

(2010) 05 GAU CK 0073
In the Gauhati High Court
Case No : Writ Petition (C) No. 4190 of 2009

Dilip Biswas and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 20-05-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 61, 64, 65
Foreigners Act, 1946 — Section 9

Citation : (2010) 3 GLT 807

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : P.K. Roy, for the Appellant; R. Chokraborty and P. Das, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—This writ petition is directed against the order dated 01.01.2009 passed by the Foreigners' Tribunal (Fast), Morigaon in Case No. FT (C) 151/07 followed by further order dated 08.02.2010 answering the particular reference in favour of the State and holding that the Petitioners are illegal migrants from Bangladesh who have entered into Assam after the cut off date, i.e. 25.03.1971. The first order of the Tribunal, i.e. one dated 01.01.2009 was an ex parte one as inspite of receipt of notice, the Petitioners did not respond to the proceeding before the Tribunal. The Tribunal on the basis of the materials on record and the statements made by two prosecution witnesses and the documents proved and exhibited by them, answered the reference against the Petitioners holding them to be illegal migrants.

2. After the filing of the writ petition on 22.09.2009, the Petitioners filed an additional affidavit on 22.10.2009. The additional affidavit was filed to explain the circumstances leading to non-appearance of the Petitioners before the Tribunal. While in the writ petition the plea taken was that no notice from the

Tribunal was served on them, but in the additional affidavit the plea taken was that one Shri Sukumar Biswas, brother of the Petitioner No. 1 who has been living independently and not in good terms with the Petitioners was served with the notice from the Tribunal who in turn did not inform the Petitioners about the said notice and resultantly the Petitioners could not appear before the Tribunal which resulted in ex parte proceeding and the order.

3. Considering the aforesaid stand of the Petitioners in the additional affidavit, this Court by order dated 01.12.2009 provided another opportunity to the Petitioners to appear before the Tribunal to establish their case that they are Indian Citizens by birth. While the instant proceeding was kept pending, learned Tribunal was directed to allow the Petitioners to adduce evidence and to decide the reference afresh taking into the said evidence.

4. Pursuant to the aforesaid order dated the Petitioners appeared before the Tribunal and adduced evidence on the basis of which the Tribunal has passed the impugned order dated 08.02.2010 once again answering the reference against the Petitioners holding them to be illegal migrants who have entered into Assam after the said cut off date. The Petitioners have filed an affidavit challenging the said order and accordingly the matter has been heard afresh.

5. I have heard Mr. P.K. Roy, learned Counsel for the Petitioners as well as Ms. R. Chokraborty, learned Addl. Sr. Govt. Advocate. I have also heard Mr. P. Das, learned C.G.S.C. I have also gone through the entire materials on record.

6. While Mr. P.K. Roy, learned Counsel for the Petitioners taking me through the entire evidence on record, argued that the Tribunal has recorded an erroneous finding in the impugned order dated 08.02.2010, Ms. R. Chokraborty, learned Addl. Sr. Govt. Advocate argued that the findings of fact arrived at by the Tribunal on the basis of the evidence on record cannot be interfered with exercising the writ jurisdiction. Referring to the particular finding of the Tribunal relating to suppression of material fact, she submitted that the matter would not have been remanded back to the Tribunal, but for the false statement made by the Petitioners. Mr. P. Das, learned CGSC also argued in tune with the arguments advanced by Ms. R. Chokraborty.

7. I have considered the submissions made by the learned Counsel for the parties and the materials on record including the records of the Tribunal which also includes the one pertaining to the impugned order dated 08.02.2010.

8. According to Mr. Roy, learned Counsel for the Petitioner, the Tribunal having not recorded any independent finding, and the impugned order dated 08.02.2010 being based on the submissions made on behalf of the prosecution, the said order is not tenable in law. This aspect of the matter will be dealt with at appropriate stage.

9. The order of remand dated 01.12.2009 was passed in view of the statement made in the additional affidavit referred to above that no notice from the Tribunal

was received by the Petitioners and the notice received by Shri Sukumar Biswas was not brought to their notice and that he has been living separately from the Petitioner No. 1. However, as recorded by the Tribunal in its subsequent order dated 08.02.2010, the evidence reveals otherwise. In the fresh proceeding before the Tribunal, the Petitioner No. 1 examined himself as OPW No. 1 and in the cross examination he has categorically stated that said Shri Sukumar Biswas and the Petitioners stay in one and the same house. Thus there was suppression of material fact and/or misleading statement in the additional affidavit that said Shri Sukumar Biswas is living separately from the Petitioners due to some family conflict. Had there been no such suppression of material fact, perhaps the order of remand would not have been passed. This being the position, the Petitioners are guilty of suppression of material fact. Be that as it may, since the Tribunal has tried the matter on merit, I now proceed to deal with the merit of the case of the Petitioners vis-a-vis the Respondents.

10. After the remand of the matter to the Tribunal for a fresh decision, the Petitioners submitted their joint written statement claiming themselves to be Indian Citizens by birth. In their written statement, their stand is that no representative of the prosecution had ever visited them and asked for documents etc. before making reference. According to the Petitioners, they are all born and brought up in Assam.

11. In paragraph-6 of the written statement, the Petitioner No. 1 has described his father as Shri Banabashi Biswas, uncles as Shri Mohan Biswas and Shri Sibashi Biswas. According to the written statement, their forefather had land at No. 2 Barunguri under Patta No. 19, but due to erosion of land they shifted to village Hiloikhunda in the District of Darrang and thereafter to village No. 2 Murkata.

12. Further stand in the written statement is that the name of the grandfather of the Petitioner No. 1 is Kartik Biswas. It has been stated in the written statement that the names of the Petitioner No. 1's parents appeared in the voter list of 1966 and 1970 and that prior to their stay in Barunguri village they had lived in the village called Laharighat.

13. As regards the Petitioner No. 2, it has been stated that her father is Shri Suresh @ Surendra @ Suren and that his and his parents' name appeared in the voter list of 1966 and 1970. According to her, her grandfather is Late Aijun Sarkar and he took a loan of Rs. 50/- in the year 1954-55 and a notice was issued to him when he could not return.

14. Alongwith the written statement, the Petitioners also enclosed certain documents which are purportedly the voter list of 1966 (copy only) and two undated land pattas showing the name of one Shri Kartik Biswas, purported Jamabandi of village Barunguri dated 11.12.09; copy of voter list of 1970 containing name of one Shri Banabashi Biswas; copy of the voter list of 1997 containing the name of Dilip Biswas, father Banabashi, aged about 37 years;

certificate dated 18.09.09 issued by Puthumari Gaon Panchayat certifying the Petitioner to be an inhabitant of the said Gaon Panchayat.

15. Further, the photo copies of the voter list of 1966 and 1970 (Ext. "Ka" and Ext. "Kha") showing the name of Shri Arjun Sarkar and the photo copy of 1975 voter list (Ext. "Ga") showing the name of one Shri Surendra Chandra Sarkar, son of Arjun Sarkar were also annexed. The particular page of 1991 Panchayat voter list (Ext. "Gha") showing the name of one Shri Suren Sarkar, son of Arjun Sarkar was also annexed. An illegible copy of the notice pertaining to loan purportedly obtained in 1954-55 by one Shri Arjun Sarkar, a caste certificate in the name of Suresh Chandra Sarkar and a certificate dated 27.09.09 issued by the Gaonburha of Valukajari village certifying that Smt. Ramoni Bala Sarkar to be the wife of Shri Dilip Biswas (Petitioner No. 1) and that the Petitioner No. 1 has been residing at No. 2 Murkata village were also enclosed.

16. As recorded in the Tribunal's order dated 08.02.2010, none of the documents have been proved by the Petitioners as required under the provisions of the Evidence Act. The said documents being primary documents, it was the duty of the Petitioners to prove the same as per the provisions of the Evidence Act.

17. As per Section 61 of the Evidence Act, the contents of the documents may be proved either by primary or by secondary evidence. Certified copies are only secondary evidence and unless they are proved with the originals, same cannot be accepted in evidence. As per Section 64 of the Evidence Act, the documents must be proved by the primary evidence except in the cases specified in Section 65. It is not the case of the Petitioner that the documents produced by them are within the exception of Section 65. No prayer was made before the Tribunal to prove the documents. This is precisely the reason as to why the Tribunal in its finding dated 08.02.2010 has rightly recorded that the Petitioners did not prove the documents as required under the provisions of the Evidence Act.

18. As recorded above, the Petitioners did not exhibit and/or duly proved 1966 voter list and so also the two undated pattas and the Jamabandi. They also did not exhibit and/or proved 1970 and 1997 voter list and so also the certificate dated 18.09.07. Only documents exhibited are Exts. "Ka", "Kha", "Ga" and "Gha" (copies of the voter list of 1966, 1970, 1975 and 1991 respectively). Other documents have not been exhibited. Even the exhibited documents have not been proved as required under the aforesaid provision of the Evidence Act. Thus, no reliance can be placed on the said documents. However, the Tribunal has discussed the said documents in its impugned judgment and order dated 08.02.2010 and has come to the opinion that the said documents did not establish the Indian Citizenship of the Petitioners by birth.

19. The prosecution has examined two witnesses. PW 2 who had conducted the enquiry pertaining to the reference deposed that he enquired about the nationality of OPs. as per the direction of the Superintendent of Police (B),

Morigaon vide Ext 1 in presence of local Gaonburha Shri Padmeswar Bishaya, P.W. 1. On being asked, the Petitioners failed to produce any documents in support of their Indian Nationality. He in his deposition further stated that the Petitioner No. 1 disclosed that the Petitioners illegally came from the village and P.S. Kaidachar, District Moimansing of Bangladesh after March, 1971 and settled at village Kachaseela in Mayong P.S. in Govt. land. PW No. 1 duly proved his enquiry reports vide Exts. 2 and 3. On receipt of the reports of Superintendent of Police (B), Morigaon, referred the case to the Foreigners' Tribunal for trial with his comments vide Ext. 3(iii).

20. The aforesaid testimony of P.W. 2 was fully supported by the local Gaonburha Shri Padmeswar Bishaya, PW 1 who had accompanied the I.O. at the time of the enquiry. According to P.W. 1, he found the Petitioner No. 1 and his family at Kachaseela village about 4/5 years back from where they shifted to another place about a year back. No material contradiction can be elicited by the Petitioners from these two P.Ws.

21. As against the aforesaid evidence of prosecution, the Petitioners examined three witnesses. The Petitioner No. 1 examined herself as OPW No. 1. OPW No. 2 is Suresh Sarkar stated to be the father of the Petitioner No. 2. OPW No. 3 is one Shri Hare Krishna Biswas.

22. Interestingly OPW No. 1, i.e. the Petitioner No. 1, in his deposition stated that the village Hiloikhunda is under P.S. Mayang which is in the district of Morigaon. But in paragraph-6 of the written statement, it has been stated that the village Hiloikhunda is in the district of Darrang. It is in this connection, learned Tribunal has observed that the Petitioner No. 1 has no knowledge where the village Hiloikhunda is situated.

23. As regards OPW No. 2 Shri Suresh Ch. Sarkar, he had exhibited "Ka", "Kha", "Ga" and "Gha" referred to above. The two pattas and the jamabandi do not indicate any year of issuance of the same. Coupled with this the said documents have also not been proved by any witness and/or in the manner as required to be proved as per the provisions of Evidence Act.

24. In the voter list of 1997, the age of the Petitioner has been shown as 37 years, but as per the evidence given on oath on 01.02.2010, his age was 36 years. Per contra in the affidavit filed in support of the writ petition, the Petitioner has declared his age as 42 years as on 22.09.09. On the other hand, in the affidavit filed after fresh order passed by the Tribunal the column relating to the age is blank.

25. The Tribunal has also found that in Ext. "Ka" voter list Shri Arjun Sarkar, purported grandfather of the Petitioner No. 2 was shown as 64 years of age and as son of Narakanta, but in Ext. "Kha" voter list of 1970 his age remained static, i.e. 64 years and his father's name was shown as Nabakanta. Similar discrepancies have also been found in the voter lists of 1970, 1975 and 1991 in respect of the name and age of the father of the Petitioner No. 2.

26. Although in the written statement it is the claim of the Petitioners that the father of the Petitioner No. 2 is Shri Suresh @ Surendra @ Suren Sarkar, but Shri Suresh Ch. Sarkar, i.e. OPW 2 himself never stated that he is also known as Surendra @ Suren. Thus, it is a matter of convenience for the Petitioners to refer any documents by any name resembling that of Shri Suresh Ch. Sarkar. No reliance can be placed on such documents in establishing one's nationality.

27. If the Petitioners are Indians Citizen by birth they could have produced cogent and specific evidence instead of placing reliance on such unproved documents. If the Petitioners, more particularly the Petitioner Nos. 1 and 2 are Indian Citizens by birth, it is not understood as to why their names do not appear in any of the voter lists except the one pertaining to the year 1997. In fact, in the said voter list also only the name of the Petitioner No. 1 appeared showing his age as 37 years and not that of the Petitioner No. 2. Thus, the Petitioner No. 2 who is the mother of the Petitioner No. 3 claims herself to be an Indian Citizen by birth, without, however, her name being included in any of the voter lists. Interestingly, she also did not come forward to depose before the Tribunal to prove the documents pertaining to her family, purported father and grandfather. OPW No. 3 in his statement stated that he has been working as Govt. Gaonburha of village called Barunguri and that about 16/17 years back the Petitioners had shifted from that village. In his cross examination he has stated that he did not bring any proof of being Gaonburha and that when the Petitioners left Barunguri village he was a small child. This witness does not help the case of the Petitioners.

28. Apart from the above, the stand of the Petitioners in their written statement is not supported by any affidavit. Interestingly, in the verification of the written statement also there is no signature of the verifiers, i.e. the Petitioners. The Petitioners have also not named their mother, particularly the Petitioner No. 1.

29. There is also no explanation from the Petitioners as to why the names of Banabashi Biswas and Kartik Biswas did not appear in any other voter list except 1966 and 1970. While the name of Banabashi Biswas appears in 1966-1970 voter list, the name of Kartik Biswas appears only in 1966 voter list.

30. I now deal with the submissions made by Mr. Roy, learned Counsel for the Petitioners that the Tribunal has not recorded any independent finding, but has recorded only the submissions made on behalf of the State. On a bare perusal of the impugned order dated 08.02.2010 will go to show that there is clear and independent finding of the Tribunal. Merely because in the said finding a reference has been made to the submissions made on behalf of the State, it cannot be said that there is no independent finding. The Tribunal has recorded its categorical finding after dealing with the entire evidence on record. Merely because of the observations that in view of the materials on record, the statements of PSI, i.e. PW 2, must be accepted, it cannot be said that there is no independent finding of the Tribunal. The finding of the Tribunal is well discernible from the impugned order itself. The order of the Tribunal will have to be

understood not on the basis of the language employed, but on the basis of the findings recorded in the order. Independent of such finding, I have also gone through the entire evidence on record to satisfy myself that it is not a case of "no evidence" and/or "perverse finding".

31. The Tribunal having recorded its finding on the basis of the materials on record and there being nothing to show that the said finding is not based on evidence and/or is perverse finding, the power of judicial review under Article 226 of the Constitution cannot extend to sit on appeal over such finding of fact and/or to re-appreciate the evidence on record. However, as stated above, I have gone through the entire materials to satisfy myself that the impugned order is not the product of "perverse finding" and/or based on "no evidence" at all.

32. As per the provision of Section 9 of the Foreigners" Act, 1946, it is for the suspected foreigner to establish his Indian Citizenship and the burden of proof lies on him. At the first instance, the matter was remanded back to the Tribunal believing the statement of the Petitioner that the recipient of the notice has been living separately from that of the Petitioners, but in the fresh proceeding it has come to the light that said recipient has been living with the Petitioners. Thus, to that extent, there was suppression of material fact. On merit, my findings are recorded above.

33. For all the aforesaid reasons, I do not find any merit in the writ petition and accordingly, it is dismissed.

34. Upon, dismissal of the writ petition upholding the impugned order of the Tribunal, the Superintendent of Police (B), Morigaon and the Deputy Commissioner, Morigaon shall now ensure apprehension and deportation/push back of the Petitioners to Bangladesh and deletion of their names from the voter list, if any. Let the compliance report be furnished on or before 07.06.2010.

35. Registry shall send down the LCR to the learned Tribunal alongwith the copy of this judgment and order. Registry shall also send a copy of this judgment and order to the Superintendent of Police (B), Morigaon and the Deputy Commissioner, Morigaon and another copy to the Union Govt. in the Ministry of Home. Another copy of this judgment be furnished to Ms. R. Chokrabarty, learned Addl. Sr. Govt. Advocate for her necessary follow up action.