
(2010) 02 GAU CK 0088
In the Gauhati High Court
Case No : Writ Petition (C) No. 5425 of 2008

Shri Abdus Samad

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-02-2010

Acts Referred:

Citation : (2010) 2 GLD 755 : (2010) 2 GLT 989

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : A. Mannaf, for the Appellant; R. Chakraborty, Addl. Sr. Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—As the experience of this Court goes in most of the cases pertaining to foreign nationals in the Foreigners' Tribunal, due to the non-responsive attitude of such foreigners, the learned Tribunals are left with no option than to proceed ex parte with the eventual passing of ex parte order/orders. However, the instant case is an exception in as much as, the impugned order is not pursuant to an ex parte proceeding. The petitioner duly responded to the proceeding before the learned Tribunal and the impugned order dated 17.9.2008 has been passed inter-party. The particular reference made against the petitioner having been answered against him he has invoked the writ jurisdiction of this Court.

2. I have heard Mr. A. Mannaf, learned Counsel for the petitioner as well as Ms. R. Chakraborty, learned Additional Senior Government Advocate, Assam. I have also gone through the records of the Tribunal. None represented the Union of India in such an important matter.

3. The particular reference against the petitioner as to whether, he is an illegal migrant entering into Assam after the cut off date i.e. 25.3.1971 came into being, when the name of the petitioner came to be included in the draft Electoral

Roll of 1997 pertaining to 39 Jaleswar Assembly constituency. House to house enumeration was done during the period from 16.1.1997 to 15.4.1997. On publication of draft Electoral Roll, which included the name of the petitioner a doubt arose as to his Indian Citizenship, and accordingly, the Electoral Registration Officer forwarded the matter to the competent authority for determination as to whether the petitioner is a foreign national. During enquiry, he could not produce any document in support of his Indian citizenship. Accordingly, the Enquiry Report was prepared and signed by the petitioner accepting the contents thereof. Thereafter, the reference was made to the Tribunal on the basis of which the case was registered against him as FT Case No. 941/G/2008.

4. On receipt of notice, the petitioner appeared before the learned Tribunal and filed his written statement on 18.8.2008. In paragraph 3 of the written statement the petitioner contended that he had been permanently residing at village 81 No. Garozan under PS-Lakhipur, in the district of Goalpara. He also contended that his name was included in the voter list of 2005 pertaining to 39 Jaleswar LAC. A photocopy of the Voter List was annexed. The petitioner in his written statement annexed another document viz. photocopy of a certificate issued by the Simlabari Gaon Panchayat certifying the fact of inclusion of his name in the Voter List of 2005. In paragraph 4 of the written statement the petitioner declared and named his father as Md. Ali Sheikh with the statement that his name was in the Voter List of 1966 pertaining to 31 Mankachar LAC in the district of Goalpara. The photocopy of the said voter list was also annexed to the written statement. The further contention of the petitioner was that he was not born in 1966 and therefore, there was no question of inclusion of his name in the said voter list.

5. It is on the above basis, the petitioner wanted to establish his Indian Citizenship, which in the writ petition he claims to be by birth. Be it stated here that in the affidavit filed in support of the statement made in the writ petition, the petitioner has declared his age as 45 years. However, there is absolutely no explanation as to why his name was not included in any other voter lists except 2005.

6. In the proceeding before the learned Tribunal the petitioner examined him as DW-1 and another namely, No tub Ali as DW-2.

7. In the evidence in chief through affidavit dated 11.9.2008, the petitioner reiterated the statement made in the written statement. It will be pertinent to mention here that both in the written statement as well as in the affidavit-in-chief, the petitioner although indicated one Md. Ali Sheikh as his father, whose name was included in the voter list of 1966 but he did not name his mother. In the cross-examination the petitioner admitted that although, he had exercised his right of franchise but he did not submit copies of all the voter lists. He further stated that his father had four brothers and three sisters. Further statement made was that the petitioner has five brothers and four sisters.

8. In the affidavit-in-chief filed by the DW-2 the statement made was that the petitioner and his father Md. Ali Sheikh, was known to him as co-villager and that said Md. Ali Sheikh's name was in the voter list of 1966. Further statement made was that he (Md. Ali Sheikh) had been residing in the village called Nelokhiya under PS-South Salmara in the district of Dhubri and that the voter list of 1966 pertained to Nilokhiya. In his cross-examination he has stated that his house is intervened by four houses from the house of the petitioner and that the father of the petitioner was at Nilokhiya village and he came to his (DW-2) village about 7/8 years back. He has further stated that the petitioner has five brothers, but he does not know how many sisters he has.

