
(2009) 01 GAU CK 0059
In the Gauhati High Court

Mukshed Ali @ Makshed Ali	Vs	APPELLANT
State of Assam and Others		RESPONDENT

Date of Decision : 23-01-2009

Acts Referred:

Constitution of India, 1950 — Article 19, 226

Citation : (2009) 5 GLR 82 : (2009) 1 GLT 812

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

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—Identifying his father by four names, the petitioner, who has been declared a foreigner (Bangladeshi national), by the Illegal Migrants (Determination) Tribunal and affirmed by the Appellate Tribunal, has invoked the writ jurisdiction of this Court towards assailing the orders of the Tribunal. The matter is pending before this Court for the last about 5 years. The proceeding against the petitioner was initiated by way of a reference made in the year 2000 and from such initiation it is now about 9 years, the matter has not attained its finality. In the process, the petitioner, even after being declared as a foreigner is freely roaming around in the Indian Soil with the voting right.

2. I have heard Mr. B. Islam, learned Counsel led by Mr. A.M. Majumdar, learned senior Counsel for the petitioner as well as Ms. R. Chakraborty, learned Additional Senior Govt. Advocate, Assam. I have also gone through the records of the lower Tribunal as well as the Appellate Tribunal. On being pointed out to the learned Counsel for the petitioner that there being concurrent findings of fact, unless it is shown to be a case of no evidence against the petitioner or the findings of both the Tribunals to be perverse, there is very limited scope of interference exercising the power of judicial review under Article 226 of the Constitution of India, the learned Counsel for the petitioner once again referred to the same very facts and findings on the basis of which, both the tribunals have returned the findings against the petitioner. In the writ petition, the

petitioner has named his father by four names, although the same was not the case in the proceedings before both the Tribunals.

3. IMDT Case No. 3531/2000 was registered against the petitioner by the IMDT, Nalbari on the basis of the reference made by the Superintendent of Police, Nalbari as per the provisions of the then IMDT Act, 1983, since struck down by the Apex Court in Sarbananda Sonowal Vs. Union of India (UOI) and Another, At the time of making the reference, the petitioner was 30 years of age. During investigation by the police, the petitioner confessed that he was born at village Gobindabari in the district of Maimansingh, Bangladesh and that he had migrated to Assam (India) through Golokganj. The petitioner made the particular statement on 3.4.2000. As per his statement he had migrated to Assam in the year 1984 due to economic condition. Two other witnesses namely Md. Jainal Abedin and Md. Sarbat Ali supported the case of the prosecution stating that the petitioner could not produce any document in support of his Indian citizenship. Their statements were also recorded on 3.4.2000. It is on the basis of such investigation, necessary report was furnished, on the basis of which the particular reference was made to the IMDT.

4. The petitioner duly appeared before the Tribunal and submitted written statement on 12.4.2002 stating that the investigating agency falsely made the reference. According to the written statement, the petitioner was born at village Kaladdia under P.S. Mukalmua, in the district of Nalbari in the year 1974 and that he had been living in his present address, i.e., village Batamara under P.S. Mukalmua in the same district. Alongwith the written statement the petitioner enclosed photocopy of the certificate dated 8.4.2002 certifying the petitioner to be a resident of village Batamara under P.S. Mukalmua in the district of Nalbari. In the certificate the name of the father was indicated as Md. Taizuddin Ali. The petitioner also enclosed alongwith the written statement, a photocopy of Annual Khiraj Patta No. 39 pertaining to Sri Kusumuddin and Tajimuddin. The said patta was for the year 1962-63. In both the documents, Md. Taizuddin was not described by any other name as alias. In all the records of the Tribunal the father of the petitioner has been described as Taizuddin and not Tajimuddin. Alongwith the written statement, the petitioner also enclosed the photocopy of the voter list of 1966, in which there is mention of one Taizuddin at serial No. 119.

5. The case of the petitioner will have to be considered on the basis of the written statement and he cannot be allowed to develop his case thereafter which the petitioner has tried to do by naming his father in four names which are Md. Taizuddin @ Taijuddin @ Tajimuddin @ Aijuddin. The lower Tribunal passed the impugned judgment and order dated 11.4.2003 on the basis of the evidence adduced by both the parties. Be it stated here that the Lower Tribunal examined three prosecution witnesses including the investigating officer who had conducted the enquiry and furnished report that the petitioner is a Bangladeshi national. The petitioner declined to cross-examine the I.O., (PW1) who was examined on 14.8.2002. However, he cross-examined the other two witnesses

namely Sarbat Ali (PW2) and Jainal Abedin (PW3) who were examined on 14.8.2002 and 17.10.2002 respectively. The petitioner declined to adduce any oral evidence. Thus the only evidence produced by the petitioner before the Lower Tribunal were aforesaid certificate dated 8.4.2002 (Ext-A); the Annual Khiraj Patta No. 39 pertaining to the year 1962-63 (Ext-B) and the voter list of 1966 containing the name of Taizuddin at serial No. 119 (Ext-C). All the documents were photocopies. It is on the basis of these documents, the petitioner wanted to prove his citizenship of India.

