
(2008) 09 GAU CK 0008
In the Gauhati High Court

Daliman Nessa

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 30-09-2008

Acts Referred:

Citizenship Act, 1955 — Section 9
Constitution of India, 1950 — Article 355
Foreigners Act, 1946 — Section 9

Citation : (2009) 5 GLR 633

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The petitioner, who has been declared as foreigner having entered into Assam after 25.3.1971 by the Foreigners Tribunal, Barpeta in FT Case No. 283/06(B) in FT Ref. No. 8504/98 (State of Assam v. Daliman Nessa) has invoked the writ jurisdiction of this Court seeking interference with the finding of fact arrived at by the tribunal.

2. I have heard Mr. M.U. Mahmud, learned Counsel for the petitioner as well as Ms. R. Chakraborty, learned Addl. Senior Government Advocate. I have also heard Ms. B. Das, learned C.G.S.C.

3. According to the petitioner, she is Indian citizen by birth and she is the daughter of one Halim Mia. Her case is that she is now 26 years of age. She is married to one Shri Pahar Khan. She has stated that her fathers name was included in the voter list of 1993 and 1997. His name was not included in the voter list of 1966 as at that point of time, he was a minor. But the name of her grand-mother namely Moimon Nessa was enrolled in the voter lists of 1966 and 1970.

4. In Paragraph 4 of the writ petition, the petitioner has stated about the police reference against her and registration of FT Case No. 283/06 in which the

impugned judgment and order dated 28.11.2007 declaring the petitioner to be a foreigner entering into Assam after the cut of date i.e., 25.3.1971 has been passed.

Suppression of material facts so glaring on the face of it

5. As usual, in this case also, the plea of me petitioner is that she had engaged an advocate and offered some documents to prove her Indian citizenship. But it is after the judgment and order of the Tribunal, she could come to know that the proceeding was ex-parte. In this connect on, she has made the following statements:

5. That the petitioner begs to State that during the pendency of the case before the Tribunal, Petitioner engaged an advocate and also handed over some documents to him, but the Lawyer concerned did not take any step for which the ex parte order was passed. The petitioner has sufficient document to prove that she is an Indian citizen by birth but she could not able to prove the same before the Tribunal which led the passing of impugned ex parte order dated 28.11.2007, which she came to know while Superintendent of Police (B), Barpeta issued a notice on 13.2.2008 and directed the petitioner to leave India within the period of 7(seven) days, through the prescribed routes of Mankachar PPCP from the date of issue of this order. Thereafter she filed petition for certified copy on 24.3.2008. The certified copy was furnished to her, on 25.3.2008, but due to their extreme poverty, she could not file writ petition before this hon''ble Court for remedy at the earliest possible time.

In this regard, it is to be noted that though the petitioner engaged Lawyer, but neither she nor her husband could identify the Lawyer properly as only once they went to Barpeta for this purpose after receiving notice and thereafter did not go, as the Lawyer told them that he will do the needful and if requires, he will call them. The petitioner, being illiterate and living in most backward area believed him but ultimately suffered a lot.

6. It is on the above basis, the petitioner has filed the writ petition seeking interference, with the judgment and order passed by the Tribunal as regards the plea of the petitioner regarding engagement of advocate and their purported inaction and that she did not know about the matter and that the petitioner and her husband met the engaged advocates only once at Barpeta after receiving notice and thereafter, did not go to him, record of the Tribunal speaks otherwise.

7. The petitioner was duly served with notice from the then I.M.D.I. on receipt of which she duly appeared before the Tribunal submitting application dated 20.10.2003 praying for time to file written statement. The application was signed by her in the form of R.T.I. The application was allowed fixing the next, date 10.12.2003. However, on that date, she did not appear and the Tribunal adjourned the matter, to 3.2.2004. The order sheet does not disclose as to what happened on that day and thereafter, till 12.5.2005, on which date, notice was again issued to the petitioner.

