

(2010) 01 GAU CK 0037
In the Gauhati High Court
Case No : Writ Petition (C) No. 2405 of 2009

Md. Ashraf Ali and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-01-2010

Acts Referred:

Citizenship (Amendment) Act, 1985 — Section 18, 6A(2), 6A(3), 6A(4), 6A(5)
Citizenship Act, 1955 — Section 3, 4, 5, 6
Constitution of India, 1950 — Article 226
Illegal Migrants (Determination by Tribunals) Act, 1983 — Section 3, 8(1)

Citation : (2010) 4 GLR 382 : (2010) 2 GLT 607

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Advocate : A.M. Mazumdar, M.U. Mondal, B. Rahman and S. Haque, for the Appellant; Asst. SGI and B.J. Ghosh, G.A., for the Respondent

Final Decision : Dismissed

Judgement

B.P. Katakey, J.—The petitioners have filed this petition seeking to invoke the jurisdiction of this Court under Article 226 of the Constitution of India in challenging the order dated 28.5.2009 passed by the learned Member, Foreigners Tribunal (1st), Morigaon in Case No. FT(C) 652/2006 declaring them as foreigners within the meaning of Section 2(a) of the Foreigners Act, 1946. (the 1946 Act).

2. A reference u/s 8(1) of the Illegal Migrants (Determination by Tribunals) Act, 1983 was made by the Superintendent of Police (B), Morigaon, Assam to the Tribunal constituted under the provisions of the said Act for determination of the question as to whether the petitioners are illegal migrants within the meaning of Section 3(c) of the said Act, alleging that they entered into India on or after 25th day of March 1971. On the basis of such reference, IM(D)T Case No. 397/2001 was registered. The said proceeding, however, subsequently transferred to the Foreigners Tribunal, Morigaon, in view of declaration of the Illegal Migrants (Determination by Tribunals) Act, 1983 as unconstitutional by the Apex Court in

Sarbananda Sonowal Vs. Union of India (UOI) and Another, and consequent upon the issuance of notification by the Government of Assam dated 5.7.2006. Accordingly FT(C) 652/2006 had been registered and numbered in the Foreigners Tribunal (1st), Morigaon and notices were issued therein. The petitioners on receipt of the notices entered appearance and filed their joint written statement contending, inter alia, that they are Indian nationals by birth and the names of the parents of the petitioner Nos. 1 and 2 were enrolled in the electoral roll of Lahorighat LAC, Assam in the year 1966 and 1970 and Dhing LAC, Assam in the year 1965 and 1970, respectively, and out of their wedlock since the petitioner Nos. 3 to 8 were born, they are also Indian nationals by birth. In the written statement they have also denied that they illegally entered into India after 25.3.1971 as alleged.

3. Altogether 4(four) witnesses were examined in the proceeding before the tribunal, 2(two) from the side of the petitioners and 2(two) by the State. The petitioners though filed seven Nos. of documents in support of their claim that they are Indian nationals, none of those documents were proved and marked as exhibits. The respondent State, however, proved 3(three) documents, namely, Ext.-1 being the communication issued by the Superintendent of Police (B), Morigaon to the Sub-Inspector of Police (B), Dharamtul P.S. to make an enquiry, under the provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983, as to whether the petitioners are illegal migrants within the meaning of the said Act and to submit the report; the Ext.-2 dated 30.11.2000 issued by the S.I. of Police (B) furnishing the particulars in Form No. 1 and Ext.-3 being the report submitted by the Sub-Inspector of Police (B), dated 30.12.2000, which also contains the recommendation of the Inspector of Police, Deputy Superintendent of Police and also the endorsement of the Superintendent of Police (B), dated 5.7.2002. The witnesses were duly cross-examined by the respective parties. The learned Tribunal upon appreciation of the materials available on record has passed the order declaring the petitioners as foreigners within the meaning of Section 2(a) of the 1946 Act, and, hence, the present writ petition.

4. I have heard Mr. A.M. Mazumdar, the Learned Senior Counsel for the petitioners and Mr. B.J. Ghosh, the Learned State Counsel appearing on behalf of respondent Nos. 2, 3 and 4. None appeared for the respondent No. 1.

