
(2008) 09 GAU CK 0090
In the Gauhati High Court

Md. Abdul Hannan and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 30-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 101, 102, 103, 114, 92
Illegal Migrants (Determination by Tribunals) Act, 1983 — Section 8(1)

Citation : (2009) 5 GLR 349

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

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—By now, it is long 13 years since the reference u/s 8(1) of the Illegal Migrants (Determination) Tribunal Act, 1983, for a decision by the Tribunal as to whether the petitioners were illegal migrants or not, was made. The reference was registered and numbered as IMDT/H/8/95. It is more than 6 years, the petitioners are in Assam even after the reference made against them was answered in the affirmative both by the Illegal Migrants (Determination) Tribunal ("the Tribunal") and the Illegal Migrants (Determination) Appellate Tribunal ("the appellate Tribunal"). The Tribunal and the Appellate Tribunal returned the concurrent findings of fact in support of the reference holding the petitioners to be illegal migrants to Assam after the cut off date i.e., 25.3.1971 by their orders dated 28.2.2002 and 19.7.2002 respectively. The petitioners then filed the instant writ petition way back in 2002, (26.8.2002) and after the interim order of stay of the orders of the Tribunal passed on 3.9.2002, they could remain in India for long 6 years even after the aforesaid concurrent findings of fact returned by the Tribunal and the Appellate Tribunal.

2. The writ petition was entertained by order dated 3.9.2002 and till 9.4.2008, there was no response from the respondents, both State as well as Union of India. This Court issued direction on 9.4.2008 for production of the records by

the learned State counsel by 29.4.2008. The matter was taken up on 30.4.2008 and on the request of the learned State counsel, further two weeks time was granted to produce the records. On 22.5.2008, when the matter came up for hearing, it was found that the records had not been received. Accordingly, direction was issued to the Registry to obtain the records. When the matter was again taken up on 14.7.2008. It was found that although the records of the Tribunal had been received, but the records of the appellate tribunal had not been received. In such a situation, the matter had to be adjourned. Eventually, when it was heard on 11.8.2008, the record of the appellate Tribunal was produced.

3. The aforesaid fact although may not be considered to be relevant for the purpose of determining the real issue is as to whether the petitioners are the illegal migrants to Assam or not, but has been indicated to show latitude and apathy on the part of the respondents in such a serious matter. The petitioners although suspected to be the foreigners, illegally entering into Assam after the cut off date, i.e., 25.3.1971 and declared to be so way back in 2002 have been merrily roaming around in Assam by initiating the writ proceeding and obtaining stay therein only because of indulgence being given by the respondents by not responding to the writ proceeding by filing any affidavit and/or producing the records of the Tribunal.

4. Above is not the experience of This Court in this particular case only, but on earlier occasions also, while dealing with the scores of such writ petitions against the judgments of the Tribunal, complete inaction, lethargy and latitude on the part of the respondents, both State and the Union Government was writ large, as a consequence of which though declared as foreigners, such foreigners could remain in Assam on the strength of the interim orders passed. Perhaps, this can never happen in any other country where a person after declaring him to be a foreigner could remain in that country due to the inaction on the part of the State machineries.

5. Coming to the instant case, as noted above, this writ petition has been filed challenging the concurrent findings of fact arrived at by the Tribunal and the appellate Tribunal. It will be pertinent to mention here that in the instant case, the proceedings under challenge were under the Illegal Migrants (Determination) Act, 1983, since repealed by the Apex Court in the case of *Sarbananda Sonowal Vs. Union of India (UOI) and Another*,

6. Needless to say that the writ court exercising its power of judicial review cannot sit in appeal over the findings arrived at by the Tribunal and the appellate Tribunal. It is the settled law that in the writ proceeding, roving enquiry on factual aspect of the matter is not permissible. The writ court can interfere with such finding of fact only when it is shown to be a case of perverse finding and/or to be a case of no evidence at all. The High Courts while exercising extraordinary jurisdiction under Article 226 of the Constitution of India do not sit as courts of appeal. The findings of fact are not interfered with by it except in case of "no

evidence" or "perverse finding".

7. Keeping in mind the above, I now proceed to deal with the case of the petitioners as has been projected in the writ petition.

8. It is the case of the petitioners that they are Indian citizens and the Tribunal by their erroneous findings have illegally declared them to be illegal migrants after the cut-off date, i.e., 25.3.1971. During the course of hearing, nothing could be shown by the learned Counsel for the petitioners as to the perversity of the finding of fact arrived at by both the Tribunals.

