
(2014) 03 GAU CK 0079
In the Gauhati High Court
Case No : WP(C) No. 6345 of 2013

Bakes Ali

APPELLANT

Vs

The 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 106
Foreigners Act, 1946 — Section 9
Transfer of Property Act, 1882 — Section 101, 106

Citation : (2014) 2 GLD 82

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : M.U. Mahmud, Advocates for the Appellant; M. Bhagabati, CGC and N. Upadhyay, 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-III, Barpeta, Assam, vide order dated 07/10/2013 in FT Case No. 120 (III)/4e4e42012 Ref. IMDT Case No. 858(A)/98, State of Assam v. Bakes Ali, has filed the instant writ petition challenging the said order. As has been claimed in the writ petition, the petitioner aged 62 years is a citizen of India by birth. Referring to the voter lists of 1966 and 1970, it is the case of the petitioner that his parent's names, namely, Juran Ali and Sukurjan Nessa, appeared in the said two voter lists pertaining to No. 54 Chenga Assembly Constituency. The petitioner has also referred to the voter list of 1989, 1997 and 2010 stating that his name also appeared in the said voter lists as Bahej Uddin and Md. Bakesh Ali respectively. According to the petitioner, Bahej Uddin and Md. Bakesh Ali is one and the same person i.e. the petitioner. The petitioner has also referred to the certificate dated 6/7/2012 purportedly issued by the particular Gaonbura (seal not legible) and not on any letter head certifying that Bakesh Ali, Son of late Juran Ali's name appeared in the voter list of 2010 and that he is a resident of the particular

village.

2. Above are the documents on the basis of which the petitioner aged 62 years claims to be an Indian citizen, by birth. What strikes on the face of it is as to why the petitioner's name did not appear in any voter list prior to 1989. If the petitioner is 62 years of age, he was born around 1952 and if that be so he had attained the age of eligibility to be a voter in 1971-1972. However, the petitioner could not produce even a single voter list containing his name from 1971-1972 to 1989, which is long 17 (seventeen) years. Appearance of name in 1989 voter list and placing reliance on the same to establish one's citizenship that too, by birth, is of no consequence as the cut-off date is 25/3/1971. Another significant aspect of the matter is that in the 1989 voter list, the name of one Bahej Uddin, aged 49 years appears but in the 1997 voter list, name of one Md. Bakesh Ali aged 48 years appears. There could not have been reduction in age by one year between 1989 to 1997. Thus, there is serious doubt as to whether Bahej Uddin and Md. Bakesh Ali is one and the same person.

3. I have heard Mr. M.U. Mahmud, learned counsel for the petitioner. I have also heard Mr. M. Bhagabati, learned CGC and Mr. N. Upadhyay, learned State Counsel appearing for the respondents. I have also perused the entire materials on record. My findings and conclusions are as follows.

4. 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 proceeded. 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 preeminently 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."

5. 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 Sonawal (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....."

6. 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.

7. 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.

8. The reference against the petitioner was on the basis of the enquiry that was conducted pursuant to the intensive revision of electoral roll and when the name of the petitioner was found included in the electoral roll for the 46 Sarukhetri Assembly Constituency, house to house enumeration was done during the period from 16th January, 1997 to 15th April, 1997. The draft electoral roll was published on 24/7/1997 and the name of the petitioner was included therein on the basis of the doubt that has arisen, a reference was made to the Superintendent of Police (B), Barpeta under the then IM(D)T Act, 1983/the Foreigners Act, 1946 for deciding the question as to whether the petitioner is a citizen of India or not. On the basis of the enquiry conducted, a report was furnished that the petitioner is not a citizen of India. Thereafter, the IM(D)T case was registered in 1998 and pursuant to the judgment in Sarbananda Sonowal (supra), F.T. Case No. 120(III)/2012 was registered. By now, long 15(fifteen) years have gone by.

9. The learned Tribunal appreciating the evidence on record, both oral and documentary, has recorded the petitioner's version as follows :--

"11. Having heard the argument of both the sides and upon very careful consideration of the entire material on record, it appears that -

(i) the OP's version is that he was born about 62 years ago in village Chenimari where he is residing permanently along with his brothers DW 2 Siddique Ali and DW 3 Akbar Ali and other family members;

(ii) that Late Juran Ali and Sukurjan Nesssa of village Chenimari are his father and own mother respectively;

(iii) that during flood season, he temporarily shifts every year since 1995, to nearby village Kukarpar and return back to his original village Chenimari during cultivation season; that though he temporarily shifts to village Kukarpar during flood season, his name is recorded as a voter only in village Chenimari along with his other family members where he casts his vote regularly in the elections but that as he temporarily stays at village Kukarpar, his name is also recorded in the voters" list of 1997 of the said village Kukarpar but as "D" voter.

(iv) That he is a citizen of India by birth having all the documents for the citizenship."

10. Appreciating the evidence on record, the learned Tribunal has held the petitioner to be a foreign national because of the reasons indicated in paragraph

12 of the judgment and discussed below. As noted above, taking the petitioner's year of birth, his name ought to have been in the voter list published in or after 1971-72. Ext. C produced before the Tribunal is a voter list of 1989 containing the name of the petitioner and his age as 49 years. There is no explanation as to why the name of the petitioner was not there in any of the voter list prior to 1989. After the extensive revision of the electoral rolls, the voters' list was published in the year 1985 but the petitioner could not produce the voter list of 1985 showing his own name and his parent's name. The learned Tribunal has also appreciated the stand of the petitioner that in the voter list of 1989, his age was wrongly recorded as 49 years instead of 39 years. Even assuming that he was 39 years of age in 1989, he was born in 1950 and thus attained the age of 21 years in 1971 but he could not produce any voter list for the period from 1971 to 1989.

11. Interestingly in the Ext. C voter list, one Bahej Uddin aged 49 years appears along with his father Juran Ali aged 59 years which means his father was only 10 years elder to his son which by no stretch of imagination is acceptable. As appreciated by the learned Tribunal, there is also variation of the name of the projected father of the petitioner, sometime, it is Juran and sometime it is Jaran.

12. The learned Tribunal has also appreciated the oral testimony of the DWs. Although DW-2 in his evidence stated that he was born in 1966 but his age in 1989 voter list was shown as 30 years instead of 23 years. Although the DW-2 wanted to explain that his name was wrongly shown as Siddin instead of Siddique but he did not state anything about the wrong recording of age. In absence of any trustworthy evidence that Siddin Ali @ Siddique Ali is one and the same person, the learned Tribunal rightly disbelieved the story made out by the petitioner.

13. DW-3 in his evidence stated that the father of the petitioner had married another woman namely Jaharan Nessa @ Begum after the death of his first wife. However, in 1997 voter list, there is the name of one Jarul Bewa whom the DW-3 claimed to be his step mother. In the evidence-in-chief, there is no statement that Jaharan Nessa and Jarul Bewa is one and the same person. This is relevant because he in his evidence stated that Bakesh Ali and Bahej Uddin is one and the same person.

14. DW-1 i.e., the petitioner in his evidence stated that Jaharan Nessa, Jaharan begum and Jarul Bewa is one and the same person. However, in Ext. C the age of Jaran Nessa is shown as 49 years but in Ext. E the age of Jarul Bewa is recorded as 65 years, which will go to show that the said two persons are different persons and not the same person. Ext. C and Ext. E are the voter lists of 1989 and 1997.

15. Dealing with the further evidence on record, the learned Tribunal has also found out the discrepancy in respect of the purchase of the particular plot of land. Moreover, the DW-2 also stated that he read upto Class-VII in Kukarpar ME

School but he could not furnish any School Certificate.

16. 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.

17. 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.

18. 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.

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

20. The Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta 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.

21. Let copies of this judgment and order be furnished to the Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta. 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 Mr. N. Upadhyay, learned State Counsel for his necessary follow up action. List after one month for furnishing reports by the Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta.