

(2014) 03 GAU CK 0064
In the Gauhati High Court
Case No : Writ Petition (C) No. 5474 of 2013

Md. Jainuddin Ali @ Joinuddin Ali @ Joinuddin and Others	APPELLANT
Vs	
The Union of India and The State of Assam	RESPONDENT

Date of Decision : 13-03-2014

Acts Referred:

Citizenship Act, 1955 — Section 6A(1)(d)
Constitution of India, 1950 — Article 226 355
Evidence Act, 1872 — Section 101 106
Foreigners Act, 1946 — Section 9
Foreigners Order, 1948 — Section 9

Citation : (2014) 2 GLD 90

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

Bench : Single Bench

Advocate : M.U. Mahmud, for the Appellant; M. Bhagabati, CGC and Mr. Junm Laskar, GA, Assam, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The petitioner, who has been declared to be a foreigner (illegal Bangladeshi migrant) by the Foreigners Tribunal ? III, Barpeta, Assam, vide order dated 30/10/2008 in FT Case No. 256 (III)/2012 (Ref. Case No. 69/2004 (State of Assam Vs. Jainuddin Ali), has filed the instant writ petition challenging the said order. As has been claimed in the writ petition, the petitioner No. 1 is the grandson of late Faiz @ Foaz Fakir and son of Late Hafejuddin Ali @ Habej @ Habijuddin. It has been stated that his father's name appeared in the voter list of 1966 and 1970 as Habez Uddin. It has further been stated that the petitioner's name also appeared along with his mother and wife in 1989. Referring to the voter list of 1997, 2005 and 2010, the petitioner has contended that his name appeared in the said voters' lists. The petitioner has also referred to the Special Family Identity Card stated to be in the name of his father. He has also referred to the certificates issued by the Gaonbura and the PAN Card in the name of the petitioner No. 1.

2. As has been held by the Division Bench of this Court in Moslem Mondal and Others Vs. Union of India (UOI) and Others, the writ proceeding is not a substitute for a proceeding before the Tribunal. If certain new materials are brought in the writ proceeding not forming part of the proceeding before the Tribunal, it has been held in the said judgment that the Writ Court cannot examine the said new materials/evidence. It has been held that the Writ Court does not enjoy original jurisdiction to determine the citizenship of a person on the basis of the new materials brought on record in the writ proceeding. It has further been held that the Writ Court can only examine those materials which were placed before the Tribunal.

3. In the instant case, the petitioner responding to the reference before the Tribunal entered appearance and adduced evidence, both oral and documentary. The petitioner examined 3 (three) witnesses, namely, Witness No. 1 (petitioner himself); Witness No. 2 (one Shri Rajeswar Das) and Witness No. 3 (one Shri Shah Alam). The petitioner in his written statement submitted before the Tribunal contended as follows:-

1. That there is no cause of action for filing the case against the 2nd party as foreigners.

2. That the name of the father of the 2nd party has been contained in the Voter List of 1966 within 52 No. Bagbhar LAC vide Sl. No. 43, house No. 16, Part No. 20 at village Bagbhar Pathar in the district of Kamrup (Assam).

3. That the name of the 2nd party has been covered in the voter list of 2005 within 42 No. Pathacharkuchi LAC vide Sl. No. 650, House No. 11 (B) Part No. 111 at village Titka Golia under the Barpeta district.

4. That the name of the wife of the 2nd party has been inscribed in the voter list of 2005 vide Sl. No. 651, H/ No. - 11(B), Part No. 111 at village Titka Golia in the district of Barpeta (Assam).

5. That the name of the father of Mohiron Begum has been inscribed in the voter list of 1965 within 42 No. Pathachar Kuchi LAC vide Sl. No. 7, H/ No. 2, Part No. 82 at village Pathsala.

6. That the 2nd party changed his residence to Village Narayanguri of Mouza-Gobardhana and lived there permanently.

7. That against the 2nd party changed his residence to village Titka Golia of Hastinapur Mouza Sub-Division Pathsala of Barpeta district and has been permanently living there with his family.

8. That above and over all the 2nd party has some land documents which proof the existence of the family of the 2nd party in Assam.

It is therefore prayed that your honour would be pleased to reject the complain against the 2nd party as foreigner and declare him as the bona fide citizen of India.

All the statements made above are true and correct to the best of my knowledge and beliefs, hence I put my thumb here unto it on the 29th Oct' 07 at Barpeta.

