

# The Tussle Between the Citizens and Foreigners in Assam

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**Prafulla Kumar Mahanta**

The book, authored by a post-graduate student of the Law Department of Gauhati University, delineates the constant struggle between the *bona fide* citizens and the surreptitious foreigners.

In this study, Mr Prafulla Kumar Mahanta, the youngest and the only student Chief Minister of Assam, has comprehended the complex constitutional issues with utmost sincerity and has also portrayed the people who are in distress consequent to the misconceived laws and miscarried justice.

In proper perspective, the book is an instance of rare mounting of a national experiment deserving top priority and saturated industry. It treats subtle distinctions of domicile and nationality in juxtaposition with migrational mobility and national interest. The humanitarian problem of statelessness has also found its proper use while determining the limited rights of the aliens. The author has cautioned the people not to get blurred with confusion of mistaken notions regarding the interchangeability of limited rights of the foreigners with the rights of minorities as laid down in the Indian Constitution.

The book is replete with the statistics on the facts, tables, case-laws, and valuable annexures. General readers, politicians, administrators, educationist and students of political science and history will immensely benefit from this book.

Prafulla Kumar Mahanta has become a dream name in the non-conformist culture of political dissent by claiming a place in the *Guinness Book of World Records* by literally walking up to the Assam Chief Minister's chair from the Postgraduate Law Classes in the Gauhati University campus. He led the All Assam Students Union's movement continuously for over seventy-seven months culminating in the historic "Memorandum of Settlement" on 15 August 1985 with the Government of India. Being trained in science and law, he drew extensively from the reservoir of student activism and popular participation to the maximum while leading the movement from the front as the President of the AASU.

The author, being fortified with singular field experiences, has made an in-depth study of this vexed problem of the tussle between the foreigners and citizens in Assam, while taking up his dissertation work for the Master's Degree in Law under Gauhati University. His marshalling of facts and figures regarding legislative and judicial forms conclusively proves his mastery over the subject.

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**Prafulla Kumar Mahanta**



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*Eyer*

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*Dedicated  
to the law-abiding and Constitution-following citizens of India  
residing in Assam  
who have waged a relentless tussle  
against the invasion of illegal foreigners masquerading as  
minorities playing to the designs of the political tricksters  
and economic exploiters.*

## ACKNOWLEDGEMENT

The author is grateful to the following:

- *Shri Bhrigu Kumar Phukan* the legendary General Secretary of the AASU, who had immensely helped me in galvanizing my academic thought-processes and in transforming this work into its present shape presentable to the reading world at large for their invariable evaluation.
  - *Shri Lalit Chandra Rajkhowa* the most vocal crusader for the cause of the constitutional issue that rocked Assam for six years, who lent constant helping hand throughout the period and guided me in completing this work.
  - *Shri Bipul Kumar Mahanta* my youngest brother, who did undertake all the drudgeries ungrudgingly while making its typescript read.
  - *Shri Dilip Kumar Mahanta* my younger brother, who has shouldered all the managerial responsibilities with dedication spurning even his youthlike pre-occupations.
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- and
- *Prof K.N. Sarma*, Dean of Faculty of Law, Gauhati University, who had overseen the origin and growth of this tiny tome, by nursing it from the chrysalis stage to the imago stage of evolution.

PRAFULLA KUMAR MAHANTA

## FOREWORD

I am happy to introduce this book written by a young student of the Department of Law, Gauhati University who also has become the youngest Chief Minister in India. To circumscribe the identity of Shri Prafulla Kumar Mahanta into that small capsule would be simply disproportionate and unjustified. Being the topmost functionary of the most powerful students' organization not only in India, but perhaps throughout the planet, his credentials are much higher and far more expansive.

Shri Mahanta, while leading the All Assam Students Union, AASU in legendary abbreviation, for the last six and a half years, has always been in the thick of the crusade he has been carrying on his broad shoulders, in cooperation with his able deputy Sri Bhriku Kumar Phukan, AASU General Secretary, throughout this eventful period. The problem is of massive dimensions having multifarious ramifications, both national and international, transcending the barriers of history and geography affecting the nation and the society at large. The general is cherubic, the weapons are Gandhian and the opposition too smart and formidable. Shri Mahanta has not only suffered the problem first hand, led the movement against the foreign nationals in Assam (may be in India) from forefront, but also realised it thoroughly through his sincere comprehension of the constitutional issues and the legal subtelties while prosecuting the Master's Degree in Law, in Gauhati University, during the later part of his student life. Throughout the analysis of the issues involved in sizing up the tussle between the citizens and the illegal foreigners masquerading as minorities in Assam, the young but competent author has not lost sight of the intricacies of the hydra-headed problem and has delved deep into the niceties of justice and fairplay. The writer has spared no pains, in spite of his hectic life schedules of a *bona fide* scholar and a natural leader, in churning up the available source materials, plethora of enactments and rules, the heap of reports ranging from classified government documents to mountains of public memoranda, for delineating the battle between the

the discerning readers to assess and to dissect. I will feel happy and rewarded if the attempt could bring to light some of the subtelties of the hydraheaded monster of foreigners' influx into Assam, nay India, and stir up my fellow countrymen to realise the gravity of the problem and the enormity of the consequences.

*Gauhati University*  
10 November 1985

PRAFULLA KUMAR MAHANTA

## CONTENTS

<i>Table of Cases</i>	xv
1. Introduction	1
2. Citizenship in General	26
3. Citizenship Laws in India with Special Reference to Assam	36
4. Concept of Citizenship Under the Citizenship Act 1955	56
5. Application of Citizenship Laws in Assam	74
6. Conclusion	112
Postscript	118
<i>Appendix One</i>	
Citizenship (Pondicherry) Order, 1962	121
<i>Appendix Two</i>	
Goa, Daman & Diu (Citizenship) Order, 1962	125
<i>Appendix Three</i>	
Dadra and Nagar Haveli (Citizenship) Order, 1962	128
<i>Appendix Four</i>	
The Immigrants (Expulsion from Assam) Act, 1950	129
<i>Appendix Five</i>	
Policy Instruction	132
<i>Appendix Six</i>	
Memorandum of Settlement	134
<i>Appendix Seven</i>	
Suo Moto Statement by the Home Minister in the Parliament	139
<i>Index</i>	145

## TABLE OF CASES

Abdul Rahman v State, AIR 1984 Pt. 384.	14
Abdul Sattar v Gujarat State, AIR 1965 SC 810.	47
Abdus Samad v State of West Bengal, AIR 1973 SC 505.	12, 47
Ameerunissa v Mehboob, AIR 1958 SC 91.	50
Aslam Khan v Fazal Haque Khan, AIR 1955 SC 282.	49
Aslam Khan v Haque Khan, AIR 1959 AH 79.	64
Ataur Rahman v State of M.P., AIR 1951 Nag 44.	52
Beldrini v Beldrini (1931) Probate-9.	15
Bombay State v Narayandas, AIR 1958 Bom 68.	50
Central Bank of India v Ram Narain, AIR 1955 SC 361.	13, 47
Dawood Md. v Union of India, AIR 1969 Guj 79.	13, 48
Ebrahim Wazir v State of Bombay, AIR 1952 SC 229.	54, 55
Gangadhar Yeshwant Bhandra v Erasmo Deo, AIR 1975 SC 972.	126
Ghaurul Hassan v State of Rajasthan, AIR 1954 Raj 172; ILR (1958) 8 Raj 928.	107
Habatullah Hazi Fazal Husain v State of Gujarat, AIR 1964 Guj 128.	17
Hassan Uzzaman v Union of India, AIR 1982 (2) SC 218.	110
Smt Indira Nehru Gandhi v Raj Narain, 175 SC 2299.	24
Izhar Ahmed v Union of India, AIR 1962 SC 1052.	54
Joshi v Madhya Bharat State, AIR 1955 SC 334.	47
Karimun Nissa v M P, AIR 1955 MP 6.	48
Kedar Panday v Narayan Shab, AIR 1966 SC 100.	13
Khalil Ahmed v State of U P, AIR 1962 All 383.	64
Kulathil Mamma v State of Kerala, AIR 1966 SC 1614.	52-54
Malkiat Singh v State of Punjab, AIR 1959 Puj 250.	13, 48
Maskharal Hasan v Union of India, AIR 1967 SC 565.	52
Michael Anthony Rodrigues v State of Bombay, AIR 1966 Bom 729.	15, 48
Mohd Manit Khan v State, 1959 All LJ 895.	92
Mohel Reza Debstani v State of Bombay, AIR 1966 SC 1436.	47, 48
Muktar Ahmed v State of U P, AIR 1965 All 191.	91
N.P. Fonnuswami v Returning Officer, AIR 1952 SC 64.	24
Nazirandai v State of MP, AIR 1952 M P.	62
Rosetta Evelyon Attaullah M v Justin Attaullah, AIR 1953 Cal 530.	15
Sankaran Govindan v Lakshmi Bharathi, AIR 1964 Ker 244.	12, 47
Sankaran v Lakshmi, AIR 1974 SC 1765.	13
Sakuntala v Beni Madhav, AIR 1964 All 165.	50

Schmidt v Secretary of State, AIR 1969 ER 904.	31
S.G.Y. Bandare v Erasmo dejus Tack Bequeria, AIR 1972 Goa 11.	126
Smt Shanno Devi v Mangal Sain, AIR 1961 SC 5.	17, 52
Sharafat v State of U P, AIR 1966 All 637.	13, 48
State v Ashfaq Ahmed, AIR 1961 All 155.	91
Stat of Bihar v Kumar Amar Singh, AIR 1955 SC 282.	52, 53
State of M P v Pir Mohammed, AIR 1963 SC 645.	111
State Trading Corporation of India v Commercial Tax Officer, AIR 1963 SC 1811.	4, 11
State of U P, v Abdul Samad, AIR 1962 SC 1506.	91
State of Uttar Pradesh v Shah Mohammed, AIR 1969 SC 1234.	94
Sudhir Ch. Nag v State of Assam, AIR 1958 Assam 25.	61
T E Mahmood v State of Madras, AIR 1961 Mad 129.	69
Wahl v Attorney General, 1932 147 LT 382.	15

## *Chapter One*

### INTRODUCTION

The word citizen is generally applied to the people of a country whose national government derives its power from the people as in a Republic. A citizen of a state or of a country is a person who enjoys full civil and political rights. The original English meaning of citizen is referred to membership of a borough or local municipal corporation, while the word 'subject' was used to denote a man's relation to the monarch or the state.

The term citizen is used in various senses. Literally, it means the resident of a city who enjoys certain privileges of such residence. Thus when we speak of citizens of Guwahati or Delhi, it means the persons who live there and enjoy the rights which are conferred upon them by their membership of those cities. The Greeks and Romans lived in tiny states called city-states and an inhabitant of a city who had the leisure and ability to actively participate in the functions of the state was called a citizen. Women, slaves and some others were not regarded as citizens. To the Greeks, citizenship meant far more than the mere membership of a modern state. Citizenship was a function and almost a profession with the Greeks. But modern states have vast areas with an equally vast number of population. The word citizen is now used in a wider sense. It includes all those who permanently reside in a country and owe permanent allegiance to that country regardless of their political function. Thus the modern conception of citizenship is more extensive. The modern state has no exacting conception of citizenship like that of the ancient city-state. Justice Miller of the Supreme Court of the USA says that "citizens are the members of the political community to which they belong. They are the people who compare the state and who in their associated capacity

have established or subjected themselves to the dominion of a government for the protection of their individual as well as their collective rights."

In ancient states, notably Sparta, Athens and Rome, the classification of nationals into citizens and non-citizens was in vogue. There was also gradation of citizenship in Athens and Rome. In Sparta, besides the citizens, there were the serfs (belots) and the unfranchised dwellers around, subject to tribute and military service. Citizenship in Athens was originally distributed amongst the 'phratries' who retained the right to the registration of citizens. Later on, with the growth of the state, there were grades of citizenship based on property qualifications with differences in political and economic privileges. From the early times the Roman wit could distinguish between civil rights and political rights. *Civitas Sine Suffragio* comprised the complex civil rights the Romans conferred on a number of towns. This limited citizenship carried with it the right of trading with Rome and the right of intermarriage. The privileges of Roman citizenship carrying the important civic rights of 'commereiums' and 'connubium' was at first restricted to the governing class (curies) in Rome proper.

