
(2013) 09 GAU CK 0034
In the Gauhati High Court
Case No : W.P. (C) No. 338 of 2013

Amjad Sheikh and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 23-09-2013

Acts Referred:

Citation : AIR 2014 Guw 44

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J.—This writ petition is directed against the order dated 03.11.2012 passed by the Foreigners Tribunal, Goalpara in F.T. Case No. 2575/G/2010 holding all the petitioners as illegal migrants of post 1971 stream from Bangladesh. Case of the petitioners is that petitioner No. 1 is the father of petitioner Nos. 3 and 4 whereas petitioner No. 2 is the wife of petitioner No. 1. On receipt of notice dated 06.05.2011 issued by the Foreigners Tribunal, Goalpara (Tribunal), petitioners filed written statement dated 13.10.2011. In the written statement, it was contended that father of petitioner No. 2 was a voter in the voters list of 1966 and subsequent voters lists of Boko L.A. Constituency. Petitioner No. 1's father was also a voter whose name appeared in the voters list of 1966 in Chenga L.A. Constituency. His name also appeared in the voters list of 1971 in Boko L.A. Constituency. Subsequently, names of both petitioner No. 1 and petitioner No. 2 were included in the voters lists of 1997 onwards. Thus, they claimed to be Indian citizens.

2. Though, initially the case was registered under the IMDT Act, subsequently, after declaration of the IMDT Act as unconstitutional, the case was transferred to the Foreigners Tribunal. As the engaged counsel of the petitioners took time to file evidence-in-chief, another advocate was appointed to conduct the proceeding on behalf of the petitioners. On 18.10.2012, the newly engaged counsel sought for adjournment on account of illness of the petitioner No. 1, but such prayer was

rejected. Case was accordingly decided ex parte and by order dated 03.11.2012, the Tribunal held the petitioners to be illegal migrants of post 1971 stream from Bangladesh.

3. Hence, the writ petition.

4. Contention of the petitioners is that evidence-in-chief could not be filed on 18.10.2012 due to absence of petitioner No. 1, who was taking steps on behalf of all the petitioners. Learned Tribunal was not justified in rejecting the prayer for adjournment and proceeding ex parte. Case should be remanded to the learned Tribunal for fresh decision.

5. Respondent No. 4 has filed affidavit. It is stated that no voters list or school certificate was produced by the petitioners before local Verification Officer or Electoral Registration Officer at the time of enquiry. Hence, ERO Case No. 540/2001 was initiated against the petitioners. No such documents were also produced before the learned Tribunal. In spite of several adjournments granted by the learned Tribunal, petitioners could not produce any documents in respect of their claim that they are Indian citizens. Several opportunities were granted to the petitioner to prove their case by the learned Tribunal but the petitioners failed to avail such opportunities. Therefore, they have been rightly declared as illegal migrants.

6. Heard Mr. M. U. Mondal, learned counsel for the petitioners and Mr. M. Bhagawati, learned Central Government counsel. Also heard Mr. J. Handique, learned Government Advocate, Assam.

7. Mr. Mondal, learned counsel for the petitioners submits that on the date of hearing, counsel for the petitioners had prayed for a short adjournment, which was unjustifiably declined by the learned Tribunal. Referring to the documents placed on record in the present proceeding, learned counsel submits that the finding recorded by the learned Tribunal is contrary to facts. Tribunal proceeded ex parte and had reasonable opportunity been granted to the petitioners, they would have succeeded in proving their case. He, therefore, prays for remanding the matter back to the learned Tribunal for a fresh decision. In support of his submissions, learned counsel has placed reliance on para-graph-92 of the Full Bench judgment of this Court in *The State of Assam and Others Vs. Moslem Mondal and Others*, .

8. Both the learned Central Government counsel as well as learned Government Advocate, Assam have opposed the submissions made by the learned counsel for the petitioners. They submit that there is no need for acceding to the prayer for remand for a fresh decision. Petitioners were negligent and failed to avail all the reasonable opportunities granted by the learned Tribunal to defend their case. Large number of adjournments were taken by the petitioners. No case for interference has been made out by the petitioners. Writ petition should, therefore, be dismissed.

9. Submissions made have been considered. Also perused the record requisitioned by the Registry.

10. Before proceeding further, order dated 03.11.2012 may be referred to, which reads as under--

Respondent Amjad Ali, Joymon Nessa absent. The alleged minor such as Azida Begum, Joyanal Abedin, vide petition No. 1690 dated 10.06.2011 i.e. the first day of appearance and W/S did not appear before us and in said petition it was also stated that where about of Ashatun Begum is unknown. In the petition the petitioners did not deny Ashatun Begum to be their family member rather stated that the whereabouts of Ashatun is unknown. As per police report Ashatun Begum and Azida Begum are presently major. Only Joyanal Abedin may be minor because as per police report Joyanal Abedin is presently 14/15 years aged. Whatever the case may be, today all respondents are absent. Case is also fixed for final order.

