
(2018) 09 GAU CK 0034

In the Gauhati High Court

Case No : Civil Writ Petition No.7897 Of 2016

Bakul Chandra Acharjee

APPELLANT

Vs

Union Of India And 4 Ors.

RESPONDENT

Date of Decision : 14-09-2018

Acts Referred:

Foreigners Act, 1946 — Section 9, 14
Code of Civil Procedure, 1908 — Order 22 Rule 6

Citation : (2018) 09 GAU CK 0034

Hon'ble Judges : Manash Ranjan Pathak, J

Bench : Division Bench

Advocate : Barnali Chowdhury, G Sarma, U K Nair, P Borgohain

Final Decision : Dismissed

Judgement

(M.R. Pathak, J)

1. Heard Ms. Barnali Chowdhury, learned counsel for the petitioner. Also heard Ms. G Sarma, learned CGC for the respondent No. 1 and Mr. U K

Nair, learned Senior Special Standing Counsel, Foreigners Tribunal, assisted by Ms. P Borgohain, learned counsel for the respondent Nos. 2 to 5.

2. Challenge in this writ petition is to the Judgment dated 24.09.2016, passed by the learned Member, Foreigners Tribunal, Diphu, District-Karbi

Anglong, Assam, in F.T. Case No. 135/2007, wherein the said Tribunal opined that the petitioner is not an Indian Citizen but a foreigner.

3. After the hearing of the matter was closed on 20.07.2018 and judgment was reserved, the counsel for the petitioner on 01-10-2018 on instructions

made submission during mentioning hour that the petitioner expired on 31.07.2018 and on her such submission the Court directed to list the matter on

10.08.2018 under the column "To be spoken to" and accordingly the matter

was listed on said date.

4. On 10.08.2018, we heard the arguments advanced by the parties on the issue of the legal consequences on the death of the petitioner on 31.07.2018

after the judgment was reserved on 20.07.2018.

5. Order 22 Rule 6 CPC stipulates that If any of the parties to a suit dies after the hearing has been completed and before the judgment is pronounced,

the suit would not abate. Accordingly, by order dated 10.08.2018, we closed the matter again for judgment.

6. The contention of the petitioner is that the impugned judgment dated 24.09.2016 of the learned Tribunal curtailed petitioner's personal liberty

and it suffers from illegality and arbitrariness and as such, the same needs to be set aside and quashed.

7. This Court, while issuing notice to the respondents on 03.01.2017, in the interim observed that the petitioner shall not be taken into custody and shall

not be deported from India. He was allowed to remain on bail to the satisfaction of the Superintendent of Police (B), Karbi Anglong.

8. Perused the records of the Tribunal.

9. It is seen that notice of said F.T. Case No. 135/2007 was issued by the learned Foreigners Tribunal, Diphu, Karbi Anglong to the petitioner, son of

Lt. Sitaram Acharjee at Village-Doyangmukh under Kheroni Police Station in the district of Karbi Anglong and also to Smt. Subata Acharjee, Sri

Ranjan Acharjee, Sri Swapan Acharjee, Sri Tapan Acharjee, Sri Bapan Acharjee and Smti. Anjali Acharjee on 25.04.2012, fixing 29.06.2012 for

appearance and for filing written statement.

10. The petitioner appeared before the Tribunal on 29.06.2012 and sought for time and accordingly, 23.08.2012 was fixed for filing written statement.

On 23.08.2012, the petitioner remained absent and his son Swapan Acharjee, filed his attendance and the Tribunal fixed the matter on 02.11.2012 for

filing written statement. On the next date, i.e. on 02.11.2012, petitioner remained absent and on an application of his advocate stating that due to some

old age ailment, the petitioner could not appear; the Tribunal fixed the matter on 05.01.2012 for written statement. Petitioner appeared before the

Tribunal on 05.12.2012, but, he again prayed for time which was granted fixing 29.03.2013. Petitioner remained absent on that day and his son

Swapan Acharjee again filed application seeking time, which was allowed fixing

29.06.2013 for written statement. On 29.06.2013, the petitioner did not appear before the Tribunal due to his illness and on a petition filed by his son Swapan Acharjee, the Tribunal fixed the matter again on 13.08.2014 for written statement and documents. The petitioner continued to remain absent in the matter before the Tribunal and occasionally filed applications either through his lawyer or his son seeking time. Due to such non-appearance, the said FT Case against the petitioner was decided ex-parte against him on two occasions i.e. on 10.02.2015 and 15.06.2016. However, on filing applications for setting aside such ex-parte orders, the learned Tribunal on both the occasions set aside the ex-parte orders and restored the said case to the file. Finally, the petitioner filed his written statement only on 27.07.2016.