The ancient Roman nation of 'cives' or 'civitas' which in later times supplied the content as well as the nomenclature of the concepts of citizenship, had its foundation not on domicile in a territory but on personality. This personal right of citizenship was extended later on for reasons of policy to the Latins and to the inhabitants of all Italy, and under Julius Caesar to the Eialpine Gaul. This well-known process culminated in the 'constitution antoniniana' of AD 212—the first public act of Caracalls by the extension of personal right of Roman citizenship to all the free men living in the Empire.

Beneath the literal sense in which the word citizen has been defined above, there is a deeper significance associated with it. Modern writers like Laski attributes to it certain qualities which, though not as intensive as the ancient

conception, have redeemed the modern citizen from the status of a mere sleeping partner of the state. The citizen in a modern state according to writers Garner, W.D. Aston, P. Jordan, L. Leacock, E.M. White and V.S.S. Sastri, is to play his part actively in the life of the community if he seriously deserves the name. His function is to give and take. He must receive all that is necessary to equip himself as a citizen and give back to the community all that promotes common well-being of the community. There is a tendency in modern times to identify citizenship with patriotism. But patriotism is not enough. The citizen must, above all, develop two virtues—virtues of toleration and moderation. Toleration enables the citizen to pay due regard to the opinion of others who do not share his views. It enables him to look upon every question from a disinterested point of view. The loyalty of citizen to the state should not be allowed to prejudice his attitude towards others. The only thing against which the good citizen should wage a relentless war is injustice and inhumanity. Modern citizenship “is in the nature of a series of concentric circles”. A citizen is a member of the family, a member of the village or town in which he lives, a member of the occupation which gives him bread, a member of the country and above all a member of humanity at large. He must adjust his relation to each of these groups in such a way that his loyalty to one may not come in conflict with that of the other. The rights of a citizen, as has been remarked by an eminent author, seem to be affected by the law of diminishing returns. The emphasis today is more and more on his duties. It is in “the contribution of one’s instructed judgement to the public good” that the essence of citizenship lies.

Generally, political rights, such as suffrage and the right to hold public office, are predicated upon citizenship. Usual incidents of citizenship are allegiance and military duty. Otherwise, the significance of citizenship varies in accordance with the relevance attributed to it in various countries. Thus in civil law countries, issues such as personal capacity (e.g. capacity to contract marriage, to make a will), legitimate and

illegitimate descent, family status, the civil consequences of marriage, succession to movable property are governed by the law of the state of which the person concerned is a citizen. In common law countries such issues are usually determined by the law of the person's domicile. In criminal matters, citizenship plays a nationally varying role, e.g. as regards extradition, penal jurisdiction or treason legislation.

### CITIZEN AND SUBJECT

Sometimes a distinction is made between a subject and a citizen. A citizen is defined as one who enjoys full civil and political rights. While a subject is one who is not entitled to any political rights. The distinction is not a real one because of the fact that the state is sovereign over all and its control is unlimited over all individuals regardless of their civil and political status. Secondly, the word subject has been used in history to describe the relation between the absolute king and those whom he ruled over. But in modern democracies, such a relationship hardly exists, and therefore the employment of the word subject is quite unnecessary. But it should be noted here that in spite of the progress of the democratic ideal, the word is still used in connection with those people who have an independent political status, e.g. the Indians before 1947. It has been said: "Though the statute speaks of the King's subjects, it extends to aliens, ... for though they are not the King's natural born subjects, they are the King's subjects when in England by a local allegiance."

A citizen, thus, is one who by reason of his birth, naturalization or otherwise is a member of an independent political society called a state, kingdom or empire. He is subject to its law and entitled to its protection in all rights incidental to that relation. The Supreme Court of India in *State Trading Corporation v Commercial Tax Officer* (AIR 1963 SC 1811) observed that citizenship, strictly speaking, is a term of municipal law and denotes the possession in a particular state of full, civil and political rights, subject to special disqualification

such as minority and sex. The conditions on which citizenship is acquired are regulated by municipal laws.

The modern terminology of citizenship has not followed the distinction drawn by Rousseau between the subject as the passive and the citizen as the active member of the political community. The reason perhaps is that there has been no sharp differentiation in the underlying development. On the contrary, it has been marked by an ever accelerated increase of citizens and a corresponding decrease of subjects, chiefly through the extension of the franchise to ever larger groups. The concept of citizenship has thus come to be closely associated with the rise of modern democracy. Similarly, the various forms which citizenship has assumed in different countries or in different periods were obviously dependent upon the degree of participation of the average citizen in the processes of government.

### **CITIZEN AND NATIONAL**

Sometimes a distinction is also made between a citizen and a national. A citizen is one who enjoys full civil and political rights but a national is one who is a citizen without full political rights. Thus a national, like a citizen, owes allegiance to the state, is subject to the control of the state both at home and abroad but with no voting right. Nationals, therefore, constitute that portion of the citizens of a state on whom the state, for some reason or other, has not conferred the right to vote. The bulk of the population of a modern state, according to this definition, consists of nationals and not citizens.

### **NATIONALITY**

A nationality is defined as a group of people bound together by identity of race, language, religion or by community of interest, history and tradition, while a nation is a group of men united under the same sovereignty. Nationality is very often used as an ethnical and cultural term. Social possessions

of mankind which in this sense make people a nationality are common racial stock, common culture, common language, religion, customs and traditions, common history, common economic interests and political associations, geographic unity or even common hopes and aspirations. Every one of these factors need not be present in order that a people become a nationality. It would be vain indeed to search for any common equality or definite interest which is everywhere associated with nationality. When a nationality forms an independent political organization, i.e. acquires statehood, it becomes a nation.

(i) *Identity of race* is held by many as a characteristic of most nationality. But recent ethnological researches have proved beyond doubt that there is hardly any race in the world which can claim itself to be the descendants of a single stock. The different races have been so intermixed with one another that it is impossible at this distance of date to separate one from the other. Besides, unity of race does not necessarily lead to the formation of a nationality. The German and the English belong to the same racial stock but they are quite distinct from the national point of view. Conversely, there are many races in the United States, but all of them are united together as 'Americans'. Thus our analysis shows that nationality is not dependent on the racial factor, although the bond of kinship—or even a mere belief in a common origin—considerably influences the growth of the corporate sentiment of nationality.

(ii) *Community of language* immensely contributes to national unity. Language is the vehicle of thought and when a people speak the same language, inter-change of ideas and ideals becomes easier than when they speak different languages. But unity of language, like unity of race, is not essential. The Swiss people speak three different languages—German, French and Italian but in spite of their linguistic differences, they live in one state and have developed a strong national consciousness.

