

(2016) 11 GAU CK 0038
In the Gauhati High Court

Case No : Rev. Pet. 86 of 2016, WP(C)3275 of 2016 (D/O)

Subhash Chandra Roy

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 17-11-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 114

Citation : (2017) 1 GauLT 273

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

Bench : Division Bench

Advocate : Mr. N.N. Karmakar, Advocate, for the Petitioner; Mr. S.C. Keyal, Asstt. Solicitor General of India and Mr. R. Dhar, Advocate, for the Respondents

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J.— Heard Mr. N.N. Karmakar, learned counsel for the review petitioner, Mr. S.C. Keyal, learned Assistant Solicitor General of India and Mr. R. Dhar, learned Govt. Advocate, Assam.

2. This petition has been filed seeking review of judgment and order dated 2.6.16 passed by this Court in WP(C) No. 3275/2016 dismissing the writ petition filed by the review petitioner challenging the legality and validity of the order dated 04.09.2013 passed by the Foreigners Tribunal, Nalbari declaring the review petitioner to be a foreigner having illegally entered into India (Assam) after 25.03.1971.

3. At the outset, relevant portion of the judgment and order dated 02.06.2016 is extracted hereunder:-

"Heard Mr. N.N. Karmakar, learned counsel for the petitioner, Mr. M. Bhagawati, learned Govt. Advocate, Assam and Ms. G. Sharma, learned counsel for the Central Government.

2. By filing this petition, petitioner has challenged the legality and validity of

order dated 04.09.2013 passed by the Foreigners Tribunal, Nalbari, opining that petitioner is a foreigner having illegally entered into India (Assam) after 25.03.1971.

3. It appears that initially a reference was made against the petitioner in the year 1998 that he was a foreigner having illegally entered into India (Assam) after 25.03.1971 under the provisions of Illegal Migrants (Determination by Tribunals) Act, 1983. The said reference was registered as 1M(D)T(Nal) Case No.2730/1998 in the IM(D)T, Nalbari. On receipt of notice, petitioner had appeared before the Tribunal on 08.11.2001. Thereafter, he submitted certain documents. Reference was pending before the said Tribunal till the year 2006.

4. After the Illegal Migrants (Determination by Tribunals) Act, 1983, was declared unconstitutional by the Supreme Court, Tribunals established under the said Act stood abolished. Consequently, the pending reference in respect of the petitioner was transferred to the Foreigners Tribunal, Nalbari, to be proceeded under the Foreigners Act, 1946, and the Foreigners (Tribunals) Order, 1964. On such transfer, the reference was registered as F.T.(Nal) B. Case No. 2737/2007. Notice was issued by the Tribunal to the petitioner. Documents placed on record indicate that petitioner had appeared before the Tribunal on 25.09.2008 but neither submitted written statement nor produced any document. Ultimately, Tribunal passed an order dated 07.12.2011 holding that in the absence of the petitioner, case would proceed ex parte. Almost two years thereafter, impugned order was passed by the Tribunal on 04.09.2013. Since petitioner was absent, he could not adduce any evidence to prove his Indian citizenship. After examining the Enquiry Officer and the related documents, Tribunal held that petitioner had failed to discharge his burden under Section 9 of the Foreigners Act, 1946, and thus he failed to prove that he was not a foreigner. Therefore, opinion was rendered that petitioner is a foreigner illegally residing in India.

5. Aggrieved by the said order, petitioner approached this Court by filing WP(C) No. 757/2016. This Court by order dated 11.02.2016, observed that petitioner may approach the Tribunal for setting aside of the ex parte order after referring to the Full Bench decision of this Court in State v. Moslem Mondal, reported in 2013 (1)GLT 809 and subject to such observation, writ petition was dismissed.

6. Thereafter, petitioner filed application for setting aside the ex parte order which was taken up for consideration by the Foreigners Tribunal, Baksa, Tatnulpur, as FT (Nal) B. Case No.2737/2007 was re-numbered as FT Case No.287/Baksa/2016 following transfer of record to Foreigners Tribunal, Baksa. The said application was registered as Misc. Case No.09/ Baksa/2016 but was rejected vide order dated 16.04.2016. Learned Member referring to the application filed by the petitioner for setting aside the ex parte order noted that according to the petitioner though he was aware of the proceeding before the Tribunal, because of the sudden death of his engaged counsel, he was unable to submit his written statement and documents and as a result, ex parte order dated 04.09.2013 was passed. Learned Member also noted that another ground

given by the petitioner was that he was suffering from illness for a long time. Grounds given by the petitioner for setting aside the ex parte order as noticed above were disbelieved by the learned Member where after the application was rejected.

7. Hence, the present writ petition.

8. According to the petitioner, it was the duty of the Tribunal to have considered the documents which were submitted by him before the 1M(D)T, Nalbari. Another plea taken is that notice issued by the Foreigners Tribunal, Nalbari, was not served on him. Since petitioner did not receive notice, he was not aware of the proceeding and, therefore, he could not contest the same.

9. Contentions advanced by the petitioner in the writ petition for setting aside the order dated 04.09.2013 are to be recorded only to be rejected. Proceeding against the petitioner was initiated way back in the year 1998. Petitioner had received notice of the said proceeding. As already noticed above, initially proceedings were conducted under the Illegal Migrants (Determination by Tribunals) Act, 1983, which was declared as unconstitutional by the Supreme Court. Thereafter, reference was transferred to Foreigners Tribunal, Nalbari, to be decided under the Foreigners Act, 1946. Documents on record disclose that after transfer of record and registration of the reference under the Foreigners Act, 1946, notice was served on the petitioner and he had appeared before the Tribunal on 25.09.2008. For three years thereafter, petitioner did not appear compelling the Tribunal to pass an order on 07.12.2011 to the effect that the reference would proceed ex parte. Again, after almost two years, impugned order dated 04.09.2013 was passed. In the application filed by the petitioner before the Tribunal for setting aside the ex parte order, the ground given, as can be seen from the order dated 16.04.2016, was that though petitioner was aware of the proceeding before the Foreigners Tribunal, due to sudden death of his engaged counsel and also on account of his illness, he could not submit written statement and documents. Learned Member found such grounds to be wholly untenable as nothing was stated as to when the engaged counsel of the petitioner had died and also about particulars of his illness. Medical certificates submitted showed illness of the petitioner from 01.07.2013 to 31.07.2013, from 1. 12.2014 to 30.12.2014 and from 20.01.2015 to 20.01.2016. But petitioner remained absent before the Tribunal after his appearance on 25.9.08. This lapse was not explained. Accordingly, application tiled for setting aside the ex parte order was rejected.

10. The grounds given in the writ petition challenging the order dated 04.09.2013 are totally contrary to the grounds given in the application filed before the Tribunal for setting aside the said ex parte order. Now it is contended that petitioner did not receive notice from the Tribunal. When the Court sought for a copy of the application filed before the Tribunal for setting aside the ex parte order since it has not been annexed to the writ petition, learned counsel for the petitioner submits that such copy is also not available with him. While before

the Tribunal, he had contended that though he was aware of the proceedings, he could not appear because of death of his counsel and also on account of his illness, in the writ petition it is contended that he did not receive notice. Such contradictory stand has made the version of the petitioner quite unbelievable. It is thus evident that petitioner has not approached this Court with clean hands. His conduct is also not aboveboard. In the circumstances, we do not find any error in the view taken by the Tribunal. In *Moslem Mondal* (supra), it has been held that only in case of special or exceptional circumstances, Tribunal would have the jurisdiction to set aside an ex-parte order. No case for setting aside the order dated 04.09.2013 is made out.

11. Writ petition is dismissed."

4. Review has been sought for on the ground that after the disposal of the writ petition, review petitioner discovered on 20.6.16 a Government of India notification dated 7.9.2015 published in the Gazette of India on 08.09.2015 containing Passport (Entry into India) Amendment Rules, 2015 and Foreigners (Amendment) Order, 2015. It is contended that case of the review petitioner comes within the purview of Rule 3 A of the Foreigners (Amendment) Order, 2015. In view of the aforesaid, decision of the Tribunal as affirmed by this Court is not executable. Therefore, judgment and order dated 02.06.2016 should be reviewed.

5. Since review petitioner has placed reliance on the Foreigners (Amendment) Order, 2015, which was notified on 07.09.2015, the same is extracted hereunder:-

"Order

GSR 686(E) - In exercise of the powers conferred by section 3 of the Foreigners Act, 1946, the Central Government hereby makes the following order further to amend the Foreigners Order, 1948, namely:-

1. (1) This Order may be called the Foreigners (Amendment) Order, 2015.

(2) It shall come into force on the date of its publication in the Official Gazette.

2. In the Foreigners Order, 1948, after paragraph 3, the following paragraph shall be inserted, namely -

"3A. Exemption of certain class of foreigners - (1) Persons belonging to minority communities in Bangladesh and Pakistan, namely, Hindus, Sikhs, Jains, Parsis and Christians who were compelled to seek shelter in India due to religious persecution or fear of religious persecution and entered into India on or before the 31st December, 2014-

(a) without valid documents including passport or other travel documents and who have been exempted under rule 4 from the provisions of rule 3 of the Passport (Entry into India) Rules, 1950 made under section 3 of the Passport (Entry into India) Act, 1920 (34 of 1920); or -

(b) with valid documents including passport or other travel document and the validity of any of such documents has expired, are hereby granted exemption from the application of the Foreigners Act, 1946 and the orders made thereunder in respect of their stay in India without such documents or after the expiry of those documents, as the case may be, from the date of publication of this order in the Official Gazette.

(F. No.25022/50/2015-FI)

GK. Dwivedi, Jt. Secy."

6. A perusal of the aforesaid Order would go to show that Order-3 A has been inserted in the Foreigners Order, 1948 by way of the aforesaid amendment. It says that persons belonging to the minority communities in Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who were compelled to seek shelter in India due to religious persecution or fear of religious persecution and had entered into India on or before 31.12.2014 with or without valid documents have been granted exemption from the application of the provisions of the Foreigners Act, 1946 and the Orders made thereunder in respect of their stay in India.

7. A careful analysis of the aforesaid Order 3A would disclose that to avail the benefit or protection of the said provision, the concerned person must belong to the minority community in Bangladesh and Pakistan. This is the first requirement. The second requirement is that he was compelled to seek shelter in India either due to religious persecution or due to fear of religious persecution and thirdly, he must have entered into India with or without any valid documents such as passport or other travel documents on or before 31.12.2014. Thus, it is implicit that a person seeking the protection of the aforesaid provision must be a citizen of Bangladesh and Pakistan who were compelled to take shelter in India on account of religious persecution or due to religious persecution.

8. Having noticed the above, let us examine the case that was projected by the review petitioner in the writ petition.

9. In paragraph-1 of the writ petition, petitioner had stated that he was born on 1.1.61 at village Nalapara under Paneri Police Station in the district of Darrang in the State of Assam (India). His parents were citizens of India. Petitioner had asserted that the allegation that he had illegally migrated to India in March, 1991 from Bangladesh, which allegation was upheld by the Foreigners Tribunal, was not correct. Thus it was the petitioner's pleaded case that he was a citizen of India by birth and therefore the allegation that he had illegally entered into India (Assam) from Bangladesh was not correct.

10. Therefore, it is evident that according to the petitioner, he was a citizen of India. If he was a citizen of India, as he claimed, he could not be a citizen of Bangladesh belonging to the minority Hindu community. Therefore, he cannot claim protection of the notification dated 07.09.2015. As already noticed above

and even at the cost of repetition, we say that to avail the protection of the said notification dated 07.09.2015, one must show that he belongs to the minority community of Pakistan and Bangladesh and because of religious persecution, he was compelled to take shelter in India before the cut off date.

11. The argument advanced on behalf of the review petitioner is diametrically opposite to the stand taken by him in the writ petition. Even in the review petition, review petitioner has nowhere stated that he had fled from Bangladesh to India (Assam) because of religious persecution.

12. Therefore, we find no merit in the review petition. Review petition is accordingly dismissed.