9. I have heard Mr. A.S. Choudhury, learned Counsel appearing on behalf of the petitioners as well as Mrs. Bobita Das, learned CGSC and Mr. R. Chakraborty, learned Addl. Senior Government Advocate, Assam.

10. Mr. Choudhury learned Counsel for the petitioners only submitted that the petitioners be given another chance to prove their citizenship. Such submission on the part of the learned Counsel is perhaps because of the apathy shown in such matters by the State and the Central Government. According to the petitioners numbering four, the petitioner No. 1 is the son of late Abdus Sukkur, whose name appeared in the voter list of 1966 and that the petitioner No. 1 in the voter list of 1970. In support of such a contention, the petitioners have annexed typed copies of the purported voter lists of 1966 and 1970.

11. According to the petitioners, they did not get reasonable opportunity of being heard before the Tribunal as their lawyers did not take proper steps. However, they have not named as to who were the lawyers. It is a common feature that in most of such cases, the blame is on the lawyers about which the appellate Tribunal has also mentioned in the impugned judgment dated 18.7.2002. Such plea on the part of the illegal migrants is an escape route to delay the proceeding and in the meantime to collect more documents to establish the citizenship. Refer Sarabari Begum (Mustt.) @ Syera Begum and Others Vs. State of Assam and Others,

12. The petitioners on receipt of notice from the Tribunal appeared on 29.11.1995, 17.2.1996, 23.7.1996, 2.1.1997, 27.3.1997 and 16.6.1997 and thereafter, remained absent all throughout till the judgment was delivered on 28.2.2002. On 27.3.1997, the petitioners filed their written statement and some documents. They did nothing to adduce any defence evidence and/or to prove the documents. In the written statement, their stand was same as reflected above. The documents produced by them were the 1994 voter list containing the name of the petitioner No. 1, photocopy of a certificate dated 13.6.1988 issued by an un-identified person certifying the inclusion of the name of Abdul Sukkur in the 1996 voter list, photocopy of purported voter list of 1970 containing the name of the petitioner No. 1 (figure "70" not so legible), a personal affidavit sworn-in by the petitioner No. 1, photocopy of 1966 voter list containing the name of one Abdul Sukkur, son of Yakub Ali, Family Identity Card of 1994, photocopies of two birth certificates pertaining to the petitioner No. 2 and the

petitioner No. 4, a revenue paying receipt of 1993 standing in the name of the petitioner No. 1 and a certificate dated 5.9.1994 by the particular Gaon Panchayat certifying that he was landless during 1976-77.

13. The aforesaid documents, all photocopies or copies were never exhibited and/or proved as is required under the law. The petitioners remained absent in the proceeding after appearing on the aforesaid dates and thus naturally, the Tribunal had to proceed ex parte against them. The prosecution duly established its case not only by proving the exhibits which included the preliminary report, etc., but also by examining 3 witnesses.

14. The reference against the petitioners and his family members was started with description of the petitioner No. 1 Md. Abdul Hannan, son of Late Yakub Ali alias Abdul Matin and not as Abdul Sukkur, as has now been claimed by the petitioners coming to the writ court. In all the relevant documents pertaining to the proceeding before the Tribunal, such as notice, the statement of the petitioner No. 1, etc., his father is described as Late Yakub Ali alias Abdul Matin and not as Abdul Sukkur.

15. In the preliminary enquiry conducted by the police, the petitioner No. 1 himself stated that he came to Assam after 1971 cut off date and that his father was Late Yakub Ali alias Abdul. He stated that his elder brother's name was Abdul Sukkur. The other witnesses, who also deposed in favour of the prosecution in the Tribunal confirmed the fact that the petitioner was an illegal migrant after 25.3.1971. Not only that, the prosecution also established the fact that the name of the petitioner was not included in the 1970 voter list as was claimed by him. To that effect, the authority obtained the certificate from the Election Office. The prosecution also obtained information from the Circle Officer, Hojai to the effect that there was no KP Patta land standing in the name of the petitioner No. 1. All these documents were proved in the proceeding before the Tribunal.

