(2018) 05 GAU CK 0015

In the Gauhati High Court

Case No : WP(C) 3547 of 2016

MD. BABUL ISLAM — APPELLANT

Vs

THE STATE OF ASSAM AND 4 ORS — RESPONDENT

Date of Decision : 09-05-2018

Acts Referred:

Income Tax Act, 1961 — Section 139A
Indian Evidence Act, 1872 — Section 1, 3
Citizenship Act, 1955 — Section 6A
Foreigners Act, 1946 — Section 9
Income Tax Rules, 1962 — Rule 114
Code of Civil Procedure, 1908 — Order 19 Rule 1
Constitution of India, 1950 — Article 226

Citation : (2018) 05 GAU CK 0015

Hon'ble Judges : UJJAL BHUYAN, NELSON SAILO

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J

1.This case was heard on 19.04.2018 and today is fixed for delivery of order.

2. We have heard Mr. I.A Talukdar , learned counsel for the petitioner and Mr. UK Nair, learned Senior Special Counsel, Foreignersâ?? Tribunal

(FT).

3. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of order dated 18.01.2016 passed by the

Foreignersâ?? Tribunal, Nagaon Court No.10th at Doboka in FT (D) Case No.335/2015 (State â?"vs- Babul Islam) declaring the petitioner to be a

foreigner who had illegally entered into India (Assam) from Bangladesh after 25.03.1971.

4. Following the aforesaid order passed by the Tribunal, petitioner was taken into custody.

5. This Court by order dated 18.08.2016 had issued notice while requisitioning the case record and passed an interim order to the effect that petitioner

should not be deported from India

6. Superintendent of Police (Border), Hojai has filed an affidavit supporting the order passed by the Tribunal.

7. On the other hand, petitioner has filed three additional affidavits, one on 19.07.2017, second on 14.08.2017 and the third on 07.09.2017, bringing on

record a number of documents.

8. Submissions made by learned counsel for the parties have been considered. Also perused the materials on record including the record, requisitioned

from the Tribunal.

9. Record reveals that petitioner had filed written statement on 09.10.2015. In his written statement, petitioner stated that his grandfather was Eudel

Sheikh, son of Toiab, who was a bonafide voter of Nagaon Sadar Constituency in the year 1955. His name also figured in the National Register of

Citizens (NRC), 1951. Father was Alal Uddin. He was a voter in the year 1966 in respect of Nagaon Sadar Constituency. Petitionerâ??s name was

enlisted in the voters list of 2005 and thereafter in the year 2014 in respect of Jamunamukh Constituency in the district of Nagaon. In his supporting

affidavit, petitioner had disclosed his age as 36 years.

10. Thus, from the written statement filed by the petitioner, what is discernible is that according to the petitioner, his grandfather was Eudel Sheikh and

father was Alal Uddin. They were citizens of India; being their grandson and son respectively, petitioner was therefore a citizen of India.

11. Let us now examine as to whether petitioner could prove the above facts in issue by adducing cogent, reliable and admissible evidence.

12. Before proceeding further, it would be useful to mention here that as per the petitionerâ??s own declaration, he was 36 years of age at the time

of filing the written statement i.e. in the year 2015. If the petitioner was 36 years of age in 2015, it would mean he was born sometime in the year

1979.

13. Petitioner stated more or less the same thing in his evidence-in-chief which he filed by way of affidavit on 16.11.2015.

14. Petitioner was subjected to cross-examination wherein he stated that his grandmotherâ??s name was late Sonaban Bibi. But he did not know as to

when his grandmother and grandfather had expired. His father was late Alal Uddin. He had expired about 12 years ago i.e. sometime in 2003. At the

time of death, he was 76 years old. Mother was Ayesha Khatun. When the petitioner was young, his mother had expired. They were two brothers, he

being the eldest and the younger being Azaruddin, 18 years of age.

15. Petitioner filed as many as 14 documents which were marked as Exhibits.

16. Exhibit-1 is stated to be a certified copy of the voters list of 1970 in respect of Barhampur Constituency. Here the sole voter was Ayesha Ali, son

of Ekad Ali aged 37 years. Likewise, Exhibit-2 is stated to be a certified copy of the voters list of 1966 in respect of Nagaon Constituency where the

sole voter was Ayesh Ali, son of Ekadin, aged 28 years. Even if we ignore the discrepancies in the name and age, i.e., Ayesh Ali and Ayesha Ali; and

28 and 37 years, which should be 32 years, what we notice is that in Exhbits-1 and 2 i.e. upto 1970, the voter was Ayesha Ali, son of Ekad Ali or

Ayesh Ali, son of Ekadin but according to the petitioner, his grandfather was Eudel Sheikh, son of Toiab. However, in Exhibits-1 and 2 we do not find

any Eudel Sheikh, son of Toiab; rather the voter was Ayesha Ali or Ayesh Ali, son of Ekad Ali or Ekadin.