5. Mr. Mazumdar, the Learned Senior Counsel for the petitioners referring to the pleadings in the written statement filed and the documents produced before the learned Tribunal has submitted that it is evident from such materials available on record that the parents of the petitioner Nos. 1 and 2 are Indian nationals, as their names were entered in the electoral rolls of Lahorighat LAC and Dhing LAC in the State of Assam in the year 1966 and 1970 and 1965 and 1970 respectively, which was done on the basis of the citizenship and as such they are Indian nationals. It has further been submitted that the copy of the National Register of Citizens (NRC) prepared by the authority in 1951 also reveals that the petitioner No. 1's father is an Indian national and, hence, the petitioner No. 1

cannot be termed as foreigner within the meaning of the 1946 Act. The further contention of the Learned Senior Counsel is that the petitioner Nos. 3 to 8 being the sons and daughters of the petitioner Nos. 1 and 2 and they having born in Assam, they are also citizens of India by birth. Mr. Mazumdar, therefore, submits that the order passed by the learned Tribunal is required to be set aside, the same being contrary to the evidences on record.

6. Mr. Ghosh, the Learned State Counsel, appearing for the respondent Nos. 2 to 4, supporting the order passed by the learned tribunal, has submitted that though u/s 9 of the 1946 Act, the burden lies on the petitioners to prove that they are not foreigners and for that purpose though mere filing of certain documents before the learned Tribunal would not be enough, unless those are proved, it appears even from the documents which were filed by the petitioners before the learned Tribunal that the petitioner Nos. 1 and 2 cannot be linked to any of the documents produced by them. It has further been submitted by the Learned State Counsel that the learned Tribunal considered all the documents filed by the petitioners and has recorded the finding that those are not relatable to the petitioners and as such they are rightly declared as the foreigners within the meaning of the 1946 Act and, hence, it cannot be said that the findings of the learned tribunal, are perverse being contrary to the evidences on record.

7. I have considered the submissions of the Learned Counsel for the parties and also perused the oral and documentary evidences adduced in the proceeding. I have also perused the documents which were produced by the petitioners herein, but have not been proved before the learned tribunal. The impugned order passed by the learned tribunal dated 28.5.2009, has also been perused.

8. Section 2(a) of the 1946 Act defines "foreigner" as a person who is not a citizen of India.

9. Under the Citizenship Act, 1955 (the 1955 Act) citizenship can be acquired by birth (Section 3), by descent (Section 4), by registration (Section 5) and by naturalization (Section 6). Section 6A has been inserted by the Citizenship (Amendment) Act, 1985, which came into effect from 7.12.1985. Such amendment has been effected in view of the Assam Accord. Section 6A of the said Act provides special provisions as to citizenship of persons covered by the Assam Accord. Sub-section (2) of Section 6A provides that subject to the provisions of Sub-sections (6) and (7), all the persons of Indian origin who came before the 1st day of January, 1966 to Assam from the "specified territory", including such of those whose names were included in the electoral rolls used for the purposes of General Election to the House of the People held in 1967, and who have been ordinarily resident in Assam since the dates of their entry into Assam shall be deemed to be citizens of India as from the 1st day of January, 1966. Clause (c) of Sub-section (1) of that section defines the "specified territory" as the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985. Clause (d) of that Sub-section provides that a person shall be deemed to be of Indian origin, if he,

or either of his parents for any of his grandparents was born in undivided India. Sub-section (3) provides that subject to the provisions of Sub-sections (6) and (7), every person of Indian origin who -

(a) came to Assam on or after the 1st day of January, 1966 but before the 25th day of March 1971 from the specified territory; and

(b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and

(c) has been detected to be a foreigner, shall register himself in accordance with the rules made by the Central Government in this behalf u/s 18 with such authority as may be specified in such rules and if his name is included in any electoral roll for Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom.

10. Sub-section (4) of Section 6A provides that a person registered under Sub-section (3) shall have, as from the date on which he has been detected to be a foreigner and till the expiry of a period of ten years from that date, the same rights and obligations as a citizen of India, but shall not be entitled to have his name included in any electoral roll for any assembly or parliamentary constituency at any time before the expiry of the said period of ten years. Sub-section (5) stipulates that after the expiry of the said period of ten years such person shall be deemed to be a citizen of India for all purposes. Sub-section (6) relates to the persons to whom provisions of Sub-sections (2) and (3) applies and who does not wish to be a citizen of India under Sub-section (2) or does not wish to be governed by the provisions of Sub-section (3). Sub-section (7) of Section 6A stipulates the persons to whom the provisions of Sub-sections (2) to (6) of Section 6A shall not be applicable.