4. In support of the aforesaid contention, the petitioner produced only four documents, namely, voter list of 1966 containing the name of one Habez Uddin aged 53 years; voter list of 1965 containing the name of one Sukur Ali and the voter list of 2005 containing the name of Md. Jainuddin Ali son of Hafejuddin aged 50 years along with Mrs. Mohiron Begum wife of Joinuddin Ali aged 32 years. He also produced two certificates dated 03/09/2007 and 05/10/2007 issued by the respective Gaonbura of Charge No. 1 Mouza Gobardhana, District p- Baksa and Charge No. 1 Village Titka Garia Mouza Sarih. By the said two certificates, the respective Gaonburas" have certified the petitioner to be a resident of the particular area for the last 7/8 years and that the petitioner is known to them and further that he had married Mohiron Begum. The aforesaid documents were exhibited and marked as Ext. A to E.

5. I have heard Mr. M.U. Mahmud, learned counsel for the petitioner. I have also heard Mr. M. Bhagabati, learned CGC and Mr. J.U.N.M. Laskar, learned State Counsel appearing for the respondents. I have also perused the entire materials on record. My findings and conclusions are as follows.

6. As has been held by the Apex Court in Sarbananda Sonowal Vs. Union of India (UOI) and Another, , there is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth, (ii) place of birth, (iii) name of his parents, (iv) their place of birth and citizenship. Sometimes the place of birth of his grand parents may also be relevant like u/s 6A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authority of the State. As per the provisions of Section 9 of the Foreigners act, 1946, the burden of proof that he is an Indian citizen is on the proceeded. In the aforesaid case, dealing with the "Burden of Proof", the apex Court in the aforesaid case of Sarbananda Sonowal, has made the following observation.

18. Though in a criminal case the general rule is that the burden of proof is on the prosecution but if any fact is especially within the knowledge of the accused, he has to lead evidence to prove the said fact. In Shambu Nath Mehra Vs. The State of Ajmer, it was held as follows:

Section 106 is an exception to S. 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and S. 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially"

stresses that. It means facts that are preeminently or exceptionally within his knowledge.

In *Collector of Customs, Madras and Others Vs. D. Bhoormall*, proceedings were initiated u/s 167(8)(c) of the Customs Act for confiscation of contraband or smuggled goods and it was observed:

..... Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the accused, it is not obliged to prove them as part of its primary burden.

..... On the principle underlying S. 106 Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty.

In *State of West Bengal Vs. Mir Mohammad Omar and Others etc.*, it was held that the legislature engrafted special rule in Section 106 of the Evidence Act to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. This principle was reiterated in *Sanjay @ Kaka Vs. The State (NCC.T. of Delhi)*, and *Ezhil and Others Vs. State of Tamil Nadu*,

In *R. v. Oliver*, 1943 All ER 800, the accused was charged with having sold sugar as a whole-sale seller without the necessary licence. It was held that whether the accused had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him. It was further held that in the circumstances of the case the prosecution was under no necessity to give prima facie evidence of non-existence of a licence. In this case reference is made to some earlier decisions and it will be useful to notice the same. In *R. v. Turner*, (1916) 5 M & S 206 : 14 Digest 430, the learned Judge observed as follows:

I have always understood it to be a general rule, that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative.

In *Williams v. Russel*, (1993) 149 LT 190, the learned Judge held as under:

On the principle laid down in *R. v. Turner* and numerous other cases where it is an offence to do an act without lawful authority, the person who sets up the lawful authority must prove it and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute.

19. Section 9 of the Foreigners Act regarding burden of proof is basically on the same lines as the corresponding provision is in U.K. and some other Western nations and is based upon sound legal principle that the facts which are peculiarly within the knowledge of a person should prove it and not the party who avers the negative.

7. The issue relating to citizenship, particularly in Assam, will have to be considered keeping in mind that there is large scale illegal migration of Bangladeshi nationals to Assam. In this connection, the Apex Court has made the following significant observation in paragraph 38 of Sarbananda Sonowal (Supra).

38. This being the situation there can be no manner of doubt that the State of Assam is facing "external aggression and internal disturbance" on account of large scale illegal migration of Bangladeshi nationals. It, therefore, becomes the duty of Union of India to take all measures for protection of the State of Assam from such external aggression and internal disturbance as enjoined in Article 355 of the Constitution. Having regard to this constitutional mandate, the question arises whether the Union of India has taken any measures for that purpose.

45. As mentioned earlier, the influx of Bangladeshi nationals who have illegally migrated into Assam pose a threat to the integrity and security of north-eastern region. Their presence has changed the demographic character of that region and the local people of Assam have been reduced to a status of minority in certain districts.....

