
(2014) 03 GAU CK 0020
In the Gauhati High Court
Case No : WP (C) No. 1430 of 2013

Zabeda Khatun

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 25-03-2014

Acts Referred:

Citizenship Act, 1955 — Section 6-A(1)(d)
Constitution of India, 1950 — Article 226, 355
Evidence Act, 1872 — Section 101, 106
Foreigners Act, 1946 — Section 9

Citation : (2014) 2 GLD 63

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : A.R. Sikdar, Advocate for the Appellant; M. Bhagabati, CGC,
Advocate for the Respondent

Final Decision : Dismissed

Judgement

Biplab Kumar Sharma, J.—The petitioner, who has been declared to be a foreigner (illegal Bangladeshi migrant) by the Foreigners Tribunal-III, Barpeta, Assam, vide order dated 31/10/2012 in FT Case No. 78 (III)/2012 (Ref. Case No. 3431/98 (State of Assam Vs. Zabeda Khatun), has filed the instant writ petition challenging the said order. As has been claimed in the writ petition, the petitioner's parent, Sattar Bhuyan and Ayoman Nessa were the voters of the particular assembly constituency and their names appeared in the voter lists of 1970 followed by 1997. Before the Tribunal, she had produced the voter lists of 1966, 1970 and 1997. According to the petitioner, her father's name was incorporated in the voter list of 1966. She has also referred to the certificate of the Gaon Burha certifying her marriage with Tomezuddin Mia, S/o. Jalal Uddin. According to the petitioner, her parents names were wrongly shown as Abdul Sattar and Zamela Begum in the voter list of 1997 instead of Sattar Bhuyan and Ayoman Nessa. She has also claimed that the name of her grandfather was wrongly shown as Amdali instead of Abed Ali.

2. Further stand of the petitioner in the writ petition is that her name appeared in the voter list of 1970 along with her husband, but inadvertently at the time of preparing the written statement filed before the Tribunal and adducing evidence in chief on affidavit, the same could not be furnished as the engaged lawyer did not guide her properly. Repeating the same very contention of wrong recording of name, she has contended that her name was wrongly shown as Zabeda Begum instead of Zabeda Khatun in the voter list of 1989. She has also claimed that her name was incorporated in the voter list of 1994. As per the statement made in paragraph-6 of the writ petition, the petitioner was born in Village-Balidhari under P.S. Tarabari in the district of Barpeta in the year 1949.

3. Above are the documents, on the basis of which, the petitioner aged about 65 years claims to be an Indian citizen by birth.

4. I have heard Mr. A.R. Sikdar, learned counsel for the petitioner. I have also heard Mr. M. Bhagabati, learned CGC. I have also perused the entire materials on record. My findings and conclusions are as follows.

5. As has been held by the Apex Court in *Sarbananda Sonowal Vs. Union of India* (UOI) and *Another*, , there is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth, (ii) place of birth, (iii) name of his parents, (iv) their place of birth and citizenship. Sometimes the place of birth of his grand parents may also be relevant like u/s 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authority of the State. As per the provisions of Section 9 of the Foreigners act, 1946, the burden of proof that he is an Indian citizen is on the proceedee. In the aforesaid case, dealing with the "Burden of Proof", the apex Court in the aforesaid case of *Sarbananda Sonowal*, has made the following observation.

18. Though in a criminal case the general rule is that the burden of proof is on the prosecution but if any fact is especially within the knowledge of the accused, he has to lead evidence to prove the said fact. In *Shambu Nath Mehra Vs. The State of Ajmer*, it was held as follows:

Section 106 is an exception to S. 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and S. 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.

In *Collector of Customs, Madras and Others Vs. D. Bhoormall*, , proceedings were

initiated u/s 167(8)(c) of the Customs Act for confiscation of contraband or smuggled goods and it was observed:

.....Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the accused, it is not obliged to prove them as part of its primary burden."

.....On the principle underlying S. 106 Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty.

In *State of West Bengal Vs. Mir Mohammad Omar and Others etc.*, , it was held that the legislature engrafted special rule in Section 106 of the Evidence Act to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. This principle was reiterated in *Sanjay @ Kaka Vs. The State (NCC.T. of Delhi)*, and *Ezhil and Others Vs. State of Tamil Nadu*, .

