
(2011) 04 GUJ CK 0030
In the Gujarat High Court
Case No : Civil Application No. 497 of 2010

Rajesh P. Mankad	Vs	APPELLANT
State of Gujarat and Others		RESPONDENT

Date of Decision : 22-04-2011

Acts Referred:

Constitution of India, 1950 — Article 21
Foreigners Act, 1946 — Section 3(2), 9

Citation : (2011) 04 GUJ CK 0030

Hon'ble Judges : S.J. Mukhopadhaya, C.J;K.M. Thaker, J

Bench : Division Bench

Advocate : Mukul Sinha and Subramaniam Iyer, for the Appellant; Prakash Jani, Government Pleader for Respondent 1-3, P.S. Champaneri and Anshin H. Desai for Respondent 4, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Mukhopadhaya, J.—This writ petition has been preferred under the caption "Public Interest Litigation" alleging illegal and unconstitutional action on the part of the Respondents in arresting, detaining and deporting Bangladeshis near Chandola lake.

Prayer has been made to declare the action of the Respondents of arresting, detaining and deporting the persons named in Annexure - B annexed with the affidavit filed by Shri Ishwarbhai N. Desai, Assistant Commissioner of Police, in Special Criminal Application No. 2374 of 2009 is without sanction of law, unauthorized and without jurisdiction and violative of Article 21 of the Constitution of India. In the said list, names of 75 person have been mentioned who were located at dwelling place at Shiyasatnagar. Prayer has been made to provide them adequate compensation for the hardships suffered by them. Further prayer has been made to prohibit the Respondents from arresting, detaining or deporting any other persons from Shiyasatnagar or any other part of the State of Gujarat without following the procedure prescribed under the

Foreigners Act, 1948 read with the Foreigners (Tribunals) Order, 1964. Interim prayer has also been made to direct the Respondents to call back all such persons who have been deported from amongst those 75 persons shown in the list and restore them to Shiyasatnagar and to restrain the Respondents from arresting them or deporting them.

2. According to the Petitioner, Shiyasatnagar is situated near Chandola lake in Shah-e-Alam, Danilimda area of the city of Ahmedabad. There were 182 hutments which were constructed after the original hutments of the residents were burnt during the 2002 riots. The hutment dwellers are poor labourers. Sometime in the month of April, 2009, a team of policemen led by the Police Inspector Incharge Special Operation Group, Crime Branch, Ahmedabad carried out raid at Shiyasatnagar and illegally arrested and detained around 100 persons including men, women and children and kept them in a lock up of Special Operation Group (SOG) at Juhapura. The Petitioner came to know about such action on the part of the police from the news published in the newspaper "The Indian Express", Ahmedabad edition dated 23.10.2009. From such newspaper, the Petitioner came to know the story of a five year old mentally challenged child viz. Tariq, whose mother Sorubibi had gone on record stating that people from SOG had hit on her eyes and taken away her three children viz. Haroon (13 years), Shafiq (10 years) and Tariq (5 years). While inquiring whereabouts of Tariq and other two children, the Petitioner came to know that the SOG was planning to deport several persons who were earlier picked up from Shiyasatnagar on 23.4.2009 and other places. Petitioner - Jan Sangarsh Manch helped the mother of the three children who filed a habeas corpus petition in Special Civil Application No. 2374 of 2009 in which notice was issued and an affidavit has been filed on 22.12.2009 by one Shri Ishwarbhai N. Desai, Assistant Commissioner of Police, SOG. Thus, the Petitioner came to know that they are arrested and deported being Bangladeshis.

3. Further case of the Petitioner is that on 3.11.2009, the Petitioner came to know that the Ahmedabad Municipal Corporation had demolished 329 hutments of Shiyasatnagar without any notice. They were constructed for the rehabilitation of the riot victims. A public interest litigation in this regard being Special Civil Application No. 14664 of 2008 has already been filed by some NG Os before this Court for rehabilitating the demolished hutment dwellers in which notice has been issued by this Court. From the affidavit as filed in the said case, the Petitioner could come to know that around 75 persons residing at Chandola lake were detained and have been described as citizens of Bangladesh including the three children of Sorubibi. It is stated that from the photo identify card of Sorubibi, one can find out that she was born as Indian and thereby she is a citizen of India by birth.

