
(2016) 11 GAU CK 0091
In the Gauhati High Court
Case No : WA No. 184 of 2016

Rahim Ali @ Rahimuddin

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-11-2016

Acts Referred:

Foreigners Act, 1946 — Section 9

Citation : (2016) 6 GauLJ 723 : (2016) 5 GauLT 315

Hon'ble Judges : Ujjal Bhuyan and Mrs. Rumi Kumari Phukan, JJ.

Bench : Division Bench

Advocate : Mr. H.R.A Choudhury, Mr. A.T. Sarkar and M.D.K. Rahman, Advocates, for the Petitioner; Mrs. G. Sarma, C.G.C. and Mr. R. Dhar, GA, Assam, for the Respondent Nos. 2 and 3

Final Decision : Dismissed

Judgement

Mrs. Rumi Kumari Phukan, J. - Heard Mr. H. R. A. Choudhury, learned senior counsel for the appellant, Ms. G. Sarma, learned Central Govt. Counsel and Mr. R. Dhar, learned Govt. Advocate, Assam.

2. This appeal is directed against the impugned judgment and order dated 25.8.2015 passed by the learned Single Judge in W.P.(C)No.4071/2013, whereby the learned Single Judge upheld the order dated 28.6.2013 passed by the learned Foreigners Tribunal-III, Barpeta in FT Case No.04(III)/2013 (Ref.IMDT Case no. 1595/01 (State v. Rahim Ali @ Rahimuddin), by the aforesaid order the appellant has been declared to be a foreigner of post 25.3.1971 stream.

3. The Superintendent of Police (B) Barpeta doubting the citizenship of the appellant made a reference to Foreigners Tribunal-III, Barpeta and accordingly FT Case No.04 (III)/2013 (Ref. IMDT Case no.1595/01) was registered against him and the learned Tribunal served a notice upon the appellant to appear before the Tribunal to prove his Indian nationality. In response to the notice he appeared before the Tribunal and filed written statement supported by an

affidavit enclosing all the relevant documents as well as adduce evidence and exhibited certain documents to prove his citizenship. But the learned Tribunal finally declared the appellant as a foreign national of post 25.3.2017 stream by its order dated 28.6.2013. Thereafter the appellant filed a writ petition before this Hon"ble Court being WP(C) No.4071/2013 challenging the aforesaid order of the learned Tribunal, which was dismissed by the learned Single Judge by his impugned judgment and order dated 25.8.2015.

4. Hence the present appeal has been preferred on the grounds that though the appellant has produced voter list of 1965/1970 appearing the names of the appellant's grandparents, father and uncle and the voter list of 1997 onwards appearing the name of the appellant and his wife, supported by certificates from concerned gaonburah but he same was disbelieved and discarded by the learned Tribunal without proper appreciation. Similarly, it is contended that the learned Single Judge also failed to appreciate the annexed documents though these documents are public documents in view of Section 74 of the Evidence Act and also failed to appreciate that the appellant has discharged his burden by producing required evidence to prove his Indian nationality. On the next it has also been contended that the minor discrepancies in the name and address of the appellant in the document are not committed by the appellant nor by their parents such mistake was committed by the enumerator, govt. officials for which the appellant cannot be blamed and cannot be deprived from the benefit of those public documents. Heard argument of learned counsel for the appellant Mr. HRA Choudhury who has highlighted the grounds of the appeal as has been mentioned above.

5. Mr. Choudhury also placed reliance on the Division Bench judgement of this Court reported in 2015(2) GLT 617 (Abdul Matali @ Matalieb (MD) v. Union of India and others) and submits that the appellant having discharged his burden of proof, the onus is shifted to the prosecution and the said onus having not been discharged, the Tribunal could not have passed the impugned order.

6. On the other hand learned counsel for the respondents has contended that the liability to prove the nationality cast upon the proceedee but he has failed to discharge the said burden by producing clinching evidence and the learned Tribunal as well as the learned Single has rightly rejected the case of the appellant. It is also contended that the appellant is to prove the contents of documents and any different interpretation against such contents of documents is not legally permissible.

7. We have given our due consideration to the submissions advanced by the learned counsel for both the parties as well as gone through the impugned orders and the documents filed by the appellant before the learned Tribunal and the evidence adduced.

8. The learned Tribunal while discussing the evidence on record has given the following findings in para 9 of the judgement:

"(a) In the instant case, the OP has projected late Abed Ali S/o. Riazuddin as his grandfather and Late Kudus Ali as his father. But except the statement of the OP made in his Affidavit, there is no corroborative or any trustworthy evidence on record to show that Late Abed Ali s/o Riazuddin, whose name appears as a voter in the voters" list of 1965 (Ex-A), is the grandfather of the OP or Late Kuddus Ali (the projected father of the OP) is the son of said Abed Ali. The linkage certificate (Ex-F) shows that one Rahimuddin (OP in this case) s/o. Kuddus Ali (even if it is accepted that Rahim Ali and Rahimuddin is one and the same person) is a resident of village Finguwa but there is nothing in Ex-F to show that Late Kudus Ali was the son of Late Abed Ali and or the aforesaid Rahimuddin was born in that village. It is sated in Ex-F that the name of the father of Rahimuddin appears written in Ex-A but on careful perusal of Ex-A it appears clear that there is nothing to show that Rahimuddin is the son of Kuddus or that the name of any Kuddus Ali is shown in Ex-A as a voter.