11. The petitioner as an opposite party/proceedee submitted 7 (seven) documents as Exhibits which are as follows:-

- i) Ext. 1 - an affidavit of the petitioner sworn before Notary.
- ii) Ext. 2 - Certified copy of voter list of 1966 of No. 71 Rangamati (ST) LAC.
- iii) Ext. 3 - Certified copy of voter list of 1972 of No. 94 Lumding LAC.
- iv) Ext. 4 - Certified copy of voter list of 1977 of No. 92 of Lumding LAC.
- v) Ext. 5 - Certified copy of voter list of 1985 of No. 92 Lumding LAC.
- vi) Ext. 6 - Certified copy of voter list of 2010 of No. 20 of Baithalangso (ST) LAC.
- vii) Ext. 7 - certificate of Sarkari Gaonburha of Village-Dikhlempur, District-Karbi Anglong dated 01.08.2016.

12. Statement of the petitioner as OP/DW-1 was recorded on 21.09.2016. On the said date, the petitioner also adduced evidence of one Hrishikesh

Chakravorty as OP's witness DW-2, who is his son-in-law.

13. It is seen that the State declined to cross examine both the proceedee as well as his witness. The OP in his written statement stated that while he

was about 6 (six) years, he came from East Pakistan (Kisanganj) in the District of Moimonsing to India with his father Sita Nath Acharjee @ Dhiren

Ch. Acharjee to Nayak Para under Mangaldoi Police Station in the District of Darrang and resided in the said place for 5 (five) years and thereafter,

his father shifted to Derapathar under Lumding Police Station in the district of Nagaon, wherein he resided for about 30 (thirty) years and then again

moved to Doyangmukh under Kheroni Police Station in the District of Karbi

Anglong. It is stated by the petitioner that since then he is residing at Doyangmukh.

14. Petitioner in his written statement further stated that his father Sita Nath Acharjee @ Dharendra Ch. Acharjee expired about 30 years back and his mother Santana Acharjee expired about 25 years back and his grandfather Daya Nath was a voter in the Voter List of 1966 of No. 71 Rangamati (ST) LAC under Mangaldoi PS of Darrang District, whereas his father Dhiren Ch. Acharjee was a voter in the voter list of 1972 of No. 94 Lumding LAC under Lumding PS in the district of Nagaon.

15. It is also stated that the petitioner himself was a voter in the voter list of 1977 and 1985 in said No. 92 Lumding LAC and was also a voter in the voter list of 2010 of No. 20 Baithalangso (ST) LAC.

16. During his deposition on 21.09.2016, the petitioner stated that his grandfather Daya Nath Acharjee expired about 40 years back and that his father's actual name was Dharendra Nath Acharjee, but he was also known as Sita Nath Acharjee, which was his nick name.

17. DW-2 Hrishikesh Chakravarty on 21.09.2016 deposed that he was born and brought up at Derapather under Kaki PS of Nagaon District and that his father Keteki Ranjan Chakravarty expired about 25 years back and his mother Subhashi Chakravarty also expired about 7 years back. He further deposed that about 30 years back, he came to Bandarmela under Murajhar Police Station in the district of Nagaon, Assam and since then he is residing in the said place and he knows the proceedee since 30 years back, who is his father-in-law. He also stated that he knows that petitioner's father was Dharendra Acharjee, whose nick name was Sita Nath Acharjee and Dharendra Acharjee and Sita Nath Acharjee is the same and single person.

18. Ext.1 is an affidavit sworn by the petitioner before the Notary on 16.12.2011 at Hojai wherein he stated that he is a resident of Village-Doyangmukh under Kheroni Police Station, District-Karbi Anglong and his father's actual name is Dharendra Acharjee and nickname is Sita Nath Acharjee.

19. Ext. 2 is the certified copy of 1966 Voter List of No. 71 Rangamati (ST) LAC of Village-Nayakpara, Block-14, Mouza-Lokrai, P.S. & Sub-

Division Mangaldoi, District-Darrang, containing single name of one Daya Nath, son of Anan aged about 26 years.

20. Ext. 3 is the certified copy of 1972 Voter List of No. 94 Lumding LAC of Village-Derapathar Non Cadastral No.1, Block-128, Mouza & P.S.-

Lumding, District-Nagaon, containing single name of one Dharendra Chandra, son of Daya Nath, aged about 60 years.