4. Mr Mukul Sinha, learned Counsel appearing on behalf of the Petitioner would contend that Respondent Nos. 1 to 3 have absolutely no documentary proof whatsoever to suggest that 27 persons having been handed over to Bangladesh

or having been crossed the border of Bangladesh. After filing of the habeas corpus petition, Respondent Nos. 1 to 3 had become active and were in great hurry to illegally throw out rest of the persons earlier detained and deported them to Bangladesh. 32 more persons were illegally deported on 24.12.2009 by Howrah Express including 9 persons as named in para 3.7 of the petition.

The learned Counsel for the Petitioner would submit that the arrest, detention and deportation of around 79 persons to Bangladesh are without sanction of law. They are citizens of India and were residing in Shiyasatnagar, near Chandola lake, Ahmedabad.

The learned Counsel for the Petitioner would submit that to detect and deport any persons who is not a citizen of India and is illegally residing in India, the Parliament has enacted a specific legislation viz. "The Foreigners Act, 1946". u/s 3 of the said Act, the Central Government has been empowered to make orders for matters of detention and deportation of the foreigners.

Reliance was placed on the Supreme Court decision in the case of Sarbananda Sonowal Vs. Union of India (UOI) and Another, wherein the Court held that the power to detain and deport a foreigner can flow only from the Foreigners Act and the Illegal Migrants (Determination of Tribunals) Act, 1983 and the Rules framed there under were struck down by the Supreme Court being unconstitutional. Therefore, according to the counsel for the Petitioner, while detaining and deporting a foreigner, the procedure prescribed under the Foreigners Act is required to be followed strictly. Notice and opportunity of hearing is required to be given to the person alleged to be a foreigner before he is declared as a foreigner for the purpose of detention and deportation.

5. The learned Counsel would contend that the Supreme Court while striking down the Illegal Migrants (Determination of Tribunals) Act, 1983 directed that all the cases pending before the Tribunal constituted under the Illegal Migrants (Determination of Tribunals) Act, 1983 would stand transferred to the Tribunal constituted under the provisions of the Foreigners (Tribunals) Order, 1964. Therefore, the aforesaid procedure is required to be followed by making reference to the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 for the purpose of ascertaining and declaring that whether the persons detained by SOG on 23.4.2009 were citizens of Bangladesh.

6. He would further contend that the fundamental right guaranteed under Article 21 of the Constitution of India is also available to the foreign nationals. Their liberty cannot be taken away without following the due process of law. The persons who were born in India prior to 1986 amendment of Citizenship Act, 1955 or if one of their parents is a citizen of India, such persons are Indian by birth. Therefore, the three children of Sorubibi viz. Haroon, Safiq and Tariq are all born in India, their mother Sorubibi having been born in India prior to 1986 and being a regular voter holding identity card issued by the Election Commission of India is a citizen of India by birth. It is alleged that the Respondent Nos. 1 to 3

without giving any opportunity of hearing, have illegally detained and deported the citizens of India to Bangladesh only because they belong to a particular community with a systematic publicity campaign for achieving ulterior political motives giving a complete go-bye to the established procedure of law.

7. Mr PK Jani, learned Government Pleader appearing on behalf of the State - 2nd Respondent disputed the allegations and the averments raised in the petition. The bona fide of the public interest litigation has also been challenged, as interest of Bangladesh citizens have been highlighted in the present case and not that of the Indian public in general. The learned Counsel referred to the different provisions of the Foreigners Act, 1946, Foreigners Order, 1948 and highlighted the procedure to be followed in the case of suspected Bangladeshis. It is submitted that the Central Government by notifications, circulars and letters delegated the power to the State officials to undertake the referred process. While each and every fact and allegation as pleaded in the writ petition has been disputed being absolutely baseless, it is stated that neither the officers of the SOG nor the police have ever beaten or tortured any of the persons in the lock up.

In fact, the 75 persons whose names have been given in the enclosure were kept in a big hall attached with garden and open plot. The statement of one Bangladeshi citizen i.e. Sakayat @ Bapdo, son of Mandar Sheikh was also recorded who was in restriction since 2.11.2008. He has also stated that Bangladeshis kept in the hall were allowed to move in the open space and the children were allowed to play in the garden. In the petition for habeas corpus, Sorubibi has not alleged that the SOG has beaten and tortured, but taken a plea that the children are missing and she could not trace them.