In *R. v. Oliver*, 1943 All ER 800, the accused was charged with having sold sugar as a whole-sale seller without the necessary licence. It was held that whether the accused had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him. It was further held that in the circumstances of the case the prosecution was under no necessity to give prima facie evidence of non-existence of a licence. In this case reference is made to some earlier decisions and it will be useful to notice the same. In *R. v. Turner*, (1916) 5 M & S 206: 14 Digest 430, the learned Judge observed as follows:

I have always understood it to be a general rule, that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative.

In *Williams v. Russel*, (1993) 149 LT 190, the learned Judge held as under:

On the principle laid down in *R. v. Turner* and numerous other cases where it is an offence to do an act without lawful authority, the person who sets up the lawful authority must prove it and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute.

19. Section 9 of the Foreigners Act regarding burden of proof is basically on the same lines as the corresponding provision is in U.K. and some other Western nations and is based upon sound legal principle that the facts which are peculiarly within the knowledge of a person should prove it and not the party

who avers the negative.

6. The issue relating to citizenship, particularly in Assam, will have to be considered keeping in mind that there is large scale illegal migration of Bangladeshi nationals to Assam. In this connection, the Apex Court has made the following significant observation in paragraph 38 of Sarbananda Sonowal (Supra).

38. This being the situation there can be no manner of doubt that the State of Assam is facing "external aggression and internal disturbance" on account of large scale illegal migration of Bangladeshi nationals. It, therefore, becomes the duty of Union of India to take all measures for protection of the State of Assam from such external aggression and internal disturbance as enjoined in Article 355 of the Constitution. Having regard to this constitutional mandate, the question arises whether the Union of India has taken any measures for that purpose.

45. As mentioned earlier, the influx of Bangladeshi nationals who have illegally migrated into Assam pose a threat to the integrity and security of north-eastern region. Their presence has changed the demographic character of that region and the local people of Assam have been reduced to a status of minority in certain districts.....

7. In the instant case, the learned Tribunal appreciating the evidence on record has held the petitioner to be a foreign national who illegally entered Assam after the cut-off date i.e. 25/03/1971. Such findings of fact cannot be lightly interfered with exercising writ jurisdiction unless it is shown to be a perverse finding or the finding being not based on the evidence on record. The writ Court exercising extra ordinary jurisdiction under Article 226 of the Constitution of India cannot sit on appeal over the findings of facts recorded by the Tribunal. Needless to say that this Court exercising its jurisdiction under Article 226 of the Constitution of India cannot re-appreciate the evidence produced before the Tribunal and on the basis of such re-appreciation of evidence arrived at a finding different from that recorded by such Tribunal. The set and laid down principle is that a question of fact once decided by the Tribunal on the basis of evidence on record, it is not appropriate for the High Court under Article 226 to re-appreciate the evidence and come to a different conclusion.

8. Keeping in mind the above principles, it is to be seen as to whether the findings arrived at by the Tribunal on the basis of evidence on record can be said to be perverse or devoid of appreciation of evidence on record or there is any error of law which has apparent on the face of the record. It is a well established principle that a finding of fact cannot be challenged under Article 226 on the ground that the evidence before the Tribunal was insufficient or inadequate to sustain the findings, as a writ Court is not a Court of appeal. So also errors in appreciation of documents or affidavits, or errors in drawing inferences, or omission to draw inferences; in other-words, errors of a Court of appeal only can examine and correct, are not amenable to correction in a certiorari proceeding. But, if it is shown that in recording the said findings, the Tribunal had

erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which had influenced the impugned findings, the same can be assailed in a writ petition.

9. As the records received from the Tribunal have revealed that the reference against the petitioner was made on the basis of the enquiry that was conducted against her. As per the verification report, she was found to be an illegal Bangladeshi migrant and accordingly the reference was made to the Tribunal. On receipt of notice from the Tribunal, she appeared and contested the proceeding by filing written statement on 19.9.2011. In the written statement, she stated the following:

1. That there is no cause of action for the proceeding to be drawn against the 2nd party, hence it is liable to be dismissed.

2. That the S.P. Barpeta falsely framed charge against the 2nd party only aim to harass the 2nd party without verify the documents of the 2nd party as well as the 2nd party's father documents hence liable to be set aside.

3. That the 2nd party is genuine and bonafide citizen of India by birth and permanently living in her husband house of by village Bourikhamar, Mouza-Sarukhetri, P.S. Sarthebnari, Dist.-Barpeta.

4. That the 2nd party's father (Sattar Bhuyan) name has been enrolled in the Electoral Voters Roll of 1966 vide Part No. 100, LAC-54 No. Chenga, House No. 7, Serial No-23 of Village-Balidari.

5. That the 2nd party father's name again enlisted in the Electoral voters Roll of 1970 vide Part No. 97, LAC 54 No. Chenga, serial No. 37, House No. 7 of Village-Balidari.

6. That the 2nd party's fathers name also enlisted in the Electoral Voters Roll of 1997 vide part wrongly as A. Sattar in place of Sattar Bhuyan. Vide Part No. 98, LAC 47 No. Chenga, Sl. No. 137, House No. 33 of village Balidari.

7. That own name of the 2nd party has been enrolled in the Electoral Voters Roll of 1989 vide Part No. 84, LAC-Sarukhetri of Village-Bechimari Pam under Barpeta district.

8. That the 2nd party's name also appeared in the Electoral Voters Roll of 1994 vide Part No. 84, LAC-Sarukhetri of village-Bechimari Pam.

9. That again the 2nd party's name appeared in the voters slip of 2011 vide Part No. 136, SL No. 634, LAC-46 No. Sarukhetri of village Bourikhamar under Barpeta district.

10. That the Gaonbura's of Balidari and Bourikhamar issued certificate in favour of the 2nd party about her identification.

It is therefore prayed that your honour would be pleased to accept the w/s and dismiss the above noted F.T. Case that framed against the 2nd party and declare

the 2nd party as Indian citizen and thus oblige.

10. In the evidence in chief through affidavit, she claimed that she was born in 1949. In the said affidavit she reiterated her stand in the written statement. The documents produced by her and exhibited were marked as Ext-A, B, C, D, E, F and G. Significantly, neither in her written statement supported by affidavit and also in her evidence in chief, the petitioner identified her as Zabeda Begum, but in the writ petition, she has named herself as Zabeda Khatun. Not only that, in all the documents referred to by her before the Tribunal, it is Zabeda Begum and not Zabeda Khatun. Even in the Vakalatnama and attendances filed by her, it is Zabeda Begum and not Zabeda Khatun. No plea was taken that Zabeda Khatun and Zabeda Begum are one and the same person.

11. The learned Tribunal appreciating the evidence on record, has held that even if the claim of the petitioner that her father's name was wrongly recorded as Abdul Sattar instead of Sattar Bhuyan in the voter list of 1997 is accepted, but on perusal of the documents relied on by the petitioner, such as voter lists of 1966, 1970 and 1997, there are some major discrepancies. On perusal of the voter lists of 1966 and 1970, it was found that the father's name of Sattar Bhuyan was recorded as Abed Ali whereas the father's name of Abdul Sattar in the voter list of 1997 stood recorded as Amdali. Coupled with this, the age of Sattar Bhuyan is shown as 58 years and 62 years in the voter lists of 1966 and 1970 respectively, but on the other hand, the age of Abdul Sattar was recorded as 76 years in the voter list of 1997. The Tribunal has rightly recorded the finding that if Sattar Bhuyan was aged 62 years in 1970, his age after 27 years in 1997 should have been 89 years and not 76 years. Thus, it cannot be said that Sattar Bhuyan and Abdul Sattar are one and the same person.

12. Above apart, in the voter lists of 1966 and 1970, the name of wife of Sattar Bhuyan is shown as Ayoman Nessa (mother of the petitioner), whereas in the voter list of 1997 her name is shown as Zamela Begum. The petitioner failed to furnish any explanation before the Tribunal. On that count also, the plea of the petitioner that Sattar Bhuyan and Abdul Sattar are one and the same person is not acceptable.

13. One A. Barek was shown as S/o. Sattar in the voter list of 1997 recording his age as 50 years. If in 1997 A. Barek was 50 years, the year of birth would be 1947 i.e. 2 years prior to the birth of the petitioner in 1949. Thus, his name should have been included in the voter lists of 1966 and 1970, but the same was not the case before the Tribunal. The petitioner could not produce any voter lists of pre 1989 containing her name. If she was born in 1949, her name should have been included in voter list much prior to that. It has rightly been held by the Tribunal on that count also the petitioner failed to discharge the burden of proof that she is an Indian citizen by birth and that Sattar Bhuyan and Abdul Sattar are one and the same person.

