
(2010) 02 GAU CK 0012
In the Gauhati High Court
Case No : Writ Petition (C) No. 489 of 2009

Tarabhanu Begum

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-02-2010

Acts Referred:

Citation : (2010) 2 GLD 297

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : J. Ahmed, for the Appellant; R. Chakraborty, Addl. Sr. Govt. Advocate for Assam, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The petitioner, who has been declared to be an illegal migrant from Bangladesh after the cut off date i.e. 25.3.1971 has invoked the writ jurisdiction of this Court by filing the instant writ petition. The impugned order dated 30.9.2008, declaring the petitioner to be an illegal migrant after the said cut off date has been passed by the Foreigners' Tribunal-III, Barpeta in F.T. Case No. 19(III)/2007 (Tara Bhanu Begam).

2. I have heard Mr. J. Ahmed, learned Counsel for the petitioner as well as Ms. R. Chakraborty, learned Additional Senior Government Advocate. I have also gone through the entire records of the tribunal.-

3. The impugned order is an ex parte one, in as much as, the petitioner in spite of notice, did not respond to the proceeding before the learned Tribunal. The case against the petitioner was first registered as Case No. 1365 of 2003 under the then IM (D) T Act, 1983. After the scrapping of the said Act by the Apex Court in Sarbananda Sonowal Vs. Union of India (UOI) and Another, the case was re-registered as F.T. Case No. 19(III)/2007 in the Foreigners' Tribunal-III, Barpeta.

4. As recorded by the learned Tribunal in its order dated 23.8.2007, notice was duly served on the petitioner and on that day she appeared and prayed for time

to file written statement. The prayer so made was by way of application duly signed by the petitioner. The learned Tribunal allowed the prayer so made fixing the matter on 28.9.2007. On that day also an application was filed praying for further time for filing written statement. The ground assigned for such a prayer was that the petitioner had not been able to collect the necessary documents. On that occasion also the learned Tribunal allowed time fixing the matter on 31.7.2007. On 31.7.2007, there was no representation on behalf of the petitioner and accordingly, the Tribunal passed an order for ex parte proceeding and issued summons to the local verification officer, who had conducted the inquiry and furnished report alleging the petitioner to be a foreign national.

5. On 17.1.2007 an application was filed on behalf of the petitioner with the prayer to set aside the order for ex parte proceeding and to give another date enabling the petitioner to file written statement. The application was allowed by setting aside the ex parte order and fixing the matter on 10.1.2008.

6. On 10.1.2008 the petitioner did not appear and also did not take any step. Accordingly, the learned Tribunal passed an order for ex parte hearing fixing the matter on 6.3.2008. Since the summons issued to the IBO was not served, the matter was adjourned on 6.3.2008 and the next date fixed was 12.5.2008. On 12.5.2008 the State witness was examined and discharged. The said witness proved the report furnished against the petitioner. Thereafter, the matter was heard and finally the impugned order dated 30.9.2008 was passed. In between 4 other dates were fixed, which are 10.7.2008, 3.9.2008, 19.9.2008 and 22.9.2008. On none of the dates the petitioner appeared before the learned Tribunal nor did she take any step.

7. In the aforesaid circumstances, the learned Tribunal was left with no other option than to deal with the reference in absence of the petitioner.

8. Let us now examine the ground assigned in the writ petition for non-appearance of the petitioner. Apart from the fact that the petitioner has suppressed the aforesaid facts of non-appearance before the learned Tribunal and prayer for setting aside the ex parte proceeding order, the casual stand taken in the writ petition is that although, on receipt of the notice, the petitioner had appeared before the learned Tribunal and took time for submitting written statement, but later on due to bad physical condition she could not appear and submit her written statement. No particulars have been given as to when the petitioner had suffered from illness and for what duration. On the other hand, the records of the Tribunal has revealed otherwise.

9. As noted above, the petitioner twice appeared before the learned Tribunal and took time for written statement. On the 3rd occasion, she made an application for setting aside the ex parte proceeding order which was allowed, but thereafter, again disappeared and did not respond to the proceeding before the Tribunal. At the first instance, the learned Tribunal allowed the prayer for setting aside the ex parte proceeding order but at the second instance, when the said opportunity

granted was also flouted, the Tribunal had no other option than to proceed ex parte against the petitioner.

10. In the writ petition, the petitioner has not even obliquely stated about the above facts, including the fact that on her prayer, the order for ex parte hearing was recalled and she was given another opportunity, which she did not avail. Her only stand is that although she had received notice, she, after initial appearance could not appear due to bad health condition. As noted above, no particulars relating to such so-called illness have been furnished.

11. In the proceeding before the learned Tribunal the State duly established its reference by examining one Khitabuddin Ahmed, who had carried out the inquiry against the petitioner. He in his deposition stated about the inquiry carried out and the failure on the part of the petitioner to produce any document to prove her Indian citizenship. He proved the Inquiry Report (Ext.-I) along with his signature (Ext.-1(1)). He also proved the signature of the Gaonburah on the Inquiry Report (Ext.-1(2)). Be it stated here that the Ext.1(2) is the signature of the Gaonburah of the village, namely Mainul Hoque.

12. In the Enquiry Report the date of birth of the petitioner is shown as 1970. As regards the queries made as to whether, the petitioner has registered her name with the authority and the production of documents in support of Indian citizenship, the remark recorded is "In spite of my repeated visit person has not submitted any document." The further remark recorded is "During reverification I met the person personally and the above statement is confirmed."

13. In view of the above position, no relief can be granted to the petitioner. The writ petition is liable to be dismissed on both counts i.e. on merit as well as on account of suppression of material fact. In the writ petition, the petitioner has annexed Annexures-3 and 4 documents so as to claim that one Rahizuddin is her father and that his name was included in the NCR and further that said Rahizuddin alias Md. Rahizudin Miah was a voter in 1965 also and further that the name of the petitioner was included in the voter list of 1970. The petitioner has also placed reliance on Annexures-5 and 6 certificates, dated 15.8.2007 and 29.11.2008 respectively, issued by one Mainul Haque, Gaonburah of the village, certifying the aforesaid 1965 voter list and inclusion of the name of the petitioner in the 1997 voter list.

14. It is on the basis of the above documents, the petitioner has contended in the writ petition that she is an Indian citizen by birth. Although in the writ petition the petitioner has declared her age as 58 years as on 3rd February, 2009 but the records of the learned Tribunal have revealed that in Ext.-1 her date of birth was recorded as 1970, which document was duly signed by the same very person i.e. Mainul Hoque, Gaonburah of Barmara village, who has issued the aforementioned Annexures-5 and 6 certificates. Such certificates cannot override the document exhibited and proved in the proceeding before the learned Tribunal, more particularly when the same very author of the said documents

was signatory to the aforementioned Inquiry Report (Ext-1). In the said document the same very Gaonburah put his signature (Ext.-1 (2)) accepting the contents therein.

15. The petitioner merely placing reliance on the Annexure-3 NRC and Annexure-3(a) voter list of 1965 claiming Rahizuddin, whose name appeared in the said 2 documents to be her father without establishing the linkage cannot claim Indian citizenship by birth. Even if, the said documents are in existence, unless it is established that the person named in the said documents is in fact the father of the petitioner, the petitioner cannot claim Indian citizenship by birth through him. That apart, it is a common phenomenon in this part of the country that one part of the family remains in Bangladesh while another part migrates to Assam. In such a situation, it will be totally unsafe to hold that the petitioner is an Indian citizen by birth on the basis of said two documents.

16. The Annexure-4 is a voter list of 1970 (photocopy) indicating one Tara Bhanu, which the petitioner claims to be her name. If the petitioner was born in 1970 as reflected in the records of the learned Tribunal, it is unbelievable that the petitioner could be a voter in 1970 itself. Merely because the name one Tara Bhanu appeared in the voter list of 1970 which resembles the name of the petitioner, the petitioner cannot claim Indian citizenship by birth solely on the basis of said document. There is no explanation as to why the name of the petitioner does not appear in any other voter list although in the writ petition she claims her age as 58 years.

17. As observed above, even if the Annexure-3 NRC and Annexure- 3(a), 1965 voter list are accepted as genuine, that by itself cannot establish the Indian citizenship of the petitioner by birth. It is interesting to note that the same very Gaonburah, namely Moinul Hoque by his certificate dated 5.9.2009 has certified otherwise than what he had endorsed by his Ext.-1(2) dated 12.5.2008. In Ext.-1 it has been stated that the date of birth of the petitioner is 1970 and that she could not produce any document to establish her Indian citizenship inspite of repeated visit to her. Thus, here is a case in which the petitioner has merely relied upon certain documents to establish her Indian citizenship by birth unmindful of the ambit, scope and jurisdiction of Writ Court. In this connection, the observations, of this Court in judgment and order dated 1.2.2010 in WA No. 238/2008 Moslem Mondal and Ors. v. Union of India and Ors. in paragraphs 38, 39 and 40 are reproduced below:

38. Moreover, a writ proceeding is not, and cannot be made, a substitute for a proceeding before the said tribunal. For instance, in the case at hand, the learned single Judge, having extensively discussed the pleadings of the writ petitioners and the documents, relied upon by them, came to the conclusion that even the documents, which the petitioners had sought to rely upon, did not establish their claim of being Indian citizens. Supposing, for instance, the learned single Judge would have found the documents, which were sought to be relied upon by the writ petitioners, enough to hold that they were Indian citizens. Could

the learned single Judge have, while dealing with a writ petition, arising out of an order passed by a Tribunal opining that the proceedee is a foreigner, upset the decision of the tribunal, and contrary to the opinion expressed by the tribunal, hold, on the basis of the pleadings of the parties in the writ proceeding and the documents, relied upon by them, that the proceedee was an Indian citizen? The answer to this question has to be in the negative inasmuch as the State cannot be denied the opportunity to cross-examine a writ petitioner before the Court relies upon any document annexed to a writ petition or produced by a writ petitioner during the course of hearing in a writ proceeding. At the same time, the writ petitioner too cannot be denied the opportunity of adducing evidence if his writ petition is to be made basis for determination of the question as to whether he (writ petitioner) is or is not a foreigner.

39. It is, thus, clear that on the basis of the pleadings of the parties in a writ proceeding and/or, on the basis of the documents placed on the record in a writ proceeding, a Court cannot determine the question as to whether a person is or is not a foreigner. The determination of the question, as to whether a person is or is not foreigner, falls, when a "reference" is made to a Tribunal under the provisions of the Foreigners Act read with the 1964 Order, within the ambit of the powers of the Tribunal and, in other cases, by a civil Court of competent jurisdiction. We may hasten to point out that so far as Tribunal is concerned, it only fenders an "opinion" with regard to the question as to whether the person alleged to be a foreigner is or is not a foreigner and, then, it is for the Central Government or the authorities, otherwise empowered, to decide as to whether such a foreigner needs to be deported from the territory of India or not. Thus, the procedure, adopted, in the writ proceeding, in the present case of determining, on the basis of the pleadings made in the writ proceeding and the documents annexed thereto, whether the writ petitioners were or were not foreigners, cannot be said to be a legally permissible procedure.

40. We wish to make it clear that against the finding of a Tribunal constituted under the 1964 Order, when a writ petition is entertained and the High Court takes the view that the Tribunal was justified in proceeding ex parte and in coming to the conclusion, which it has reached, that the person, proceeded against, is a foreigner, the Court is not required to, once again, determine afresh in the writ proceeding, on the basis of the pleadings of the parties and the documents brought on record in the writ proceeding, the question as to whether the petitioner is or is not a foreigner. If, however, the Court decides and enters into the question of the merit of the conclusion, which the Tribunal has reached, the Court's decision has to be based on the materials, which were available before the Tribunal, and not on the basis of such a material, which was not available with the Tribunal or has not been allowed to be produced, as additional evidence, in the writ proceeding, by the High Court. Taking of additional evidence obviously means examining the witness, in person, with regard the oral evidence, which he likes to give, and also with regard to the documentary evidence, which he would like to rely upon. Examination of the writ petitioner, in

such a case, would be subject to cross- examination by the State. No such procedure was, admittedly, followed in the present writ proceeding.

18. In the records of the learned Tribunal the age of the petitioner is shown as 28 years as on 28.5.1998 and in Ext.-I her date of birth is recorded as 1970. As per the said recorded date of birth, the age of the petitioner at the time of filing the writ petition on 4.2.2009 was around 39 years, which also tallies with the opinion expressed by the Regional Diagnostic Centre, Barpeta Civil Hospital. The said centre by its report dated 22.12.2009 has diagnosed the approximate age of the petitioner as 40/50 years. If that be so, there is no question of the petitioner being a voter in 1970.

19. From what has been stated above, there is absolutely no doubt that the petitioner has taken recourse to falsehood in moving the writ petition. She has also taken recourse to falsehood in respect of the proceedings before the Tribunal. As noted above, there was absolutely no indication before the learned Tribunal that the petitioner was under any kind of illness rather she took time to collect documents to file written statement. Eventually, she did not respond to the proceeding before the learned Tribunal and now coming to the Writ Court, all sorts of unsustainable pleas have been advanced, which needless to say that the Writ Court cannot appreciate and/or reappraise like a trial Court.

20. For all the aforesaid reasons, the writ petition is dismissed upholding the order of the learned Tribunal. The Superintendent of Police (B), Barpeta, shall now ensure the detention and deportation of the petitioner without any delay. Simultaneously, the Deputy Commissioner, Barpeta, shall also ensure the deletion of the name of the petitioner from the voter list, if any. Let the compliance reports be furnished by both the authorities on or before 31.3.2010 and for perusal of said reports, the Registry shall list the matter again on 31.3.2010.

21. Let the copies of this judgment and order be sent to the Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta and so also to the Union of India, Home Department. Another copy shall also be furnished to Ms. R. Chakraborty, learned Additional Senior Government Advocate for her necessary follow up action.