

D/L. 17.
March 5, 2024.
MNS.

WPA No. 1323 of 2024

Monoyara Begum and another
Vs.
The State of West Bengal and others

Mr. Habibur Rahaman,
Mr. Kapil Guha,
Mr. Supriyo Ghosh

... for the petitioners.

Sk. Md. Galib,
Ms. Tanwishree Mukherjee

...for the State.

Mr. Atarup Banerjee,
Ms. Sumita Sarkar

...for the Union of India.

1. The petitioner no. 2 claims to be a resident of Chanditala, Hooghly in West Bengal. However, the petitioner no. 1 is his wife and is a co-applicant in view of the nature of the reliefs claimed.
2. The petitioner no. 2 had come with a Pakistani passport and a valid visa to India in the year 2001. Subsequently, the petitioner faced trial under the Foreigners Act, 1946 (for short, "the 1946 Act") and was ultimately convicted in the year 2019 for three years. Accordingly, the petitioner no. 2 was incarcerated, which ended in the month of October, 2022. However, although under normal

circumstances the petitioner no. 2 ought to have been released from prison after exhausting his period of sentence, the petitioner has still been retained in custody. The petitioner no. 2 seeks release from the prison and to live a life of dignity.

3. It is contended by the petitioners through counsel that the petitioner no. 2 has a family of several members, parents, his wife and several children. As such, the petitioner no. 2 seeks to reintegrate into family life and not spend the rest of his life behind the bars.
4. Learned counsel for the State places reliance on the conviction order of the petitioner no. 2. The same envisaged that after the petitioner no. 2 suffers imprisonment for three years and to pay fine of Rs.10,000/-, in default simple imprisonment for six further months, the convict, that is, the petitioner no. 2 was to be deported/repatriated to his own country Pakistan through proper channel.
5. It is contended that the modality which has been adopted universally is that, pending deportation, a person is kept in a different cell than an ordinary prisoner, but within the prison precincts.
6. In the case of the petitioner no. 2, it is submitted that the petitioner no. 2 was

transferred to the Tihar jail for the purpose of having easier access to the Pakistani Consulate. However, it transpires that the Pakistan Embassy has refused to recognize the Pakistani citizenship of the petitioner no. 2. Thus, it is submitted that the petitioner no. 2 cannot be deported immediately for which he has been retained in custody, but in a different cell.

7. Learned counsel for the State places reliance on Section 2 of the 1946 Act, which defines the 'foreigner' means a person who is not a citizen of India. It is contended that since the petitioner is not a citizen of India, he cannot be permitted to live a free life akin to citizens of India standing otherwise on similar footing.
8. Learned counsel places reliance on Section 3(2) of the 1946 Act, which provides that in particular and without prejudice to the generality of the foregoing power as stipulated in Section 3(1), orders may be made under the section, *inter alia*, including the power to arrest and detention or keep confined such a person.
9. It is contended that there is provision for grant of parole to such persons as well.
10. However, it is submitted that the petitioner, unless deported or granted a citizenship, does

not have the right to lead a normal life like other citizens of India.

11. In this context, learned counsel for the State cites Section 13 of the Citizenship Act, 1955 (Act of 1955), which provides that the Central Government may in case as it thinks fit, certify that a person, with respect to whose citizenship of India a doubt exists, is a citizen of India; and a certificate issued under the said Section shall, unless it is proved that it was obtained by means of fraud etc., be conclusive evidence that the said person was such a citizen on the date thereof, but without prejudice to any evidence that he was such a citizen at an earlier date.

12. Learned counsel for the Union of India submits that there is no option but to deport the petitioner no. 2 which cannot take place immediately due to the refusal by Pakistan to take in the petitioner.

13. It is highlighted by learned counsel for the Union of India that the petitioner no. 2 had come with a Pakistani passport and was granted limited visa, upon overstaying which he was convicted under the 1946 Act. Hence, the position remains that the petitioner no. 2 is a foreigner and cannot get rights on parallel footing as citizens of India.

14. It is relevant to mention here that learned counsel for the petitioners cites an unreported judgment dated April 29, 2022 of the Supreme Court in the case of *Ana Parveen and another Vs. Union of India and others*.

15. In the said judgment, the Supreme Court was considering the case of a Pakistani national who had come into India and married here and had five children. The petitioner, it was observed, had five children, who were Indian citizens who reside in Meerut, as does their mother. It was observed that seven years had elapsed since the father had served out his sentence following the conviction under the 1946 Act. In the said backdrop, the Supreme Court was of the view that it would be appropriate if the Foreigners' Division of the Union Ministry of Home Affairs takes a final decision on the representation for the grant of visa/long term visa having regard to all the facts and circumstances of the case and after assessing the inputs from the security angle. The petitioner therein was put to a personal bond of Rs.5,000/- with two sureties of Indian citizens in the like amount and was directed to furnish his address of his place of permanent residence to the local police station.

