

(2018) 05 GAU CK 0074

In the Gauhati High Court

Case No : WP(C) 7088 of 2016, WP(C) 6280 of 2016

Abdul Samad, Abdus Samad, Md. Samad Uddin

APPELLANT

Vs

Union Of India And 3 Ors

RESPONDENT

Date of Decision : 14-05-2018

Acts Referred:

Illegal Migrants (Determination by Tribunals) Act, 1983 — Section 8(1)
Foreigners' Act, 1946 — Section 9
Citizenship Act, 1955 — Section 6A

Citation : (2018) 05 GAU CK 0074

Hon'ble Judges : UJJAL BHUYAN, J; NELSON SAILO, J

Bench : Division Bench

Advocate : B U Laskar

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J.

1. Heard Mr. HRA Choudhury, learned senior counsel assisted by Mr. BU Laskar, learned counsel for the petitioners and Mr. J Payeng, learned

Special Counsel, Foreignersâ?? Tribunal (FT).

2. Initially WP (C) No. 6280 of 2016 was filed by two petitioners, namely, Tuta Mia @ Md. Tota Mia and Abdul Samad @ Abdus Samad @ Md.

Samad Uddin assailing the legality and correctness of the common order dated 05.08.2016 passed by the Foreignersâ?? Tribunal, Dima Hasao at

Haflong in FT Case Nos. 10 and 23 of 2015. Md.Tota Mia was the proceedee in FT Case No.10/2015 whereas Md.Samad Uddin was the proceedee

in FT Case No.23/2015. Md. Samad Uddin is the son of Md. Tota Mia. Both the references were heard together and were disposed of vide the

common order dated 05.08.2016 answering the reference in favour of the State

by declaring the two proceedees to be foreigners who had illegally entered into India (Assam) from Bangladesh after 25.03.1971.

3. When WP (C) No.6280 of 2016 was moved on 06.10.2016, this Court ordered that the said writ petition would be confined to petitioner No.1 i.e.

Tuta Mia @ Md. Tota Mia giving liberty to petitioner No.2, i.e. Md. Samad Uddin to file a separate writ petition relatable to his reference.

4. Thereafter, Md. Samad Uddin filed WP (C) No.7088 of 2016.

5. On 04.05.2018, Mr. HRA Choudhury, learned senior counsel for the petitioners submitted that Md. Tota Mia had expired on 10.11.2016. This was

mentioned in the additional affidavit filed on behalf of the petitioners wherein a death certificate has been annexed.

6. This Court has already held that there is no question of abatement of a reference on the death of a proceedee. The materials on record on the basis

of which the proceedee was suspected to be a foreigner remains on record. In such circumstances, it has been held that it would be the duty of the

referral authority i.e. the Superintendent of Police (Border) to make reference in respect of the other family members of the deceased proceedee

because if a person is suspected to be a foreigner, it would be quite natural to suspect the other family members drawing lineage from the side of the

father to be foreigners. In so far the two writ petitioners are concerned, Md. Tota Mia was already declared to be a foreigner by the Tribunal vide

order dated 05.08.2016 which order remains undisturbed till date.

7. In so far Md. Samad Uddin is concerned, we find from the record that initially reference was made by the Superintendent of Police (Border), Karbi

Anglong under Section 8(1) of the Illegal Migrants (Determination by Tribunals) Act, 1983 (IMDT Act) suspecting the petitioner Samad Uddin to be

an illegal migrant i.e. a foreigner who had unauthorizedly entered into India after 25.03.1971. The reference was registered on 15.06.2002. It is most

distressing to note that during pendency of the reference before the Illegal Migrants (Determination) Tribunal, Diphu, only summons were issued date

after date; sometimes the reference used to be adjourned for non-availability of members. It continued this way till 27.02.2006.

8. IMDT Act was declared unconstitutional by the Supreme Court in the case of Sarbananda Sonowal â"vs- the Union of India , (2005) 5 SCC 665

with the further direction that the references which were pending before the

Tribunals constituted under the IMDT Act should be transferred to the Tribunals constituted under the Foreigners Act, 1946 read with the Foreigners (Tribunals) Order, 1964. As a result, the related reference was transferred by the Illegal Migrants (Determination) Tribunal, Diphu to the Foreignersâ?? Tribunal, Diphu on 25.04.2006. But shockingly the case record was received by the Foreignersâ?? Tribunal only on 09.12.2009 i.e. after more than 3 Â½ years. This speaks volumes about the way the Tribunals, be it the Tribunals under the IMDT Act or the Tribunals under the Foreignersâ?? Act, 1946 functioned during that period. But this is not all. As we move ahead, in the order sheet we find that certain orders came to be passed by the In-Charge Upper Division Assistant/ Accountant of the Tribunal. In the meantime, notice continued to be issued to the proceedee and the proceedee continued to remain absent. Ultimately on 09.03.2012, Foreignersâ?? Tribunal, Diphu observed that since the proceedee Md. Samad Uddin was not available, the case was â??filedâ??.

9. Similar was the position in respect of the reference in case of father Md. Tota Mia in whose case also reference was ultimately â??filedâ?? on 22.06.2012 after more than a decade of procrastination.

10. This Court has already held that when a reference is made by the referral authority to a Foreignersâ?? Tribunal seeking its opinion whether the proceedee is a foreigner or not, question of â??filingâ?? of such a reference on the ground of non-availability of the proceedee or non-service of notice does not arise. A Foreignersâ?? Tribunal which is mandated with the task of rendering opinion as to whether the proceedee is a foreigner or not cannot put a reference in cold storage by terming the same as â??filedâ??. If the proceedee is not traceable, there are enough provisions in the Foreignersâ?? (Tribunals) Order, 1964 to deal with the situation. But instead of doing that, reference cannot be â??filedâ??. A Foreignersâ?? Tribunal cannot decline to render an opinion on such ground and to take recourse to such impermissible steps, such as, â??abatementâ?? and â??filingâ??. Since this aspect of the matter has come to our notice, the State should take remedial steps in this regard.

11. It was only after creation of additional Tribunals in the year 2015 that things started moving. Foreignersâ?? Tribunal, Dima Hasao at Haflong was created whereafter the case records of the two references were transferred

to the Foreignersâ?? Tribunal, Dima Hasao at Haflong. This time

notice issued by the Tribunal was served upon the proceedees at the first instance itself whereafter both the proceedees appeared before the Tribunal;

filed written statements and adduced evidence. It only goes to show that service of notice upon the proceedee is really not an issue. Everything

depends upon how a Foreignersâ?? Tribunal functions and the approach of the learned Member manning the Tribunal.

12. In so far petitioner Md. Samad Uddin is concerned, he filed his written statement on 15.10.2015. In his written statement, he stated that he was a

permanent resident of village West Hassanpur under Badarpur Police Station in the district of Karimganj. In connection with his work, he had come to

Haflong. Name of his father and himself were enlisted in the voters list of 2014. Grandfather was enlisted in the voters list of 1966.

13. This was all that the petitioner stated in his written statement which was wholly inadequate to establish his identity as a citizen of India having

regard to the mandate of Section 9 of the Foreignersâ?? Act, 1946 as explained by the Supreme Court in paragraph 26 of Sarbananda Sonowal

(supra). Though petitioner stated that his grandfather was a voter in 1966, name of the grandfather was not mentioned. Father was a voter only in the

year 2014; even than his name was not mentioned. So we do not know who was the grandfather and father of the petitioner; not to speak of mother

and brothers and sisters, if any.

14. In his evidence-in-chief filed by way of affidavit on 19.12.2015, petitioner described himself as Md. Samad Uddin, son of Tota Mia, aged 29 years.

This affidavit was sworn on 18.12.2015, which would mean that petitioner was born sometime in the year 1986. But such year of birth of the petitioner

is contradicted by Exhibit-4, which is stated to be a birth certificate dated 11.01.1989. As per this birth certificate, Abdus Samad was born on

28.12.1988 and his father was Md. Tota Mia. If indeed petitioner was born on 28.12.1988, it is not understood as to why this fact was not mentioned

in the written statement. That apart, declaration of his age as 29 years contradicts such date of birth. On the other hand, the affidavit was by Md.

Abdus Samad whereas Exhibit-4 certificate was in the name of Abdul Samad. That apart, Exhibit-4 was not proved by comparing with the original.

15. Exhibit-1 is a certificate dated 24.09.2015 issued by the Secretary of

Mahakal Gaon Panchayat certifying that Abdus Samad was the son of Tota Mia. This certificate has the State Emblem of India embossed at the top in the middle of the letter head "Government of Assam". First of all, a Gaon Panchayat is not a department of the Government of Assam and therefore cannot use the letter head in the name of "Government of Assam". That apart, under the State Emblem of India (Regulation of Use) Rules, 2007, framed under the State Emblem of India (Prohibition of Improper Use) Act, 2005, Panchayati Raj Institutions such as Gaon Panchayats are specifically debarred from using the State Emblem of India in any manner. Therefore, such unauthorised use of the State Emblem of India has rendered Exhibit-1 inadmissible in evidence.

16. In *Rupjan Begum vs- Union of India* reported in (2018) 1 SCC 579, Supreme Court has observed that certificate issued by Gaon Panchayat Secretary was meant to be a link document linking a married woman to her parents. Even then, Supreme Court had sounded a note of caution that such a certificate by itself is not a proof of citizenship. This has to be verified at two stages; authenticity of the certificate itself as well as the authenticity of the contents. Not to speak of such verification, this certificate does not even concern a married woman. Therefore, such a certificate would have no probative value besides being inadmissible in evidence. In addition, the author of the certificate did not prove the said certificate as well as the contents thereof by deposing before the Tribunal on the basis of contemporaneous record.

17. In so far Exhibit-2 is concerned, it is an extract of the voters list of 2014 whereby voter was Abdus Samad, son of Tota Mia. This document is not admissible in evidence because it is not a certified copy. Therefore, it is neither primary evidence nor secondary evidence. Even then, if we accept the document at its face value, it only shows Abdus Samad to be son of Tota Mia. But there is nothing on record to trace existence of Tota Mia on Indian soil prior to 25.03.1971, which is the cut off date for identification of foreigners in the State of Assam as per Section 6-A of the Citizenship Act, 1955, as amended.

18. The last of the document is an Elector Photo Identity Card (Exhibit-3) where the elector was Abdus Samad and the relation's name was Tota Mia. This Elector Photo Identity Card in the absence of any corroborative material

cannot be taken as proof citizenship. Moreover, as discussed above, there is no presence of Tota Mia independent of Abdus Samad or Abdul Samad relatable to a date prior to 28.12.1988 (Exhibit-4) on which date Abdul Samad was stated to have been born.

19. One Sri Sanjay Sinha, Junior Assistant in the office of the Circle Officer, Badarpur Revenue Circle deposed before the Tribunal stating that he was authorised by Sri Anis Rasul Mazumdar, Electoral Registration Officer and Circle Officer, Badarpur to appear before the Tribunal and to produce the original voters list of 1966 and 2014. But from a careful reading of his deposition, it is seen that he had brought the original voters list of 2014 wherein Tota Mia and Abdus Samad were voters. Though he stated that he had also brought original voters list of 1966, he did not say or prove that Tota Mia was a voter in 1966.

20. In his deposition, Samad Udin had stated that he had one younger brother and three younger sisters being Abdul Ali, Ruksana Begum, Apsana Begum and Sumana Begum. His mother was Esha Bibi. But none of them came forward to depose before the Tribunal.

21. Similar is the position in respect of Tota Mia. Though in his case, he had stated that he was son of late Mutasin Ali, his linkage with Mutasin Ali was not proved just like Samad Udin could not prove his linkage with Tota Mia to a period prior to 25.03.1971.

22. Net result of the above discussion is that in so far Md. Samad Udin is concerned, he had failed to discharge his burden under Section 9 of the Foreigners Act, 1946 to prove that he was not a foreigner but a citizen of India. Consequently, we do not find any merit in the Writ Petition No.7088 of 2016 which is accordingly dismissed.

23. In so far WP (C) No. 6280 of 2016 is concerned, in absence of any substitution, the order dated 05.08.2016 in the case of Md. Tota Mia has attained finality which stands reinforced and affirmed by our decision in the case of Md. Samad Uddin.

24. Since, Md. Tota Mia is stated to have expired, Superintendent of Police (Border), Haflong shall make the consequential reference in respect of the other family members of Tota Mia as disclosed by Samad Uddin in his testimony, whereafter law will take its own course.

25. In view of our discussions in paragraph 10 above, Home and Political

Department, Government of Assam shall issue instructions to all the Foreigners Tribunal to carry out an audit search in the respective Tribunals to find out whether there are any "filed" cases or where the references have been closed as having "abated". All such references, whether "filed" or closed as "abated" should be revived and proceeded with as per provisions of the Foreigners (Tribunals) Order, 1964. The entire process should be completed by September 30, 2018.

26. Registrar (Judicial), Guahati High Court shall inform Principal Secretary, Home and Political Department, Government of Assam about this order who shall ensure compliance.

27. Registry to send down the LCRs forthwith and inform the concerned Foreigners' Tribunal, Deputy Commissioner and the Superintendent of Police (Border) for doing the needful.

28. A copy of this order may be furnished to the learned Standing Counsel, Election Commission of India and State Coordinator, NRC.