8. On receipt of the notice, the petitioner again appeared on 29.6.2005 through her uncle Mobbesh Ali and prayed for adjournment on ground of her illness. The prayer was allowed fixing the next date as 3.8.2005. Thereafter, the matter was transferred to Foreigners Tribunal in view of the scrapping of Illegal Migrants (Determination) Act, 1983 by the Apex Court in Sarbananda Sonowal Vs. Union of India (UOI) and Another,

9. The Tribunal took up the matter on 25.9.2006, on which date also, the petitioner filed an application praying for time to file written statement the application was filed by the petitioner herself putting her R.T.I. The prayer was allowed fixing the next date as 11.10.2006, on which date also, adjournment was prayed for to file written statement upon collection of documents. The prayer was allowed fixing the next date as 30.10.2006.

10. On 30.10.2006, one Shri Abdul Halim the father of the petitioner filed an application praying for adjournment on the ground of her illness. The prayer for adjournment, was allowed as last chance fixing the next date 21.11.2006. Thereafter, the petitioner remained absent in the proceeding and consequently, by order dated 1.8.2007, it was recorded that the proceeding would proceed ex-parte. On 29.10.2007, the prosecution examined the witnesses and proved the documents exhibited. The hearing was concluded on 13.11.2007, and the judgment was delivered on 28.11.2007.

11. There was neither any written statement filed by the petitioner denying the reference against her nor any evidence was adduced by her in support of her case. Now, coming to the writ court, as in all such cases, the petitioner has blamed her un-named advocate. Refer Sarabari Begum (Mustt.) @ Syera Begum and Others Vs. State of Assam and Others, As per the statement made in the writ petition. (Paragraph 5) after receiving notice from the Tribunal, the petitioner and her husband met their, lawyer at Barpeta only once and thereafter, did not go to meet him on his assurance that he would do the needful in the matter. However, as described above, the records speak otherwise. Not only the petitioner appeared before the Tribunal, her uncle and father also appeared on her behalf praying for time to file written statement which the petitioner never did as if it is the duty of the Tribunal to go to her requesting her to file written statement and adducing evidence.

12. In any proceeding, if such is the conduct of the party, such proceeding is bound to proceed ex-parte. As is in this nature of proceeding in which the burden of proof lies on the person suspected to be foreigner u/s 9 of the Citizenship Act, 1946 about which the Apex Court has made observations and directions in Sarbananda Sonowal (supra), it was all the more necessary for the petitioner to discharge the said burden but, instead she kept on taking time from the tribunal either on the ground of illness or on the ground of collecting documents and eventually gave up appearing before the Tribunal and now, coming to the writ court has blamed the unnamed advocate. Thus, there is clear suppression of material facts. The petitioner who has been declared as foreigner and/or illegal

migrant entering into Assam after the cut off date i.e., 25.3.1971 cannot expect the writ court to give any indulgence to such plea, which in my considered view, if given indulgence to, same will be an abuse of the process of law.

13. As noted above, it is a clear case of suppression of material fact. The petitioner being a foreigner, cannot pray for differential treatment giving her more indulgence than an Indian citizen. As has been observed by the Apex Court in *The State of Haryana v. Karnal Distillery Ltd.* (1977) 2 SCC 431, the petitioner has no right to move the court, for enforcement of fundamental right on a petition containing misleading and inaccurate statements in case of filing such petition, the court will dismissed the same. A calculated and designed suppression of material fact in order to secure admission and interim relief, which if disclosed would have disentitled the petitioner to the extraordinary remedy, or in any case, would have materially affected the merits on both the interim and ultimate relief claimed, would deprive the petitioner from considering her case on merit.

14. In the instant case, on the sole ground of suppression of material fact, the petitioner is not entitled to any relief. As a general rule, the suppression of material fact by a litigant disqualifies such litigant from obtaining the relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it.

15. The petitioner has filed the writ petition with the distorted fact that, she had only once met the lawyer at Barpeta and never met him again. However, as discussed above, the records speak otherwise. She duly appeared before the Tribunal and kept on taking time. However, due to her further non-appearance, the proceeding resulted in ex parte proceeding and eventually, the impugned judgment and order was passed. Before the Tribunal, the prosecution duly established its case and proved the documents exhibited. The proceeding was initiated against the petitioner on the basis of the reference made by the Electoral Registration Officer to the Superintendent of Police, Barpeta, the name of the petitioner came up for consideration for such reference on the basis of the intensive revision of the electoral roll. Her name was included in the draft electoral roll of 1997 and doubt having arisen, the reference was made on the basis of which further investigation was carried out and it was found that the petitioner entered into Assam illegally after the cut off date.

16. The petitioner having failed to discharge her burden of proof as required u/s 9 of the Foreigners Act and she having not responded to the proceeding before the Tribunal after initial appearance on several dates, the Tribunal had no other option than to proceed ex parte against the petitioner. However, with the falsification of truth and with the naked suppression regarding her appearance before the Tribunal, she managed to get the writ petition entertained and obtained interim relief. As observed above, on the ground of suppression of material fact alone, the writ petition is liable to be dismissed.

What is the case of the petitioner

17. Annexure 1 document dated 30.11.2006 annexed to the writ petition is a certificate issued by the President of the particular Gaon Panchayat certifying the petitioner to be the daughter of Halim Mia and that the name of her father appeared in the voter list of 1997. To the same effect, another certificate is that of Annexure-2 dated 20.3.2008. In both the certificates, the name of the father of the petitioner is Halim Mia and not Abdul Halim...as indicated in Annexure-3 voter list of 1993. Further, the voter list of 1993 pertains to Ward No. 28 Polling Centre No. 28/929 of village Amguri in the district of Barpeta, Police Station Shorbhog, Mouza Rupshi purportedly containing the name of the father of the petitioner Abdul Halim at Sl. No. 448, House No. 249. Apart from the fact that the person concerned is Abdul Halim and not Halim Mia. Annexure-1 and 2 certificates pertain to some other particulars in the name of Halim Mia, and not Abdul Halim.

18. The petitioner has referred to Annexure-4 voter list of 1966 so as to claim that the name Moymon Nessa appearing therein is that of her grand-mother, without, however, anything else to prove the same. Even assuming that Moymon Nessa is her grandmother, that by itself will not establish that the petitioner is a citizen of India. Same is the case with Annexure-5 voter list of 1970.

Writ court - Easy approach

19. Coming to the writ court, the petitioner has annexed photocopies of documents merrily which she could not or did not do before the Tribunal even after appearing on six different occasions. The answer is simple in case of producing such documents, the burden will be on her to prove the same u/s 9 of the Foreigners Act, 1946. Possibly, it is the impression of the writ petitioner that the writ court will give indulgence to any such document without deciding the same in the touch-stone of Section 9 of the Act.

20. During the course of hearing before the proceeding, on 14.8.2008, the following order was passed:

Heard Mr. M.U. Mahmud, learned Counsel for the petitioner as well as Ms. R. Chakraborty, learned state counsel.

In paragraph 5 of the writ petition, the petitioner has made statement blaming the advocate who was engaged to conduct the case in the Tribunal. However the advocate is not named. On being asked, Mr. Mahmud, learned Counsel for the petitioner could not explain. He also does not know the name of the advocate. In the writ petition, the petitioner has annexed certain documents claiming the father of the petitioner as Halim Mia. In the affidavit filed in support of the writ petition also the father of the petitioner is described as Halim Mia. However, in the voter, list, on which the petitioner has placed reliance contains the name of Abdul Halim, who the petitioner claims to be her father. It is not the case of the petitioner that Halim Mia. and Abdul Halim is one and the same person.

It is on the basis of the aforesaid stand in the writ petition, the petitioner has challenged the impugned judgment of the Tribunal, by which she has been declared as foreigner having entered into Assam after 25.3.1971. The manner and method in which the petitioner has projected her case speaks for itself. In such a serious matter, where the allegation is that the petitioner is a foreigner and not an Indian national, the petitioner seeks interference of this Court on the aforesaid ground.

Mr. Mahmud, learned Counsel for the petitioner prays for two weeks time to obtain instruction from the petitioner. He will also obtain instruction as to who was the advocate engaged by the petitioner to conduct her case against whom allegation has been made in the writ petition. The advocate concerned cannot be condemned unheard.

List after two weeks. In the meantime, the Superintendent of Police, Barpeta shall ensure that the petitioner does not flee from her home, so that in case of passing any adverse order against her, she does not become untraceable. Her name and address are as follows.

Daliman Nessa, daughter of Halim Mia, wife of Pahar khan, village Balarpathar, P.S. Baghbor, District Barpeta.

Let a copy of this order be furnished to Ms. Chakraborty, learned State counsel for her appraisal to the Superintendent of Police, Barpeta.

The matter shall be listed immediately after two weeks.

21. Pursuant to the aforesaid order, the petitioner has filed an additional affidavit dated 29.8.2008 taking the stand that Halim Mia, and Abdul Halim is one and the same person. The affidavit sworn in by Halim Mia, to that effect has been annexed to the additional affidavit. Needless to say that such self sworn affidavit is not admissible in evidence. It is an admission by the purported father of the petitioner in her favour and has no evidentiary value. In the order dated 11.8.2008, it was indicated that there was no disclosure of name of the advocate, whom the petitioner has blamed. Learned Counsel for the petitioner was directed to obtain instructions as to who was the advocate engaged by the, petitioner. However, in the additional affidavit, not to speak of disclosure of the name of the advocate, there is not even any iota of reference to the same.

22. It is on the above basis, the petitioner wants the writ court to believe her story that she is an Indian citizen by birth. If India is considered to be inclusive of Bangladesh her statement that she is a citizen of India by birth can be accepted as true, but when it is not so, her such statement, in absence of any contrary and cogent evidence is a false statement.

Only an example

23. This is only an example of many such cases. The kind of indulgence, a foreigner gets in Assam is shocking. The Reference against the petitioner was

initiated way back in 1998. It took almost 10 years to complete the process and answer the Reference. The petitioner then invoked the writ jurisdiction and obtained stay, with material suppression of fact. In the entire process she, a foreigner could freely move around. How dangerous, the free presence of a foreigner illegally in India for years together, need not be told. Such presence of a foreigner, allthroughout the legal proceeding, necessarily will have serious consequence including even legal problem in deporting his or her children. Thus, even if a foreigner is detected through a long and time consuming process, by the time the final verdict comes, the foreigner leaves behind far more problems, about which, it appears that the authorities at the helm of affairs are not at all concerned.

24. If this is the situation in a case which has come to light, a right thinking man can easily visualize the alarming situation and as to what is in store for Assam. It is not a matter to be wished away or smiled away. In no other country, one can even conceive of such an approach to the problem. This is precisely the reasons to why the Apex Court in *Sarbananda Sonowal Vs. Union of India (UOI)*, observed, thus:

64. In the fact of the clear directions issued in *Sonowal* it was for the authority concerned to strengthen the Tribunal under the 1964 Order and to make them work. Instead of doing so, the 2006 Order has been promulgated. It is not as if the respondents have found the 1964 Order unworkable in the State of Assam; they have simply refused to enforce that order in spite of directions in that behalf by this Court. It is not for us to speculate on the reasons for this attitude. The earlier decision in *Sonowal* has referred to the relevant materials showing that such uncontrolled immigration into the North-Eastern States posed a threat to the integrity of the nation. What was therefore called for was a strict implementation of the directions of this Court earlier issued in *Sonowal* so as to ensure that illegal immigrants are sent out of the country which in spite of lapse of time, the Tribunal under the 1964 Order had not been strengthened as directed in *Sonowal*. Why it was not so done has not been made clear by the Central Government. We have to once again lament with *Sonowal-I* that there is a lack of will in the matter of ensuring that illegal immigrants are sent out of the country.

25. In *Sarbananda Sonowal Vs. Union of India (UOI)* and *Another*, , the report of the Government of Assam has been exclusively quoted to appreciate the situation in Assam. In the report detailing the dangerous consequences of large scale illegal migration from Bangladesh, it has been observed thus:

22. The dangerous consequences of large scale illegal migration from Bangladesh, both for the people of Assam and more for the Nation as a whole, need to be emphatically stressed. No misconceived and mistaken notions of secularism should be allowed to come in the way of doing so.

23. As a result of population movement from Bangladesh the specter looms large

of the indigenous people of Assam being reduced to a minority in their home State. Their cultural survival will be in jeopardy their political control will be weakened and their employment opportunities will be undermined.

24. The silent and invidious demographic invasion of Assam may result in the loss of the geostrategically vital districts of lower Assam,. The influx of these illegal migrants is turning these districts into a Muslim majority region. It will then only be a matter of time when a demand for their merger with Bangladesh may be made. The rapid growth of intern national Islamic fundamentalism may provide for driving force for this demand. In this context, it is pertinent that Bangladesh has long discarded secularism and has chosen to become an Islamic State. Loss of lower Assam will severe the entire land mass of the North East, from the rest of India and the rich natural resources of that region will be lost to the Nation.

26. In the above context, the following observations of the Apex Court in Sarbananda Sonowal (I) may also be noted:

34. There was a large scale influx of persons from the then, East Pakistan into India before the commencement of December, 1971 Indo Pak War. On 3rd November, 1971 one month before the actual commencement of the war, Dr. Nagendra Singh, India's representative in the Sixth Committee of the General Assembly on the Definition of Aggression, made a statement, wherein he said: "...The first consideration, in the view of the Indian Delegation, is that aggression must be comprehensively defined. Though precision may be the first virtue of a good definition, on, we would not like to sacrifice the requirement of a comprehensive definition of aggression at any cost. There are many reasons for holding this view. Aggression can be of several kinds such as direct or indirect armed in nature or even without the use of any arms whatsoever. There can be even direct aggression without arms.... We would accordingly support the categorical view expressed by the distinguished delegate of Burma, the U.K., and others that a definition of aggression excluding indirect methods would be incomplete and therefore dangerous.

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 in to Assam pose a threat to the integrity and security of north-eastern region. Their presence has clanged the demographic character of that region and the local people of Assam have been reduced to a status of minority in certain districts.

27. In the later part of nineteenth century large number of Chinese labour had started going to U.S.A. The U.S. Congress passed legislations to restrict and then to totally stop their entry in the country. One such Chinese labourer who had earlier worked there for over ten years and has a certificate to that effect came back after a visit to his home in China but was detained in the ship in San Francisco Port. His habeas corpus petition was dismissed by the circuit court and then an appeal was taken to U.S. Supreme court. Certain observations made in the judgment, which is reported in 130 US 581 (Chae Chan Ping v. United States), are very illuminating and are being reproduced below:

To preserve its independence and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The Government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon its departments and officers. If, therefore, the Government to the United States, through its legislative department considers the presence of foreigners of a different race in the country, who will not assimilate with us to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist and the same authority which adjudges the necessity in one case - must also determine its in the other.

28. China is not contiguous to U.S.A. The Journey from a port in China to San Francisco, as the facts of the case show, use to take about a month and having regard to the expenses involved and the carrying capacity of a ship in those days. (1870-90) the number of Chinese labour coming to USA would have been miniscule compared to the influx of people from Bangladesh. Yet the U.S. Supreme Court viewed it as "aggression" and the presence of such foreigner as "dangerous to peace and security of the nation".

29. For all the aforesaid reasons, the writ petition is liable to be dismissed both on account of suppression of material fact as well as on merit, which I accordingly do.

30. The writ petition is dismissed with the direction to the Respondent No. 3 i.e., the Superintendent of Police, Barpeta to take the petitioner into custody immediately and to keep her in custody till she is deported from India.

31. Let the matter be listed again on 3.11.2008 for furnishing compliance report by the Superintendent of Police, Barpeta. Let a copy of this judgment and order

also be furnished to the learned Counsel appearing for the respondents as well as to all concerned including the Superintendent of Police, Barpeta immediately for taking necessary follow up action. The L.C.R. be also sent down immediately.