

43.
24.02.2020
S.D., Ct.08

W.P. 928 (W) of 2020

Bismillah Khan
vs.
Union of India & Ors.

Mr. Baidurya Ghosal
Ms. Sharmistha Podder
....For the petitioner.

Mr. Amitesh Banerjee, Ld. Sr. St. Counsel,
Mr. Srijib Chakraborty
...For the State.

Mr. Debapriya Gupta
Mr. Tapan Bhanja
...For the Respondent Nos. 1 to 3.

The grievance of the present petitioner is that the petitioner is being denied the citizenship of India since the petitioner is not being able to file an application under Section 5 (1) (c) of the Citizenship Act, 1955, apparently due to the online application, which has to be filed now, contemplating a copy of the passport of the applicant as a mandatory requirement for such application.

Learned counsel for the petitioner submits that the petitioner was a Pakhtoon citizen and due to political turmoil in the said State, which subsequently merged partially into Afghanistan and partially into Pakistan, the petitioner, as a five-year old, had to migrate to India with his father in the year 1973. It is further submitted that under such circumstances, the petitioner could not have any opportunity of having a valid passport, since they were refugees under distress.

As such, the petitioner had previously approached a Coordinate Bench of this Court, wherein a learned Single Judge, vide order dated July 25, 2018 passed in W.P. 6345 (W) of 2018 was pleased to direct that the writ petitioner was to comply with the formalities required, as communicated by the Secretary to the Government of India to the Secretary to the Government of West Bengal (Home), vide a letter dated December 7, 2017. The writ petitioner was given the liberty to apply afresh before the appropriate authority under Section 5(1)(c) of the 1955 Act, having complied with all the formalities as aforesaid.

Learned counsel for the petitioner submits that since a complete application as directed by the Coordinate Bench cannot be possibly filed by the petitioner due to the mandatory requirement of uploading a copy of his passport, which the petitioner does not have due

to reasons beyond his control, the petitioner is not in a position even to file such complete application.

Learned counsel for the Union of India submits that in view of no application having been filed by the petitioner, there is no scope of granting such proposed application at the present juncture for the Union.

Learned counsel further relies on the provisions of Section 5(1)(c) of the Citizenship Act, read with Rule 5 as well as Rules 11 and 12 of the Citizenship Rules, 2009 and argues that it is mandatory to file an application in Form III for the application of the petitioner under Section 5(1)(c) of the Act to be considered at all. Moreover, it is submitted that the appropriate application has to be made before the concerned Collector, who shall issue an acknowledgement in Form IX as contemplated in Rule 11 of the 2009 Rules, followed by the Collector forwarding such application to the State Government or the Union Territory Admission as the case may be within a period of 60 days as stipulated therein.

Learned Counsel for the State submits that in view of the petitioner not complying with the mandatory requirement of submitting

a copy of the passport of the petitioner, the State Government cannot, under the law, forward such application to the Union Government.

It appears from the relevant provisions of Section 5(1)(c) of the Act of 1955, read in conjunction with Rule 5 (1) of the 2009 Rules, that the petitioner has to make an application on the ground of acquiring citizenship under Section 5(1)(c) of the Act mandatorily in Form III as given in the said Rules. The language of Rule 5(1) is specific as to such an application from a person not being entertainable unless the application is made in Form III. A perusal of Form III shows that Clause 9 of the same requires the passport particulars of the applicant to be filled in and the documents to be attached with the application includes a valid foreign passport.

However, a compliance of Rule 5(1)(a), although contemplates that an application shall not be entertained unless the application is made in Form III, such provision *ipso facto* does not make the availability of a passport a mandatory requirement, since the Form given with the Rules or the Rules themselves cannot override the provision of the statute itself, under which the said Rules are framed, which does not stipulate such a mandate on the applicants for citizenship under Section 5 (1)(c) of the 1955 Act mandatorily to carry a passport.

Although such provision is included in the Form, which has to be complied with by the applicant, it is nowhere indicated in such Form that all the relevant particulars, including the particulars regarding passport of the petitioner have to be furnished mandatorily, along with a copy of a valid foreign passport, even in the event the petitioner, for valid reasons, is not in a position to produce such passport.

Under such circumstances, it cannot be held that the provision of producing a passport and its particulars is mandatory in nature and there has to be a relaxation in such requirement in the case the petitioner is able to satisfy the appropriate authorities the reasons for non-availability of such passport. Unless such a leeway is given to the applicants, genuine persons who otherwise have all the formal documents indicating that they have been residing in India for a long time and have married a resident of India would also be unable to apply for Indian Citizenship, despite having lived their entire lives and contributed to the economy and diverse culture of this country, which is contradictory to the spirit of Article 14 of the Constitution of India.

In such view of the matter, the requirement of having a passport has to be read as optional in Form III of the Citizenship Rules, 2009 and the authorities are deemed to have the power to relax such

requirement in the event the applicant satisfied the authorities for genuine reasons why the applicant is not in a position to produce such passport.

Read in such light, the petitioner ought to have the opportunity to approach the appropriate authorities as contemplated in Rules 11 and 12 of the Citizenship Rules, 2009 and upon such authorities being satisfied, on reasons to be recorded, why the applicant is not in a position to produce his passport, can forward such application to the Central Government, which is then bound to consider such application, despite the absence of a passport of the petitioner, upon being satisfied that the ground of satisfaction recorded by the State Authorities is up to the satisfaction of the Central Government.

In such view of the matter, despite the provision of making applications online, a provision has to be made for persons who do not have all the particulars of their passport, which is read as optional, to file applications manually, which are to be treated as valid applications under Rule 5 of the Citizenship Rules, 2009, alternatively to amend the necessary software so that the online applications can be presented with or without passports, in the latter case furnishing detailed reasons as to non-furnishing of passports. Sanctioning of such forms, however, will be

conditional upon the satisfaction of the relevant authorities about the reasons for the applicant not being able to produce her/his passport. Reading the order of the learned Single Judge dated July 25, 2018 passed in W.P. 6345 (W) of 2018 in such light, W.P. 928 (W) of 2020 is disposed of by granting the petitioner liberty to file an application before the authority as contemplated in Rule 11 of the Citizenship Rules 2009, upon furnishing explanation as to the non-availability of the passport of the petitioner. Upon receiving such application, and upon being satisfied about the reasons given by the petitioner as regards the absence of passport and as to the correctness of the particulars of the application, the Collector shall forward such application to the State Government which, upon a consideration under Rule 12(a) shall, if satisfied about the reasons for the absence of passport, forward the said application to the Central Government, which will dispose of such application in accordance with law, giving due credence according to its own standards to the reason furnished by the petitioner for not being able to produce his passport.

Consequentially, the communication dated March 28, 2019 being annexure "P 9" at page 116 of the writ petition is also set aside since the same refused to consider the application of the petitioner on an

erroneous premise that it was mandatory to possess a valid foreign passport for processing of application for grant of Indian Citizenship, in which light it was observed that the petitioner had failed to produce any valid foreign passport and any explanation in that regard were not admissible, without going into the merits of such explanation at all.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)

