

(2015) 04 GAU CK 0034
In the Gauhati High Court
Case No : Writ Petition (C) No. 1691 of 2015

Sulema Khatun

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 29-04-2015

Acts Referred:

Foreigners Act, 1946 — Section 2(a)

Citation : (2015) 2 GLD 725 : (2016) 1 GLT 565

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : Z. Hammad, for the Appellant; S.C. Keyal, A.S.G.I. and N. Upadhyay, G.A., Advocates for the Respondent

Final Decision : Dismissed

Judgement

Biplab Kumar Sharma, J.—Heard Mr. Z. Hammad, learned counsel for the petitioner. Also heard Mr. S.C. Keyal, learned ASGI representing the Union of India. I have also heard Mr. N. Upadhyay, learned State counsel. I have also perused the entire materials on record.

2. By means of this writ petition, the petitioner has challenged the ex-parte judgment and order dated 02/09/2014 of the learned Member, Foreigners Tribunal (2nd) Morigaon passed in FT (D) 53/11 (Police Reference D/N case No. 2779 dated 04/07/1998) (EROs reference No. 83/80/65 dated 17/10/1997) (State of Assam Vs. Sulema Khatun). By the said judgment and order, the petitioner has been declared to be foreigner under Section 2(a) of the Foreigners Act, 1946, who illegally entered into India (Assam) after the cut of date i.e. 25/03/1971. In paragraph 6 of the impugned judgment and order, the reason for passing the impugned judgment and order has been recorded and the same is reproduced below:-

"6. After examination of Verification Officer date was fixed on 05.10.2012 for evidence of O.P's side. On that day O.P's lawyer filed adjournment petition No.

874 for separate date. The petition was granted fixing next date 17.11.2012. On that day O.P's lawyer filed another adjournment petition No. 1085 for separate date. The petition was granted. Thereafter filed adjournment petition No. 269 on 25.04.2013. The petition was granted and next date was fixed on 04.07.2013 but on that day O.P's lawyer filed adjournment petition No. 707 praying for separate date. The prayer was granted and next date was fixed on 26.08.2013 but on that day O.P's lawyer again filed adjournment petition No. 983 for separate date. The prayer was granted fixing next date 09.10.2013. On 09.10.2013 O.P's lawyer again filed adjournment petition No. 1295 seeking another date without any supporting document. It appears that already several adjournment were granted but O.P's side failed to produce and adduced any witness. I found no reliable ground for further adjournment. Therefore the petition is rejected. Heard prosecution side. The O.P's side failed to adduce witness nor proved document. The plea of W/S left unproved."

3. In the writ petition, the petitioner has stated that she had filed written statement respondent to the proceeding initiated by the Tribunal, a copy of the said written statement has been annexed to the writ petition as Annexure-6. For a ready reference, the written statement is reproduced below:-

"IN THE COURT OF FT NO. 2, MORIGAON

Ref : FT (C) 53/11

State Vs. Sulema Khatun Petitioners : Sulema Khatun (opp. party)

Written statement from the side of the Opp. party.

Sir,

The Opp. party was respectfully begs to submit the W/S as follows:-

1. That, the allegation against the above cited O.P. under the Foreigner Tribunal order 1964 1964 (4) Act-1946. It is totally false and baseless, it is only a unreasonable doubt nothing else so the case should be dismissed.
2. That, the enquiry Officer could not made the proper enquiry in this case and submit a false report on the basis of which the case is registered. By this case the OP has been arrasseted in vain. So the case should be dismissed.
3. That, the verification Officer neither visited the house of O.P. nor gave any notice to produce the relevant documents which shall prove that the O.P. is the Indian National.
4. That, Annexure "A" (Verification report) has not filed up on the spot by the V.O. and it is manufacture by him hence it is not correct and admissible.
5. That, the contents of Annexure "B" is strongly denied by the O.P. and he claimed that he is an Indian National by birth.
6. That, the actual facts is the O.P. is the daughter of Lt. Jamsheer Ali of the

village Amlakhi, P.S. Batadraba in the Dist of Nagaon (Assam) and the O.P. was married with Md. Nobi Hussain, S/o. Sayeb Ali, R/o. Vill-Moirabari, P.S. Moirabari, Dist-Morigaon (Assam) since Marriage the O.P. has been residing permanently at her matrimonial resident and in their conjugal life issued children also.

