

(1977) 07 GAU CK 0002

In the Gauhati High Court

Case No : Second Appeal No. 99 of 1973

The State of Assam and others

APPELLANT

Vs

Abdul Sattar

RESPONDENT

Date of Decision : 28-07-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 5, 6, 7
Evidence Act, 1872 — Section 25

Citation : AIR 1978 Guw 48

Hon'ble Judges : K.M. Lahiri, J

Bench : Single Bench

Advocate : D.N. Konwar as Public Prosecutor, Assam, for the Appellant; S.R. Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

K. Lahiri, J.—This is a Second Appeal directed against the concurrent findings of the Courts below.

2. The plaintiff's suit is for declaration that he is an Indian citizen and for permanent injunction restraining the defendants from executing the quit India notices issued against the plaintiff-respondent. The case has a long and checkered career. The Plaintiff-respondent filed the suit being Title Suit No. 130 of 1966 in the Court of Munsiff at Karimganj. His case, inter alia, is that he was born in village Hashanpur under Badarpur Police Station in the district of Cachar, India and was serving in a Assam Police Department as a constable, In the year 1947, while there was a possibility that the whole of district of Sylhet including the sub-division of Karimganj might be included in Pakistan, the plaintiff having had his permanent homestead and cultivation in the said village, opted his services for Pakistan as he had the impression that his home village would go over to Pakistan. Accordingly, he was released from the services, came from Shillong to his native village, attended his ailing father, but in the mean time the

"Red -Cliff Award was published and the whole of the sub-division of Karimganj remained in India. The plaintiff then went back to Shillong and could learn that on the basis of his option, his services had been transferred to Pakistan authorities. The plaintiff came back to his own village and took to cultivation. His case is that he was born, brought up and married in the village, has had his permanent home and cultivation and was continuously residing in the said village. He had never gone to Pakistan to serve in Sylhet or as a matter of that for any other purpose. His case is that his name appeared in the electoral rolls, even Ration Cards were issued in his name. But, however, as late as in 1965 he received a notice from the Superintendent of Police, Cachar (defendant No. 1) to leave India, describing him to be a foreigner (a Pakistan national); he made representation to the Superintendent of Police, served a notice under S. 80 C.P.C. intimating his claim and intention to file the suit. The notice was duly served In spite of withdrawing the Quit India notice he was served with another similar order dated 17-5-66. His case, in short is that he is and was an Indian citizen all along; never had been to Pakistan and that the impugned orders of "Quit India", be set aside and that he be declared as a citizen of India.

3. The defendants, Union of India, State of Assam and the Superintendent of Police, Cachar at Silchar filed a joint written statement and contested the suit. The defendants claim that Quit India Notices were valid; did not admit that any valid notice under S. 80, C.P.C. had been served on them. The positive defence plea is that although the plaintiff was born in India, he had lost his citizenship by opting his services for Pakistan in 1947 and thereafter served in East Pakistan as a Police Constable for several years since 1947 and returned to India sometime in 1960 or 1961 without any migration certificate or any other valid document or authority. According to the defendants, his case was heard by the Member, Foreigners" Tribunal, at Silchar and the learned Member having considered his case had found the plaintiff to be a foreigner.

4. As many as 8 Issues were framed. The suit was tried and disposed of by the Munsiff at Karimganj on 31-3-69. The learned Munsiff decreed the suit after thoroughly scrutinizing the entire evidence on record. But, however, on appeal, the decree was set aside and the matter was sent down on remand to the trial on the scope that the Munsiff had not considered the evidence adduced by the plaintiff. The matter went back to the Munsiff at Karimganj. Before the learned Munsiff, the first 5 Issues, namely, as to the want of cause of action, maintainability of the suit, jurisdiction of the Court, the validity of the notice, limitation, were not at all pressed by the defendants. Issues Nos. 6 and 7, namely, as to whether the plaintiff lost his citizenship in India and as to whether he is, entitled to a decree, were contested by the defendants and accordingly considered by the trial Court. While considering the Issues 6 and 7 aforesaid, the Munsiff considered the oral as also the documentary evidence adduced by the plaintiff. The Munsiff found that sufficient oral evidence had been produced by the plaintiff to substantiate his case that he had never left for Pakistan; found that Ext. 2 (Kabinama) had been executed by the plaintiff; the plaintiff's name