This case was enquired into by Goalpara Police (B) as per order of the then Superintendent of Police(B) communicated vide memo No. GLP/B/III-3/2001/2704 dated 26.07.2001. Accordingly one Achyut Talukdar S.I. of Baladmari O.P. collected the evidence and finally submitted his report filing up form No. II that respondents are illegal migrant of post 1971 stream from Bangladesh. The then Superintendent of Police (B) forwarded the case to the then chairman IM(D)T seeking opinion where persons referred to are illegal migrant.

Due to abolition of IM(D) Tribunals the case came up before Foreigners Tribunal. As soon as case came up before me for disposal a show-cause notice was issued on the respondent assigning main grounds of proceeding asking a written statement from the respondents. On service of notice the respondent appeared before me and filed petition No. 1690 as stated above and prayed date for filing written statement on 10.06.2011. On 13.10.2011 i.e. after four months respondent Amzad Ali and Joytun Nessa submitted their written statement and vide petition No. 2954 dated 13.10.2011 sought permission to represent two minors though one is not minor and by another petition 2962(A) on same day stated that Ashatun was his daughter from his first wife but present her whereabouts is unknown and by petition No. 2954 on same day prayed to separate case of Ashatun as because whereabouts of her is totally unknown to him and he has no communication also.

I have given a birds eye view on the written statement submitted by Amzad Ali and Joymon Nessa. By paras 4 and 5 of written statement both respondents claimed to be citizens of India by birth and totally denied to be an illegal migrant of post 1971 stream.

When respondent Nos. 1 and 2 contested the case denying to be illegal migrant I have fixed the case for evidence of respondent by adducing both primary and secondary evidence. The date for evidence were fixed on 15.11.2011,

23.12.2011, 25.1.2012, 5.3.2012, 5.4.2012, 15.5.2012, 15.6.2012, 30.7.2012 and 18.10.2012 total 9 dates with around one year. On the 8th date for evidence I gave a last chance for evidence of respondent; because on the last 24th April, 2012 a Gazette notification published by Government of India and it was communicated to us which was an amendment to Foreigners (Tribunals) Order, 1964 where strict direction was given to dispose of a case within 60 days from the date of initiating proceeding. Proceeding was initiated on 6-5-2011 in connection with this case. Earlier I granted even 10 dates for evidence of respondent but after communication of notification I reduced the same and still I provide opportunity to the respondent to prove the case of respondent. After fixing case for evidence of respondent first six dates respondent did not attend the Court to adduce evidence. On 7th date I avail leave but respondents prayed adjournment for want of documents. On 8th date respondent changed their advocate and on that ground submitted petition stating ground that newly engaged advocate could not prepare evidence. So, I gave a last chance and the learned advocate also acknowledged order. But on 9th date respondent did not appear nor their advocate.

Thus I am compelled to hold my opinion that respondents have no good case to prove as they claim in their written statement. On the other hand the above amendment directed us to exercise power of adjournment very sparingly. In my opinion it is nothing but worst deliberate gross negligence of respondent in proving their claim. We have number of examples that on the day of appearance respondent submitted evidence on affidavit with all required documents and on same date we cross-examined the witnesses and only judgment is reserved for 2nd date. In some cases we disposed off within 3 dates. But in this case we gave 9 dates for evidence only and from the date of initiating proceeding we have killed one year six months. For gross deliberate negligence of respondent in my opinion they never deserve any chance to prove their claim. Respondent compelled us to discharge our function at their pleasure.

So, I hold that all respondents are illegal migrants of post 1971 stream from Bangladesh. So, they have no locus standi to live within territory of India. And they are liable to be pushed back within an early date.

Inform Superintendent of Police (B) Goalpara to restrain the free movement of all five respondents forthwith through his subordinate agency. Goalpara Police (B) shall be at liberty to push back all 5 respondent from the territory of India within an early date in accordance with provision of law without Quit India notice and shall report their compliance with to this Tribunal positively within one month from the date of communication of the order of this day.

The case is finally disposed off on contest. Inform accordingly.

ERO 37 Goalpara LAC shall delete names of respondent/respondents from the electoral roll of Moilapather under his constituency.

11. A perusal of the aforesaid order dated 03.11.2012 would indicate that

reference was made to the learned Tribunal by the Superintendent of Police with the report that petitioners are illegal migrants of post 1971 stream from Bangladesh. Though written statement was filed by the petitioners, no evidence was adduced by them even though a number of dates were fixed for production of evidence whether primary or secondary. From the impugned order as well as from the record it appears that 10(ten) dates were granted for adducing evidence but petitioners failed to adduce any evidence. In paragraphs of the writ petition, it is stated that evidence-in-chief could not be filed on 18.10.2012 because of absence of petitioner No. 1 as he was taking steps on behalf of all the petitioners. In the previous paragraph i.e., in paragraph-6, it is stated that though all the evidence-in-chief of petitioners were ready, the same could not be filed on 18.10.2012, due to illness of petitioner No. 1 as petitioner No. 1 was taking steps in the proceeding on behalf of all the petitioners. But in the order dated 03.11.2012, it is recorded that newly engaged counsel sought for time on the ground that he could not prepare evidence. Even though the case was fixed thereafter on 03.11.2012 none of the petitioners appeared before the learned Tribunal on that day. A perusal of the record also does not indicate that any medical certificate was enclosed with the application dated 18.10.2012.

12. A Full Bench of this Court in *The State of Assam and Others Vs. Moslem Mondal and Others*, has held that in an ex parte proceeding before the Tribunal when the proceedee does not appear and does not adduce any evidence to discharge his initial burden, the Tribunal has no alternative but to opine the proceedee as a foreigner, having regard to the grounds on which reference has been initiated and notice having been issued. In an ex parte proceeding, State is not required to adduce evidence as the burden lies on the proceedee to prove to the satisfaction of the Tribunal that he is not a foreigner in view of the provisions contained in Section 9 of the Foreigners Act, 1946. Paragraph 78 of the said judgment is as under:

(78) In a proceeding under the Foreigners Act, 1946 read with 1964 Order the issue is whether the proceedee is a foreigner. It being a fact especially within the knowledge of the proceedee, the burden of proving that he is a citizen is, therefore, upon him, because of Section 9 of the 1946 Act and it is, therefore, his obligation to provide enough evidence to establish that he is not a foreigner. In an ex parte proceeding before the Tribunal constituted under the provisions of 1964 Order the said position would not be changed as the burden of proving that the proceedee is not a foreigner continues to be upon the proceedee, which cannot shift and when the proceedee does not adduce any evidence to discharge such burden, the Tribunal has no alternative but to opine the proceedee as a foreigner, having regard to the main grounds on which the reference has been initiated and the notice having been issued to the proceedee. Unlike in a suit in the Civil Court, where the Court may require the plaintiff to adduce evidence to prove his case even in an ex parte proceeding, as the burden of proof lies on the plaintiff in view of Section 101 of the Evidence Act, in a proceeding before the Tribunal under the provisions of 1946 Act read with 1964 Order, the same is not

required, meaning thereby that the State is not required to adduce evidence in an ex parte proceeding, as the burden lies on the proceedee to prove to the satisfaction of the Tribunal that he is not a foreigner, in view of the provisions contained in S. 9 of the 1946 Act.

13. Coming to ex parte proceeding, the Full Bench held that in a given case the Tribunal has jurisdiction to entertain and pass necessary order on an application to set aside an ex parte opinion provided it is proved to the satisfaction of the Tribunal that the proceedee was not served with the notice in the reference proceeding or that he was prevented by sufficient cause from appearing in the proceeding. Full Bench opined that such application cannot be entertained in a routine manner. Paragraph 92 of the said judgment reads as under:

(92) As discussed above, the Tribunals constituted under the Foreigners Act read with the 1964 Order have to regulate their own procedure and they have also the quasi-judicial function to discharge and hence in a given case the Tribunal has jurisdiction to entertain and pass necessary order on an application to set aside an ex parte opinion, provided it is proved to the satisfaction of the Tribunal that the proceedee was not served with the notice in the reference proceeding or that he was prevented by sufficient cause from appearing in the proceeding, reason for which was beyond his control. Such application, however, should not be entertained in a routine manner. The Tribunal can entertain such application provided the proceedee could demonstrate the existence of the special/ exceptional circumstances to entertain the same by way of pleadings in the application filed for setting aside the ex parte opinion, otherwise the very purpose of enacting the 1946 Act and the 1964 Order would be frustrated. The Tribunal, therefore, would have the jurisdiction to reject such application at the threshold, if no ground is made out.

14. When the petitioner seeks remand for a fresh decision by the Tribunal, he must be able to show to the satisfaction of the Court that he was either not served the notice of the proceeding or he was prevented by sufficient cause from appearing in the proceeding, the reason for his absence being beyond his control. A proceeding relating to citizenship of a person cannot be taken lightly. After a proceeding is continued for a number of years and when the materials on record indicates clear laches and negligence on the part of the petitioners, order of remand is not to be passed unless exceptional circumstances are made out by the petitioners.

15. A perusal of the averments made in the writ petition do not disclose any such exceptional circumstances to warrant remand of the case to the Tribunal for a fresh decision as sought for by the petitioners.

16. This Court does not find any good ground to interfere with the order of the Tribunal dated 03.11.2012.

17. Writ petition is accordingly dismissed. Interim order passed earlier on 31.01.2013 stands re-called. Registry to send down the case record.