17. Exhibit-3 is stated to be a certified copy extract of the voters list of 1997 (Jamunamukh Constituency) in respect of Alal Uddin whom the petitioner

claimed to be his father. Alal Uddin was shown as son of Ekadin, aged 65 years. According to the version of the petitioner, Alal Uddin was his father

and Eudel Sheikh was his grandfather. Therefore, Ala Uddin in Exhbit-3 ought to have been shown as son of Eudel Sheikh but it was not so. That

apart, Alal Uddin was 65 years of age in 1997 which would mean that he was born sometime in the year 1932 in which event he was eligible to be a

voter in 1953. Therefore, in 1966 as well as in 1970, he should have been a voter along with his father Eudel Sheikh. But both Eudel Sheikh and Alal

Uddin were conspicuous by their absence in 1966 and 1970 voters lists.

18. Exhibits 4 and 5 are stated to be voter details of Ekadil Miya and Ayesh Ali obtained from the office of the State Coordinator, NRC but as

discussed above, these two documents have no relevance to the facts in issue.

19. Exhibit-6 is a certified copy extract of voters list of 2014 in respect of

Jamunamukh Constituency where one of the voters was Babul Islam, son of

Alal Uddin, aged 35 years. Likewise, Exhibit-7 is Elector Photo Identity Card where the electorâ??s name was Babul Islam and the relationâ??s

name was Ala Uddin. Exhbit-8 is said to be an Income Tax Pan Card where the Pan Card holder was Babul Islam and the other name was Alal

Uddin.

20. These documents were not proved in accordance with law. That apart, we have grave doubts about the genuineness of the Income Tax Pan Card

having regard to the provisions contained in Section-139 A of the Income Tax Act, 1961 read with Rule 114 of the Income Tax Rules, 1962. While

Section 139 A provides for the categories of persons who are required to obtain Pan Card, Rule 114 and Form 49 A lay down the procedure for

obtaining Pan Card. Without complying with the legal requirements as per the aforesaid provisions, sudden filing of Pan Card cannot be accepted and

relied upon. In Mustt. Rabiya Khatun â?"vs- Union of India, WP (C) No.4986/2016, decided on 09.02.2018, it was held as under:

â??17. Petitioner introduced Exhibit-5, a PAN card of the Income Tax Department wherein Rabiya Khatun was shown as related to Kurdus Ali and

her date of birth was mentioned as 10.9.1974.

17 A. Tribunal took the view that this PAN card could not be treated as trustworthy document. We concur with the view of the Tribunal for more

than one reason. Firstly, petitioner is not an income tax payee. There is no record of filing of return of income tax by the petitioner at any point of time.

That apart, petitioner appears to be from agricultural background. Agricultural income is exempt from the purview of the Income Tax Act, 1961.

Therefore, obtaining of PAN card by the petitioner appears to be quite unusual.

17 B. Secondly, this PAN card was not proved by tendering of evidence by the Income tax authority. Had a responsible officer of the income tax

department deposed before the Tribunal , it would have been clear as to whether petitioner had indeed made any application for obtaining the PAN

card and the particulars of such application. In the absence thereof, no credence can be given to such a PAN card.

17 C. Thirdly, this PAN card categorically mentioned the date 10.9.1974, which may be presumed to be the date of birth of the card holder. If the date

of birth was known to the petitioner, certainly the same should have been mentioned in the written statement as well as in the evidence-in-chief filed

by way of affidavit. But that was not done.

18. Therefore, this Exhibit-5 cannot be said to be a valid piece of evidence to establish that Kurdus Ali was a citizen of India and that Rabiya Khatun

was the daughter of Kurdus Ali and thereby she was a citizen of India.â??

20.1. Again, in Gulbhan Begum â?"vs- Union of India, WP (C) No. 583/2017, decided on 27.02.2018, this Court held as under:-

Â â??13. Exhibit-6 is stated to be a Pan Card issued by the Income Tax Department in the name of the petitioner where another name was

mentioned as Kashem Sheikh. A date i.e. 01.10.1970 was mentioned in the said Card bearing Permanent Account No. CIVPB8591E. Petitioner is not

an income tax payee. At least there is nothing on record to show filing of income tax return by the petitioner at any point of time. That apart, petitioner

and her husband Amir Khari appear to be agriculturist. Under the Income Tax Act, 1961, agriculture is exempt from income tax. Therefore, when

such a proceedee suddenly places on record a Pan Card stated to have been issued by the Income Tax Department and relies upon the same as proof

of citizenship, it has to be examined with great deal of care, caution and circumspection. The authority which allegedly issued the Income Tax Pan

Card in favour of the petitioner was not brought to the Tribunal to prove the fact that the petitioner had applied for the Income Tax Pan Card and that

Income Tax Department had as a matter of fact issued the Pan Card to the petitioner. In the absence thereof, no reliance can be placed on exhibit-VI

as a valid piece of evidence.â??

20.2 In so far Exhibit-7 Elector Photo Identity Card is concerned, besides not being proved, it is a post 25.03.1971 document. Besides, merely

producing such an identity card in the absence of supporting evidence would not be proof of citizenship.

20.3. But the crucial point is that even if we take the contents of these documents at their face value, it only shows that Babul Islam was the son of

Ala Uddin or related to Alal Uddin. But Alal Uddinâ??s presence in India is traceable only to Exhibit-3 i.e. 1997. Beyond 1997, the linkage is

obfuscated.

21. Exhibit-9 is a driving license in the name of Babul Islam. A driving license is not and cannot be a proof of citizenship.

22. In so far Exhibit-10 is concerned, it is an electricity bill in the name of Babul Islam. It is neither here nor there. An electricity bill cannot be a proof

of citizenship. Even then, in Exhibit-10, Babul Islam was shown as resident of Khakanjuri whereas in Exhibits-6 to 9, Babul Islam was a resident of

village Bhelowguri. Such discrepancies have only reinforced the unacceptability of the said documents.

23. Petitioner tried to explain the discrepancies in the name of father and grandfather by swearing an affidavit on 30.01.2015 which was marked as

Exihibit-11. Such a self serving suo moto affidavit is neither proof nor evidence having regard to the provisions contained in Sections 1 and 3 of the

Indian Evidence Act, 1872 and Order XIX Rule 1 of the Code of Civil Procedure, 1908.

24. Exhibit-12 is a Gaonburah certificate dated 24.10.2015 certifying that Babul Islam was the son of late Alal Uddin. In the absence of the certificate

being proved by the Gaonburah by deposing before the Tribunal and by production of the original record, such a certificate would hardly have any

probative value. Moreover, there is unauthorized use of the State Emblem of India by the Gaonburah in the certificate in violation of the mandate of

the State Emblem of India (Regulation of Use) Rules, 2007 framed under the State Emblem of India (Prohibition of Improper Use) Act, 2005

rendering the same inadmissible in evidence. A Gaonburah is not authorised to use the State Emblem of India in any manner. Such unauthorized use of

the State emblem of India would render the certificate issued by the Gaonburah not only inadmissible in evidence but also untenable.

25. In so far Exhibit-14 is concerned, it is a Jamabandi for surveyed villages wherein at serial No.23, name of Babul Islam, son of late Alal Uddin

appeared as pattadar. But as per remarks in the remarks column, petitionerâ??s name was substituted as a pattadar following order of the Circle

Officer dated 16.11.2013. Therefore, this document in no way can come to the assistance of the petitioner. That apart, as noticed above, this

document only links the petitioner with Alal Uddin but Alal Uddin is traceable in India only to 1997 and not beyond.

26. Net result of the above discussion is that the petitioner had failed to establish his linkage with an Indian parent or grandparent relatable to a period

prior to 25.03.1971 which is the cut off date for identification of foreigners in the State of Assam as per Section -6 A of the Citizenship Act, 1955, as amended. Thus, petitioner failed to discharge his burden under Section 9 of the Foreigners Act, 1946 to prove that he was not a foreigner but a citizen

of India.

27. In so far the additional affidavits are concerned, it is a settled principle that materials which were not produced before the Tribunal cannot be gone

into in a proceeding before the High Court examining the legality and correctness of the Tribunalâ??s order. Even then, on a careful consideration,

we are of the view that such affidavits and documents in no way improves the case of the petitioner.

28. For all the aforesaid reasons, we find no merit in the writ petition and accordingly the writ petition is dismissed. Interim order passed earlier stands

vacated.

29. Registry to send the LCR forthwith and inform the concerned Foreignersâ?? Tribunal, Deputy Commissioner and the Superintendent of Police

(Border) for doing the needful.

30. A copy of this order may be furnished to the learned Standing Counsel, Election Commission of India and State Coordinator, NRC.