
(2014) 03 GAU CK 0066
In the Gauhati High Court
Case No : WP (C) No. 6388 of 2013

Ajibor Rahman

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 25-03-2014

Acts Referred:

Citizenship Act, 1955 — Section 6-A(1)(d)
Constitution of India, 1950 — Article 226, 355
Evidence Act, 1872 — Section 101, 106
Foreigners Act, 1946 — Section 9

Citation : (2014) 2 GLD 76

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : A.R. Sikdar, Advocates for the Appellant; M. Bhagabati, CGC and K. Devi, GA, Advocates for the Respondent

Judgement

Biplab Kumar Sharma, J.—The petitioner, who has been declared to be a foreigner (illegal Bangladeshi migrant) by the Foreigners Tribunal, Kamrup (Rural), Assam, vide order dated 25/3/2013 in GFT (R) Case No. 102/2012 corresponding Police Case No. 478/2011, Union of India v. Ajibar Rahman, has filed the instant writ petition challenging the said order. As has been claimed in the writ petition, the petitioner is a citizen of India being a permanent resident of village-Goraimari, Bilorjan in the district of Kamrup (R). According to him he was born in the year 1976 in the said village, however, he was also temporarily residing in a rented house of one Md. Azizur Rahman at Momaikatagarh (Changsari) under Kamalpur Police Station. He has projected his grandfather as Falu Sheikh whose name appeared in the NRC of 1966. The petitioner has also claimed that his parents' names (Mozibor Rahman and Hazera Khatun) appeared in the voters' list of 1977. He has also referred to the 1997 voters' list incorporating the name of his projected grandfather Falu Sheikh. It is the further case of the petitioner that his great grand father's name is Haji Monsob Ali @ Monsob Bepari and his name was incorporated in the 1966 voters' list. The

petitioner has further stated in the writ petition that his name was incorporated in 1997 voters" list. Further case of the petitioner is that his great grandfather"s name also appeared in a land document executed in the year 1952.

2. According to the petitioner, inspite of the aforesaid documents produced before the learned Tribunal he has been wrongly declared as an illegal Bangladeshi migrant. The writ petition is supported by an affidavit filed by one Majibor Rahman, aged about 65 years identifying the petitioner as his son. On the other hand, the records received from the Tribunal has revealed that in the documents pertaining to the enquiry that preceded the reference made to the Tribunal, the petitioner"s father was shown as Late Mozibor Rahman. Even in the statement signed by the petitioner on 21/7/2011 his father was described as Late Md. Mozibor Rahman. In the interrogation report also his father was described as Late Mozibor Rahman. Significantly in the notice served on the petitioner from the Tribunal also, his father was clearly shown as Late Mozibor Rahman and the petitioner duly accepted the same.

3. As to what are the documents the petitioner has referred to has been noted above. As has been held by the Division Bench of this Court in Moslem Mondal and Others Vs. Union of India (UOI) and Others, , the writ proceeding is not a substitute for a proceeding before the Tribunal. If certain new materials are brought in the writ proceeding not forming part of the proceeding before the Tribunal, it has been held in the said judgment that the Writ Court cannot examine the said new materials/evidence. It has been held that the Writ Court does not enjoy original jurisdiction to determine the citizenship of a person on the basis of the new materials brought on record in the writ proceeding. It has further been held that the Writ Court can only examine those materials which were placed before the Tribunal.

4. Before the Tribunal the petitioner had produced and exhibited only 4(four) documents, which are Ext-A photocopy of the voters" list of 1966 containing the name of one Falu Sheikh S/o. Mansor aged 45 years. He also produced Ext-B purported land document but on perusal of the same it appears that the same is not a land document but an application for settlement of which the applicant was one Mansab Bepari. Ext-C is the voters" list of 1997 containing the name of one Md. Mozibor Rahman S/o. Falu Sheikh aged 44 years. The petitioner also produced the Ext.-D certificate of the Gaonbura dated 25/7/2012 certifying that the petitioner"s name appeared in the voters" list of 2011. Significantly, the records received from the Tribunal also contain another certificate dated 14/6/2012 issued by the Gaonbura certifying that no one in name Md. Ajibor Rahman S/o. Late Mozibor Rahman is in the area of the village.