8. In the instant case, the learned Tribunal appreciating the evidence on record has held the petitioner to be a foreign national who illegally entered Assam after the cut-off date i.e. 25/03/1971. Such findings of fact cannot be lightly interfered with exercising writ jurisdiction unless it is shown to be a perverse finding or the finding being not based on the evidence on record. The writ Court exercising extra ordinary jurisdiction under Article 226 of the Constitution of India cannot sit on appeal over the findings of facts recorded by the Tribunal. Needless to say that this Court exercising its jurisdiction under Article 226 of the Constitution of India cannot re-appreciate the evidence produced before the Tribunal and on the basis of such re-appreciation of evidence arrived at a finding different from that recorded by such Tribunal. The set and laid down principle is that a question of fact once decided by the Tribunal on the basis of evidence on record, it is not appropriate for the High Court under Article 226 to re-appreciate the evidence and come to a different conclusion.

9. Keeping in mind the above principles, it is to be seen as to whether the findings arrived at by the Tribunal on the basis of evidence on record can be said to be perverse or devoid of appreciation of evidence on record or there is any error of law which has apparent on the face of the record. It is a well established principle that a finding of fact cannot be challenged under Article 226 on the ground that the evidence before the Tribunal was insufficient or inadequate to sustain the findings, as a writ Court is not a Court of appeal. So also errors in

appreciation of documents or affidavits, or errors in drawing inferences, or omission to draw inferences; in other-words, errors of a Court of appeal only can examine and correct, are not amenable to correction in a certiorari proceeding. But, if it is shown that in recording the said findings, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which had influenced the impugned findings, the same can be assailed in a writ petition.

10. The records have revealed that the reference against the petitioner was on the basis of the enquiry conducted by the Superintendent of Police, Barpeta. During enquiry, the petitioner was named as Joinuddin Ali, S/o. Habijuddin Ali. In the statement recorded during the enquiry, the petitioner allegedly stated that he had come to Assam in 1986 from Bangladesh and that his birth place as in the district of Moimonsing under PS and Village Tangail. He could not produce any document in support of his Indian citizenship. Another witness examined during the said enquiry was Totamia who also in his deposition stated that the petitioners had come to India from Bangladesh and that he could not produce any document in support of his Indian citizenship. Another witness namely, Sekendar Ali also stated in the same line. In the relevant form and the report, the petitioner was described as Md. Jainuddin S/o. Late Habejuddin Ali. In the notice issued from the Tribunal also he was named as Jainuddin Ali S/o. Late Habijuddin Ali. In the written statement also the petitioner named his father as Habejuddin. However, in the writ petition he has named his father as Habejuddin Ali @ Habej @ Habijuddin. The petitioner himself has named him as Md. Jainuddin Ali @ Joinuddin Ali @ Jainuddin.

11. The learned Tribunal on the basis of the materials available on record has held thus:-

9. After perusal of the written statement and evidence adduced by the opposite party No. 1 it appears that the case of his is that he is Indian citizen by birth. He was born at village Narayanguri and his father cast vote 3-4 times there and he also expired in that village 25/30 years ago. The Opposite party No. 1 has also disclosed his age in his evidence as 50 years. If that be so, he was born in the year 1958 and his father died during the period from 1978-1983 then his father's name would have been incorporated in the voter lists from 1958 to 1983 at village Narayanguri. The opposite party No. 1 has exhibited one voter lists of 1966 vide Ext-"A" claiming that his father's name appeared in that voter list. But it appears that this voter list (Ext-A) is of the village of Bagharpathar under Baghar Police Station, whereas the opposite party No. 1 has all along claimed in his evidence that his father had been living at village Narayanguri under Barpeta Road Police Station till his death. There is of no explanation as to why his father's name incorporated in the voter list of village Bagharpathar whereas he was a resident of village Narayanguri. Mere resemblance of name in the voter list of 1966 i.e. Ext ? "A" does not mean that the person concern is the father of the opposite party No. 1. Moreover the opposite party has not produced any other

voter list of village Narayanguri in which his father's name incorporated. There is also of no explanation as to why in none of the voter list of village Narayanguri, the name of his father is included although as per evidence his father had been living at village Narayanguri till death. So, I am of the view that the opposite party No. 1 picked up one voter list, find out name resembling his father, obtained certified copy of the same and exhibited it in the proceeding claiming to be his father, which is not at all believable.

10. Another claim of the opposite party No. 1 is that his name along with wife incorporated in the voter list of 2005. I have gone through the voter list of 2005 i.e. Ext ? "C" in which name of the opposite party No. 1 appeared at Serial No. 650 and his age was recorded as 50 years. If that be so opposite party No. 1 was eligible as a voter in 1976 at his age of 21 years. The opposite party No. 1 is quite silent as to why in none of the voter list prior to 2005 his name is not included though his age was recorded in that voter list as 50 years. From 1976 to 2005 is a period of long 32 years. Had the opposite party No. 1 been Indian citizen and he was born in Assam and has been living at village Narayanguri under Barpeta Road Police Station, Assam, they could have shown any voter list covering this period of long 32 years. The 2005 voter list of no consequence unless the linkage is established to pre 25/03/71 period in India.