(iii) *Religion* was formerly considered to be an important factor that promoted national unity. But with the growth of

the spirit of toleration and the rise of religious freedom, the influence of religion on the formation of nationality is definitely on the wane. Now-a-days people professing different religious faiths are living side by side in a nation, e.g. the German Catholics and the German Protestants. Religious unity, therefore, fosters national unity but is not to be considered as an indispensable element.

(iv) *Geographical unity* sometimes contributes to a healthy growth of national feeling. When a people occupy a definite territory, local contiguity promotes mutual sympathy and thus develops their national consciousness. But as with other factors; this is also not essential. Nationality is not lost or destroyed by migration. The Jews are regarded as a nationality although they are scattered throughout the world.

(v) *Common subjection and community of economic and cultural interests* often promote the national sentiment. A common political ideal leads to the creation of a general nationality out of heterogeneous race elements as in Switzerland. About the nationality Ramsay Muir has aptly remarked: "Its essence is a sentiment, and in the last resort, we can only say that a nation is a nation because its members passionately and unanimously believe it to be so." Race, language, religion, political aspirations—there is no doubt—stimulate the growth of national sentiment but they are not nationality itself. "Nationality", as Brenan says, "is a spiritual sentiment, a condition of mind, a way of feeling, thinking and living which is the outcome of historical development. It comes from the consciousness of wrongs and oppressions suffered through common subjection during a long period of time to a despotic government, the pride of a common share in great historic struggle and the possession of a common heritage and common traditions expressed in songs and legends." Burns therefore opines that "besides mere physical relationship, we have to reckon with the unity of traditions. A common memory and a common ideal—more than a common blood—make a nation." That is the reason why the Swiss people are a nation in spite of their racial, linguistic and religious differences.

### **Character of Indian Nationality**

Most of the Western critics have sought to prove that India is not a nation. India cannot claim identity of race, unity of language or oneness of religion. Besides, as between the communities themselves, the homogeneity or community of tradition which is the real mark of nationality is conspicuous by its absence here. The two principal communities of India, the Hindus and the Muslims, have not only different traditions, but an influential section of the Muslims was of opinion that the Muslims constituted a separate state of Pakistan. Now some Sikhs also demand an independent Khalistan for the Sikhs in Punjab. They do not want to consider themselves as Hindus. Therefore, they demand to amend Article 25(b) of the Indian Constitution to recognise them as Sikhs by religion and not as Hindus.

It is true that in India, there are many races, spoken languages and religions, but considering the historical antecedents and the size of the country, these diversities may be taken to be natural and inevitable. We admit that religion is striking a discordant note in the political life of the country but such differences existed in the past and still exist in some form or other in many countries. Divergences of race, language and religion exist in the USSR, the USA and Switzerland. If we do not deny to those countries the character of a nation on the scores of their diversities of race, language and religion, there is no reason why we should deny it to India. Besides, nationality, as we have seen, is psychological; it is a peculiar condition of the mind and as such it depends more on spiritual factors than on mere physical basis. A close and careful study of the Indian history will reveal that there is a fundamental unity in India even in the midst of her diversities. Even a reactionary body like the Simon Commission did not fail to have been struck by this fundamental unity. The Commission (1928) in their report remarked, "It would be a profound error to allow geographical dimensions or statistics of population or complexities of religion, caste and language to belittle the significance of what is called the Indian

National Movement." Hinduism, Buddhism, Islam, Christianity—all of them have played their part in time and have contributed to the growth of that sense of national unity which has gathered considerable strength during the course of its historical evolution. The Hindus and Muslims have been living together for a long time in the past. Both the communities in many places have not only common languages, but have developed common traits of character and have common economic and cultural interests. The quarrel between them is of recent growth and is the outcome of manipulation by interested parties. Besides, what is important in the formation of a nation is not mere physical relationship like race, languages and religion but a common memory in the past and a common ideal in future and it is this spiritual bond of union which has enabled the diverse race elements of the USSR to live together under the same sovereignty, thus setting up a new ideal before the world. Such a common memory and common ideal do exist in India. Besides, the common system of education, common laws and common methods of administration prevailing in India during British rule considerably helped the growth of a strong national consciousness throughout the country. What was uppermost in the mind of every Indian was the consciousness that he was bearing the burden of an alien government and his political aspiration was the attainment of political independence. But in spite of the fundamental unity, the country was divided into two states on the basis of Late Mr Jinnah's two-nation theory.

The position of India and the status of the Indian nationality have changed since the attainment of Independence in 1947. Now that India has combined nationality with independent statehood, it will be wrong to deny to India the character of a full-fledged nation. It is true that there still exists some physical diversities in the form of different races, languages and religions but the Indians of today are of different make. They are now a free people who have united themselves under the banner of a sovereign democratic

republic which recognises the equal rights of all men irrespective of caste, colour or creed, whose avowed objective is to build up a secular state comprising the Hindus, Buddhists, Mohammedans, Sikhs and Christians who have united together as Indians. Unity in diversity has been the main feature of Indian civilization and this ideal today has found expression through the newly created state of the Indian Union. If the USSR, the USA or Switzerland be a nation, then India of today must need be a nation.

### **Nationality in Its Legal Sense**

However, we are concerned with nationality in its legal sense. A state which is a political organization may not coincide with nationality in its ethnic or cultural sense. A state may consist of more than one nationality. A nationality may spread over several states. Nationality may be acquired by mere birth in the territory of a state under the rule of *jus soli*.<sup>1</sup> Mixed ethnic and legal concepts as to citizenship have become a marked feature of post Second World War constitutions and citizenship laws in some of the countries of Continental Europe. Violent national tension have distinguished this part of Europe for a long time. The so-called abolished German law of September 1935 made a distinction between German citizens who were of "German or cognate blood" and had full political rights and others who were mere German nationals.