5. I have heard Mr. A.R. Sikdar, learned counsel for the petitioner. I have also heard Mr. M. Bhagabati, learned CGC and Mrs. K. Devi, learned State Counsel appearing for the respondents. I have also heard Mr. J. Ahmed, learned counsel representing the respondent No. 5 who is an Advocate and who conducted the case before the Tribunal on behalf of the petitioner. The respondent No. 5 has

been arrayed as party respondent in view of the fact that an allegation has been made against the said respondent with the statement that he failed to provide proper advice to the petitioner in connecting the proceeding. It has also been alleged that the said Advocate did not annexed some vital documents along with the written statement, although was furnished to him. I have also perused the entire materials on record. My findings and conclusions are as follows.

6. Mr. A.R. Sikdar, learned counsel for the petitioner referring to the aforesaid documents submitted that the petitioner is an Indian citizen by birth, the learned counsel representing the official respondents submitted that there being failure on the part of the petitioner to prove his Indian citizenship in discharge of burden of proof as envisaged under Section 9 of the Foreigners Act, 1946, the learned Tribunal has rightly passed the order. Mr. J. Ahmed, learned counsel representing the respondent No. 5 submitted that there being failure on the part of the petitioner to establish the wild allegation made against the said respondent, the writ petition should be dismissed with cost. Referring to the allegations made against the respondent No. 5 he submitted that the allegations being not specific but only sweeping, no indulgence should be given to the petitioner.

7. As has been held by the Apex Court in *Sarbananda Sonowal Vs. Union of India (UOI)* and *Another*, , there is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth, (ii) place of birth, (iii) name of his parents, (iv) their place of birth and citizenship. Sometimes the place of birth of his grand parents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authority of the State. As per the provisions of Section 9 of the Foreigners Act, 1946, the burden of proof that he is an Indian citizen is on the precede. In the aforesaid case, dealing with the "Burden of Proof, the apex Court in the aforesaid case of *Sarbananda Sonowal*, has made the following observation.

"18. Though in a criminal case the general rule is that the burden of proof is on the prosecution but if any fact is especially within the knowledge of the accused, he has to lead evidence to prove the said fact. In *Shambu Nath Mehra Vs. The State of Ajmer*, it was held as follows :

"Section 106 is an exception to Section 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that it means facts that are pre-eminently or exceptionally within his knowledge."

In *Collector of Customs, Madras and Others Vs. D. Bhoormall*, , proceedings were initiated under Section 167(8)(c) of the Customs Act for confiscation of contraband or smuggled goods and it was observed:

".....Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the accused, it is not obliged to prove them as part of its primary burden."

".....On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty.

In *State of West Bengal Vs. Mir Mohammad Omar and Others etc.*, , it was held that the legislature engrafted special rule in Section 106 of the Evidence Act to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. This principle was reiterated in *Sanjay @ Kaka Vs. The State (NCC.T. of Delhi)*, and *Ezhil and Others Vs. State of Tamil Nadu*, .

In *R. v. Oliver*, 1943 All ER 800, the accused was charged with having sold sugar as a whole-sale seller without the necessary licence. It was held that whether the accused had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him. It was further held that in the circumstances of the case the prosecution was under no necessity to give prima facie evidence of non-existence of a licence. In this case reference is made to some earlier decisions and it will be useful to notice the same. In *R. v. Turner*, (1916) 5 M & S 206 : 14 Digest 430, the learned judge observed as follows :

"I have always understood it to be a general rule, that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative."

In *Williams v. Russel*, (1993) 149 LT 190, the learned Judge held as under :

"On the principle laid down in *R. v. Turner* and numerous other cases where it is an offence to do an act without lawful authority, the person who sets up the lawful authority must prove it and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute."

19. Section 9 of the Foreigners Act regarding burden of proof is basically on the same lines as the corresponding provision is in U.K. and some other Western nations and is based upon sound legal principle that the facts which are

peculiarly within the knowledge of a person should prove it and not the party who avers the negative."

8. The issue relating to citizenship, particularly in Assam, will have to be considered keeping in mind that there is large scale illegal migration of Bangladeshi nationals to Assam. In this connection, the Apex Court has made the following significant observation in paragraph 38 of Sarbananda Sonowal (supra).

