
(2015) 07 GAU CK 0046
In the Gauhati High Court
Case No : WP(C) No. 3989 of 2013

Usman Gani

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 21-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151
Foreigners Act, 1946 — Section 9

Citation : (2015) 4 GLT 161

Hon'ble Judges : Biplab Kumar Sharma, J.

Bench : Single Bench

Advocate : M.U. Mondal, for the Appellant; S.C. Keyal, ASGI and M. Talukdar, G.A., for the Respondent

Judgement

Biplab Kumar Sharma, J.—This writ petition is directed against the judgment dated 5.11.2013 of the Foreigners Tribunal, Nagaon passed in FT Case No. 98/2009 (State of Assam v. Usman Ali). By the said judgment, the petitioner has been declared to be a foreigner of post 25.3.1971 stream. The judgment so passed is ex-parte? It appears that the petitioner made the Annexure-10 application under Section IX Rule 13 and Section 151 of the Code of Civil Procedure for setting aside the ex-parte judgment. The said application was rejected by order dated 3.6.2013. The petitioner has also challenged the said order. I have heard Mr. M.U. Mondal, learned counsel for the petitioner. Also heard Ms. M. Talukdar, learned State Counsel and so also Mr. S.C. Keyal, learned ASGI and Mr. P.J. Saikia, learned counsel, representing the respondent No. 6. I have also perused the entire materials on record including the records received from the Tribunal.

2. Mr. Mondal, learned counsel for the petitioner submits that the learned Tribunal ought to have set aside the ex-parte judgment dated 5.1.2013 inasmuch as on that day, the petitioner had appeared before the Tribunal along with two witnesses. However, his engaged counsel i.e. the respondent No. 6 could not

take step because of his busy schedule and eventually the Tribunal passed the impugned judgment ex-parte. According to the petitioner, the ex-parte judgment is passed because of the fault on the part of the engaged counsel i.e. the respondent No. 6.

3. For a ready reference, paragraph-11 of the writ petition, in which, the aforesaid allegation has been made is quoted below:

"That the petitioner begs to state that the petitioner was appearing before the Ld. Tribunal regularly but on 05.01.2013 though the petitioner appeared in time before the Ld. Tribunal with his witnesses No. 1 and 2 i.e. Local Gaonburah and one brother of the petitioner to adduce their evidence but the Ld. Engage Counsel could not take steps because of his busy schedule and ultimately the Ld. Tribunal was pleased to decide the case by ex-parte order declaring the petitioner as foreigner and as such for the fault of the Ld. Engage Advocate, the petitioner should not be harassed and as such the impugned ex-parte order dated should be recalled and the matter may be remanded for fresh trial considering the facts and circumstances of the case otherwise the petitioner would suffer irreparable loss, hardship and injustice."

4. Par contra, in the application for setting aside the ex-parte order(Annexure-10), the petitioner did not attribute any fault on the part of the respondent No. 6. It was also not placed that he had appeared before the Tribunal on 5.1.2013 along with two witnesses. For a ready reference, the said application is also reproduced below:

"In the Court of Foreiners Tribunals, Nagaon (Assam)

F.T. CASE No. 98/09

State

Vs

Md. Usman Ali@ Usman Goni.

Petitioner:-- Usman Goni S/o. Mohar Ali Vill-Dighalidoba, P.S. Kamrup, Dist Nagaon. (Assam)

Petition under Order ix, Rule-13 and 151 of C.P.C. Sir,

The Humble submission of the petitioner is that an ex-parte order has been passed on 05.01.2013 against the petitioner. After received the summon from the Ld. Tribunal the petitioner had appeared and filed written statement but at the time of evidence the petitioner has been appearing on two dates along with Gaonburah but the evidence could not be adduced due to unavoidable circumstances. After that, he had been suffering from illness and was under treatment for a long period and as such he could not appear before the Tribunal as a result the ex-parte order has been passed against the petitioner. Actually the petitioner did not commit any wrong with knowledge or disobeyed the court.

The petitioner is a citizen of India by birth and he has all necessary documents and he may be proved himself as a bona fide citizen of India if a chance is given him to contest the case.

It is therefore, prayed that your honour would be pleased to pass an order and condone the mistake committed unwillfully by the petitioner and a chance may be given to the petitioner to contest the case and thus oblige.

Verification

I Usman Goni solemnly declare and affirm that all the statements made above are true to the best of my knowledge and belief and I put my signature on to it on 23.05.2013."

5. From the above, there is absolutely no manner of doubt that coming to the Writ Court, the petitioner has taken recourse to falsehood, which is an abuse of the process of law. On that count alone, the writ petition is liable to be dismissed.

6. On perusal of the records received from the Tribunal it is found that the petitioner on receipt of the notice first appeared on 5.5.2010 and filed written statement, Thereafter he kept on taking time on all subsequent dates, which are 15.6.2010, 24.6.2010, 17.8.2010, 1.10.2010, 23.11.2010, 20.1.2011, 16.3.2011, 10.5.2011, 27.6.2011, 8.8.2011, 23.9.2011, 16.11.2011, 28.12.2011 etc. In between, his engaged counsel i.e. the respondent No. 6 filed petitions praying for time to adduce evidence and those petitions were allowed granting adjournments. However; after the said adjournments, the petitioner further remained absent without any steps on 20.2.2012, 12.4.2012, 1.6.2012, 23.7.2012, 17.9.2012, 9.11.2012, 12.12.2012 and eventually on 5.1.2013.

7. On perusal of the records, petitions for adjournment filed on few occasions found available upto 2011. Therefore and naturally so, the records do not reveal filing of any adjournment petition inasmuch as the petitioner did not appear. Thus, the story made out in the writ petition that he had appeared on 5.1.2013 along with two witnesses is absolutely false inasmuch as the records do not reveal any steps being taken by the petitioner on 5.1.2013. On the other hand, the stand taken in the application that was filed for setting aside the ex-parte judgment dated 5.1.2013 is altogether different

8. The blame game taken recourse to by the petitioner against the respondent No. 6 is not to be found in the application that was filed for setting aside the ex-parte order. In the said application, it is never the case of the petitioner that he appeared before the Tribunal on 5.1.2013 along with two witnesses. However, in the writ petition, he has developed the plea that on 5.1.2013 he had appeared before the Tribunal along with two witnesses.

9. Although there is no provision in the Foreigners Act, 1946 or Foreigners (Tribunal) Order 1964 to set aside an ex-parte judgment, but the Full bench of this Court in The State of Assam and Others Vs. Moslem Mondal and Others, held that the Tribunal has jurisdiction to entertain and pass necessary order on

an application for setting aside an ex-parte opinion, but at the same time it has also been held rather cautioned that such application must not be entertained in a routine manner, otherwise the very purpose of enacting the 1946 Act and the 1964 Order would be frustrated. For a ready reference, paragraph-92 of the said judgment is reproduced below:

"92. As discussed above, the Tribunals constituted under the Foreigners Act read with the 1964 Order have to regulate their own procedure and they have also the quasi-judicial function to discharge and hence in a given case the Tribunal has jurisdiction to entertain and pass necessary order on an application to set aside an ex-parte opinion, provided it is proved to the satisfaction of the Tribunal that the proceedee was not served with the notice in the reference proceeding or that he was prevented by sufficient cause from appearing in the proceeding, reason for which was beyond his control. Such application, however, should not be entertained in a routine manner. The Tribunal can entertain such application provided the proceedee could demonstrate the existence of the special/ exceptional circumstances to entertain the same by way of pleadings in the application filed for setting aside the ex-parte opinion, otherwise the very purpose of enacting the 1946 Act and the 1964 Order would be frustrated. The Tribunal, therefore, would have the jurisdiction to reject such application at the threshold, if no ground is made out."

10. The ground assigned in the application for setting aside the ex-parte order cannot be said to be good and sufficient ground. The purported "unavoidable circumstances" and "suffering from illness" are not explained as it requires to be explained for setting aside an ex-parte order. The application was also not supported by any medical document. That apart, there was also delay in filing the said application. In spite of granting several opportunities (as many as 21 adjournments), the petitioner did not take any step to discharge the burden of proof to substantiate the claim made in the written statement. The Apex Court in *Sarbananda Sonowal Vs. Union of India (UOI)* and *Another*, has elaborately discussed about the requirement of discharging the said burden by proceedee having regard to the object and purpose of determining the issue as to whether he/she is a foreigner or not.

11. It was in such circumstances, the learned Tribunal dismissed the application for setting aside the ex-parte order, which also did not specify any cogent or sufficient ground. Needless to say that a reference made to the Tribunal to render opinion is required to be decided with utmost expedition.

12. From the above narration of fact, it is amply evident that the petitioner failed to discharge the burden of proof as envisaged under Section 9 of the Foreigners Act, 1946 in spite of granting several opportunities. Mr. Mondal, learned counsel for the petitioner submits that one of the brother of the petitioner having been declared to be an Indian citizen by the Foreigners Tribunal, the petitioner is also required to be declared to be an Indian citizen. I am afraid such a proposition is not available to the petitioner, firstly for his conduct and secondly, in the Indo-

Bangladesh border one can easily enter into Assam and then to go back. In such a situation to falling back on the purported brother of the petitioner is not available to the petitioner. Such a plea was also not taken before the Tribunal.

13. In view of the above, the writ petition is dismissed upholding the impugned orders of the learned Tribunal.

14. Registry may transmit the case records to the Tribunal.

15. The Superintendent of Police (B), Nagaon and the Deputy Commissioner, Nagaon are directed to take appropriate action in the matter towards deportation of the petitioner from India and deletion of her name from the voter lists. She shall be immediately taken into custody and kept in detention camp, if not already done.

16. Let copies of this judgment and order be furnished to the Superintendent of Police (B), Nagaon and the Deputy Commissioner, Nagaon. Another copy be sent to the Union of India in the Ministry of Home. An extra copy of this judgment and order may also be furnished to Mr. S.C. Keyal, learned ASGI for his necessary follow up action. List after one month for furnishing reports by the Superintendent of Police (B), Nagaon and the Deputy Commissioner, Nagaon.