
(2015) 02 GAU CK 0056
In the Gauhati High Court
Case No : Writ Petition (C) No. 2960 of 2012

Ayub Ali and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 26-02-2015

Acts Referred:

Constitution of India, 1950 — Article 21
Foreigners Act, 1946 — Section 3, 8, 9

Citation : (2015) 2 GLT 245

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : A. Choudhury, S. Islam and A. Ali, for the Appellant; M. Bhagawati, C.G.C. and H. Rahman, G.A., Advocates for the Respondent

Final Decision : Dismissed

Judgement

Arup Kumar Goswami, J.—Heard Mr. A Choudhury, the learned Counsel for the petitioners. Also heard Mr. M. Bhagawati, learned Central Government Counsel (C.G.C) appearing for respondent No. 1 and Mr. H. Rahman, learned State counsel appearing for respondent Nos. 2 to 4. This writ petition is directed against an order dated 23.02.2012 of the Foreigners Tribunal (1st), Morigaon (for short, "the Tribunal") in F.T. (C) Case No. 49/2007. The Tribunal rendered an opinion that the petitioners illegally migrated from Bangladesh to India (Assam) after 25.03.1971.

2. Mr. A. Choudhury, learned counsel for the petitioners submits that in response to a notice issued by the Tribunal, the petitioners had entered appearance and had submitted a written statement annexing certain documents to establish that the allegations against the petitioners are not correct and that they are Indian citizens by birth. Learned counsel submits that the petitioners could not collect the documents and therefore, they had filed a petition on 23.02.2012 praying for further time for adducing evidence. But the Tribunal rejected the said prayer most unreasonably and proceeded to render the judgment, which is impugned in

this petition.

3. Argument advanced by Mr. Choudhury is that the petitioners had been denied adequate and reasonable opportunity to discharge the burden of proof that the petitioners are not illegal migrants but are Indian citizens. He submits that one more opportunity may be granted to the petitioners so that their valuable citizenship rights are not taken away. He has further submitted that documents annexed with the written statement would, prima facie, go to show that accusations made against the petitioners are false and that the petitioners are Indian citizens.

4. Mr. Bhagawati, learned C.G.C. submits that case against the petitioners were initiated under the Illegal Migrants (Determination by Tribunals) Act, 1983 (for short "the IMDT Act") way back in 1997. After the Hon'ble Supreme court had struck down the I.M.D.T., Act as ultra vires in the case of Sarbananda Sonowal Vs. Union of India (UOI) and Another, AIR 2005 SC 2920 : (2005) 6 JT 79 : (2005) 5 SCC 665 : (2005) 1 SCR 472 Supp , in terms of the said judgment, the case was transferred to the Foreigners Tribunal, Morigaon. He has submitted that the argument of Mr. Choudhury that the petitioners have been denied reasonable opportunity to establish their case is wholly untenable in the facts and circumstances of the case as 15(fifteen) years is too long a period to contend that they have been denied reasonable opportunity. Mr. Bhagawati has also submitted that, may be, the documents produced before the Tribunal in the written statement were not genuine. Otherwise, there could not have been any justification for the petitioners to be unable to produce the originals of the documents, although the needle of suspicion against them as foreigners was subsisting from the year 1997.

5. Mr. H. Rahman, learned State Counsel also echoes the submission of Mr. Bhagawati.

6. I have considered the submissions of the learned counsel for the parties and have perused the materials on record including the records of the Tribunal, which has been called for.

7. The petitioners herein belong to one family. The petitioner No. 1 is the husband of petitioner No. 2 and father of petitioner Nos. 3 and 4. It appears that there was a case registered against the petitioner Nos. 1 and 2 under IMDT Act. Consequent upon the Hon'ble Supreme Court striking down IMDT Act, 1983 and the Illegal Migrants (Determination by Tribunals) Rules, 1984, for short, IMDT Rules, 1994, as unconstitutional, in terms of the directions contained in the said judgment all pending cases stood transferred to the Tribunals constituted under the Foreigners (Tribunals) Order, 1964, for short, the Order of 1964 and are to be decided in the manner provided in the Foreigners Act, 1946, for short, the Act of 1946 and the Rules made there under and the procedure prescribed under Order of 1964.

8. The Tribunal had issued a notice dated 01.03.2007 to the petitioners indicating

that the Superintendent of Police (Border), Morigaon had submitted a report that they are suspected to have illegally entered India after 25.03.1971 and are residing in India in the present address of the petitioners. By the said notice dated 01.03.2007, the petitioners were directed to submit written statement on 20.04.2007 failing which, it was indicated that the case would proceed ex-parte against them.

9. The petitioners appeared before the Tribunal and presented their written statement on 20.04.2007. Two witnesses were examined on behalf of the State. On 14.06.2011, case was posted for evidence of the petitioners. On 16.08.2011, on the ground of ailment, petition for adjournment was filed and accordingly, case was posted for evidence on 14.11.2011, after about 3 months. On 14.11.2011, a petition was filed on behalf of the petitioners praying for adjournment on the grounds that they have not been able to collect their documents as well as due to sickness of the witnesses. On both the occasions, namely, on 16.08.2011 and 14.11.2011, while granting adjournment, the Tribunal had noted that medical certificates were not produced. The Tribunal also noted in the order dated 14.11.2011 that the plea that they have not been able to collect the documents at that distance of time, could not be considered to be a reasonable ground for granting adjournment. Nevertheless, one more opportunity was granted to produce the documents by fixing the matter after more than 3 months on 23.02.2012. It was also recorded in the said order that if on the next date fixed, the witnesses were not ready with their documents, the Tribunal will dispose of the case in accordance with law.

10. Once again a petition was filed on 23.02.2012 praying for adjournment on the ground that though they had applied for voter list, they had not received the same. The Tribunal rejected the prayer for adjournment and in absence of any evidence on the side of the petitioners, proceeded to hold the petitioners to be illegal migrants entering India after 25.03.1971.

11. Section 9 of the Act of 1946 provides that if in any case not falling under Section 8 any question arises with reference to the Act or any order made or direction given there under, whether any person is or not a foreigner of a particular class or description, the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall notwithstanding anything contained in the Indian Evidence Act, 1872, shall lie upon such person. A Full Bench of this Court in the case of *The State of Assam and Others Vs. Moslem Mondal and Others*, (2013) 1 GLT 809 , had held that Section 9 of the Act of 1946 imposes a burden on the proceedee to prove that he is not a foreigner. It was further held that the State is not required to adduce evidence even 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.

12. It is also relevant to note that in exercise of powers conferred by Section 3 of the Act of 1946, the Central Government had made certain amendments in the Order of 1964. Paragraph 3 of Order of 1964 is substituted and presently,

paragraph 3(9) of the said order reads as follows:-

"After the case has been heard, the Tribunal shall submit its opinion as soon as thereafter as may be practicable, to the officer or the authorities specified in this behalf in the order of reference. Every case should be disposed of within a period of 60 days after the receipt of the reference from the competent authority."

13. Thus, in view of the above, every case should be disposed of within a period of 60 days from the date of receipt of the reference from the competent authority. However, this amendment was effected after the Tribunal had rendered the impugned judgment. But it goes without saying even in absence of a timeframe, the reference were to be disposed of within a reasonable period of time having regard to the issue involved. The Full Bench in Moslem Mondal (Supra) had also noted about this aspect of the matter and had observed that speedy trial is a fundamental right which is guaranteed under Article 21 of the Constitution of India and that while there can be no denying of the fact that in the name of detection and deportation of foreigners, Indian citizens should not be harassed, it is equally true that the reference proceedings must also be disposed of at the earliest so that foreigners can be deported from India immediately as otherwise it would be against national interest.

14. That the petitioners did not adduce any evidence is not in dispute. The thrust of the argument of the learned counsel for the petitioners is that the petitioners have been denied reasonable opportunity to enable them to discharge the burden cast upon them by Section 9 of the Act of 1946 and one more opportunity should be granted to them.

15. Principles of natural justice cannot be put into a strait-jacket formula. It is more than three decades that the issue of influx of foreign nationals has been in public domain in the State of Assam. Process of determination of question of citizenship cannot be a one - way traffic, leaning only in favour of a person whose citizenship is doubted. Interest of the State is also of paramount importance in that unabated influx has the potential to affect the integrity and sovereignty of the country. Citizenship of a person, no doubt, is a very valuable right and should be zealously guarded. However, if a person does not take steps for safeguarding his interest, he does so at his own peril. Right to a fair hearing or principles of natural justice cannot be permitted to lead to a farcical situation and to be an engine for defeating the very object of identification and deportation of foreigners. The petitioners had known about the allegations against them that they are foreigners entering India without any valid documents, at least from 2007, even ignoring the earlier part under the IMDT Act from 1997. The petitioners, all these years, apparently, did not take any step to defend their rights in the Court proceedings. In the circumstances, I am not inclined to grant any further opportunity to the petitioners as any such course of action, according to the perception to the court, would be self-defeating.

16. The writ petition is, accordingly, dismissed. The State respondents will take

necessary steps in accordance with law for deportation of the writ petitioners.
The records of the Tribunal be sent back forthwith.