16. As regards the statements made by 3 prosecution witnesses namely, PW1, PW2 and PW3 stating in categorical terms that the petitioners were illegal migrants to Assam and their proving the exhibited documents including the preliminary report etc., there was no cross-examination on the part of the petitioners for which they have now blamed their engaged counsel. As noted above, after the date 27.3.1997, on which the petitioners filed their unverified written statement and photocopies of documents, they remained absent all throughout for long five years when the judgment was delivered by the tribunal on 28.2.2002. It is very easy to blame the advocates, but then one cannot be unmindful of duty and obligation cast on the party concerned by law to prove their case before the Tribunal. It is also to take the plea of being illiterate etc. Any amount of indulgence to such pleas, will be anti-thesis to the very fact that large numbers of illegal foreigners are present in the State of Assam and will also be an abuse of the process of law. Any amount of indulgence to such pleas and for that matter, to the illegal migrants will be fatal to the process of detection

and deportation of illegal migrants from Assam. Such illegal migrants, with such pleas, if accepted, will have the liberty to roam around freely and in the process apart from doing the vanishing act will also be able to collect more false documents to establish that they are Indian citizens, from the persons who are always with helping hands to such illegal migrants.

17. The Tribunal in its judgment dated 28.2.2002, which came to be delivered after long 7 years of initiation of the proceeding, during which the petitioner all along remained absent for long 5 years, i.e., from 27.3.1997 to 28.2.2002 has answered the reference in the affirmative against the petitioners. The Tribunal has appreciated the evidence on record and upon such appreciation about which there is no perversity, has held the petitioners to be illegal migrants to Assam long after 1971. It is not a case of "no evidence" rather, evidences are overwhelming against the petitioners.

18. Against the aforesaid judgment and order of the Tribunal, the petitioners preferred Appeal Case No. 6/2002 before the appellate Tribunal, which was barred by limitation. However, eventually, the appellate Tribunal condoned the delay and entertained the appeal on merit. The learned Tribunal while concurring with the finding arrived at by the lower Tribunal, noticed various dates of appearance of the petitioners before the Tribunal and their eventual non-appearance resulting in ex parte proceeding against the petitioners. The learned appellate Tribunal once again appreciated the evidence on record and affirmed the finding arrived at by the lower Tribunal. As regards the plea of the petitioners against their engaged counsel, the appellate Tribunal has observed, thus:

The appellants case is that they are illiterate persons and that their counsel in the Lower Tribunal had assured them that on the basis of the documents in their possession, they would win the case and that after filing the W/S and the relevant documents they need not attend the Tribunal any more. This Tribunal has heard scorers of appeal against the ex parte judgment and order of various Lower Tribunals and in almost all the cases the contention of the appellants has been that their counsel assured them that they need not come and therefore they did not attend the proceedings before the Lower Tribunal. This contention appears to be without any substance. It appears unbelievable that all the advocates would ask their clients not to come to the Tribunal any more and that they would win the case. Complainants witnesses have to be cross-examined and for the cross-examination the presence of one of the appellants is necessary. The evidences on behalf of the appellants have also to be adduced in rebuttal and documents fled by the appellants have to be proved. No Lawyer in the circumstances would ask the appellants not to attend the trial of the case. It appears that after filing the W/S the appellants disappeared in the hope that after the case is decided, they would get it remanded either in appeal or in writ petition and would get a second innings to delay their deportation.

19. The appellate Tribunal has also referred to photocopies of the documents produced by the petitioners along with the memorandum of appeal and has

rightly observed that such photocopies are not admissible in evidence. The observation of the Tribunal is as follows:

The appellants have filed Photostat copies of some documents along with the memo of appeal. Photostat copies are not admissible in evidence. Moreover no affidavit has been filed to show that these documents were not in their power or custody or that they could not obtain them after due diligence. In the absence of any such plea, the documents attached to the memo of appeal cannot be looked into. Order 41, Rule 27, CPC, lays down the conditions under which addl., evidence can be accepted in appeal. These conditions have not been complied with and as such no case for accepting the documents filed with the memo of appeal has been made out.

It was argued that the judgment has passed without considering the provisions of Sections 92, 101, 102, 103 and 114 of the Evidence Act. Sections 102 and 103 relate to the question of burden of proof. In this case the burden of proof has rightly been placed upon the complaint and on the basis of evidence adduced in the case the Lower Tribunal has decided the matter. Section 114 deals with the presumptions which the court may make regard being held to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. The learned Counsel for the appellants failed to show as to how any presumption could have been made in favour of the appellants in the facts and circumstances of the case.