21. Ext. 4 is the certified copy of 1977 Voter List of No. 94 Lumding LAC of Village-Derapathar Non Cadastral No.1, Block-23, Mouza & P.S.

Lumding, District-Nagaon, containing a name of Bakul, son of Dharendra, aged about 28 years.

22. Ext. 5 is the certified copy of 1985 Voter List of No. 92 Lumding LAC of Village-No.1 Derapathar, Block-47, Mouza & P.S. Lumding, Sub-

Division-Hojai, District-Nagaon, reflecting the single name of one Bakul Chandra Acharjya, son of Sita Nath, aged about 40 years.

23. Ext. 6 is the certified copy of 2010 Voter List of No. 20 Baithalangso (ST) LAC under the Area and Ward- Doyangmukh, Block-207, Revenue

Circle-Dongka, P.S.- Kheroni, Sub-Division-Hamren, District-Karbi Anglong, reflecting the names of Bakul Acharjee, son of Sita Nath Acharjee,

aged about 55 years; Minati Acharjee, wife of Bakul Acharjee, aged about 47 years; Ratan Acharjee, son of Bakul Acharjee, aged about 35 years;

Bhuj Acharjee, wife of Ratan Acharjee, aged about 30 years and Swapan Acharjee, son of Bukbal Acharjee, aged about 28 years.

24. Ext. 7 is the certificate dated 01.08.2016 issued by one Sukhamay Biswas, Sarkari Gaonburha of Village-Dikhlempur, under P.S.-Kheroni of

District-Karbi Anglong, Assam certifying that the petitioner Bakul Acharjee, son of Dharendra Chandra Acharjee/Sita Nath Acharjee of Doyangmukh

is aged about 62 years as recorded and that earlier he resided at Nagaon District.

25. The petitioner in his written statement filed on 27.07.2016 stated that his father Sita Nath Acharjee @ Dharendra Chandra Acharjee expired 30

years back, whereas his mother Santana Acharjee expired about 25 years back.

26. Though, the petitioner in his written statement submitted that his grandfather Daya Nath was a voter in the voter list of 1966 of No. 71 Rangamati

(ST) LAC (Ext. 2) of Mangaldoi Sub-Division in Darrang District, but he at the same time, also submitted that his father Dharendra Chandra Acharjee

was a voter in the voter list of 1972 of No 94 Lumding LAC (Ext.3) and he

himself was the voter of 1977 of No. 92 Lumding LAC (Ext.4).

27. Ext. 2 voter list of No. 71 Rangamati LAC reflects the name of one Daya Nath aged about 26 years, whereas the Ext. 3 voter list of 1972 of No.

94 Lumding LAC reflects the name of one Dharendra Chandra son of Daya Nath aged about 60 years. Further, the voter list of 1976 of No. 92

Lumding LAC (Ext. 4) reflects the name of one Bakul, son of Dharendra aged about 28 years, whereas the voter list of 1985 of No. 92 Lumding LAC

reflects the name of one Bakul Ch. Acharjya aged about 40 years son of Sita Nath.

28. In the written statement, the petitioner categorically stated that while he was about 6 years old, he came to India along with his father Sita Nath

Acharjee @ Dhiren Ch. Acharjee to Nayak Para under Mangaldai Police Station in the district of Darrang, where they stayed for 5 years and then

shifted to Derapathar under Lumding police station in the district of Nagaon. The petitioner neither in his written statement nor in his deposition stated

that his grandfather also came with them or accompanied them to India and resided at Nayak Para.

29. Ext. 3 the voter list of 1972 of No. 94 Lumding LAC reflects single name of one Dharendra Chandra son of Daya Nath and does not reflect

Dharendra Chandra Acharjee, son of Daya Nath.

30. Considering the age of Daya Nath in the voter list of 1966 as 26 years, his date of birth would be in the year 1940. Similarly, from the Ext. 3

reflecting name of Dharendra Chandra in the voter list of 1972 of No. 94 Lumding LAC, his age has been shown as 60 years in the year 1972 and in

that aspect, his date of birth would be 1912 and as such, the father of the petitioner Dharendra Ch. Acharjee cannot be older than his grandfather

Daya Nath.