appeared in the electoral roll for the year 1958. He also found that a Ration Card (Ext. 11) had been issued to the plaintiff. After considering the plaintiffs evidence, the learned Munsiff also considered the evidence adduced by the defendants and came to the conclusion that there was no evidence to establish that the plaintiff had actually migrated to Pakistan at any point of time. The learned Munsiff did not place any reliance on the documentary evidence, namely, Exts. B and D, said to be some statements recorded by the police during the inquiry of the case. According to the learned Munsiff, they were prepared by the police during the course of the investigation. It is an admitted fact that these two documents were never shown or put to the plaintiff while he was in the witness box. It also appears that the contents of the documents were not put to the plaintiff nor any effort was made to move the alleged signatures of the plaintiff. The learned Munsiff was not satisfied in regard to the admissibility of the documents; did not place any reliance on the authors of the two documents. (Exts. B and D); came to the conclusion that the defendants' witnesses did not state that they had ever seen the plaintiff migrating to Pakistan or had any personal knowledge about his migration. The Munsiff did not believe the three witnesses examined by the defendants. He came to the conclusion that the plaintiff had proved his case that he did not migrate to Pakistan and relinquished his Indian citizenship and decreed the suit for declaration as prayed for by the plaintiff and restrained the defendants from deporting the plaintiff out of India. Against the said judgment, the matter was taken on appeal; the appellate Court considered the entire evidence threadbare; did not believe the statements of defence witnesses; could not place reliance on their testimony; held that Exts. B and D were admissible in evidence, but were not reliable.

5. Concurrent finding of facts is that the plaintiff had never migrated to Pakistan at any point of time and he was all along in India. The Courts below believed the testimony of the plaintiff, his witnesses and the documents, The Courts below did not place any reliance on the evidence of the witnesses for the defendants.

6. Under these adverse circumstances, Shri D.N. Konwar, the counsel for the appellants had little scope for argument. He submits that Ext. B is a vital piece of evidence and the trial Court has left it out of consideration as inadmissible and that although the first appellate Court has considered the same to be admissible, did not appreciate the real effect of the said document. I find that Ext B was never put to the plaintiff. The appellate Court has very rightly held that it is destructive of the positive defence case that the plaintiff had reentered India sometime in 1960-61. Shri Konwar admits that there is no admission made by the plaintiff in Ext. B to the effect that he had returned back to India in 1960 or 1961. Further, realising the fact that the document (Ext. B) was not proved in accordance with law, the learned counsel did not press home the point. I find that the author of the documents was found to be thoroughly unreliable by the Courts below. No law under which such statements could be recorded, could be placed by the counsel. If they are recorded in connection with any criminal case, it is hit by Section 25 of the Indian Evidence Act. In any view of the matter, in

the instant case, the Courts below have not relied on the author of these documents. The appellate Court has rejected the documents as not worthy of belief. Under these circumstances, I do not find any force in the contention of the learned counsel for the appellants.

7. The most serious contention that has been made by the counsel for the appellants is that the very fact that the respondent-plaintiff had opted to serve in Pakistan amounted to migration as contemplated under the provisions contained in Arts. 5, 6 or 7 of the Constitution. In my opinion, expression of desire to go to another country and to serve there, cannot be termed as migration unless a person physically goes to the country. It is hardly possible to conceive that the word "migration" as contemplated in the said Articles includes a mere desire or wish of a person to go to a foreign land. The ordinary meaning of the word migration" is a change of abode, a removal from one country or climate to another. Two elements, namely, mental desire and physical departure to the land are essentially necessary to constitute an act of migration. I do not find any force in the contention of the learned counsel.

8. The appeal is dismissed with costs.