(b) The OP has further stated in his evidence in chief that his father died before 1965 and that his grandfather died after 1965. By saying so he wants to convey that because his father died before 1965, his (his father's) name did not appear in Ex-A. Further if the statement of the OP to the effect that his father died before 1965 is accepted as true, the statement that his (OP's) name appeared in Ex-C and Ex-D along with the name of his step mother Sibarun Nessa cannot be accepted as true because if Sibarun Nessa is his step mother than she should have married OP's father before his (father of OP) death i.e. before 1965 and in that case her name should also have been recorded in Ex-A along with the name of the actual projected mother of the OP, namely Yaroan. In Ex-C the age of Sibarun Nessa (the projected step mother of the OP) is recorded as 60 years in 1989 and if it is so, she should have born in or about 1929 and as such she was eligible to be a voter in 1950 (after 21 years from the date of her birth i.e. 1929). If her (Projected step mother of the OP) name appears in Ex-C and Ex-D it can well be presumed that she was alive at least till 1997 but there is no explanation or clarification on record as to why her name was not recorded in any of the voters" lists of 1965, 1970, 1971 and 1985 and as to why no such voters" list showing her name has been submitted and proved in this case.

(c) The OP has stated that the names of his uncles Hayat Ali, Pulmat Ali and Sukur Ali are recorded in Ex-A but there is nothing on record to show as to why the voters" list of 1970 showing their names therein could not be filed. The amended voters" list of 1971 (Ex-B) also did not show the names of Hayat Ali and Pulmat Ali as voters. It shows only the name of Sukur Ali and his two wives. None of the aforesaid projected uncles of the OP has been examined as a witness in this case to prove that the OP is the son of their own brother Late Kuddus Ali.

(d) If we go through the cross-examination portion of OP's evidence, we get some more interesting facts. In the Affidavit filed by the OP along with his written statement as well as in the evidence-in-chief filed by him on Affidavit, the OP has mentioned his age as 53 years in 2013. He has also admitted in his cross-

examination that his present age is 53 years. Therefore, according to his own declaration and statement on oath he should have been born in or about 1960. In his cross-examination, the OP has stated that his father died when he was about 12 years of age. If that is so, his father must have been alive at least till 1972 and as such the statement of the OP made in his evidence-in-chief as well as in his written argument to the effect that his father died before 1965 or 1966 is apparently incorrect. The aforesaid statements were made, in my considered view, to convey and to make this Tribunal believe that his father's name did not appear in Ex-A because he (the projected father of the OP) died prior to 1965 or 1966.

(e) The OP has further stated in his cross-examination that his step mother died after about five years of the death of his father. This statement is also self contradictory because in his evidence-in-chief, he has specifically stated that the name of his step mother is recorded in the voters' lists of 1989 and 1997 which he has exhibited as Ex-C and Ex-D respectively in this case. If the father of the OP, as per OP's own statements made in his evidence-in-chief and the written argument, had died before 1965 or 1966, then as per his statement made in his cross-examination that his step mother died after five years of the death of his father is apparently incorrect because in that case his step mother's name could not have been recorded in the voters' lists of 1989 (Ex-C) and 1997 (Ex-D).

(f) The OP has also stated in his cross-examination that there does not appear the name of his father Kuddus Ali as a voter in the voters' lists of 1965 (Ex-A) and 1971 (Ex-B) but that it should have been there. He has also stated that at the time of the death of his father, his father, his uncles and other members of their families used to live together but that he does not know as to why the name of his father is not recorded in Ex-A and Ex-B.

(g) In Ex-C the age of the OP is recorded as 35 years in 1989 whereas in Ex-D his age is recorded as 39 years in 1997 (after eight years from 1989). Further his age is shown as 46 years in Ex-E in the years 2005. There is no explanation in this respect also."

9. The impugned order was challenged before the learned Single Judge wherein the learned Single Judge has refused to interfere with the impugned order of the Tribunal by its order dated 25.8.2015. Hence the present appeal has been preferred with a prayer to set aside the impugned order dated 25.8.2015 passed by the learned Single Judge as well as the order dated 28.6.2013 passed by the learned Foreigners Tribunal. The relevant portion of the judgment of the learned Single Judge is quoted below:

"5. Independent of the above findings, I have also verified the records of the Tribunal in reference to the findings recorded by the learned Tribunal. Ex-A is the voters' list of 1965 in which the name of the father of the petitioner Kuddus Ali does not appear. The purported linkage certificate Ex-F issued by the Gaonbura of the particular village is in the name of Rahim Uddin, does not show that the

Late Kuddus Ali was the son of Late Abed Ali and that Rahimuddin was born in the particular village.

6. The petitioner in his evidence stated that his father had died before 1965 and his grandfather died after 1965. If that be so, his step mother was married to his father before 1965. However, the petitioner placing reliance on the Ext. C & D voters" lists of 1989 and 1997, projected one Sibaran Nessa as his step mother. That apart, as discussed in the judgement of the learned Tribunal, if the step mother of the petitioner was born in 1929, her name ought to have appeared in the voters" lists of 1965, 1970, 1971 and 1985 but the petitioner failed to produce any document.

7. In the proceeding before the Tribunal, the petitioner claimed that he was 53 years of age in 2013 and if that be so he was born in or about 1960. In the cross examination he stated that his father died when he was about 12 years of age. In that case, his father was alive till 1972 but in his evidence in chief as well as in his written argument, he contended that his father died before 1965.

8. As has been held by the Apex Court in Sarbananda Sonowal v. Union of India reported in AIR 2005 SC 2920, the burden of proof lies on the proceedee that he is not a Foreigner. The petitioner miserably failed to discharge his burden of proof. That apart, mere exhibition of some documents without proving the contents thereof is not enough. In this connection, para 31 of the judgement is quoted below :-

"31. Under the Law of Evidence also, 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 amount to admission of contents but not its truth. Documents having not been produced and marked as required under the Evidence Act cannot be relied upon by the Court. Contents of the document cannot be proved by merely filing in a court."

10. As we found both the learned Tribunal as well as learned Single Judge has elaborately discussed evidence and all the documents that has been filed by the appellant.

11. On appreciation all the matters on record we notice certain glaring discrepancies in the case of the appellant which is mentioned below.

The appellant in his written statement has specifically mentioned the name of his mother as Yarjan Nessa and there is no mention about his step mother etc. The name of his said mother Yarja stated to have enlisted in the voter list of 1965 vide Ext.A. In the said voter list there is also another name, namely Sabiran Nessa, wife of Sukur Ali. But while giving evidence the appellant made a mention that the name of his step mother Sabiran Nessa appeared in the voter list of 1989, 1997 along with their name. Obviously, such a statement and document beyond pleadings cannot be accepted. Again the name of said Sabiran Nessa appeared in the voter list of 1965 as wife of one Sukur Ali, who is uncle of the

appellant. Now the same appellant has projected said Sabiran Nessa as his step mother which does not tally with his own pleadings and documents. Accordingly the learned Tribunal as well as learned Single Judge has rightly rejected the case of the appellant.

Though the appellant submitted voter list of 1989, 1997 and 2005 showing the name of said Sabiran Nessa as his mother along with their name which cannot at all be accepted in view of the findings above.

It was the plea of the appellant that his father died prior to 1965 so his name did not appear in the voter list of 1965 then how his name can appear in the voter list of 1970 that has been filed by the appellant, is not explained and hence cannot be accepted.

In paragraphs 6 and 7 of the writ petition it has been contended by the appellant that his mother's name wrongly appeared as Yarjan Nessa in the voter list of 1965 and 1970 but thereafter his mother's name appeared as Sabiran Nessa which is the correct name of his mother. It is stated that in cross-examination the appellant as DW 1 has wrongly deposed that he has two mothers namely Yarjan Nessa and Sabiran Nessa which is actually the name of same woman, who is the mother of the appellant. It is also stated that the appellant wrongly deposed that his mother died earlier than his father but actually his mother died much later and his mother's name appeared upto the voter list of 1997.

Such a flexible explanation made by the appellant at his own whims, giving a different interpretation of his own evidence and documents is out rightly liable to be rejected. Law is well settled that no amount of evidence, document can be looked into beyond pleadings and one cannot be permitted to offer different explanation to his own evidence in any subsequent legal proceedings.

On the top the appellant in his cross examination as DW 1 in sharp contrast to his own pleaded case has stated that his father was live in 1965 but he does not know why his name did not into the voter list. The said assertion is enough to prove the falsity of his plea as taken in the written statement.

12. All above indicates only the falsity of claim of the appellant for which serious inconsistency appeared in every stage. The appellant failed to prove any vital document to prove his linkage that the aforesaid Kuddus Ali was the father of the appellant who was resident of India prior to 1966 by any cogent oral or documentary evidence. The name of the appellant appeared in the voter list of 1989 that too with the name of one so called mother of the appellant Sabiran Nessa which is not at all believable as has been discussed above. None of the brother of the said Kuddus Ali (father of the appellant) who are still alive has not been examined to prove the aforesaid aspect and the document issued by the gaonbura cannot be accepted as there is no mention that father of appellant Kuddus Ali was the son of late Abed Ali to support the voter list of 1965 (linkage).

13. In view of the finding and discussions above, we are of the considered view

that the appellant miserably failed to discharge the burden to prove his nationality as envisaged under Section 9 of the Foreigners Act, 1964. We found no substance at all in the submission of the learned counsel for the appellant. On consideration of the entire matter we find no any error, illegality or irregularity in the impugned finding arrived at by the learned Single Judge as well as the learned Tribunal. Resultantly, the appeal is devoid of any merit and dismissed. No costs.

14. Registry to inform the concerned Deputy Commissioner & Superintendent of Police (Border) and engaged counsels for the respondents accordingly.