
(2016) 07 GAU CK 0050
In the Gauhati High Court
Case No : W.A. No. 36 of 2016

Kulsum Khatun @ Kulsum Bibi

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 19-07-2016

Acts Referred:

Foreigners Act, 1946 — Section 9

Citation : (2016) 5 GauLJ 580 : (2016) 4 GauLT 471

Hon'ble Judges : Mr. Ujjal Bhuyan and Mrs. Rumi Kumari Phukan, JJ.

Bench : Division Bench

Advocate : Mr. M.U. Mahmud, Mr. S. Hoque, Mr. M. Ali, Mr. A. Rahman, Ms. A. Medhi, Mr. A. Das and Mr. M.R.Z. Choudhury, Advocates, for the Petitioners; Mr. S. Chakraborty, GA & Ms. G. Sarma, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Ujjal Bhuyan, J.— Heard Mr. M.U. Mahmud, learned counsel for the appellant, Ms G Sarma, learned counsel for the Central Government and Mr. S. Chakraborty, learned Government Advocate, Assam.

2. This appeal is directed against the Judgment and Order dated 30.09.2015, passed by the learned Single Judge, dismissing W.P. (C) No. 5399 of 2015, filed by the appellant as the writ petitioner against the order dated 20.12.2010, passed by the learned Member, Foreigners" Tribunal (II), Nagaon in FT Case No. 227 of 2006, declaring the appellant to be a foreigner having illegally entered into India (Assam) after 25.03.1971.

3. From the materials on record, it is seen that a reference was made by the Superintendent of Police (Border), Nagaon, under the Foreigners" Act, 1946 and the Foreigners" (Tribunals) Order, 1964, against the appellant with the allegation that appellant was a foreigner having illegally entered into and residing in India (Assam) after 25.03.1971. On the basis of the said reference, FT Case No. 227 of 2006 was registered in the Foreigners" Tribunal (II) Nagaon. Notice issued by the

Tribunal was served upon the appellant, where after, she appeared and submitted her written statement refuting the allegation and stating that she was an Indian citizen. She also adduced one witness and exhibited 2 (two) documents in support of her claim. After hearing the matter, learned Member disbelieved the version of the appellant and vide order dated 20.12.2010, declared the appellant to be a foreigner having illegally entered into India (Assam) from Bangladesh on or after 25.03.1971.

4. Appellant, thereafter, filed W.P. (C) No. 5399 of 2015 before this Court challenging the legality and validity of the aforesaid order dated 20.12.2010. On due consideration, learned Single Judge vide the judgment and order dated 30.09.2015 upheld the order of the Tribunal and dismissed the writ petition.

5. Hence, the present appeal.

6. Submissions made by learned counsel for the parties have received the due consideration of the Court. Also perused the materials on record.

7. Before the Tribunal, appellant had filed written statement stating that she was an Indian citizen by birth. Her father's name appeared in the voters' list of 1965. Appellant produced one witness in support of her claim. A Government Gaonburah of Village Borhola under Kaliabor Legislative Assembly Constituency deposed as DW-1. According to him, father of appellant, Sheikh Amiruddin had cast his vote in the year 1965. Though Sheikh Amiruddin was alive, he could not walk due to old age. DW-1 stated that the proceedee (appellant) was living with her husband at Village - Boraligaon, but he did not know the name of the husband. 2 (two) documents were exhibited, namely, voters' list of 1965 of Village Borhola under No. 90 Kaliabor Legislative Assembly Constituency, wherein name of Sheikh Amiruddin, son of Bilayat appears. The second exhibit is a certificate certifying that Sheikh Amiruddin, son of Bilayat was a resident of Village-Chikoniborhola and his name appeared in the Voter's List of 1965. Learned Member stated that the first exhibit nowhere mentioned the name of the proceedee. Father of the proceedee did not come forward either to support the evidence of DW-1 or to prove that proceedee was his daughter. Learned member did not believe the statement of DW-1 that Sheikh Amiruddin was old and unable to move in the absence of any documentary proof to that effect. There was no document identifying the proceedee or to prove that she was the daughter of Sheikh Amiruddin. Learned Member further noted that the proceedee did not examine herself to support her case. Therefore, vide order dated 20.12.2010, learned Member took the view that the proceedee had failed to prove her case that she was a citizen of India either by oral or by documentary evidence. Therefore, reference was answered in favour of the State by holding that the proceedee was a foreigner, who had illegally entered into India (Assam) after 25.03.1971.

