

(2014) 06 GAU CK 0027

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 1143 of 2014

Ismail Uddin

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 25-06-2014

Acts Referred:

Citizenship Act, 1955 — Section 6A(1)(d)
Constitution of India, 1950 — Article 226, 355
Evidence Act, 1872 — Section 101, 106
Foreigners Act, 1946 — Section 9

Citation : (2014) 3 GLD 86 : (2014) 4 GLT 543

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : J. Ahmed, Advocate for the Appellant; M. Bhagabati, CGC and B. Dutta, State Counsel, Advocate 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) in F.T. Case No. 145(III)/2009 (Ref. IMDT Case No. 1856/2001) (State of Assam vs. Ismail Ali) has filed the instant writ petition challenging the said order. According to the petitioner, he is a citizen of India Referring to the voter list of 1965 and 1970, it is the case of the petitioner that the names of his parents appeared in the said two voter lists. He has also referred to the voter list of 1985 to claim that the name of his wife was recorded therein. The petitioner has also referred to the Annexure-6 school certificate dated 06.11.2013 to show that he was a student of Fingua Borhola M.E. School and read up to Class-IV. As per the said certificate, he was born on 21.01.1961 and left the school on 31.03.1971 while in Class-IV. It will be pertinent to mention herein that the petitioner never contended before the Tribunal that he had studied in any school. The school certificate has been obtained after the impugned judgment was delivered on 30.09.2013.

2. Further case of the petitioner in the writ petition is that his name had

appeared in the voter lists of 1997 and 2010 and that of his wife in the voter list of 2014. The petitioner has also referred to the Annexure-10 certificate of the Gaon Burah certifying that his name appeared in the voter list of 2011 and that he is a resident of the particular locality.

3. According to the petitioner, in view of the above documents, he is required to be declared as Indian National and accordingly the impugned judgment of the Tribunal declaring him to be an illegal migrant who entered into Assam after the cut off date i.e. 25.03.1971 is liable to be interfered with.

4. As to what are the documents the petitioner has referred to in the writ petition has been noted above. On receipt of notice from the Tribunal, the petitioner appeared and filed his written statement stating therein that he is an Indian citizen by birth and permanent resident of village Fingua, Mouza Paka in the district of Barpeta (Assam). In the written statement, the petitioner had contended that the name of his father appeared in the voter list of 1966 pertaining to village Fingua. He also stated that his father's name also appeared in the voter list of 1965 pertaining to village Kayakuchi Pam in the district of Barpeta and that his name also appeared in the voter list of 1997.

5. The written statement was filed on 19.03.2010. On the basis of such statements in the written statement with the production of the Ext. A photocopy of the voter list of 1965 containing the name of his purported father Gopal Ali; Ext. B Photocopy of the voter list of 1970 containing the name of his said father; Ext. C photocopy of the voter list of 1997 purportedly containing the name of his father; Ext. D land document of 1981 containing the name of his purported father; Ext. E certificate of the Gaon Burah certifying that the petitioner is a resident of the particular locality; Ext. F photocopy of the voter list of 1985 containing the name of the petitioner and photocopy of 1997 voter list also containing the name of the petitioner, the petitioner wanted to prove his Indian citizenship that too by birth.

6. I have heard Mr. J. Abedin, learned counsel for the petitioner and Mr. M. Bhagabati, learned CGC so also Ms. B. Dutta, learned State Counsel. I have also considered the entire materials on record including the records received from the Tribunal. Mr. Ahmed, learned counsel for the petitioner referring to the documents annexed to the writ petition submits that the tribunal took an erroneous view of the matter so as to answer the reference against the petitioner and in favour of the State. Referring to the documents annexed to the writ petition and also the documents produced before the Tribunal, he submits that on the basis of the said documents, the Tribunal ought to have declared the petitioner to be an Indian citizen. Countering the said argument, Mr. Bhagabati, learned CGC and Ms. B. Dutta, learned State Counsel on the other hand submit that the findings of fact arrived at by the learned Tribunal cannot be interfered with sitting on appeal and appreciating the evidence afresh exercising writ jurisdiction. Referring to the decision of the full bench as reported in *The State of Assam and Others Vs. Moslem Mondal and Others*, , learned CGC submits that

the evidence on record being over whelming to establish that the petitioner is not an Indian citizen, the order of the Tribunal cannot be interfered with exercising writ jurisdiction.