7. That, in support of his claim the following documents is produced which shall prove their Nationality-

- a) A Gaonburha Certificate.
- b) A Panchayat Certificate.
- c) A voter list of 1965 in the name of father of the O.P.
- d) A voter list of 1993 in the name of father of the O.P.
- e) A voter list of 1997, 2005, 2010 in the name of the O.P.
- f) A Land record in the name of the father of O.P.
- g) Other relevant documents and original documents will be produced if required/ at the D.W. Stage of the case.

Verification

We, the O.P. Parties, do hereby declare that the statements made from para 1 to 6 are all true to the best of my knowledge, belief and information and hence I put my signature on this 5th day of May/2012."

4. If we go by the stand of the petitioner in the above quoted Written Statement it is found that there is no statement not to speak of relevant statement towards discharging the burden of proof that the petitioner is a citizen of India. Although, in paragraph 6 of the written statement, a statement has been made about the production of the documents mentioned in para 6(a) to 6(j) but on perusal of the records received from the Tribunal, it is found that no such documents had been annexed to the written statement. Even if such document had been annexed, same would require to be proved as per the provision of the Evidence Act. As has been held by the Apex Court in L.I.C. of India and Another Vs. Ram Pal Singh Bisen, (2010) 125 FLR 325 : (2010) 3 JT 53 : (2010) 2 SCALE 121 : (2010) 4 SCC 491 : (2010) 1 SCC(L&S) 1072 : (2010) 3 SCR 438 : (2011) 1 SLJ 201 : (2011) 2 SLR 792 : (2010) 3 UJ 1354 , mere production of some documents or exhibiting the same without proving the contents thereof is not enough. In this connection, para 31 of the judgment 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."

5. Learned counsel for the petitioner submits that good ground having been cited towards setting aside the ex-parte order impugned in this proceeding, the petitioner is required to give another opportunity. In paragraph 7 of the writ petition it has been stated thus:-

"7. That the petitioner begs to state that after submitting her written statement in the aforesaid case, the prosecution side examined their witnesses and thereafter the Ld. Tribunal fixed the case on 05/10/2012 for evidence. Thereafter, several dates were fixed and adjournments were taken and finally the case was fixed on 09/10/2013 for pronouncing judgment and order. On that day, although both the parties were heard but because of serious ailment i.e. Acute Br. Asthma with viral fever of the petitioner she could not adduce any witness nor any further supportive document for which her engaged counsel could not adduce the same. In this connection, a Medical certificate dated 06/12/2013 was issued by the M and HO-1, Moirabari CHC/FRU advising her to take bed rest for 7 days. As a result the engaged counsel of the petitioner prayed for adjournment of the case by filing a petition but the petition was rejected by the Learned Tribunal without considering the matter in its true perspective. Accordingly, the judgment and order was passed by the Ld. Tribunal without giving any further chance/opportunity to the petitioner and thereby declaring her as a foreigner u/s. 2(a) of the Foreigners Act, 1946, who illegally entered into India (Assam) after 25/3/1971."

6. On perusal of the LCR, it is found that on 09/10/2013 i.e. the date of passing the impugned judgment and order, a prayer was made on behalf of the petitioner for adjournment on the ground of petitioner's alleged illness. However, the petition was not supported by any verification and/or affidavit and so also by any medical certificate. Now, after the impugned judgment, the petitioner has obtained a medical certificate dated 06/12/2013 certifying that the petitioner was under treatment from 24/09/2013 to 121/10/2013 and that she was advised for bed rest for 7(seven) days w.e.f. 13/10/2013. If that be so, she was not under advice of bed rest on the date of passing the impugned judgment and order dated 09/10/2013.

7. Above apart, on perusal of the records received from the Tribunal what has transpired is that although in the written statement, the petitioner mentioned about the submission of the above mentioned document but she did not submit any document. On the other hand, kept on praying for adjournment, the dates on which she prayed for adjournment are as follows:-

(i) 01/12/2012, 29/02/2012 (Petitioner remained absent without step).

(ii) 31/03/2012, 05/05/2012 (on these dates although the petitioner submitted her written statement; as recorded in the order sheet no document had been produced).

(iii) 16/08/2012, 05/10/2012, 17/11/2012, 25/04/2013, 04/07/2013, 26/08/2013 and finally 09/10/2013.

8. As per the procedure laid down towards adjudication of the reference made to the Tribunal, such references are to be adjudicated upon finalization within 30 days. The Tribunal after having granted repeated adjournments on behalf of the prayers made on behalf of the petitioner, had no other option to proceed ex-parte against the proceedee i.e. the petitioner. As has been held by the Full Bench of this Court in its judgment reported in *The State of Assam and Others Vs. Moslem Mondal and Others*, (2013) 1 GLT 809 , although the Tribunal has the jurisdiction to entertain and pass necessary order on an application to set aside an ex-parte opinion but the same cannot be in a routine manner. Such an application can be considered only when sufficient grounds are assigned. It has been held by the Full Bench that the Tribunal can entertain such application provided the proceedee could demonstrate existence of special/exceptional circumstances to entertain the same by way of producing the same along with the application for setting aside the ex-parte opinion, otherwise the very purpose of enacting the Foreigners Act, 1946 and the Foreigners (Tribunal) Order, 1964 would be frustrated. Therefore, the Tribunal would have jurisdiction to reject such application at the very threshold if no ground is made out.

9. Above apart, in the writ petition also the petitioner has not enclosed any document pertaining to her citizenship. What she has enclosed is the document (photocopy) of the Gaon Panchayat and the photocopy of 1951 NRC and 1966 voter list containing the name of one Jomser Ali, whom she has identified as her father. However, she has not been able to establish any linkage to the said person as his daughter. In the affidavit that has been filed in support of the writ petition, the petitioner has disclosed her age as 39 years. If that be so, she attained the age of voting 21 years back but the petitioner has not enclosed a single voter list showing incorporation of her name.

10. Needless to say that the matter relating to foreigners is required to be dealt with firmly. This aspect of the matter has been emphasized by the Apex Court in *Sarbananda Sonowal Vs. Union of India (UOI) and Another*, AIR 2005 SC 2920 : (2005) 6 JT 79 : (2005) 5 SCC 665 : (2005) 1 SCR 472 Supp and *Sarbananda Sonowal Vs. Union of India (UOI)*, (2006) 13 SCALE 33 : (2007) 1 SCC 174 : (2006) 10 SCR 167 Supp .

11. Above being the position and the petitioner having not assigned any cogent and sufficient ground towards setting aside the ex-parte order coupled with the fact that she had measurably failed to discharge her burden of proof to establish that she is an Indian citizen that too by birth, I see no reason to interfere with the impugned judgment and order dated 02/09/2014 passed by the learned Member, Foreigners Tribunal (2nd) Morigaon in FT (D) 53/11. Accordingly the writ petition is dismissed.

12. Consequent upon dismissal of the writ petition, now the Superintendent of Police (B), Morigaon shall ensure that she is arrested and detained in the detention camp till her deportation to her country of origin i.e. Bangladesh. The Deputy Commissioner, Morigaon shall ensure deletion of the name of the

petitioner from the voter list, if any.

13. Let the matter be listed again after one month so as to submit report by the Superintendent of Police (B) Morigaon about the action taken in the terms of this order.

14. Registry shall send down the case records to the learned court below along with a copy of this judgment and order. A copy of the judgment and order may also be furnished to Mr. N. Upadhyay, learned State Counsel as well as Mr. S.C. Keyal, learned ASGI, for their immediate necessary follow up action. Copies shall also be sent to the SP (B), Morigaon and Deputy Commissioner, Morigaon, for their immediate follow up action.