8. 5 (five) years thereafter, appellant filed the related writ petition. It was stated in the writ petition that she was told by her counsel that since the Government

Gaonburah had given evidence there was no necessity for her to give further evidence. Because of that, she remained absent later on and had no knowledge about the order dated 20.12.2010. She came to know about it only upon her arrest by the police. Another statement made in the writ petition was that appellant was a mentally retarded person since childhood. Therefore, she could not enlist her name in the voters' list.

9. Such statement made by the appellant in the writ petition are absolutely hollow and cannot be accepted in the absence of any documentary support. If the appellant was suffering from mental retardation, this fact ought to have been mentioned in the written statement. The written statement is completely silent in this regard. No documents have been annexed or placed on record to show that appellant is a mentally retarded woman. DW-1 also did not say anything in this regard in his evidence. Therefore, such a plea taken by the appellant is clearly an afterthought and cannot be entertained. Moreover, the writ petition which was filed 5 (five) years after passing of the order by the Tribunal was clearly hit by delay and laches.

10. However, notwithstanding the delay of over 5 (five) years in filing the related writ petition, learned Single Judge entertained the writ petition and even examined the evidence on record. Learned Single Judge, thereafter, held as under:-

"I have considered the submissions advanced by the learned counsel appearing for the parties and have also perused the entire materials on record including the LCR received from the Tribunal.

As discussed in the impugned order, the petitioner exhibited 2(two) documents, namely, Exhibit-Ka, voter list of 1965 and Exhibit-Kha, certificate certifying that Seikh Amiruddin, son of Bilayat is a resident of the particular village. In the proceeding before the Tribunal, the petitioner herself did not adduce any evidence, but examined the village Headman as DW-1. In the written statement filed by the petitioner, she contended that she is an Indian citizen by birth and that her father's name appeared in the voter list of 1965. However, she did not name her father. The 2(two) documents, which she had produced before the Tribunal, are photocopies of 1965 voter list (extract only) and a certificate dated 7th February, 2009 on a plain paper purportedly issued by the DW-1. In the voter list of 1965, name of one Seikh Amiruddin, son of Bilayat, aged 32 years appears whom the petitioner projected as her father. In the certificate, the DW-1 certified that Amiruddin was known to him. However, the certificate did not state that the petitioner is the daughter of said Amiruddin.

It is on the basis of the above 2(two) documents, the petitioner wanted to discharge her burden of proof as envisaged under Section 9 of the Foreigners Act, 1946, about which detail discussions have been made in *Sarbananda Sonowal v. Union of India & Ors.* reported in AIR 2005 SC 2920.

As noted above, the petitioner herself did not lead any evidence. It was DW-1,

who in his deposition, stated that Amiruddin's name appeared in the 1965 voter list. He further stated that although Amiruddin was alive but was not in a position to move around due to old age. He also stated about the purported brothers and sisters of the petitioner. However, none of them was examined. Secondly in the cross-examination, he stated that he did not remember the birth year of the petitioner. He also stated that he did not see the grandfather of the petitioner and admitted that in the certificate, he did not mention about inclusion of the name of Amiruddin in the voter list of 1970. He also failed to name the petitioner's husband, although claimed that Amiruddin was his neighbour."

11. The Tribunal on appreciation of the evidence adduced and other materials on record had returned a finding of fact that the proceedee, i.e., the appellant was a foreigner having illegally entered into India (Assam) on or after 25.03.1971. Whatever evidence were adduced on behalf of the appellant that was considered by the Tribunal, where after, the above finding of fact was recorded. Learned Single Judge again examined and scrutinised the materials on record including the LCR requisitioned from the Tribunal but did not find any error or infirmity in the decision of the Tribunal. Thereafter, learned Single Judge dismissed the writ petition by upholding the order of the Tribunal.

12. As per requirement of Section 9 of the Foreigners' Act, 1946, the burden was on the appellant to prove her Indian citizenship by producing cogent and reliable evidence. The Tribunal on appreciation of the evidence adduced did not accept the same. Such decision of the Tribunal cannot be said to be perverse to the record or suffering from any error apparent on the face of the record.

13. In *Narendra & Co. (P) Ltd. v. Workmen*; reported in (2016) 3 SCC 340, the Supreme Court has held that in an intra-Court appeal, on a finding of fact, unless the Appellate Bench reaches a conclusion that the findings of the Single Bench is perverse, it shall not disturb the same. Merely because another view or a better view is possible, there should be no interference or disturbance to the order passed by the Single Bench.

14. For all the aforesaid reasons, we do not find any error or infirmity in the order of the learned Single Judge. There is no merit in the writ appeal, which is accordingly dismissed.

15. Registry to inform the concerned Deputy Commissioner and Superintendent of Police (Border).

16. Let a copy of this order be also furnished to Mr. S. Chakraborty, learned Government Advocate, Assam, for information to the above officers.