8. The learned Counsel appearing on behalf of the State would contend that as per Section 9 of the Foreigners Act, 1946, the onus to prove citizenship of India is on the person who claims it. In the present case, Sorubibi has never turned up before any of the authorities contending, inter alia, that she was a citizen of India. The election card produced by the Petitioner is yet to be verified. It is stated that not only the ration card was procured, but many of them were cancelled. Some cancellations were made on 24.7.2003 and the letter of the Zonal officer, Consumer Protection Officer, Maninagar Zone, Ahmedabad has been enclosed. It is stated that during the course of investigation, statement of the husband of Sorubibi was recorded wherein he has specifically submitted that he belonged to Bangladesh and, therefore, Sorubibi, her children and husband were citizens of Bangladesh and not of India and, therefore, the authority had rightly taken the decision to deport them. It is stated that Sorubibi is not traceable and her three children and her husband have been deported from Indian border to Bangladesh by the Indian Government.

9. Further stand taken by the learned Counsel for the State is that Bangladeshi nationals as per the Government of India circulars have been handed over to the officers of the Border Security Force (BSF) by the SOG. Thereafter, the BSF sent

them into the border of Bangladesh and in view of the Government of India circulars and directions they have been deported to Bangladesh. Therefore, the question of producing evidence by SOG does not arise. He would contend that the grounds taken in the writ petition are ill-founded.

10. Mr PS Champaneri, learned Counsel appearing on behalf of the Union of India referred to the affidavit filed by the Central Government wherein a request has been made to dismiss the writ petition as the case is not in the public interest and general allegations have been made. According to the Union of India, the Ministry of Home Affairs, Government of India, vide circular dated 16.9.1997 has issued directions to all the State Governments and Union Territories earmarking the procedure of deportation of Bangladeshi nationals in the form of revised instructions. The issuance of circular was necessitated on account of the fact that Bangladeshi nationals who came to India illegally on or after 25.3.1971 are treated as illegal immigrants as per the instructions dated 20.9.1972. Bangladeshi infiltrators and those overstaying unauthorisedly after expiry of their visa had to be deported back to Bangladesh. Deportation of such Bangladeshi nationals is carried out in accordance with the instructions of the Ministry of Home Affairs, Government of India which was earlier issued on 3.1.1976 and later on 27.8.1992.

The entire issue relating to deportation of Bangladeshi nationals has been reviewed by the circular dated 16.9.1997 and in supersession of all the earlier instructions issued on the subject matter, it was changed that deportation of Bangladeshi nationals will be carried out as per the procedure laid down in the circular dated 16.9.1997 issued by the Ministry of Home Affairs, Government of India. Thereunder, directions have been given to the State Governments and Union Territories and those documents have been classified as "Secret Document". Bangladeshi nationals who are intercepted at the borders while crossing into India unauthorisedly, shall immediately be sent back by the Border Management Agency then and there. Bangladeshi nationals detected staying unauthorisedly in the States other than village border States shall be taken by the concerned State Police under proper escort in groups as far as possible and hand over them to the BSF in West Bengal at the place designated by the Inspector General, BSF, Calcutta. They should be accompanied by appropriate orders to be issued by the competent authority of the State Government u/s 3(2)(c) of the Foreigners Act, 1946 and after proper inquiry, the BSF shall facilitate their exit from India to Bangladesh.

11. The learned Counsel for the Central Government would contend that though the State Governments having their borders contiguous for Bangladesh, will continue to deport Bangladeshi nationals staying unauthorisedly as per the existing practice, they are served with appropriate orders u/s 3(2)(c) of the said Act. Directions have been issued to the effect that the State Governments would initially incur expenditure for transportation of foreign nationals to the designated points before being handed over to the Border Management Agency and