### **Citizenship and Nationality**

There is also a difference between citizenship and nationality. Actually the term citizenship refers to the relationship with a state from the internal aspect, while the term nationality refers to similar relationship from the international aspect. One is a question of municipal law while the other falls within the province of international law. Nationality is

1. The Citizenship Act, 1955, Section 3(i) and The British Nationality Act, 1948, Section 4.

the status or quality of belonging to some particular nation or state. The nationals of a state comprise all persons who are politically members of that state and owe allegiance to that state but all of them may not possess the full civic privileges which are conferred upon citizens. It (nationality) may not be accompanied by residence within the state. Nationality may be acquired by (a) birth, (b) naturalization, (c) marriage, (d) repatriation, or (e) cession or conquest of territory. On the other hand citizenship can be acquired only by (a) birth, (b) descent, (c) registration, and (d) naturalization. In *State Trading Corporation of India v Commercial Tax Officer*,<sup>2</sup> C.J. Sinha of the Supreme Court observed that nationality and citizenship are not interchangeable terms. Drawing a distinction between citizenship and nationality, the court stated that while all citizens are nationals of a state, the converse was not always true, because nationality was a concept of international law while citizenship was a concept of municipal law. Therefore, while a company might have nationality which ordinarily is determined by the place of its incorporation, it does not have citizenship. Referring to hold the State Trading Corporation as a citizen, the court rejected its petition under Article 32 of the Indian Constitution.

Citizens have every right to enjoy full political rights as well as other rights which are available for them under local law of the state or country and are still domiciled in the country. The distinction between citizenship and nationality as set out by Hyde was also quoted in the same case given below:

Citizenship as distinct from nationality, is a creature solely of domestic law. It refers to rights which as state sees fit to confer upon certain individuals who are also its nationals.<sup>3</sup>

2. AIR 1963 SC 1811 at page 1819 (1963).

3. Hyde, *International Law*, 2nd Edn., p 106.

**DOMICILE AND CITIZENSHIP**

Domicile, citizenship and nationality are not identical. The domicile is a complex legal concept in the area of the conflict of laws.<sup>4</sup> The basic idea of 'domicile' is permanent home. A person's domicile is the country which is considered by law to be his permanent home. Residence in the country, and the intention to make it his home are necessary to constitute a domicile. Mere residence in a place by itself is not sufficient to constitute it his domicile. It must be accompanied by the intention to make it his permanent home. A person who lived for thirty years in England and died there was held to have his domicile in India as he had expressed his desire to come back to India in some of his letters.<sup>5</sup> Even Article 5 of the Indian Constitution draws a distinction between domicile and residence, for neither domicile nor mere residence is sufficient to make a person an Indian citizen. Legal domicile has been defined as the place where a person has his true, fixed and permanent home, and principal establishment and to which, whenever he is absent, he has the intention of returning. Actually domicile means residence by choice with the intention of the residence being permanent in a particular country and as Halsbury states:<sup>6</sup>

A person's domicile is that country in which he either has or is deemed by law to have his permanent home.

Later on in that paragraph:

All those persons who have, or whom the law deems to have, their permanent home within the territorial limits of a single system of law are domiciled in the country over

4. The Indian Succession Act, 1925, lays down some rules on this topic for the purposes of the Act.

5. *Sankaran Govindan v Lakshmi Bharathi*, AIR 1964 Ker 244, also *Abdus Samad v West Bengal*, AIR 1973 SC 505.

6. Halsbury, *History of English Laws*, Vol 6, p 198, Art. 242.

which the system extends, and they are domiciled in the whole of that country, although their home may be fixed at a particular spot within it.

In law a person can be without citizenship, but no person can be without a domicile.<sup>7</sup> Everyone gets a domicile at birth which is the domicile of the parents and he has right to it till he acquires another domicile on attaining majority or on marriage (in the case of women only). Broadly speaking domicile is composed of two elements: intention to reside permanently at a place, and actually residing there. When both the conditions are fulfilled, one is said to be domiciled at that place. *Bank of India v Ram Narayan*, 1955 SC 360 and *Sankaran v Lakshmi*, 1974 SC 1964 clearly denote the above point. Under Indian law, wife's domicile is still the domicile of that of the father, and if illegitimate that of the mother. This is known as the domicile of origin.<sup>8</sup> When a person leaves his place of domicile and goes to live at another place with an intention to live there, he acquires a domicile there. This is known as domicile of choice. Domicile of wife and children is known as the domicile of dependent person.

The concept of domicile in English law which has been followed in India is different from that in Continental countries of Europe where 'capacity' and 'habitual residence' are sufficient to establish a domicile. The Constitution of India has made domicile in the territory of India an essential element for citizenship at the commencement of the constitution. Domicile implies connection with a territory, not membership or community which lies with the rest of the nation of citizenship or nationality. Every person with a civil domicile does not have citizenship or nationality. He may be

7. Pares Deqan, *Indian and English Private International Laws*, 1978, Chapter VI.

8. *Kedar Pandey v Narayan Shah*, AIR 1966 SC 100; *Dawood Md v Union of India*, AIR 1969 Guj. 79; *Milkiat Singh v State of Punjab*, AIR 1959 Punj. 250; *Sharafat v State of U.P.*, AIR 1960, All. 637.

stateless, in other words, without nationality.<sup>9</sup>

### **Domicile and Permanent Residence**

Domicile and permanent residence are two different and distinct things. Domicile is an expression which has certain implications in international law. Actually domicile means residence by choice with the intention of the residence being permanent in a particular country and Halsbury states in *History of English Laws*, Vol. 6, p 198, Art. 242:

A person's domicile is that country in which he either has or is deemed by law to have his permanent home.

Later on in that paragraph:

All those persons who have, or whom the law deems to have their permanent home within the territorial limits of a single system of law are domiciled in the country over which the system extends and they are domiciled in the whole of that country, although their home may be fixed at a particular spot within it.

Residence may be some *prima facie* proof of domicile but from the fact of residence, it is not to be inferred in any way that domicile results even though the person has no other residence in existence or contemplation.

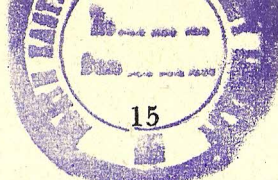
### **Domicile and Nationality**

Domicile and nationality are two quite different conceptions as pointed out by Lord Westbury in *Udny v Udny*:

The law of England, and of almost all civilized countries ascribe to each individual at his birth two distinct legal states or conditions: One, by virtue of which he becomes the subject of some particular country binding him with

9. *Abdul Rahman v State*, AIR 1984, Pt. 384.

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the tie of national allegiance, which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country and as such is possessed of certain municipal rights, subject to certain obligations which is the civil status or condition of the individual. This may be quite different from the political status. This political status may depend on different laws existing in different countries, whereas the civil status is governed universally by one single principle, namely that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, marriage, succession, testacy or intestacy, must depend.

A man may change his domicile without divesting himself of his nationality.<sup>10</sup> Similarly, there may be a change of nationality without a change of domicile. A change of domicile is not a condition of naturalization and naturalization does not necessarily involve a change of domicile.<sup>11</sup>

Nationality and domicile are two entirely different concepts in private International Law. A man may have one nationality and different domiciles. He may owe allegiance to one country and he may have a domicile in another country.

### Change of Domicile and Migration

Domicile was equivalent to migration. But in some cases, migration may take place without changing domicile. The illustrations given in *Dicey's Conflict of Laws*, Eleventh Edition, on pages 98 and 99, which bring out the true ambit and scope of the concept of domicile, incidentally differen-

10. *Beldrini v Beldrini*, 1932 Probate 9; *Wahl v Attorney General* 1932 147 LT 382; *Evelyn Attaullah, Mrs v Justin Attaullah*, AIR 1953 Cal. 530 at p 534:57 CWN 778.

11. *Michael Anthony Rodrigues v State of Bombay*, AIR 1956 Bom. 729 at p 731:ILR (1956) Bom. 954:58 Bom. LR 825.

tiate it from the concept of migration. They are as follows:

1. D, whose domicile of origin is Turkish, resides in England without any intention of residing anywhere else. He is domiciled in England.
2. D, whose domicile of origin is Scottish, goes as a trader to India. He intends to reside there until he has made his fortune and then to return to Scotland. He retains his Scottish domicile.
3. D, whose domicile of origin is Scottish, came to England at the age of thirty, to accept an appointment in England. The appointment is for an indefinite period, subject to a retiring age of sixtyfive. D intends to reside in England until he reaches the retiring age and then to return to Scotland. He retains his Scottish domicile.

These illustrations bring out the difference between the two concepts of 'change of domicile' and 'migration'. In this case of migration, there is only *animus manendi*—the intention to remain in a particular country but there is no *animus revertendi*, the intention to return to the country of domicile. In the case of change of domicile, however not merely the *animus manendi* is present, but also the *animus revertendi*. Therefore, the crucial distinction is that, in the case of migration, a person leaves the country of his permanent home but always has the intention to return to the country of his domicile; whereas, in the case of a change of domicile, the person not only leaves the country of his home but he does so with the intention of never returning back to the country of his domicile. In the later case, the intention is to change his civil status, but not so in the former case. In the first case, he does not sever his tie with the country of his domicile but intends to retain it. He leaves the country of his permanent home for some such purpose as that of a profession, or for earning a fortune, or for employment. It does not make any difference even though he may have to stay away for a long or indefinite period from his home to achieve this object. Thus the two terms 'migration' and 'change of domicile' cannot be equated

together.<sup>12</sup>

Therefore, the law relating to the change of domicile cannot be linked with the law relating to migration. The fact that in some respects the two concepts of change of domicile and migration coincide does not mean that there is one law governing both the concepts.

It would thus appear that a proposition that the two concepts of migration and change of domicile are identical is not borne out by the observations of the Supreme Court in Shanne Devi's case, AIR 1955 SC 282 and is opposed to the earlier decision in Kumar Amar Singh's case.<sup>13</sup> The two concepts of migration and change of domicile, though common in several respects, are not identical and the law governing the one is not necessarily the same as the law governing the other.

### Acquisition of Nationality

Nations lay down in their respective municipal laws as to how nationality can be acquired as also for determining the grounds on which individuals obtain their nationality. Two of the different modes of acquisition of nationality are by subjugation after conquest or by cession of territory. The inhabitants of the subjugated and the ceded territory acquire *ipso facto* by such subjugation or cession, the nationality of the state which acquires the territory.

The circumstances under which Britain withdrew from India though of a unique character are not altogether without precedent. From the territory which was under the sovereignty of the British King and Parliament, viz British India, the latter withdrew such sovereign authority and after division of the territory into two different parts ceded such territory to two new independent States which were brought into existence under a Parliamentary Statute, viz. the Indian Independence Act. Oppenheim in Sec. 219 on page 503 observes:

12. Habatullah Hazi Fazal Husain v State of Guj, AIR 1964 Guj. 128 at pp 134, 135.

13. AIR 1961 SC 258.

As the object of cession is sovereignty over the ceded territory, all such individuals domiciled therein become subjects of the ceding State *ipso facto* by the cession subjects of the acquiring State.

If the old state does not disappear altogether it is possible to mitigate the hardship of the inhabitants being handed over to a new sovereign state against their will by a stipulation in the treaty of cession, if any, which binds the acquiring state, to give the inhabitants of the ceded territory the option of retaining their old citizenship on making an express declaration.

It has been pointed out by Oppenheim in Sec 219(a), pages 504 and 505 that:

Failing a stipulation expressly forbidding it, the acquiring state may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of aliens and endanger the safety of the acquiring state.

In some cases, therefore, an option is stipulated in favour of the inhabitants if they are handed over to a new sovereign against their will. The terms of option may vary from case to case but the general principle applied has been that a person habitually resident in a ceded territory acquires *ipso facto* the nationality of the state to which the territory has been transferred, and loses the nationality of the ceding state.

From the principle referred above it will be significant that a person habitually resident within a particular ceded territory acquires *ipso facto* as a result of the cession the nationality of the State to which the territory is transferred.

The State of Sikkim, was independent and ruled by kings but now they have merged themselves with India. They acquired the Indian nationality at present. In the case of Bangladesh, before 1971 that country was a part of Pakistan named as

East Pakistan. But by the great revolution of the East Pakistanee people they got independence and renamed their country as Bangladesh. Now Bangladesh is an independent sovereign country. The people of Bangladesh now acquired the Bangladesh nationality. If we observe the position of Hongkong, now the land is under the British. The population is 99 per cent Chinese and only 1 per cent British. This territory will be handed over to China in AD 2000 by which the population of the Hongkong Island will acquire the Chinese nationality. This is also interesting from both the political and legal angles,

#### CITIZEN AND ALIEN

An alien is a foreigner who *temporarily* resides in a state of which he is not a member. A citizen of a state is one who resides in the state and is subject to the state matters. Both receive the protection of law in respect of their life and property in the state they inhabit. Both must obey the laws and pay rates and taxes. An alien cannot expect protection when he goes outside the state in which he temporarily resides. But the interest of a citizen will be looked after by the state not only at home but even when he is abroad. A citizen is subject to the laws of conscription while an alien cannot be forced to serve in the army. An alien may be expelled from the state for misconduct but a citizen cannot be expelled from his own state. But the most important point of distinction between the two is that aliens do not enjoy the same political privileges as citizens do. Thus a foreigner in England can buy property, can sue and be sued but he cannot exercise franchise, either municipal or parliamentary, for holding any office or sit as a juror.