"38. This being the situation there can be no manner of doubt that the State of Assam is facing "external aggression and internal disturbance" on account of large scale illegal migration of Bangladeshi nationals. It, therefore, becomes the duty of Union of India to take all measures for protection of the State of Assam from such external aggression and internal disturbance as enjoined in Article 355 of the Constitution. Having regard to this constitutional mandate, the question arises whether the Union of India has taken any measures for that purpose.

45. As mentioned earlier, the influx of Bangladeshi nationals who have illegally migrated into Assam pose a threat to the integrity and security of north-eastern region. Their presence has changed the demographic character of that region and the local people of Assam have been reduced to a status of minority in certain districts....."

9. In the instant case, the learned Tribunal appreciating the evidence on record has held the petitioner to be a foreign national who illegally entered Assam after the cut-off date i.e. 25/3/1971. Such findings of fact cannot be lightly interfered with exercising writ jurisdiction unless it is shown to be a perverse finding or the finding being not based on the evidence on record. The writ Court exercising extra ordinary jurisdiction under Article 226 of the Constitution of India cannot sit on appeal over the findings of facts recorded by the Tribunal. Needless to say that this Court exercising its jurisdiction under Article 226 of the Constitution of India cannot re-appreciate the evidence produced before the Tribunal and on the basis of such re-appreciation of evidence arrived at a finding different from that recorded by such Tribunal. The set and laid down principle is that a question of fact once decided by the Tribunal on the basis of evidence on record, it is not appropriate for the High Court under Article 226 to re-appreciate the evidence and come to a different conclusion.

10. Keeping in mind the above principles, it is to be seen as to whether the findings arrived at by the Tribunal on the basis of evidence on record can be said to be perverse or devoid of appreciation of evidence on record or there is any error of law which has apparent on the face of the record. It is a well established principle that a finding of fact cannot be challenged under Article 226 on the ground that the evidence before the Tribunal was insufficient or inadequate to sustain the findings, as a writ Court is not a Court of appeal. So also errors in appreciation of documents or affidavits, or errors in drawing inferences, or omission to draw inferences; in other-words, errors of a Court of appeal only can examine and correct, are not amenable to correction in a certiorari proceeding.

But, if it is shown that in recording the said findings, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which had influenced the impugned findings, the same can be assailed in a writ petition.

11. If the petitioner's father is still alive and the affidavit in support of the writ petition sworn by him is to be accepted, his present age is 65 years and if that be so, he was born in 1948 and thus attained the voting right in the year 1969. However, the petitioner could rely upon only the voter list of 1977 containing the name of one Mozibor Rahman showing his age as 29 years. After 20 years there from his name was again included in the voters' list of 1997 showing his age as 44 years. In the 1966 voters' list, name of one Falu Sheikh aged 45 years appears but there is no explanation as to why his name does not appear in any other voters' list, pre or post 1966 except 1997.

12. As far as the petitioner is concerned he has shown his name incorporated in the voter list of 1997 aged 28 years. There is also no explanation as to why his name did not appear in any other voters' list.

13. The learned Tribunal appreciating the evidence on record, both oral and documentary, has arrived at the following findings :--

"From above evidence on record it appears that the opposite party has relied on two documents namely the voters list of 1966 marked as Ext-"A" allegedly belong to his paternal grandfather Falu Seikh who according to his own evidence came to India from the then East Pakistan before independence and stayed at Goroimari and a land document in the name of one Monseb Bepari. On careful examination of said voters list and the evidence of opposite party it is seen that the name of his paternal great grandfather is Haji Monseb Ali son of Saber who had landed property at village Lakhipur under Bagariguri Mouza of Kamrup District. There is nothing in his evidence to show that Falu Seikh came to India along with his father Haji Monseb Ali before independence and acquired land at Lakhipur. Sarkari Gaonburah although stated in his evidence that he knows Falu Seikh and his father Munseb Bepari who has land at Goroimari Bilorjan about 40/45 years back has not mentioned the same in Ext-"D" by which he identified the opposite party as son of Mujibur Rahman on the basis of voters list of 2011. Further as per evidence of opposite party his paternal great grandfather has land at Lakhipur of Bagoriguri and not at Goroimari as stated by Sarkari Gaonburah and that goes to show that Sarkari Gaonburah identified the opposite party as great grandson of Monseb and grandson of Falu Seikh without having any knowledge about them. The identification of the opposite party by Sarkari Gaonburah is therefore found not reliable.