subsequently get the amount reimbursed alongwith the amounts incurred by them for performing the functions on behalf of the Central Government under the said Act. By circular dated 9.9.1998, the Ministry of Home Affairs, Government of India issued directions to all the Home Secretaries of all the State Governments and Union Territory Administrations regarding the procedure to be adopted for deportation of Bangladeshi nationals staying in India illegally. The State Governments have been directed to identify and detect Bangladeshi nationals illegally staying in India, the addresses as claimed by the suspected persons are to be sent to the concerned State Government wherein the said persons claim to head from and claim to be Indian, for verification and report within 30 days. Earlier, the Ministry of Home Affairs, Government of India had delegated the power to all the State Governments and Union Territory Administrations to carry out the functions and powers available to the State Governments for detection and deportation of foreign nationals from India u/s 3(2)(c) of the Act. On 2.8.2005, the Ministry of Home Affairs, Government of India responded to the concern over infiltration of Bangladeshi nationals to mechanically well developed States like Gujarat and Maharashtra in a discussion in the 19th meeting of the Western Zonal Council held at Mumbai on 24.5.2005. In response thereto, it was reiterated by the Ministry of Home Affairs, Government of India that in view of what is stated above, requisite detection and deportation of foreign nationals be undertaken accordingly. The Ministry of Home Affairs, Government of India in July, 2003, estimated that around 15 to 18 million illegally migrants from Bangladesh are residing in various parts of the country. This trend has continued inspite of the efforts by both the Government of India as well as the State Governments and in order to curb infiltration through Indo-Bangladesh border, it is also suggested by the Union of India that police personnel should accompany the groups of deportees upto the place of deportation and the BSF personnel would further escort them to the deportation point and to ensure smooth deportation process, Bangladeshi deportees be sent as far as by such trend so as to reach at railway station at night time.

12. The learned Counsel for the Central Government placed reliance on Section 3(2)(c) of the Act read with para 11(2) of the Foreigners Orders, 1948 and submitted that the Central Government has powers to issue orders requiring a foreigner to reside in a particular place and imposing restrictions on his movements. The powers have been delegated to the State Governments and the Union Territory Administrations. Whenever a foreigner is found to be in possession of any invalid travel documents and comes to adverse notice or overstays beyond the validity of visa, necessary inquiries are to be conducted by the law enforcement agencies. As per the procedure prescribed by the Ministry of Home Affairs (Foreigners Division), Government of India, by letter dated 23.11.1009, the illegal immigrants from Bangladesh who are apprehended in the country and against whom action is taken u/s 14A(b) of the Act, and whose cases are referred to the Bangladesh High Commission for nationality verification through the Ministry of External Affairs, shall be reprimanded or deported after

the confirmation of their nationality and till the nationality of such Bangladeshi national is confirmed, he may be kept in detention centres set up in the State/ Union Territories concerned, and in respect of the Bangladeshi nationals found to be staying unauthorisedly in the particular State or Union Territory, appropriate inquiry is required to be conducted by the State Government/Union Territory concerned as indicated by the letter of the Ministry of Home Affairs, Government of India dated 23.11.2009.

13. Section 3 of the Foreigners Act, 1946 empowers the Central Government to make provisions with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or, their departure therefrom or their presence or continued presence therein. u/s 3(2)(c), a foreign national cannot remain in India, or in any prescribed area therein. u/s 3(2)(e), the foreign nationals are required to comply with such conditions as may be prescribed or specified requiring them to reside in a particular place and the restriction of their movements can be imposed. This will be evident from Section 3 of the Foreigners Act, 1946 and quoted hereunder:

3. Power to make orders.- (1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India, or their departure therefrom or their presence or continued presence therein.

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner -

(a) shall not enter India, or shall enter India only at such times and by such router and at such port or place and subject to the observance of such conditions on arrival as may be prescribed;

(b) shall not depart from India, or shall depart only at such times and by such rout and from such port or place and subject to the observance of such conditions on departure as may be prescribed;

(c) shall not remain in India, or in any prescribed area therein;

(cc) shall, if he has been required by order under this section not to remain in India, meet from any resources at his disposal the cost of his removal from India and of his maintenance therein pending such removal;

(d) shall remove himself to, and remain in, such areas in India as may be prescribed;

(e) shall comply with such conditions as may be prescribed or specified -

(i) requiring him to reside in a particular place;

(ii) imposing any restrictions on his movements;

(iii) requiring him to furnish such proof of his identity and to report such

particulars to such authority in such manner and at such time and place as may be prescribed or specified;

requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his handwriting and signature to such authority and at such time and place as may be prescribed and specified;

requiring him to submit himself to such medical examination by such authority and at such time and place as may be prescribed or specified;

prohibiting him from association with persons of a prescribed or specified description;

prohibiting him from engaging in activities of a prescribed or specified description;

prohibiting him from using or possession prescribed or specified articles;

otherwise regulating his conduct in any such particular as may be prescribed or specified;

(f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions;

shall be arrested and detained or confined;

and may make provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

(3) Any authority prescribed in this behalf may with respect to any particular foreigner make orders under Clause (e) or Clause (f) of Sub-section (2).