16. Certain aspects of the matter are required to be considered.
17. The petitioner no. 2, even after serving out his sentence, is still in prison.
18. Although it is contended by the State that the petitioner no. 2 has been put in a different cell than other prisoners, after all a prison cell is a prison cell, by whatever name called.
19. The detention in the confines of a cell is in outright contrast with human liberty.
20. In the present case, we are to look into the interplay between Articles 14 and 21 of the Constitution of India. It is noteworthy that neither of the said Articles are restricted to Indian citizens, but are available to any person on the soil of India. In fact, the right to equality before law and equal protection before the law as well as the right to live a life of dignity does not flow from the Constitution but has merely been recognized by the Constitution. Such rights are implicit human rights which are inextricable from a life worth being called a human existence and a person cannot be denuded under any circumstances from the said two rights.
21. Unlike Article 19, which has been given to citizens of India and is subject to reasonable restrictions of law framed by the Parliament,

Articles 14 and 21 are unfettered in that sense and are available to any human being on the soil of India. As such, the petitioner, having completed his sentence, cannot be retained in further custody, in any prison cell, of whatever colour, texture or dimension.

22. The petitioner no. 2 is entitled to live a life of dignity. A person denuded of dignity leads a life worse than a human being and may be a little better than an animal, which is not expected of any civilized society.

23. In the present case, reliance of the State on Section 13 of the Act 1955 is misplaced, since the petitioner has already undergone a sentence, being convicted under Section 14 of the 1946 Act. It is anybody's guess as to what would happen if the petitioner no. 2 now seeks to apply for citizenship, since his citizenship is no longer in doubt. He came in as a Pakistani national and overstayed his visa which has been vindicated by the court of law by convicting the petitioner no. 2. Hence, under no stretch of imagination can the petitioner take advantage of the doubtfulness as to his citizenship contemplated in Section 13 of the Act of 1955 to seek to fresh citizenship.

24. Insofar as Section 3 of the 1946 Act is concerned, the said stage is over for the

petitioner no. 2 since the said chapter has already merged into his conviction under Section 14 of the 1946 Act, which is a subsequent stage. Although an appeal is apparently pending at the behest of the petitioner no. 2 against the order of conviction, the best outcome of the same would be that the conviction is set aside and it might be left open to the petitioner no. 2 to reassert his claim of Indian citizenship.

25. If such state of affairs comes to pass there would not be any further reason of giving any protection to the petitioner no. 2. However, till (if at all) that happens, the petitioner no. 2 remains in a no-man's land since Pakistan is refusing to take back the petitioner no. 2 and disowning him and the petitioner no. 2 has been proved beyond reasonable doubt by his conviction to be a foreign national, unless such conviction is ultimately overturned.

26. For such persons, there is a glaring chink in the armour of the law of the State, which is a precise scenario where the writ court ought to interfere to protect the fundamental rights ensured to the petitioner no. 2 and recognised in Articles 14 and 21 of the Constitution of India.

27. However, this court is not oblivious of the fact that the Central Government is the ultimate authority, being the Executive whose powers ought to be interfered with readily by the Judiciary, to decide as to the ultimate fate of the petitioner no. 2. If the Central Government takes resort to any law or regulation to extend the visa or grant long term visa to the petitioner, it is for the Central Government to consider the same. Also, if the petitioner no. 2 ultimately wins his appeal against the order of conviction, the petitioner no. 2 may have other avenues open to him. However, till then, the court must come to his aid.

28. Keeping in view the safety considerations which may exist in the perception of the Union Government, the petitioner no. 2 is required to be set free but under certain conditions.

29. Accordingly, WPA No. 1323 of 2024 is disposed of by directing the respondent no. 8, that is, the Superintendent, Dum Dum Correctional Home, to release the petitioner no. 2 upon the petitioner no. 2 furnishing a bond of Rs.10,000/- with two sureties of like amount each, both of whom should be local, residing within the territorial jurisdiction of the Police Station where the petitioner no. 2 intends to go back, that is, the Village-Suchia,

Post Office- Masat, Police Station Chanditala, District, Hooghly, Pin 712701, to the satisfaction of jurisdictional Magistrate of the area of permanent residence of the petitioner no. 2.

30. Such release of the petitioner no. 2 shall, of course, be on further condition that the petitioner no. 2 presents himself to the Officer-in-Charge/Inspector-in-Charge of the local Police Station having territorial jurisdiction of the area of his permanent residence once every month and disclose to such officer his exact permanent place of residence.

31. In the event the petitioner no. 2 is required to be present in connection with his appeal or before any law enforcement agency or other authority in due process of law, the petitioner no. 2 shall make himself available for any such enquiry/investigation/appearance before such authority, also in due process of law.

32. The petitioner no. 2 shall not leave the territorial jurisdiction of the District of Hooghly except without specific leave being obtained from the jurisdictional Magistrate of the locality of his permanent residence.

33. It is made clear that nothing in this order shall create any special right or equity in favour of the petitioner no. 2 than which the petitioner is

otherwise entitled to in law and/or under the Constitution of India.

34. Moreover, the petitioner no. 2 will be at liberty to apply for extension of his visa before the appropriate authority and/or grant of long term visa. If such an application is made, the concerned authorities shall decide the same in accordance with law.

35. The petitioner no. 2 shall also be at liberty to proceed with his appeal against the order of conviction.

36. The present order shall be subject to the outcome of such appeal and to any order which might be passed by the appellate court at the time of finally deciding the appeal of the petitioner no. 2.

37. There will be no order as to costs.

38. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)