#### STATELESS PERSON

A person without any nationality is called stateless person. A foreigner has diplomatic protection but a stateless person has no diplomatic protection. Stateless persons have no right to

enjoy the rights dependent on reciprocity. Without nationality the stateless persons put themselves in an inchoate status and inferior position. In the eye of the International Law the position of the stateless person is an anomaly and in a large number of countries that type of person is on the fringe of the law. About the legal position of stateless persons with comparison to foreigners who have nationality some investigations were made in the middle of AD 1950. The international convention (U.N.) made some attempts by bringing out some formulation. Generally stateless persons are treated as citizens of a foreign country. Regarding the stateless persons there are two protocols—(1) Concerned with the nationality of the father of a child. If the father of a child has no nationality (stateless), or his nationality is unknown then the nationality of the child shall be determined depending upon the nationality of its mother.<sup>14</sup> It is because nationality is not determined by mere birth of a child in a particular territory. (2) Protocol dealt with the admission of a stateless person, who loses his nationality after entering a foreign country, in the state whose nationality the person last possessed before becoming stateless.<sup>15</sup>

#### CITIZEN AND ELECTOR

A distinction is also made between a citizen and an elector. An elector is a person who has a right to vote. But there may be citizens who are not electors and electors who are not citizens. The son or the wife of a citizen is a citizen but he or she may not be an elector. In the USA, there are many electors in the component states who are not citizens. Citizenship ordinarily cannot be identified with the right to vote.

14. 178 League of Nations Treaty Series; 115 India has rectified the protocol.

15. League of Nations Document, C. 227 M. 114. 1930 V. This protocol has not entered into force.

### Franchise and Electorate of a Citizen

It is the privilege of a citizen to participate in the electoral processes by which he can elect a person to the seat of power. The rights of a citizen to cast vote for a candidate and to contest for an elective office are the most powerful rights in a democratic country. India has been characterised as the biggest democracy in the world because of the colossal nature of the elections held in the country. In a general election an electorate of over 250 million goes to the polls to elect members for the Lok Sabha, the State Legislative Assemblies and the Legislature of the Union Territories. The present democracy in India is the direct democracy or representative democracy. Under this system people elect their representatives to perform the functions of legislation and to take part in the law making body on behalf of them. It is not possible for the large population of a country or state to unite together or to meet together to discuss the affairs of the state and to frame laws. In modern democracy the government is constituted and administered by the citizens. This is the foundation of a popular government in a democratic country.

Franchise means the right of voting of a citizen. The persons who are qualified to vote are collectively called the electorate. Suffrage is defined as voting in support of some opinion or measure, or some candidate for office, and derivatively as the right or privilege of participating in elections. The term suffrage is substantially synonymous with franchise when used in connection with political activity. Suffrage and other related questions acquire importance only in governments which are to some extent democratic. The problem does not arise in pure monarchies or oligarchies. Suffrage is generally associated only with popular elections in which a large or at least a considerable element of the community takes part. The element which exercises the suffrage is properly spoken of as the electorate. It is often very incorrectly identified with the people as a whole, as in the statement "the people have decided the question at the polls."

There are five different theories about the nature of the

suffrage. Most of them are not explicitly stated but inherent in the current practice. The theories are: (i) the theory effective among primitive people and in the city-states of antiquity and of the Renaissance. This theory holds that the suffrage is an attribute or function of citizenship; (ii) the later feudal theory that the suffrage is a vested privilege, an incident of a particular status, usually connected with the possession of land; (iii) the theory of the early constitutional regime that the suffrage is an abstract right founded in natural law, a consequence of the social compact and an incident of popular sovereignty; (iv) the theory of modern political science that voting is a function of government. It holds that the voter in casting his ballot performs a public office and that the electorate, like the legislature or the courts, is an organ of government; and (v) the ethical theory, which is strongly urged at the present time by certain writers, that the suffrage is an important, indeed an essential means for the development of individual character, a condition necessary for the realization of the worth of human personality.<sup>16</sup>

The five theories concerning the suffrage are all mingled in the thought of the present time. The clarification of the underlying theory of the suffrage is one of the important obligations of contemporary political science.

The problem of franchise is similar to the problem of the composition and organization of the legislature or the courts. Ritchie in his statement expresses his view:

The suffrage, by all thoughtful persons at least, is regarded as a means to the working of the constitution, and the right of voting is obviously a right created by law . . . and cannot intelligibly be represented as a right prior to and independence of law . . ., on whom the suffrage should be conferred is a matter not to be settled *a priori*,

16. W.J. Shepard, "Suffrage", in *Encyclopaedia of Social Sciences*, Vols. XIII-XIV. Thirteenth Printing 1959, p 447.

but by reference to the particular circumstances of the country.<sup>17</sup>

Among the modern writers, Prof Laski in his *Grammar of Politics* insists that

every adult citizen has the right to indicate what persons, he desires, should undertake the task of government. No test has been devised which enables us to limit the franchise in such a fashion as to equate civic virtue with its possession and the permanent essence of freedom is that the personality of each individual should be so unhampered in its development, whether by authority or by custom, that it can make for itself a satisfactory harmonisation of its impulses.

Under the Constitution of India, Alladi Krishnaswami Ayyer observed from the floor of the Constituent Assembly:

The Assembly has adopted the principle of adult franchise with an abundant faith in the common man and in the ultimate success of democratic rule, in the full belief that the introduction of a democratic government on the basis of adult suffrage will bring enlightenment and promote the wellbeing, the standard of life, comfort, and the decent living of the common man.

In our freedom movement adult suffrage of our people had become a *sine qua non* of independence. The right to vote and the right to contest elections are not fundamental rights under the Indian Constitution, yet the democracy and our faith in democratic values pervade a democratic Republic. We have opted for parliamentary form of government and the representative institutions. In the

17. *Natural Rights*, 3rd Edn., London, 1916, p 225. Alladi Krishnaswami Ayyer, CAD XI, 9, 835.

election case the Supreme Court observed that the principle of free and fair election is an essential postulate of democracy and democracy is a part of the basic structure of the constitution.<sup>18</sup>

### **Right of a Citizen to Vote under the Indian Constitution**

Under the Indian Constitution the right to vote and the right to stand as a candidate at an election are not civil rights but statutory rights and are subject to the limitation laid down in the statute.<sup>19</sup>

Article 326 of the Indian Constitution has recognised the adult suffrage. It states that "the election to the House of the people and to the Legislative Assembly of every state shall be on the basis of adult suffrage." Actually adult suffrage means that every citizen of India who is 21 years old or more has a right to vote. It is also important that he/she, i.e. voter, may be disqualified "on the ground of non-residence, unsoundness of mind, commission of a crime or a corrupt or illegal practice." Parliament conferred the power under Article 326, and passed R.P. (Representation of Peoples) Act which lays down that "no person is entitled to be registered as a voter in the electoral rolls of Lok Sabha or Assembly constituency if:

- (i) He/she is not a citizen of India;
- (ii) He/she is declared to be of unsound mind by a competent court; or
- (iii) He/she is disqualified from voting under a law relating to corrupt practices and other offences in connection with elections.

A citizen of India who covers 21 years or more can exercise his right to vote only if he is registered as a voter in a Parliamentary or Assembly constituency. Article 325 of the Indian Constitution provides for one general electoral roll for every territorial constituency. The Constitution of India abolishes separate electorate on communal or any other

18. *Smt Indira Nehru Gandhi v Raj Narain*, AIR 1975 SC 2299.

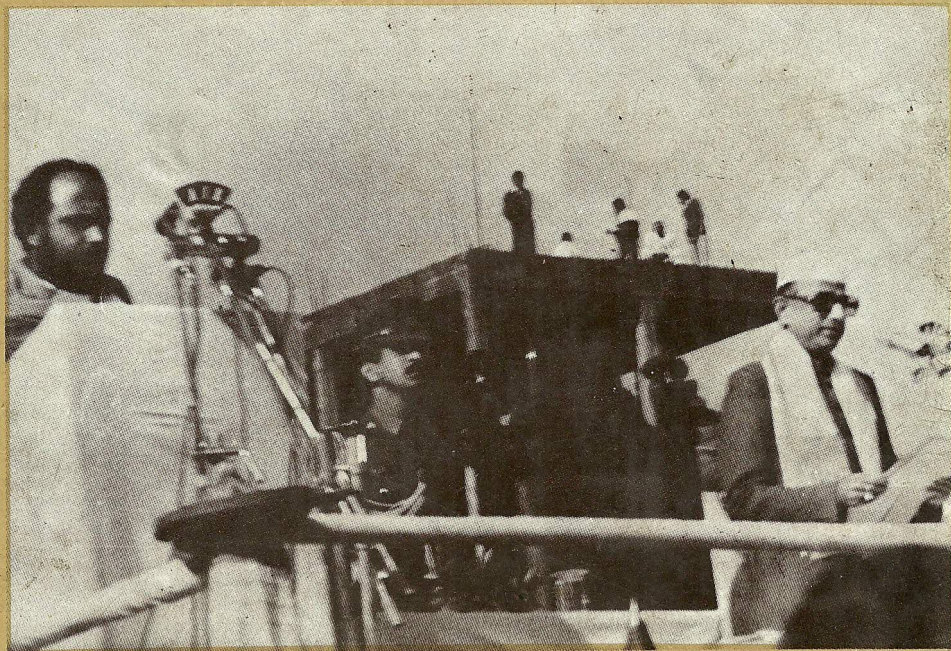
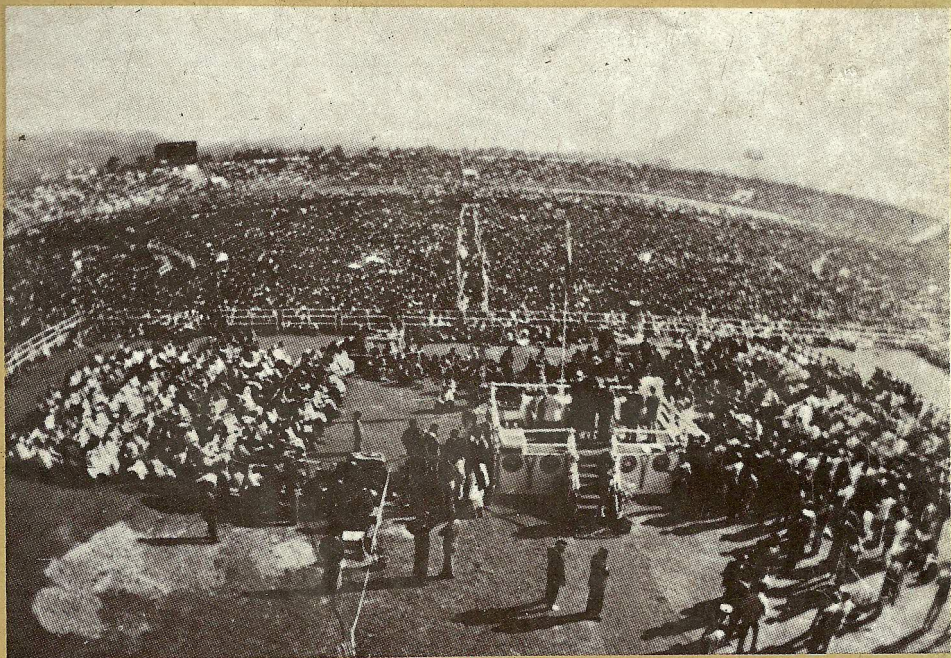
19. *N.P. Ponnuswami v Returning Officer*, AIR 1952 SC 64.

basis. Article 325 lays down:

- (a) No person is ineligible for inclusion in the electoral roll on grounds only of religion, race, cast, sex or any of them; and
- (b) No person can claim to be included in any special electoral roll for any constituency on grounds only of religion, race, cast, sex or any of them.

Thus, religion, race, caste or sex cannot be a basis of inclusion or exclusion in the electoral roll.

The ordinary citizen does not participate in the election of the President and the Vice-President who are elected indirectly through separate electoral colleges.



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