9. It is on the above basis, the petitioner wanted to establish his Indian Citizenship by birth.

10. As recorded above, the petitioner could not produce any document in support of his Indian Citizenship during the verification made by the Local Verification Officer and the Verification Officer's report was duly signed by the petitioner. The learned Tribunal upon verification of the evidence on record has come to the conclusion that the petitioner has failed to establish his Indian Citizenship. Such findings arrived at by the learned Tribunal cannot be interfered with unless it is shown to be a case of no evidence or that the findings arrived at are perverse.

11. The learned Tribunal in its impugned order dated 17.9.2008 has discussed the entire evidence in detail. It is on record that the Tribunal gave further opportunity to the petitioner to prove the photocopies of the documents. The learned Tribunal has rightly recorded that the petitioner having not disclosed the name of his mother and/or having not identified Kaila Khatun Bibi, whose name also appeared in the voter list of 1966, as his mother either in the written statement or in the affidavit-in-chief was precluded from claiming the same through a certificate issued by the Gaon Panchayat. If Kaila Khatun Bibi was the mother of the petitioner he would have said so in his written statement and his affidavit-in-chief but he indicated only said Md. Ali Sheikh as his father whose name appeared in the 1966 voter list. No linkage having been established to said Md. Ali Sheikh as the father of the petitioner, merely on the basis of inclusion of the name of Md. Ali Sheikh in the voter list of 1966, the petitioner cannot be declared to be an Indian Citizen by birth. This aspect of the matter has been discussed by the learned Tribunal in its order dated 17.9.2008.

12. As regards the evidence adduced by DW-1 and 2, the learned Tribunal has pointed out the inherent contradictions. It is on record that the petitioner was declared as doubtful voter in 1997, and accordingly, as observed by the learned Tribunal it was the bounden duty of the petitioner to prove that he was a voter prior to 1997, because as per the age declared by him he would have been a voter even prior to 1997 had he been an Indian Citizen. The petitioner cannot establish his Indian Citizenship simply through a certificate issued by Gaon Panchayat.

13. It has been observed by the learned Tribunal that the petitioner did not state in his written statement or his evidence-in-chief as to how he became permanent resident of 39 No. Jaleswar LAC, which was very much necessary in view of his own stand that his father was a resident under 31 No. Mankachar LAC. It was incumbent on the part of the petitioner to establish as to how his father became a resident of Garojan village within 39 No. Jaleswar LAC.

14. In the evidence of DW-2 it was deposed that he knew the petitioner and his father Md. Ali Sheikh and that his name was included in the voter list of 1966. According to this witness the father of the petitioner was at Nilokhiya village since his birth. On the other hand, the petitioner was born at Garojan village under another constituency. However, the petitioner himself is silent about his place of birth.

15. In the cross-examination, the DW-2 contrary to his stand in the evidence in chief stated that the father of the petitioner came to his village about 7/8 years before. Interestingly, although his house is stated to be intervened by four other houses but he does not know as to how many sisters the petitioner has. It has rightly been observed by the learned Tribunal that taking into account the declared age of the petitioner as 45 years it was impossible on his part to be born at village Garojan to which village his father had come about 7/8 years before as per the deposition of DW-2. It has also been rightly observed by the learned Tribunal that mere production of a copy of 1966 voter list containing the name of one Md. Ali Sheikh and claiming him to be the father of the petitioner but without naming the other person Kaila Khatun Bibi as his mother but later on claiming to be so is not enough to establish one's Indian Citizenship that too by birth.

16. For all the aforesaid reasons, I do not find any merit in the writ petition and accordingly it is dismissed. The Superintendent of Police (B), Goalpara, is directed to detain the petitioner either in jail custody or in Detention Camp till such time he is deported to Bangladesh. The Deputy Commissioner, Goalpara shall ensure the deletion of the petitioner's name from the voter list(s).

17. Let the compliance report be furnished by both the authorities i.e. Superintendent of Police (B) and Deputy Commissioner, Goalpara on or before 31.3.2010.

18. The Registry shall list the writ petition on 31.3.2010 for perusal of compliance reports.

19. Let copies of this judgment and order be sent to SP(b), Goalpara; Dy. Commissioner, Goalpara and Union of India in the Home Ministry. A copy of the judgment and order shall also be furnished to Ms. R. Chakraborty, learned Addl Sr. Govt. Advocate for her necessary follow up action.

20. Before parting with the case records a disturbing factor needs to be highlighted. The petitioner was found to be doubtful voter way back in 1997 but by the time formalities were observed and eventually, the learned Tribunal

declared the petitioner to be a foreign national by its impugned order dated 17.9.2008, long 11 years consumed. In the process the petitioner could remain in Assam and cast his votes, which contributed towards electing the representatives both to the Legislative Assembly and Parliament who, in turn, contributed in various decision making process pertaining to independent India.