14. Discussing the undated certificate issued by the Gaonburha showing one

Jabeda Begum as daughter of Late Sattar Bhuyan, the Tribunal has held that the said certificate is not in the official pad of the Gaonburha. The signature of the Gaonburha was also not proved. Referring to the other certificate of another Gaonburha showing Jabeda Begum, wife of Late Tomej, the Tribunal has recorded that the same pertains to another village. In the year 1989, the petitioner was aged 40 years and mother of two children, aged about 22 and 19 years respectively as per the photocopy of the voter list of 1989, but she failed to produce any voter list incorporating her name prior to 1989.

15. Above apart, in the voter list of 1994 (photocopy), the petitioner's name is shown as Jabeda Begum, W/O Late Tomej, but in the voter list of 1989 (photocopy) her name is shown as Mustt Zabeda Begum, W/O Tomejuddin. There is no evidence on record to show that as to when Tomejuddin died. The Tribunal has rightly appreciated the fact that if the two sons of the petitioner namely Makbul Hussain and Moslemuddin, aged about 22 and 19 years respectively are to be taken into account, then her husband was alive at least till 1967, but no voter list showing the name of Tomejuddin could be produced by the petitioner from 1967 to 1989.

16. Appreciating the evidence on record, learned Tribunal has held that the petitioner to be a foreign national because of the reasons indicated in the impugned judgment and discussed above.

17. Mr. Sikdar, learned counsel for the petitioner has referred to the copy of the voter list of 1970 enclosed to the writ petition with the statement that the said voter list could not be produced before the Tribunal. According to him, the name of the petitioner having been included in the 1970 voter list, she cannot be branded as a foreigner. Apart from the fact that no such stand was taken before the Tribunal, the name referred to in the 1970 voter list is of one Zabeda Khatun whereas in the voter lists of 1989 and 1994 is that of Zabeda Begum, W/O Late Tomej. More resemblance of name of two persons appearing in the voter lists without proving that both pertain to same person cannot be any help to the proceedee who is required to discharge the burden of proof as envisaged in Section 9 of the Foreigners Act, 1946.

18. The petitioner has annexed to the writ petition a self sworn affidavit dated 13.3.2013 (sworn after the impugned judgment dated 31.10.2012) stating therein that her parents names Sattar Bhuyan and Ayoman Nessa appeared in the voter lists of 1966 and 1970, but were wrongly recorded in 1997 voter list as Abdul Sattar and Zamela Begum. Thus, this is a development from the case projected before the Tribunal. The petitioner cannot be allowed to go on developing her case to meet the findings recorded by the Tribunal. Moreover, as has been held by the Division Bench of this Court in Moslem Mondal and Others Vs. Union of India (UOI) and Others, , this Court exercising writ jurisdiction cannot go beyond the evidence that was available before the Tribunal. In that view of the matter, the photocopy of the voter lists of 1970 annexed to the writ petition is of no help to the case of the petitioner.

19. On perusal of the impugned order in reference to the evidence on record, it cannot be said to be a case of any wrong appreciation of evidence and/or recording of perverse finding opposed to the evidence on record.

20. Above being the position, this Court exercising writ jurisdiction, cannot interfere with the same. As has been held by the Apex Court in *L.I.C. of India and Another Vs. Ram Pal Singh Bisen*, , admission of documents in evidence does not amount to its proof, in other words, merely making of exhibit or a document does not dispense with its proof, which is required to be done in accordance with law. The documentary evidence adduced by the petitioner was also required to be proved in accordance with the provisions of the Evidence act which he failed to do. Under the Law of Evidence 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 also to admission of contents but not its truth. Apart from the aforesaid position of the case, the documents were also not produced and marked as required under the Evidence Act. Needless to say that the contents of the documents cannot be proved by merely filing in a Court.

21. For all the aforesaid reasons, I do not find any merit in the writ petition and accordingly it is dismissed, without however, any order as to costs.

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

23. The Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta 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, of not already done.

24. Let copies of this judgment and order be furnished to the Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta. 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. M. Bhagawati, learned CGC for his necessary follow up action. List after one month for furnishing reports by the Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta.