

# NOTES AND COMMENTS

## DUAL CITIZENSHIP FOR NON-RESIDENT INDIANS

### I Introduction

WHO ARE non-resident Indians or NRIs? By the very description they are Indians but not resident in India. This expression has been universally used obviously because it correctly expresses the status of Indians living abroad. The word "Indian" itself may have a dual connotation meaning that either he is an Indian citizen or a person of Indian origin but not an Indian citizen. The use of the same word "Indian" for both these concepts shows that the basic characteristic of being Indian is not lost by merely changing the citizenship. For, Indian is an ethnic term which is based on the possession of a whole complex of qualities such as origin, heritage, culture, religion, way of life, nature of the society, the family, language, blood relationships, residence, history rooted in the past and also aspirations, prospects of the present and future and how the rest of the world used the word Indian. It is for this reason that a divorce between the two concepts of Indian citizenship and Indian origin is not desirable.

### II Constitutional provisions

To prevent such a dichotomy the Constitution of India provides as follows.

Article 5 defines a citizen of India as one, (a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory of India for not less than five years. The three bases of citizenship in article 5 are thus citizenship by, (i) birth; (ii) parentage; and (iii) residence.

Article 8 specifically deals with rights of citizenship of persons of Indian origin residing outside India. This is a proviso to article 5 and aimed at a certain type of citizenship. It states :

Notwithstanding anything in Article 5, any person who or either of whose parents or any of whose grandparents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of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 of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or

after the commencement of this Constitution, in the form and manner prescribed by the Government of India.

Article 8 highlights the point of registration. A person of Indian origin can be registered as an Indian citizen while residing in the foreign country itself and without the necessity of having any Indian residence. This brings out the significance of registration. It does not require any qualification except the Indian origin. It does not at all require residence in India. The registration is a recognition of citizenship by being a person of Indian origin. It is only evidentiary. The status of citizenship already exists. Registration is only enlisting such persons in a common register. This meaning of registration will have to be read into the Citizenship Act 1955 which has been enacted in accordance with article 11 of the Constitution. This article is another peculiarity of the citizenship law. Normally, the Constitution prevails over ordinary legislation. But article 11 reverses this rule. It reads :

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.

Article 9 states :

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.

What this article says is that the presumption of being an Indian citizen as a person of Indian origin residing outside India will not arise in favour of such a person under article 8 if he has voluntarily acquired the citizenship of any foreign state. The voluntary acquisition is contrasted with legal consequences which follow the residence of an Indian in a foreign country without any positive action on his part to acquire the citizenship of the foreign country. The residence in the foreign country is not regarded as such a positive act. For, such residence does not disrupt the continuance of Indian citizenship of an Indian citizen residing abroad. Its continuance is assured by article 10.

### III Residence in foreign country

Residence in a foreign country is a neutral act. On the one hand, it does not come in the way of continuance of the Indian citizenship of a person of Indian origin residing abroad. On the other hand, it qualifies the person with residence in a foreign country to become a citizen of the country in which he resides. If such residence is not a disruption of the Indian citizenship then the culmination of such residence ripening into a foreign citizenship by the mere residence may not be considered a voluntary acquisition of

the foreign citizenship. For, voluntary acquisition is contrasted with residence. Residence abroad is considered as good as residence in India in respect of a person of Indian origin. At any rate, article 9 does not say that the citizen of India voluntarily acquiring foreign citizenship shall be deprived of his existing citizenship. All it says is that he shall not be deemed to be a citizen of India by virtue of article 6 or article 8. Such a deeming provision is needed only if citizenship of India is not conferred on such a person by a specific provision of the law. For instance, if such a person is registered as an Indian citizen under article 8 of the Constitution or under section 5 of the Citizenship Act then article 9 alone will not deprive him of that citizenship. Some more specific provisions of law which result in the deprivation of his Indian citizenship will have to be considered.

Section 8(1) of the Citizenship Act reads:

If any citizen of India of full age and capacity, who is also a citizen or national of another country, makes in the prescribed manner a declaration renouncing his Indian citizenship, the declaration shall be registered by the prescribed authority; and upon such registration, that person shall cease to be a citizen of India.

This section is innocuous. One can hardly imagine any citizen who will take the trouble of making such a declaration under the rules framed under the Indian Citizenship Act to renounce his citizenship. What does he gain by making such a declaration? Why should he make it? It is important to remember that section 8 of the Citizenship Act refers to a declaration made under the said Act and rules framed thereunder. It does not refer to any such declaration being made under any foreign law. The important point about section 8 is that it is the only provision which refers to a voluntary renunciation of Indian citizenship by an Indian citizen. Such voluntary action consists in the making of a declaration in the prescribed manner giving it a formal and legal effect. Such a voluntary renunciation may be considered with a voluntary acquisition of citizenship under article 9 of the Constitution. The word "voluntary" is not used in section 8. But, obviously, it is implied therein. For, the making of a declaration in the prescribed manner is a deliberate and voluntary act with knowledge of the relevant law and the intention of complying with it. One would be justified in ascribing the same meaning of voluntary acquisition of citizenship referred to in article 9. If it is not necessary for an Indian citizen residing abroad to renounce his Indian citizenship before the foreign citizenship is conferred on him, then he will continue to be an Indian citizen because there is no renunciation by him under section 8 of the Citizenship Act. It is only if he is made to renounce his Indian citizenship in the foreign country as a condition precedent to acquiring the foreign citizenship that it may be said that he has voluntarily acquired the foreign citizenship within the meaning of article 9 of the Constitution and he will not thereby be deemed to be a citizen of India thereafter. But when the foreign country does not require that the Indian citizen acquiring its citizenship must renounce his

Indian citizenship, then obviously the foreign citizenship is conferred on the Indian citizen by reason of the foreign law, not because the Indian citizen voluntarily acquires the foreign citizenship by a positive act such as renunciation of the Indian citizenship.

Section 9, Citizenship Act, however, speaks of voluntary acquisition of citizenship of another country by a citizen of India. Such voluntary action consists in "naturalisation, registration or otherwise". It is submitted that the tenure of section 9 is contrary to the spirit of the provisions of the Constitution whereunder the mere residence of an Indian citizen abroad howsoever long does not disrupt the continuance of his Indian citizenship. The acceptance of a foreign citizenship by an Indian citizen who has become entitled to it merely by long residence or otherwise should not be regarded as a voluntary acquisition of the foreign citizenship because the long residence is not considered as a disruption of his Indian citizenship. If the same residence which does not disqualify him from being a citizen of India qualifies him to become a foreign citizen also, then this is par excellence a case of dual citizenship and should be recognised as such so that the same person can possess citizenship of two countries without having to renounce either of them.

#### IV Citizenship by registration

Section 5 of the Citizenship Act supports the above interpretation of section 9. Section 5(1) states:

Subject to the provisions of this section and such conditions and restrictions as may be prescribed, the prescribed authority may, on application made in this behalf, register as a citizen of India any person who is not already such citizen by virtue of the Constitution or by virtue of any of the other provisions of this Act and belongs to any of the following categories :

- (a) Persons of Indian origin who are ordinarily resident in India and have been so resident for six months immediately before making an application for registration;
- (b) Persons of Indian origin who are ordinarily resident in any country or place outside undivided India;
- (c) Women who are, or have been, married to citizens of India;
- (d) Minor children of persons who are citizens of India; and
- (e) Persons of full age and capacity who are citizens of a country specified in the First Schedule (Commonwealth countries).

Provided that in prescribing the conditions and restrictions subject to which persons of any such country may be registered as citizens of India under this clause, the Central Government shall have due regard to the conditions subject to which citizens of India may, by

law or practice of that country, become citizens of that country by registration.

The application for registration under section 5 of the Citizenship Act is to be made only when the applicant is not already a citizen of India. This is clear because he could have been so either by virtue of the Constitution or the Citizenship Act and section 5 applies only when he is not such an Indian citizen by virtue of either of these provisions. Persons of Indian origin who are citizens of India by birth, descent or residence of five years within the meaning of article 5 of the Constitution do not have to apply for such registration. And yet such non-citizens of India have been treated favourably by article 5 only because they are within the five categories of persons specified in section 5 of the Citizenship Act. One such category is "persons of Indian origin who are ordinarily resident in any country or place outside undivided India". This is a clear recognition of the right of a non-citizen of India residing abroad to be registered as a citizen of India merely because he is a person of Indian origin. He thus has a right to acquire Indian citizenship by registration.

#### V Right to nationality

After all, citizenship or nationality is a human right. The Universal Declaration of Human Rights proclaimed by the United Nations in 1948 contained clause 15 which emphasises that, "Everyone has a right to nationality".

Section 5 of the Citizenship Act has to be understood in the light of such a human right. If a person of Indian origin ordinarily resident outside India is entitled to become an Indian citizen by registration, such registration is considered necessary only because such a person is not already an Indian citizen. Section 5 does not say that such a person should not be a foreign citizen. Foreign citizenship is immaterial provided that the person is of Indian origin. Indeed, section 5 must be contemplating that such a person may be a foreign citizen. For, normally everyone has some citizenship or nationality and statelessness is a very rare condition. Therefore, section 5 may be understood as contemplating that a person who is not a citizen of India may be a citizen of a foreign country. But even then he would be registered as an Indian citizen if he is a person of Indian origin. This right is given by the Citizenship Act, the provisions of which prevail over those of the Constitution by virtue of article 11 of the Constitution. Another feature of section 5 is that a clear distinction is made between persons of Indian origin who are ordinarily resident in India and those who are not so resident. For the former, a residence of six months in India is required by section 5(1)(a) before registration. This cannot be objected to because of the express provisions of section 5(1)(a). But no such residence in India is required at all for a person of Indian origin ordinarily resident outside India and covered by clause (b) of section 5(1). The

reason is obvious. It would be a contradiction in terms for section 5(1)(b) to say that a person of Indian origin ordinarily resident outside India is entitled to become an Indian citizen by registration even if he is a foreign citizen and for any rule or application form being prescribed under the said rules made under the Citizenship Act to say that a five-year residence would be required in India for such registration. It is amazing that such a requirement should have been made under the prescribed application form set out under the rules framed under the Citizenship Act. Such rules can be made under section 18 of the Act "to carry out the purposes of the Act". The only conditions which can be prescribed under section 5 are those relating to reciprocity of Indian citizens being registered as foreign citizens in a foreign country in the same way as foreign citizens in India can be registered as Indian citizens. Both in USA and UK, Indian citizens residing there for a certain period of time become entitled to citizenship without having to renounce Indian citizenship and thus becoming entitled to a dual citizenship. Section 5 does not contemplate that a person who is given the right to become an Indian citizen on the ground of being a person of Indian origin residing outside India can be subjected to the condition of residing in India and that too for five years to become an Indian citizen by registration. Such a condition would be totally irreconcilable with section 5 and the rules and application form prescribed thereunder would, therefore, be *ultra vires*. It is hoped that the Central Government would appreciate this legal position and take steps to repeal such a contradictory provision in the rules and application form.

An additional argument in favour of this interpretation of section 5 is to read section 6 with it. Section 6 expressly relates to a different mode of acquiring Indian citizenship, namely by naturalisation. The qualifications for naturalisation are prescribed in the Third Schedule to the Constitution. They include necessary residence in India for a certain period of time. The very meaning of naturalisation is that a person is naturalised in the country concerned by residence for the prescribed period of time. Therefore, registration has to be contrasted with naturalisation. Both of them cannot be residence for a particular period of time. On the contrary, it is because naturalisation so means that registration cannot so mean.

### VI Migrants to Pakistan

Article 7 of the Constitution distinguishes those who migrated to Pakistan after 1 March 1947 from India as being persons who are not entitled to the benefit of articles 5 and 6 of the Constitution. The citizenship of India by birth, descent and residence is denied to them. It is this loss of Indian citizenship of migrants to Pakistan which is covered by termination of citizenship under article 9 of the Act. Naturally, such migrants would acquire the citizenship of Pakistan. Section 9(2) says that if any question arises as to whether, when or how any person has acquired the citizenship

of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf. The only enquiry to be made under section 9(2) is as to the acquisition of foreign citizenship losing thereby his Indian citizenship. Such a loss of citizenship is envisaged by the mere act of migration to Pakistan under article 7 of the Constitution. Migration to any other country does not have such a consequence. On the contrary, possession of a foreign citizenship is no bar to a person of Indian origin not resident in India acquiring Indian citizenship by registration under section 5.

### VII Ambit of section 9(2) of Citizenship Act

Section 9(2) may create an impression that every question of citizenship is to be determined by the Central Government and not by the courts. Such an impression would be wrong. The only inquiry under section 9(2) is as to the acquisition of a foreign citizenship. This is relevant only in case of migrants to Pakistan, not to other countries. For, section 5(1)(b) expressly contemplates migrants to other countries being citizens of those countries still entitled to Indian citizenship by registration if they are persons of Indian origin not residing in India. Such a claim under section 5(b) is not to be enquired into by the Central Government under section 9(2) because it does not involve any inquiry into foreign citizenship. Foreign citizenship is not a disqualification in the acquisition of Indian citizenship under section 5(1)(b). Therefore, despite section 9(2) a writ petition against the Central Government would lie for denial of citizenship by registration to a person of Indian origin residing abroad on the ground that he must reside in India for 5 years before he can be so registered.

### VIII Conclusion

Citizenship by registration under section 5(1)(b) is open as of right to a person of Indian origin not residing in India and possessing a foreign citizenship. If this right is denied to him, he can assert it in a court of law as a statutory right protected both by the Constitution and the Citizenship Act and the courts will have jurisdiction to decide on that right as section 9(2) does not bar this jurisdiction of the court.

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