7. The Apex Court in *Sarbananda Sonowal Vs. Union of India (UOI) and Another*, has held that 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 grandparents 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 S. 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 S. 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 pre-eminently 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 S. 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 wholesale 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."

8. 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 Sonowal* (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....."

9. 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. 25.03.1971. 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.

10. 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.

11. The learned Tribunal has found the following inconsistencies while appreciating the evidence on record:-

"On careful perusal of the W/S, the evidence of the OP as well as the documents filed and relied upon by him, some major discrepancies, as mentioned below, are found, which cast a serious doubt about the truthfulness of his version as well as about his nationality.

(a) In Para 4 of his W/S, the OP has stated that his father's name appeared in

the voters list of 1966 at village Fingua under Bhawanipur LAC but he has said nothing about any such voters list of 1966 in his evidence on oath. He has also filed no such voters list of 1966 showing the name of his father recorded therein.

(b) In Para 5 of his W/S, the OP has stated that his father's name appeared in the voters list of 1965 at village Kayakuchipam under 53 No. Sarukhetri LAC but in his evidence-in-chief recorded on oath, he has stated that his father's name appeared in the voters list of 1965 (Ex. A) of village Fingua under 49 No. Bhawanipur LAC which appears to be a self contradictory statement of the OP. Nothing has been said in his evidence about voters list of 1965 of village Kayakuchipam under 53 No Sarukhetri LAC.

(c) In Para 6 of his W/S, the OP has stated that his name along with the name of OP No. 2 (his wife) appeared in the voters list of 1997 vide Sl. No. 161 and 162, House No. 52, Part No. 42 of village Fingua under 46 No. Bhawanipur LAC but no such voters list is found filed in this case.

(d) In his evidence in chief, the OP has stated that his name appeared, along with the names of his parents and brothers in the electoral roll of 1997 (Ex. C) of village Fingua under 53 No. Sarukhetri LAC but on perusal of Ex. C it is seen that OP's name has not been recorded therein as a voter. In another copy of the voters list of 1997 (Ex. G) only one name of Ismail Uddin is found recorded. The House No. Mentioned in both Ex. C and Ex. G is different. Therefore, the statement of the OP that his name is recorded in the voters list of 1997 along with his parents and brothers is found to be not correct.

(e) The age of het projected father of the OP namely Gopal Ali and his projected mother namely Rupjan Nessa is recorded as 42 years and 27 years respectively in the voters list of 1970 (Ex. B) but after 27 years from 1970, their age is recorded as 89 and 75 years respectively in the voters list of 1997 (Ex. C) whereas if their age was 42 years and 27 years respectively in 1970, their age should have been recorded as 69 years and 54 years respectively in 1997. The difference of 20 years in the age, appearing in Ex. B and Ex. C of both the projected parents of the OP has not been explained or clarified by the OP which makes the evidence of the OP not trustworthy.

(f) In his further examination-in-chief, the OP has stated that his name along with the name of his wife Anowara Khatun is recorded in the voters list of 1985 (Ex. F) at village Fingua. On perusal of Ex. F it is found that the age of the OP is recorded therein as 40 years (in 1985). If that so, the OP should have born in or about 1945 and as such at the age of 21 years in 1966, his name should have been recorded in the voters list of 1966, and if not, at least in the voters list published in 1970 but no such voters list showing his name as a voter is filed and proved in this case by the OP and no explanation has also been furnished in this respect.

(g) The OP has also stated in his further examination-in-chief that his name is recorded in the voters list of 1997 (Ex. G) and that he is regularly casting his

vote in every election till date. On perusal of Ex. G it is found that the name of only one voter namely Ismail Udin S/o Gopal aged about 44 is recorded therein. On perusal of both Ex. F and Ex. G it is found that in Ex. F the age of one Ismail Udin S/o Gopal is recorded as 40 years in 1985 but the age of Ismail Uddin S/o Gopal is recorded after 12 years from 1985 as 44 years in Ex. G in 1997. The difference in age of the OP, as found above, has not been explained or clarified by the OP.

(h) In his cross examination, the OP has stated that for the last about 21 years he is working at village Jalikata under Patacharkuchi but he used to cast his vote in every election at village Fingua; that though he used to stay away from village Fingua but his name was always recorded as a voter, along with the names of his parents and brothers; that for the last about 20 years all his brothers are having separate kitchen but that their names are recorded together as voters at village Fingua; that his father died about 6 years ago and that his mother died about 4 years ago (from 18.07.2013 the date of recording his cross examination). To substantiate his said contention, the OP has however, failed to file any voters list showing his name recorded along with the names of his parents and brothers as already stated above. No voters list published after 1997, including the voters list of 1985 which was prepared and published after extensive revision of the electoral rolls, till date showing the name of the OP and the names of his parents and brothers as voters has been filed and proved in this case. No explanation has also been furnished in this respect.

(i) The OP has stated in his evidence that a registered sale deed (Ex. D) of a plot of land was executed in the name of his father in 1981. Ex. D does not prove that the OP was born in Assam or any other part of India. The land shown in Ex. D was purchased admittedly in 1981 i.e. much after 1971 and it cannot be ruled out that after entering into Assam without authority much after 1971 the purchaser might have purchased the said land.

(j) The OP has also relied upon one certificate (Ex-E) issued by Gaon Burah of Village Fingua certifying that Ismail Uddin S/o Gopal Mia is a resident of village Fingua. There is nothing in Ex. E to show that said Ismail Uddin was born in the said village or as to for how long he is residing there. Therefore, this is not sufficient proof to prove that the OP is a citizen of India by birth."

12. Above apart, as noted above, it was never the plea of the petitioner before the Tribunal that he was a student of any school. It is only after the impugned judgment of the Tribunal, he has obtained the Annexure-6 certificate dated 06.11.2013 from the particular school certifying that he was a student of the said school. Such a plea of the petitioner in absence of even any whisper in the written statement and evidence cannot be accepted. As has been rightly held by the learned Tribunal, there could not have been wide variation in respect of the age of the purported father of the petitioner in various voter lists. In the voter lists pertaining to 1970 and 1997, the name of the purported father of the petitioner appears with the age of 42 years and 89 years respectively. The father

of the petitioner, if was aged 42 years in 1970 could not have become 89 years of age in 1997. Thus it is a matter of convenience to pick up any name from the voter list resembling the chosen name so as to project the same as one's parents name.

13. The production of voter lists of 1985 and 1997 before the learned Tribunal is of no consequence, unless the link is established to pre 25.03.1971. There is also no explanation as to why the name of the petitioner did not appear in any voter lists prior to 1985, in which his age was shown as 40 years.

14. The learned Tribunal having appreciated the entire evidence on record has returned the above quoted findings. As recorded in paragraph 16 of the impugned judgment, the petitioner appeared before the learned Tribunal on 21.10.2009 and prayed for filing written statement. As recorded in paragraph 16 of the impugned judgment, the conduct of the petitioner in responding to the proceeding and towards is early conclusion was opposed to the requirement of early conclusion of such proceeding. It is a case of repeated adjournment prayed for by the petitioner, the matter got delayed and eventually the Tribunal could pass the impugned judgment on 30.09.2013.

15. 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.

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

17. 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.

18. 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 Ms. B. Dutta, learned State Counsel for his necessary follow up action.

19. List after one month for furnishing reports by the Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta. With the above directions, the writ petition stands dismissed. There shall be no order as to costs.