The land document marked as Ext-"B" is not a Khiraj Patta issued in the name of Monseb Bepari but an application filed by one Monseb Bepari son of Late Sahar Munshi who appears to be not the great grandfather of opposite party to show that Sahar Munshi and Saber is one and same person. This document is found

not sufficient to hold that his paternal great grandfather came to India along with his grandfather Falu Sheikh before independence and stayed at Goroimari since then. If his paternal great grandfather was in possession of land at Lakhipur in the year 1952, his name would have taken place in the voters list of 1966 or prior to that year. Therefore I am of the opinion that these two documents submitted by the opposite party are manipulated documents which do not pertain to his paternal grandfather and paternal great grandfather.

The voters list of 1977 in the name of his father is not going to help him as the same is not a valid document to prove his Indian Nationality."

14. From the above reading of the findings of the Tribunal and also on perusal of the evidence on record, it is found that before the Tribunal the petitioner basically relied upon 2(two) documents, namely, the voters" list of 1965 (Ext-A) allegedly containing the name of his paternal grandfather Falu Sheikh, who according his own evidence came to India from the then East Pakistan before independence. The materials have disclosed that the petitioner has projected the name of his great grand father as Haji Monseb Ali S/o. Sober, There is nothing in the evidence to show that Falu Sheikh came to India along with his grand father Haji Monseb Ali before independence.

15. The learned Tribunal has rightly appreciated that the Sarkari Gaonbura also stated in his evidence that Falu Sheikh is known to him and his father is Munseb Bepari but did not mention the same in Ext-D certificate by which he identified the petitioner as the son of Mujibur Rahman on the basis of the voters" list of 2011. It has also been rightly appreciated by the learned Tribunal that as per the evidence of the petitioner, his paternal great grandfather had land at Lakhipur at Bagoriguri and not Goraimari, as stated by Sarkari Gaonbura, which will go to show that the Gaonbura identified the petitioner as great grandson of Monseb and grandson of Falu Sheikh without having any knowledge about them. Such identification by the Gaonbura is of no help to the case of the petitioner.

16. As has rightly been recorded by the learned Tribunal that the Ext-B land document is not a Khiraj Patta as was claimed by the petitioner but an application filed by one Monseb Bepari son of late Sahar Munsu who is not the great grand father of the petitioner. There is nothing in the evidence to show that Sahar Munsu and Saber is one and the same person. Further, if the paternal great grandfather of the petitioner was in possession of land at Lakhipur in the year 1952, his name would have been appeared in the voters" list of 1966 or even prior to that.

17. On perusal of the impugned order in reference to the evidence on record, it cannot be said to be a case of any wrong appreciation of evidence and/or record of perverse finding opposed to the evidence on record.

18. Above being the position, this Court exercising writ jurisdiction, cannot interfere with the same. As has been held by the Apex Court in L.I.C. of India and Another Vs. Ram Pal Singh Bisen, , admission of documents in evidence does

not amount to its proof, in other words, merely making of exhibit or a document does not dispense with its proof, which is required to be done in accordance with law. The documentary evidence adduced by the petitioner was also required to be proved in accordance with the provisions of the Evidence Act which he failed to do. Under the Law of Evidence it is necessary that contents of documents are required to be proved either by primary or by secondary evidence. At the most, admission of documents may also to admission of contents but not its truth. Apart from the aforesaid position of the case, the documents were also not produced and marked as required under the Evidence Act. Needless to say that the contents of the documents cannot be proved by merely filing in a Court.

19. For all the aforesaid reasons, I do not find any merit in the writ petition and accordingly it is dismissed, without however, any order as to costs.

20. Registry may transmit the case records to the Tribunal.

21. The Superintendent of Police (B), Kamrup (R) and the Deputy Commissioner, Kamrup (R) are directed to take appropriate action in the matter towards deportation of the petitioner from India and deletion of his name from the voter list, if found to have entered.

22. Let copies of this judgment and order be furnished to the Superintendent of Police (B), Kamrup (R) and the Deputy Commissioner, Kamrup (R). Another copy be sent to the Union of India in the Ministry of Home. An extra copy of this judgment and order may also be furnished to Mrs. K. Devi, learned State Counsel for his necessary follow up action. List after one month for furnishing reports by the Superintendent of Police (B), Kamrup (R) and the Deputy Commissioner, Kamrup (R).