11. It has already been discussed that the opposite party No. 1 has miserably failed to establish that his father's name incorporated in 1966 voter list and hence it is crystal clear that there is no linkage to per 25/03/1971 period in India. Moreover, though the opposite party stated in evidence that his father had landed properties at village Narayanguri but he could not produce any such document in support of his claim.

12. The opposite party No. 1 has averred in written statement that his father-in-law's name is Md. Sukur Ali of village Titka Garia and his name incorporated in the voter list of 1965. During the proceeding he has exhibited and proved the voter list of 1965 vide Ext.-B in which Sukur Ali's name appeared at Serial No. 7, House No. 2, Part No. 82. Local Gaonburah of village Titka Garia also in his certificate dtd. 05/10/07 i.e. Ext ? E clearly stated that Sukur is a permanent resident of that village. So, it shows that Sukur Ali has been permanently residing at Village Titka Garia since before 1966.

12. As has been discussed by the learned Tribunal in the impugned judgment, the case projected by the petitioner before the Tribunal is that he was born at Village Narayanguri and his father also cast votes 3-4 times and he expired in that village 25/30 years ago. The petitioner also disclosed his age as 50 years. It has rightly been held by the learned Tribunal, if that be so the petitioner having born in the year 1958 and his father having died during the period from 1978-1983, his and his father's name ought to have been appeared in the voter list of the relevant period, if the petitioner was born in 1958 he has attained the age of majority during the period from 1958 to 1983, so as to cast vote in the year 1979. However, except the voter list of 2005 he also could not produce any

voter list and so also in case of his father whose name allegedly appeared in the voter list of 1966. If the petitioner is a Indian citizen, by birth, he could have produced the relevant documents instead of placing reliance only on the aforesaid five documents so as to establish the same. The learned Tribunal has also appreciated the oral testimony of the D.Ws. As to what evidence adduced by the DW 2 and DW-3 have been referred to above. Their testimony does not help the case of the petitioner to prove that he is an Indian citizen, by birth. In the testimony of DW-1 i.e. the petitioner had referred to the aforesaid exhibits only. In the cross examination, although he had stated that his father had cast vote at village Narayanguri 3-4 times but the only one voter list that was produced pertains to Bagbhar Pathar. All these aspects of the matter have been discussed by the learned Tribunal in detail.

13. On perusal of the impugned order in reference to the evidence on record, it cannot be said to be a case of any wrong appreciation of evidence and/or record of perverse finding opposed to the evidence on record.

14. Above being the position, this Court exercising writ jurisdiction, cannot interfere with the same. As has been held by the Apex Court in L.I.C. of India and Another Vs. Ram Pal Singh Bisen, admission of documents in evidence does not amount to its proof, in other wards, merely making of exhibit or a document does not dispense with its proof, which is required to be done in accordance with law. The documentary evidence adduced by the petitioner was also required to be proved in accordance with the provisions of the Evidence act which he failed to do. Under the Law of Evidence it is necessary that contents of documents are required to be proved either by primary or by secondary evidence. At the most, admission of documents may also to admission of contents but not its truth. Apart from the aforesaid position of the case, the documents were also not produced and marked as required under the Evidence Act. Needless to say that the contents of the documents cannot be proved by merely filing in a Court.

15. For all the aforesaid reasons, I do not find any merit in the writ petition and accordingly it is dismissed, without however, any order as to costs.

16. Registry may transmit the case records to the Tribunal.

17. The Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta are directed to take appropriate action in the matter towards deportation of the petitioner from India and deletion of his name from the voter list, if found to have entered.

18. Let copies of this judgment and order be furnished to the Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta. Another copy be sent to the Union of India in the Ministry of Home. An extra copy of this judgment and order may also be furnished to Mr. N. Upadhyay, learned State Counsel for his necessary follow up action.

19. List after one month for furnishing reports by the Superintendent of Police

(B), Barpeta and the Deputy Commissioner, Barpeta.

20. The Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta are directed to take appropriate action in the matter towards deportation of the petitioner from India and deletion of his name from the voter list, if found to have entered.

21. Let copies of this judgment and order be furnished to the Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta. Another copy be sent to the Union of India in the Ministry of Home. An extra copy of this judgment and order may also be furnished to Mr. N. Upadhyay, learned State Counsel for his necessary follow up action. List after one month for furnishing reports by the Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta.