
(2012) 06 GAU CK 0138
In the Gauhati High Court
Case No : WA No. 179 of 2007

Jahurakhaturun

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 15-06-2012

Acts Referred:

Illegal Migrants (determination By Tribunals) Act, 1983 — Section 3(1)(c)

Citation : (2012) 4 GLT 523

Hon'ble Judges : Indira Shah, J; Amitava Roy, J

Bench : Division Bench

Advocate : M.H. Ahmed, for the Appellant; M. Bhagabati, CGC and Mr. P.S. Deka, State Counsel, for the Respondent

Final Decision : Allowed

Judgement

Amitava Roy, J.—In assailment is the judgment an order dated 10.01.06, rendered in WP (C) No. 5474 of 2005, rejecting the appellant/writ Petitioner's impugnement of the determination made by the then Court of Illegal Migrant (D) Tribunal Barpeta (hereinafter for short referred to as the learned Tribunal), adjudging her (writ appellant/writ petitioner) to be an illegal migrant within the meaning of section 3(1)(c) of the Illegal Migrant (Determination) Tribunal Act 1983 (for short hereafter referred as the At). We have heard Mr. MH Ahmed, learned counsel for the appellant/writ petitioner and Mr. M Bhagabati, learned Central Government Counsel for the Union of India. Also heard Mr. PS Deka, learned State Counsel, Assam.

2. On a reference being made under the Act, Case No. 1342/2003 was registered against the writ appellant/writ petitioner before the Illegal Migrant(D) Tribunal, Barpeta then functional under the Act.

Notices were issued to her in the said proceedings, but inspite thereof, she did not arrange for her representation, though served therewith. By order dated 07.03.2005 the learned Tribunal, on a perusal of the materials on record, held

the writ appellant/writ petitioner to be an illegal migrant within the meaning of the Act.

Being aggrieved, she instituted WP (C) No. 5474/2005, contending, inter alia, that no prior notice in the proceeding before the learned Tribunal had been served on her at any point of time and that the ex-parte determination made therein against her being violative of the principles of natural justice, was non-est in law.

3. The learned Single Judge on a scrutiny of the records of the proceedings before the learned Tribunal was of the view that not only notices had been duly sent to the writ petitioner/writ appellant, those were served on her more than once and that on one occasion, she had appeared through her learned advocate and had prayed for time, which was granted. The learned Tribunal further recorded that thereafter the writ appellant/writ petitioner had remained absent without steps and, consequently, the ex-parte judgment and order dated 07.03.2005 was passed, rejecting the plea that she had never been served with the notice of the proceeding before the learned Tribunal. Apart from this revelation from the original records and also being of the opinion that she even, otherwise, could not establish her claim of Indian Citizenship, the learned Single Judge, by the decision impugned in the instant appeal, rejected the writ petition.

An application for review of the judgment and order dated 10.01.2006, thus rendered by the learned Single Judge as above, was made by the writ appellant/writ petitioner contending that it was a bonafide mistake of her learned conducting counsel to aver in the writ petition that she not been served with the notice of the proceedings before the learned Tribunal. According to her, she had instructed her learned counsel to the effect that no notice of the enquiry before the reference had been served on her and that absence of service of notice on her by the learned Tribunal was a result of an inadvertent misunderstanding on the part of her learned counsel. The application for review was rejected on 29.11.2006.

4. In the instant appeal, the writ appellant/writ petitioner has proffered additional facts. According to her, her father, Late Gendu Mia had been residing in the State of Assam from before 1947 and was possessed of immovable property for which he paid land revenue regularly. She further stated that her father's name was enrolled in the voters list of 1966 of 52 No. Baghbor LAC. She claimed to have been given in marriage to one Minazuddin of Digirpam, P.S. Baghbor, Barpeta, whose name was also enrolled in the voters list of 1989. She claimed herself to be bonafide citizen of the country along with other siblings. According to her, though the learned Tribunal adjudged her to be an illegal migrant, she could not immediately, thereafter, prefer an appeal, as by the decision, rendered in Sarbananda Sonowal Vs. Union of India (UOI) and Another, the Apex Court had annulled the Act as a result whereof the learned Tribunal constituted thereunder ceased to function. That the mistake on the part of her learned counsel qua the factual aspect of service of notice of the proceedings of the

learned Tribunal, was bonafide and that she, being a rustic illiterate village woman, ought not to be made to suffer therefor has been highlighted.

5. The Superintendent of Police (B), Barpeta filed an affidavit-in-opposition in the appeal, pleading, inter alia, that Minazuddin, husband of the writ appellant/writ petitioner and Miachan Ali, her son had produced before SI (B) Sirajul Islam of Baghbor a voters list of 1966, 1997 and 2011 of village Digirpam 45 No. Baghbor LAC. That the voters lists of 1966 and 1977 contained the name of Late Gendu Mia, S/o. Late Dukhi Mia for village Rank Pam, 52 No. Baghbor LAC and Satra Kanara Gobindapur Reserve 45 No. Baghbor, LAC was also stated. Production of the voter lists of 1966 and 1997 enrolling the name of Late Basaton Nessa, W/o. Late Gendu Mia was also affirmed. The deponent, however, contended that no document, however, was available to establish that the writ appellant/writ petitioner was the daughter of Late Gendu Mia and late Basaton Nessa of village Satra Kanara Gobindapur Reserve.

6. In reply thereto, the writ appellant/writ petitioner in her affidavit, while affirming the production of the aforementioned documents has brought on records, the relevant extract of the Chitha of Ranir Pam under Mandia Mauza recording the names of the heirs and legal representatives of Gendu Mia, S/o. Late Dukhi Mia. A copy of the revenue paying receipt dated 23.06.2006 pertaining to the said land and issued in her favour has also been appended thereto.