11. The provisions of the 1955 Act and the 1946 Act, as noticed above, therefore, stipulate that every person of Indian origin, who or either of his parents for any of his grandparents if was born in undivided India and who came to Assam, as defined in Clause (a) of Sub-section (1) of Section 6A, on or after the 1st day of January, 1966, but before the 25th day of March 1971 from the territories included in Bangladesh immediately before the commencement of the citizenship (Amendment) Act, 1985 and has since the date of his entry into Assam, been ordinarily resident in Assam and has been detected to be a foreigner, would acquire all rights and obligations of a citizen of India as soon as his name is registered in accordance with the provisions contained in the 1946 Act and the Rules framed thereunder. Such person, however, shall loose his voting right for 10 years from the date on which he has been detected to be a foreigner. All the persons of Indian origin who came before 1st day of January 1966 to Assam from the "specified territory", including such of the persons whose names were included in the electoral rolls used for the purposes of General Election to the house of people in the year 1967 and who have been ordinarily resident in Assam since the date of their entry into Assam are deemed

to be the citizens of India as from the 1st day of January 1966. Such persons, however, shall have the right of franchise from the very date itself. The person, who came to Assam after 25th day of March 1971 from Bangladesh shall not acquire the citizenship and would be foreigner, even if either of his parents or grandparents was born in undivided India.

12. Section 9 of the 1946 Act, except in cases where Section 8 applies, imposes the onus on the person, to prove that he is not a foreigner or is not a foreigner of a particular class or description, whenever such questions arise with reference to the said Act. Such provision is an exception to the provisions contained in the Indian Evidence Act relating to the burden of proof. Hence, the person, against whom the proceeding under the provisions of the 1946 Act relating to the question as to whether he/she is a foreigner has been initiated, has to prove by adducing cogent and reliable evidence that he is not a foreigner. Mere filing of certain documents before the learned Tribunal constituted under the provisions of the 1946 Act, unless those documents are proved and marked as exhibits as required under Indian Evidence Act, would not be enough.

13. As noticed above, the proceeding before the learned tribunal had been registered, on the basis of the reference made by the Superintendent of Police, initially before the tribunal constituted under the provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983, to determine the question as to whether the petitioners are "illegal migrants" within the meaning of the said Act, which had, however, subsequently been transferred to the Foreigners Tribunal constituted under the provisions of the 1946 Act, which proceeding had been contested by the petitioners by filing written statement and by adducing oral evidenced The learned tribunal by the impugned order declared the petitioners to be the foreigners within the meaning of Section 2(a) of the 1946 Act by taking into consideration even the documents which were filed by the petitioners but not proved as required under the Indian Evidence Act.

14. The petitioners in support of their claim that they are not foreigners and are citizens of India have examined two witnesses, namely, the petitioner No. 1 himself as OPW-1 and one Md. Habibur Rahman as OPW-2. It also appears from the records of the Case No. FT(C) 652/ 2006 that 7(seven) Nos. of documents were filed by the petitioners in support of their claims but none of those documents were proved and marked as exhibits by any of the witnesses examined by the petitioners in support of their claims. OPW-1 in his evidence has stated that he was born in Dewaguri village under Lahorighat police station in the year 1969 and thereafter because of acute poverty they shifted to Borbari village under Dharamtul police station in the year 1977 and since then has been living there with his family. He has further deposed that in the year 1984 he married the petitioner No. 2, daughter of Abdul Sattar, a resident of Bherbheri village under Dhing police station and out of their wedlock the petitioner Nos. 3 to 8 were born. OPW-2 in his evidence except stating that he knows the petitioner No. 1 and his family, who has 3/4 sons and daughters and they are residing in

Borbari village since 1983, did not support the oral testimony of OPW-1 that the petitioners are Indian citizens having born in Dewagiri village in 1969. None of the witnesses has also prove any document in support of the claim of citizenship, though u/s 9 of the 1946 Act onus is on the petitioners to prove that they are not foreigners.

15. Even though the documents which were filed by the petitioners before the learned tribunal in support of their claims cannot be looked into for the purpose of deciding the proceeding, the same having not been proved as required under the Indian Evidence Act, since those documents were taken into consideration by the learned tribunal, while passing the impugned order, I shall now deal with those documents, which are annexed to the writ petition as Annexures-1, 2, 3, 4, 6, 7 and 8. The petitioners have also annexed another document, which was not filed before the learned tribunal, as Annexure-5 to the writ petition, which is a certificate dated 7.10.1985 issued by the President of Kushtali Gaon Panchayat certifying that the name of one Janab Ali along with the names of 5(five) other persons were included in the voters list of 1970.