6. As stated above, at the time making the reference in the year 2000, the petitioner's age was 30 years and, thus, was a major. Had he been an Indian citizen, his name would have been included atleast in the voter lists, if not in other documents. There is also no explanation as to why his father's name was included only in the voter list of 1966 and not before and thereafter. If the 1966 voter list is to be believed Md. Taizuddin whom the petitioner claims to be his father was 28 years of age and thus he was eligible to be a voter even prior to 1966. The Annual Khiraj Patta No. 39 is in the name of Kusumuddin and Tajimuddin and not in the name of Taizuddin. It has rightly been held by both the Tribunals that the petitioner with the sole purpose of establishing link to his father produced the said patta as the name Tajimuddin, he thought resembles to Taizuddin and now coming to the writ court he has named his father by four different names taking advantage of the word/term "alias".

7. Being aggrieved by the order dated 11.4.2003 declaring the petitioner to be a Bangladeshi national and an illegal migrant, the petitioner preferred Appeal case No. 50/2003. In the appeal filed on 13.8.2003 and also in Misc. Case No. 48/2003 filed for condonation of delay, the petitioner described his father as Taijuddin and never stated that he was also known as Tajimuddin. No alias was put against the name of Taijuddin. In the grounds of appeal, there was no indication that the petitioner's father was also known as Tajimuddin. In fact in the appeal except mentioning the voter list of 1966, in which name of Md. Taijuddin appears at serial No. 119, it was never the contention of the petitioner that his father was also known as Tajimuddin and the Annual Khiraj Patta No. 39 was issued to his father in the name of Tajimuddin.

8. In the appeal, it was contended in ground No. 2 that the Tribunal passed the impugned order ex-parte and no notice was served upon the appellant/writ petitioner to file W.S. or for producing Witnesses. On the other hand in ground No. 7, it was stated that the petitioner duly appeared before the Tribunal and submitted documents in support of his citizenship and nationality. In ground No. 8, it was stated that the Tribunal did not give any opportunity to the engaged counsel of the petitioner to cross-examine the prosecution witnesses and that the depositions of the witnesses were recorded behind the back of the petitioner.

9. Above grounds urged in the appeal are totally false inasmuch as the petitioner not only was served with the notice but he also appeared before the Tribunal through his engaged counsel. As noted above, the petitioner duly cross-

examined PW2 and 3 namely Md. Sarbat Ali and Md. Jainal Abedin. So far as PW1, I.O., is concerned, the petitioner did not cross-examine him. It will be pertinent to mention here that both PWs1 and 2 were examined on the same date, i.e., 14.8.2002 and the petitioner while cross-examining the PW2 did not cross-examine the PW1. Thus, the entire statement of the PW1 in support of his report and exhibits reflecting that the petitioner is a Bangladeshi national and migrated to Assam illegally after the cut-off date, i.e., 25.3.1971 through Golokganj and that the petitioner was a resident of the particular village in the district of Maimansingh in Bangladesh and also that he could not produce any document in support of his Indian citizenship has gone in evidence unrefuted.

10. The above revelations from the records of the Tribunals will go to show that the petitioner made false statement before the Appellate Tribunal that he was not given opportunity to cross-examine the witnesses and to adduce defence evidence. In fact the petitioner, in spite of giving several opportunities after 14.8.2002, declined to adduce any defence evidence. By order dated 17.10.2002, on which date PW3 was examined and cross-examined, the matter was fixed on 17.12.2002 for defence evidence. Although, the petitioner appeared on that day but he did not adduce any defence evidence. Only prayer made by the petitioner was to fix the matter alongwith IMDT Case No. 3532/2000 as the person involved in the said case was related to him. The prayer was allowed fixing the matter on 4.1.2003. On 4.1.2003, the petitioner appeared before the Tribunal, but as recorded in the order sheet he declined to examine any defence witness. Thereafter the matter was fixed on 29.1.2003, 28.3.2003, 10.4.2003 and finally 11.4.2003, on which date the Lower Tribunal finally decided the issue. Thus, it will be seen that the petitioner was given all the opportunities to defend his case, but before the Appellate Tribunal he took recourse to falsehood, which finds mention in the impugned judgment and order dated 3.2.2004 passed by the Appellate Tribunal in Appeal Case No. 50/2003.

11. In the writ petition, the petitioner has blamed his engaged advocate by making the statement that due to wrong guidance of the Advocate, he did not succeed before the Tribunal. However, he has not spelt as to what was that wrong guidance. In the writ petition, the petitioner has made voluminous statement and has annexed some documents which he never made and produced before the Lower Tribunal and the Appellate Tribunal. Needless to say that the case of the petitioner will have to be decided on the basis of the reference made and the evidence the petitioner had produced before the Tribunal at the first instance. He cannot be allowed to develop his case in the writ proceeding. It will be pertinent to mention here that apart from the endeavor on the part of the petitioner to develop his case by filing certain documents which are of post 25.3.1971 period, there is no virtual challenge to the orders of the Tribunal and the Appellate Tribunal. It is in this context, on being asked, as to on what grounds the orders of the Tribunals are not sustainable, the learned Counsel for the petitioner could not point out any except referring to the documents annexed to the writ petition, which never formed part of the records

of the Tribunal and the Appellate Tribunal. In the process, the petitioner, as noted above, has also named his father by four different names.

12. The petitioner, a Bangladeshi national has no right to move this Court for enforcement of his alleged fundamental right on a petition containing misleading and inaccurate statements. The petitioner has not made full and true disclosure of the facts in the writ petition, but has, in order to put forward his case of a violation of the principles of natural justice chosen to suppress the material facts. As a general rule, suppression of material fact by a litigant disqualifies him from obtaining any relief. This rule have been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. The petitioner is not a citizen of India. He is, therefore, a foreigner as defined in the Foreigners Act. Not being a citizen, he is clearly not entitled to any fundamental right guaranteed by Article 19 of the constitution. He has does no right to remain within the territories of India.

13. The Appellate Tribunal noticing all the relevant facts has dismissed the appeal by its impugned judgment and order dated 3.2.2004. As discussed above, it has rightly been held by the Appellate Tribunal that it is wrong to say that no opportunity was giving to the appellate/writ petitioner to adduce evidence in defence. In fact, opportunity was given, but the petitioner himself declined to adduce evidence in defence. The Appellate Tribunal, as discussed above, has also noted the contradiction relating to the allegation made against the engaged counsel. No such ground was urged in the appeal. The Appellate Tribunal has duly discussed the evidence on record. As observed by the Tribunal, admission is the best evidence against a person making it unless it is successfully withdrawn or proved to have been made erroneously. In the grounds of appeal the admission on the part of the petitioner before the I.O., that he had migrated to Assam through Golokganj after the cut-off date, i.e., 25.3.1971 was not even denied and thus, it has been rightly observed by the Appellate Tribunal that such admission operates as an estoppel and acquiescence.

14. The Appellate Tribunal in its impugned judgment and order has discussed the projection made by the petitioner that his father was also known as Tajimuddin and concurred with the finding of the Lower Tribunal that the particular "patta" did not belong to his father. The Appellate Tribunal has also discussed the inadequacy of the documentary evidence adduced by the petitioner. As against his own statement before the 1.O., that he migrated to Assam from Bangladesh through Golokganj in the year 1982, he claimed before the Lower Tribunal that his father's name was included in the voter list of 1966. There is no explanation as to why his father's name did not appear in any one of the voter list before of after 1966. The enquiry officer had no animus against the petitioner to state a wrong thing and to depose falsely against the petitioner.

15. The petitioner declared his age as 36 years before the Appellate Tribunal, but in the writ petition, he has declared his age as 27 years as on 19.4.2004. The appeal was filed on 13.8.2003. Up to the stage of the Appellate Tribunal, the

petitioner never contended that his name was included in any of the voter list, although he attained majority 15 years back, which aspect of the matter clearly finds mention in the order of the Tribunal. In the writ petition, the petitioner has enclosed certain typed copies of documents, one of which is the purported school certificate issued in favour of the petitioner, certifying that the petitioner was a student of the particular school in the year 1985 and that he was 8 years 1 month as on 31.1.1985. If that be so his age would be of 27 years as of 2004, but in the appeal proceeding, the petitioner disclosed his age as 36 years as on 14.8.2003. It is with this kind of solemn affirmation, the petitioner has invoked the writ jurisdiction preceded by the two proceedings one before the original Tribunal and another before the Appellate Tribunal, to assert his Indian citizenship by birth. It was never the case of the petitioner before either of the Tribunals that he was a school student. Falsity with the sole endeavor to develop the case towards establishing Indian citizenship stares on the face of it.

16. For all the aforesaid reasons, this third round of litigation initiated by the petitioner invoking the writ jurisdiction also fails like that of earlier two proceedings before the original Tribunal and the Appellate Tribunal. It is an irony of the procedural practice being followed in this country that a Bangladeshi national even after declaring him to be so, is roaming around in Indian soil freely even with the right of franchise. Unless some strong action is taken in such a matter by the power that be, the fast changing demographic pattern of Assam reducing the indigenous people to minority will attain its finality in near future.

17. The writ petition is dismissed. The S.P., Nalbari is directed to take the petitioner into custody and to detain him till such time he is deported to Bangladesh. Let compliance report be furnished by the S.P., Nalbari on or before 28th February, 2009. The matter shall be listed in the 1st week of March, 2009.

18. Bring this judgment and order to the notice of the Deputy Registrar (J). Let copies of this judgment and order be furnished immediately to Ms. R. Chakraborty, Additional Senior Govt. Advocate, Assam for the appraisal of the authority. In addition, copy may also be sent to the S.P., Nalbari.