20. The appellate Tribunal has rightly appreciated the evidentiary value of documentary evidence vis-a-vis the oral evidence. It was submitted before the appellate Tribunal that although the petitioners failed to prove the documentary evidence but the same should be looked into. In that context, the appellate Tribunal discussed the voter list of 1966 and the affidavit sworn-in by the petitioner No. 1 himself. It has rightly been observed that the statement given by a living person is not admission in evidence as the same is an admission on the part of the petitioner No. 1 in his favour. The appellate Tribunal referring to the evidence on record found that even if the 1970 voter list is accepted to be correct, containing the name of the petitioner No. 1, but in absence of any explanation as to why his name did not appear in any one of the voter lists published thereafter, same is not acceptable.

21. Referring to the evidence, it was found that the father of the petitioner No. 1 was Yakub Ali alias Abdul Matin and not Abdul Sukkur. The witnesses examined on behalf of the prosecution stated that one Md. Jamaluddin was son of Abdul Sukkur. It has rightly been observed by the Tribunal that the petitioner No, 1 stumbled upon the voter list showing Abdul Hannan, son of Abdul Sukkur and thereafter, started showing that Abdul Sukkur was his father. As regards the other documents, it has rightly been observed by the Tribunal that the said documents being pertaining to the period from 1989 to 1994 are of no consequence in absence of any linkage being established to pre, 25.3.1971 period in India. The appellate Tribunal on the basis of the materials on record has

observed that there is no semblance of evidence which would show that the petitioners are the citizens of India and that on the evidence adduced by the prosecution, it is clearly established that they migrated to India from Bangladesh after the aforesaid cut off date. One significant observation made by the Tribunal is that no plea and/or argument was advanced that two witnesses out of three, examined in the case belonging to the same community and the same village had deposed falsely against the petitioners.

22. Another significant aspect of the matter which I feel expedient to mention here is that as against the claim of the petitioner No. 1 and his name appeared in the voter list of 1970, but in the self-sworn affidavit, which was produced as one of the documents in support of his Indian citizenship, he never stated so. While in para 2 of the said affidavit, he stated that his father's name (Abdul Sukkur) had been enrolled in the voter list of 1966, in para 3 of the affidavit, the petitioner No. 1 stated that his name was enrolled in the voter list of 1990. In para 4 of the affidavit, he stated that he had applied for enrolment of his wife's name in the voter list. Had it been a case of enrolment in the voter list of 1970, in the affidavit sworn in by him on 1.11.1993, he would have definitely stated so instead of stating that his name was enrolled in the voter list of 1990.

23. In the writ petition, the petitioner has described his father as Late Abdul Sukkur but in the aforesaid affidavit as well as in the written statement filed, he described his father as Abdul Sukkur. Thus, it is a matter of convenience of furnishing any particulars having semblance of re-semblance towards establishing the case of Indian citizenship with the kind of indulgence in such a proceeding about which discussions have been made above. The petitioners are merrily roaming around in the State for the last long 13 years when the reference was made against them leaving aside the earlier period of their stay after illegally migrating to Assam.

24. This is only one case of one Md. Abdul Hannan and his family members which has come to light in this proceeding. Such large number of illegal migrants, whose presence has been noticed by the Apex Court in Sarbananda Sonowal Vs. Union of India (UOI), and also in the judgment on the same issue dated 25.7.2008 Musstt. Sarabari Begum (Mustt.) @ Syera Begum and Others Vs. State of Assam and Others, with the kind of indulgence all along being given by those at the helms of affairs Will, certainly have a far reaching affect - not only in the demographic pattern of Assam, but also in matters incidental thereto including the act of terrorism which cannot be just wished away and/or smiled away as a matter of exaggeration, fall out, of which the people of Assam have already experienced.

25. Writ petition is dismissed with the direction to the Superintendent of Police, Nagaon, i.e., the respondent Nor 3 to keep the petitioners in detention till they are deported from Assam the petitioners should be taken into custody in no time.

26. Let the matter be listed again on 3.11.2008 by which date the

Superintendent of Police, Nagaon shall furnish compliance report.

27. The Registry shall send down the LCRs and furnish the copies of the judgment to all concerned including the Superintendent of Police, Nagaon forthwith. A copy shall also be furnished to Ms. R. Chakraborty, learned State counsel for her necessary follow up action.