14. Section 5A of the Foreigners Order, 1948 empowers the civil authority to examine any person who seeks leave to enter India or to depart therefrom or during his stay in India for the purpose of Foreigners Act, 1946 or of any order made thereunder, and it shall be the duty of every such person to furnish to the civil authority, such information in such manner and at such times, as that authority may require. Section 11 therein imposes restrictions on movements, etc. as evident from the said provision and quoted hereunder:

11. Power to impose restrictions on movements, etc. - The civil authority may, by order in writing, direct that any foreigner shall comply with such conditions as may be specified in the order in respect of -

(1) his place of residence;

(2) his movements;

(3) his association with any person or class of persons specified in the order; and

(4) his possession of such articles as may be specified in the order.

15. From the aforesaid provisions, it will be evident that a foreigner can be deported/migrated as per the provisions of Section 3(2)(c) of the Foreigners Act or action can be taken. Such person can be booked u/s 14 and penalty for contravention of the provisions of the Act has been prescribed thereunder, which reads as follows:

14. Penalty for contravention of provisions of the Act, etc. - Whoever -

(a) remains in any area in India for a period exceeding the period for which the visa was issued to him;

(b) does any act in violation of the conditions of the valid visa issues to him for his entry and stay in India or any part thereunder;

(c) contravenes the provisions of this Act or of any order made thereunder or any directing given in pursuance of this Act or such order for which no specific punishment is provided under this Act, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if he has entered into a bond in pursuance of Clause (f) of Sub-section (2) of Section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof or show cause to the satisfaction of the convicting Court why such penalty should not be paid by him.

Explanation,- For the purposes of this section, the expression "visa" shall have the same meaning as assigned to it under the Passport (Entry into India) Rules, 1950 made under the Passport (Entry into India) Act, 1920 (34 of 1920).

16. The learned Counsel for the Petitioner could not lay hand on any document to suggest that the Tribunal under the Foreigners (Tribunals) Order, 1964 is defined for those foreigners who can be intercepted in the State of Gujarat to decide whether a person is or not a foreigner within the meaning of the Foreigners Act, 1946.

17. On the other hand, the Central Government has referred to the provisions under which circulars have been issued from the Ministry of Home Affairs, Government of India, from time to time including the instructions dated 30.9.1972, 3.1.1976, 27.8.1992, circulars dated 16.9.1997, 9.9.1998 and 2.8.2005.

18. The learned Counsel for the Petitioner submitted that though the reference to the circulars has been given, but the copies have not been served. With a view to satisfy the Court, the learned Counsel for the Union of India produced copies of the circulars dated 30.9.1972, 3.1.1976, 28.7.1992, 16.9.1997, 9.9.1998 and 25.11.2009. Thereunder, guidelines have been issued to the State Governments and Union Territory Administrations relating to investigation of illegal stay of Bangladeshi nationals and for their deportation, but those documents being secret, we have not allowed to file the same by way of affidavit but just for our

satisfaction, we have perused the same without asking the Respondents to hand over the copies to the counsel for the parties.

19. It appears that even recently the Ministry of Home Affairs (Foreigners Division), Government of India issued circulars for deportation of Banladeshi nationals from the State of Gujarat and by letter dated 25.2.2010 asked the Principal Secretary, Government of Gujarat to take action in terns with Section 3(2)(c) of the Foreigners Act, 1946 read with para 11(2) of the Foreigners Order, 1948, having power to issue such orders requiring the foreigner to reside in a particular place.

20. We have noticed the concern of the Government of India about illegal migration of Bangladeshi nationals into India. It is very shocking to know that as in July, 2003, the Ministry of Home Affairs, Government of India could estimate that roughly 15 to 18 million illegal migrants from Bangladesh to India are residing in various parts of the country. Such trend has continued inspite of the efforts by both the Government of India as well as the State Government in order to curb infiltration through Indo-Bangladesh border. In this background, in terms of the procedure prescribed by the Central Government if the Bangladeshi nationals are detected and deported, the Petitioner cannot raise any objection that too by way of filing a writ petition, when such detection, detention and deportation of such illegal migrants from Bangladesh being in public interest for the Indian citizens. There being no merit in the case, we dismiss the case. No costs.