31. The petitioner has failed to place any evidence about the linkage of Daya Nath, Dharendra Chandra and Bakul from the Exhibits- 2, 3 and 4 and

also failed to establish that that Bakul Chandra Acharjya is the son of Dharendra, whose grandfather is Daya Nath. Moreover, the Exhibits- 3, 4, 5 and

6 are post-1971 documents.

32. Ext. 7 certificate dated 01.08.2016 of Sarkari Gaonburha of Dikhlempur Village, placed by the petitioner, was not proved by examining the

concerned person, who issued the same and therefore, the said exhibit cannot be

accepted as evidence. Moreover, the affidavit of the petitioner Ext. 1

cannot determine that name of Dhirendra Chandra reflected in the voter list of 1972 Ext.2 is his father.

33. Petitioner stated that his grandfather died about 40 years back and his father died around 30 years back. Thus petitioner's grandfather expired

around the year 1976 and his father expired around 1986. From the voter list of 1972, Ext.3 it is seen that petitioner's father was 60 years old.

Therefore, considering the years of death of his grandfather and father, the voters lists exhibited by the petitioner should have contained their names

together. But none of such voters lists reflect the names of petitioner's grandfather and father together. Similarly, name of petitioner's father

and of his own should have been figured together in voters lists. But none of the voters lists exhibited by the petitioner reflects the same.

34. Section-9 of the Foreigners Act, 1946 relates to "Burden of Proof" and it reads as follows:-

9. Burden of Proof." If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given

thereunder, whether any person is or is 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

(1 of 1872), lie upon such person.

35. A Constitution Bench of the Hon'ble Supreme Court (Bench of five Hon'ble Judges) in the case of Union of India and Others -Vs- Ghaus

Mohammad, reported in AIR 1961 SC 1526, decided on 04.04.1961 have held that a

"When a question arises whether a person is or is not a foreigner, the onus of proving that he is not a foreigner is on that person as provided under

Section-9 of the Foreigners Act. The question whether the person is a foreigner is a question of fact on which there is a great deal of dispute, which

would require a detailed examination of evidence."

36. In a case where the appellant was prosecuted under Section 14 of the Foreigners Act, 1946 and in determining the question as to whether he is a

foreigner within the meaning of said 1946 Act or not, another Constitution Bench of the Hon'ble Supreme Court (Bench of five Hon'ble

Judges) in the case of Abdul Sattar Haji Ibrahim Patel -Vs- State of Gujarat, reported in AIR 1965 SC 810, decided on 17.02.1964 have held that â?

â??The appellant is being prosecuted under S. 14 of the Foreigners Act, 1946 (XXXI of 1946). In determining the question as to whether he is a

foreigner within the meaning of the said Act or not, S. 9 of the Act will have to be borne in mind. Section 9 applies to all cases under the Act which do

not fall under S. 8, and this case does not fall under S. 8, and so, Section 9 is relevant. Under this section, the legislature has placed the burden of

proof on a person who is accused of an offence punishable under S. 14. This section (Section-9) provides inter alia that where any question arises

with reference to the said Act, or any order made, or direction given thereunder whether any person is or is not a foreigner, the onus of proving that

such a person is not a foreigner, shall notwithstanding anything contained in the Indian Evidence Act, lie upon such, person; so that in the present

proceedings in deciding the question as to whether the appellant was an Indian citizen within the meaning of Art. 5, the onus of proof will have to be

placed on the appellant to show that he was domiciled in the territory of India on January 26, 1950 and that he satisfied one the three conditions

prescribed by cls. (a), (b) and (c) of the said Article. It is on this basis that the trial of the appellant will have to proceed.â??

37. Honâ??ble Supreme Court in the case of Sarbananda Sonowal -Vs- State of Assam, reported in (2005) 5 SCC 665 have considered Section-9 of

the Foreigners Act at length.

38. It is seen that the learned Tribunal passed the impugned Judgment dated 19.07.2016 on appreciation of the materials on record. The documents on

the basis of which the petitioner led his claim before the Tribunal did not support his version and the petitioner failed to discharge his burden under

Section 9 of the Foreigners Act, 1946 to dislodge the accusation made against him by the State.

39. For the reasons above, we are not inclined to interfere with the impugned Judgment dated 24.09.2016, passed by the learned Member, Foreigners

Tribunal, Diphu of Karbi Anglong District, Assam, in F.T. Case No. 135/2007.

40. Accordingly, this writ petition being devoid of merit stands dismissed.

41. Registry shall return the records of F.T. Case No. 135/2007 to the Foreigners Tribunal, Diphu, Karbi Anglong District forthwith.