7. Mr. Ahmed has assiduously argued that the learned Single Judge has erred in law in overlooking the fact that the imputation that the writ appellant/writ petitioner is an illegal migrant had not been proved as required and that on that count alone the impugned judgment is liable to be set aside. According to the learned counsel, notwithstanding the fact that the learned Tribunal had decided the proceedings ex-parte against the writ appellant/writ petitioner, the prosecution was unmistakably required to prove the imputation levelled against her and there being no semblance of any material in support thereof as is obvious on the face of the order dated 07.03.2005, the same ought to have been interfered with by the learned Single Judge. Reiterating that the writ appellant/writ petitioner should not be made to suffer the adverse consequences of a bonafide mistake of her conducting counsel, Mr. Ahmed, has argued that the Act having been annulled by the Apex Court vide its decision in Sarbananda Sonowal (supra), the matter ought to be remitted to the jurisdictional Foreigners Tribunal to be adjudicated afresh after due opportunity to the writ appellant/writ petitioner to prove her claim of Indian Citizenship. Referring to the documents on record, more particularly, the voters list of 1966 containing the name of Gendu Mia as well as the copy of the extract of the Chitha disclosing her to be one of his legal heirs, the learned counsel has insisted that interest of justice warrants examination of the writ appellant/writ petitioner's claims of Indian Citizenship afresh. In support of his submissions, the learned counsel has placed reliance on the decision of the Apex Court in Sarbananda Sonowal Vs. Union of India (UOI)

and Another, and of this Court in Santi Ranjan Dey and Others Vs. State of Assam and Others, , Karamat Ali Vs. State of Assam and Others, and The Commissioner Cum Secretary, Department, The Chief Engineer (Power), Eastern Electrical Zone, Department of Power, Govt., The Superintendent Engineer (Power), A.P. Electrical Department of Power, and The Executive Engineer Deomali Electric Division, Department of Power Vs. T.C. Syndicate, .

8. Mr. Bhagabati, as against this has contended that as the writ appellant/writ petitioner had failed to defend her cause before the learned Tribunal inspite of service of notice on more than one occasion having regard to the reasons recorded in the impugned judgment and order sustaining its determination, no interference is called for. According to the learned Central Government Counsel, the documents on record are all yields of afterthought and ought not to be entertained. Mr. Deka has endorsed the contentions advanced on behalf of the Union of India.

9. We have extended our thoughtful consideration to the pleadings on records and the documents available. That, the writ appellant/writ petitioner had been served with the notice of the proceedings of the learned Tribunal, whereupon, she had entered appearance through her learned counsel and had prayed for time at the first instance is a matter of record. That, she did not appear thereafter and had remained absent without steps is also not disputed. The order dated 07.03.2005 of the learned Tribunal, however, does not discuss in details the materials produced on behalf of the prosecution to establish that she was an illegal migrant within the meaning of the Act. Though the learned Tribunal had recorded that the writ appellant/writ petitioner was absent inspite of service of notice and had failed to submit the relevant documents in support of her nationality, the determination against her is visibly summary and cryptic. Even the contents of the report on which the reference had been registered have not been set out to indicate the reasons in support of the ultimate adjudication that the writ appellant/writ petitioner is an illegal migrant under the Act. This assumes significance in the face of the basic fundamental principle that even, while disposing of a proceeding ex-parte, a judicial forum ought to examine the availability or otherwise of sufficient materials/evidence in support of the party in whose favour the eventual verdict is pronounced. The proceeding before the learned Tribunal being adversarial in nature, this fundamental proposition of law as highlighted by the Apex Court in Ramesh Chand Ardawatiya (supra) and this Court in Commissioner-cum-Secretary & Ors. (Supra) cannot be disregarded. To this extent, the challenge to the tenability of the determination made by the learned Tribunal can not be lightly brushed aside.

10. A shifting stand of the writ appellant/writ petitioner vis-a-vis the service of notice of the proceedings before the learned Tribunal is apparent. Be that as it may, her plea of inadvertent and bonafide mistake by her learned counsel in correctly projecting her instructions in this regard is not an implausible one, she being an unlettered and rustic village woman.

On a prima facie perusal of some of the documents referred to by the Superintendent of Police (B), Barpeta in his affidavit filed in the instant appeal, more particularly, the extract of the voters list of 1966 carrying the name of Gendu Mia, S/o. Dukhi Mia, copy of the extract of the Chitha of the aforementioned land and that of the revenue paying receipt pertaining thereto disclosing, amongst others, the name of the writ appellant/writ petitioner as the daughter/legal heir of Late Gendu Mia, we are of the considered opinion that in the singular facts and circumstances of the case, she is entitled to one opportunity of proving her claim of Indian Citizenship in accordance with law. In arriving this conclusion, we have felt guided by the decision of a Division Bench of this Court in Karamat Ali (supra).

11. In the above view of the matter, the impugned judgment and order dated 10.01.2006 as well as the determination made by the learned Tribunal vide its order dated 7.3.2005, passed in Case No. 1342/2003, are interfered with. The matter is remitted to the learned Foreigners Tribunal, Barpeta for a decision afresh after due opportunity to the parties. The appellant/writ petitioner would present herself before the Tribunal without fail on 2.7.2012 to take further order(s) in this regard. We make it clear that on her failure to do so, this determination would automatically stand recalled without further reference to her. The appeal is, thus, allowed. No costs.

A copy of this order be forwarded to the Superintendent of Police, Barpeta to ensure action in terms therewith.