16. It is the claim of the petitioner No. 1 that the name of his father Janab Ali appears in the NRC of 1951, in support of which a photocopy of such NRC, (Annexure-1 at page 14 of the writ petition) had been produced before the learned Tribunal. It appears from the said document that the name of Janab Ali does not find place and instead the name of one Janbali Fakir, S/o Dengu Fakir, whose age was 35 in the year 1951, appears in that document. The petitioners in the translated version of the said document, which is available at page 13 of the writ petition, with a view to obtain undue benefit, has changed the name from "Janbali Fakir" to "Janab Ali". In the voters list of 1966 and 1970 (Annexures-2 and 3 to the writ petition) name of one Janab Ali, son of Dengu Fakir, appears whose age is stated to be 45 years in 1966 and 49 years in 1970. It, therefore, appears that Janbali Fakir and Janab Ali cannot be the one and the same person, as in 1951 alleged NRC his age was reflected as 35 years and in 1966 and 1970 alleged voters list his age was shown as 45 and 49 years respectively. Had Janbali Fakir and Janab Ali been one and the same person, Janbali Fakir would have been 50 and 54 years respectively in the year 1966 and 1970. There is also no evidence on record that they are one and the same person. Those documents, therefore, cannot be the basis for holding that the name of petitioner No. 1's father was included in the NRC prepared in the year 1951 and his name had also been entered into the electoral rolls of 1960 and 1970 of Lahorighat LAC, Assam.

17. The claim of the petitioner No. 2 is that her father was Abdus Sattar and his name was enrolled in the electoral roll of Dhing LAC in the year 1965 and 1970, in support of which she produced the voters lists (Annexures-6 and 7). The witnesses examined by the petitioners have not been stated anything about the inclusion of the petitioner No. 2's father's name in such voters list. Mere production of those documents, unless it is proved that the person named "A. Sattar", whose name appeared against Sl. No. 387 in the voters list of 1965 and

1970 in respect of Dhing LAC, is the father of the petitioner No. 2, named "Abdus Sattar", such document cannot be relied upon for the purpose of holding that the petitioner No. 2 is not a foreigner. The document which has been annexed as Annexure-8 and was produced before the learned tribunal is a certificate dated 1.3.2007 issued by the Gaonbura of Bherbheri village certifying that the petitioner No. 2 is the daughter of Abdus Sattar and married with the petitioner No. 1 and Abdus Sattar's name was unrolled in the voters list of 1965. This document was also not proved by any of the witnesses examined by the petitioners before the learned Tribunal. In the absence of any proof that "A. Sattar", whose name appeared at Sl. No. 387 against House No. 67 in the voters list of 1965 and 1970, is the father of the petitioner No. 2, that document, i.e., the certificate, also cannot be the basis for holding that the petitioner No. 2 is not a foreigner. Moreover Gaonbura of a village being not competent to issue citizenship certificate, the said document cannot be the basis for holding that the petitioners are not foreigners within the meaning of 1946 Act. Annexure-4 document, which is stated to be a voters list, being in respect of the year 1985, the same is not relevant for the purpose of the present case, as the issue is whether the petitioners entered into India after 25.3.1971. The certificate dated 7.10.1985 (Annexure-5) issued by the President of Kushtali Gaon Panchayat cannot also be the basis for declaration that the petitioners are not foreigners, in the absence of any proof that the Janab Ali whose name appears in the voters list of 1970 is the father of the petitioner No. 1. The petitioners, as noticed above, have failed to prove any of those documents before the learned tribunal. Mere pleading in the written statement is not enough unless such pleadings are proved by adducing cogent and reliable evidence, which the petitioners have failed to do.

18. The scope of interference with the order passed by the learned Foreigners Tribunal, in exercise of the jurisdiction conferred under Article 226 of the Constitution of India, is very limited. A writ of certiorari can be issued when the tribunal acts without or in excess of its jurisdiction, or in contravention of the rules of natural justice or commits an error apparent on the face of the record. When the evidences on record are not considered in its proper perspective, the writ court may interfere with the order passed by the tribunal. The tribunal admittedly had the jurisdiction to decide as to whether the petitioners are foreigners or not. There is also no allegation of contravention of the rules of natural justice as the petitioners contested the proceeding before the learned tribunal by filing written statement and by adducing evidence. In the instant case, the learned tribunal has discussed all the materials available on record, including the documents produced by the petitioners but not proved, while passing the order impugned in the present writ petition. The oral testimony of the witnesses examined by the petitioners and the documents which were produced before the learned tribunal and also before this Court, do not substantiate the claim of the petitioners that they are not foreigners as defined in Section 2(a) of the Act.

19. In view of the aforesaid discussion, I do not find any merit in the present writ petition to interfere with the order of the learned tribunal, hence the same is dismissed. The respondents are directed to take the petitioners in custody and to deport them from India immediately. No cost.