article 11: PARLIAMENT TO REGULATE THE RIGHT OF CITIZENSHIP BY LAW

Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

The citizenship Act,1955, which was amended by Citizenship (Amendment) Act of 1986,1992,2003,2005,2015 and 2019. Earlier it was said that any person who migrates to India from Afghanistan, Bangladesh, Pakistan should live in India for at least 11 year or work as any Indian government employee for 11 years is eligible for Citizen to India. Now after the



Citizenship (Amendment) Act 2019, any person who migrates illegally from Afghanistan, Bangladesh and Pakistan of Hindu, Sikh, Buddhist, Jain, Parsi, or Christian religious communities on or before December 31<sup>st</sup>, 2014, that is only 5 years”.

According to this bill, the first major problem is why these three above mentioned countries are being chosen and why these six above mentioned religions are chosen in this bill, why other countries and other religions are not chosen because due to this Article 14 is violated. In answer to this senior advocate Harish Salve says that the main objective of Citizenship (Amendment) Act, 2019, is that to expand or relax the loss of migration, he also says that in our neighbour country minority community is being tortured or they are forced to leave the country or give up their religion. And the answer for why these three above mentioned countries have been chosen is that in these countries their constitution is not declared as a secular country but they are declared as Islamic State. According to the above discussion, In Afghanistan, Bangladesh, Pakistan minorities are Hindu, Sikh, Buddhist, Jain, Parsi, or Christian whose religious persecution is being done. That is why these three countries and these six religions are being chosen in this bill.

According to this bill the second major problem in the north east part of India specifically from Assam is that the citizenship (Amendment) Act has the record from 2014 and is applicable for the migrants on or before 31<sup>st</sup> December 2014 but in Assam there are many migrants from 1951 to 1971. According to this where will the migrants of Assam will go or what is their citizen. For this people in Assam started doing violent protests against CAA. The protest in Assam has resulted in a huge number of students joining and been so powerful that the army has been called. Internet service has been suspended in 10 districts of Assam and curfew imposed in many cities of Guwahati.

The opposition has opposed that Citizenship (Amendment) Act does not include Muslim immigrants calling the move discriminatory and a part of the BJP's Hindutva agenda. Simply it seems that opposition parties are ok with Citizenship (Amendment) Act give provisions to Muslim migrants the legislation of Citizenship.

In Assam, the protest is neither for Hindu nor for Muslim, it is only for the cut-off date of people who got Citizenship of India. The Citizenship (Amendment) Act 2019 has cut-off of December 31<sup>st</sup> 2014 and the protest of Assam says, is a violation of the Assam Accord of 1985.

The Assam Accord has been signed between the Rajiv Gandhi government of the centre and the protesters led by the All-Assam Student Union (AASU).

Under the Assam Accord, the cut-off date was set at March 25,1971.

This amendment is if unconstitutional only the supreme court declares that. As it is a clear infringement of Article 16 which promotes equality in the matter of public employment.

However, under this Amendment Hindu, Parsi, Sikh, Buddhist, Jain and Christians will be eligible for service in government and residence after 5 year. But a Muslim has to wait for eleven years to get residence and service in government. Thus, this amendment is not uniformly applicable in the whole of India.

The Citizenship (Amendment) Act,2019 is completely based on the idea of fascism and extremism. Moreover, this amendment is clearly the infringement of Secularism and violation of Fundamental rights (Article14 and 15).

It may be noted that under the Indian Constitution while certain rights, like those mentioned in Article19, are available only to citizens, others like the right to equality mentioned in Article 14 and the right to life and liberty mentioned in Article 21 are available to all persons. A non-citizen is certainly a person, and hence is also entitled to rights.

### CASE LAWS

- **HASHEM ALI MIRDHA V. UNION OF INDIA**

Ujjal Bhuyan, J- Heard Mr A.R. Sikdar, learned counsel for the petitioner; Mr. S.C. Keyal, learned Assistant Solicitor General of India and Mr. U.K. Nair, learned Sr. Special Counsel, FT.

- Initially, Mr. Sikdar, learned counsel had argued that independent and the percentage of the petitioner, by virtue of his birth on Indian soil between 26.01.1950 and 01.07.1987 petitioner would be a citizen of India in view of the provisions contained in Section 3 of the Citizenship Act, 1955. However, in the course of the hearing today, Mr. Sikdar, learned counsel for the petitioner submits that he would not be pressing this point; instead he would argue that petitioner would rest his case on a harmonious application of Section 3 and Section 6A of the Citizenship Act,1955.

- In view of the above submission made by learned Counsel Mr. Sikdar, it is not necessary for us to adjudicate the issue as to whether petitioner would be a citizen of India or not by application of Section 3 of the Citizenship Act, 1955.
- Learned counsel for the parties have made submissions on the merit of the impugned order passed by the Tribunal.
- Arguments concluded.
- Because of intervening summer holidays, it may not be possible to dictate the order before the summer holidays.
- List on 09.07.2018 at 2:00 p.m. for delivery of order.

● UNION OF INDIA & OTHERS V. GHAUS MOHAMMAD

Sarkar, J.- This is an appeal by the Union of India from a judgement of the High Court of Punjab allowing the respondent's application under Article 226 of the Constitution for a writ quashing an order made against him on January 29, 1958, Under Section 3(2)(c) of the Foreigners Act, 1946.

That order was made by the Chief Commissioner of Delhi and was in these terms:

“The Chief Commissioner of Delhi is pleased to direct that Mr Ghaus Mohd... a Pakistan national shall not remain in India after the expiry of three days from the date on which this notice is served on him”.

- The order was served on the respondent on February 3, 1958. The respondent did not comply with that order but instead moved the High Court on February 6, 1958, for a writ to quash it.
  - The High Court observed that: “There must be prima facie material on the basis of which the authority can proceed to pass an order under Section 3(2)(c) of the Foreigners Act, 1946. No doubt if there exists such a material and then the order is made which is on the face of it a valid order, then this court cannot go into the question whether or not a particular person is a foreigner or, in other words, not a citizen of this country because according to Section 9 of the Citizenship Act, 1955, this question is to be decided by a prescribed authority and under the Citizenship Rules, 1956, that authority is the Central Government.” The High Court then examined the materials before it and held, “in the present case there

was no material at all on the basis of which the proper authority could proceed to issue an order under Section 3(2)(c) of the Foreigners Act, 1946.” In this view of the matter the High Court quashed the order.

- It was contended on behalf of the Union of India that Section 9 of the Citizenship Act, 1955, had no application to this case. We think that this contention is correct. That Section deals with the termination of citizenship of a citizen of India in certain circumstances. It is not the Union case nor that of the respondent that the letter’s citizenship came to an end for any of the reasons mentioned in that section. The reference to that section by the High Court for the decision of the case, was therefore not apposite. That section had no application to the facts of the case
- Section 2(a) of the Foreigners Act, 1946, defines a “foreigner” as “a person who is not a citizen of India.” Sub- Section (1) of Section 3 of that Act gives power to the central government by order to provide for the presence or continued presence of foreigners in India. Sub- section (2) of Section 3 gives express power to the government to pass orders directing that a foreigner shall not remain in India. It was under this provision that the order asking the respondent to leave India was made.
- There is no dispute that if the respondent was a foreigner, then the order cannot be challenged. The question is whether the respondent was a foreigner. Section 8(1) of the Foreigners Act to which we were referred, deals with the case of a foreigner who is recognised as its national by more than one foreign country or when it is uncertain what his nationality is. In such a case this section gives certain power to the government to decide the nationality of the foreigner. Sub-Section (2) of this section provides that a decision as to nationality given under sub- section (1) shall be final and shall not be called in question in any court. We entirely agree with the contention of the Union that this section has no application to this case for that section does not apply when the question is whether a person is a foreigner or an Indian citizen, which is the question before us, and not what the nationality of a person who is not an Indian citizen, is.
- Section 9 of this Act is the one that is relevant. That section so far as is material is in these terms:

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

It is quite clear that this section applies to the present case and the onus of showing that he is not a foreigner was upon the respondent. The High Court entirely overlooked the provisions of this section and misdirected itself as to the question that arose for decision. It does not seem to have realised that the burden of proving that he was not a foreigner, was on the respondent and appears to have placed that burden on the Union. This was a wholly wrong approach to the question.

- The question whether the respondent is a foreigner is a question of fact on which there is a great deal of dispute which would require a detailed examination of evidence. A proceeding under Article 226 of the Constitution would not be appropriate for a decision of the question. In our view, this question is best decided by a suit and to this course neither party seems to have any serious objection. As we propose to leave the respondent free to file such a suit if he is so advised, we have not dealt with the evidence on the record on the question of the respondent's nationality so as not to prejudice any proceeding that may be brought in the future.
- We think, for the reason mentioned earlier, that the judgement of the High Court cannot be sustained and must be set aside and we order accordingly. On behalf of the Union of India the learned Attorney- General has stated that the Union will not take immediate steps to enforce the order of January 29, 1958, for the deportation of the respondent so that in the meantime the respondent may if he so chooses, file a suit or take any other proceedings that he thinks fit for the decision of the question as to whether he is a foreigner.
- In the result the only order that we make is that the order and the judgement of the High Court are set aside.

## **CONCLUSION**

From my point of view, only Protest against this amendment is not the right way. Only the higher judiciary of India can rectify the same. In India Hindu is a majority community and then also the first right of facility, job is given to all the Indian citizens. Now a day's major problems faced by us are due to these non-Indian migrants who live in India and it must be prevented. Our Parliament rightly sanctioned these amendment bills and we hope that the benefit of this bill is given in the right way to Indian citizens. Provision of citizenship is a message for Unity among the Indian people.

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