

WP(C) 1002/2016

BEFORE

HON'BLE MR. JUSTICE UJJAL BHUYAN

HON'BLE MR. JUSTICE PARAN KUMAR PHUKAN

Ujjal Bhuyan, J.

Heard Mr. AS Bhattacharjee, learned Senior Counsel assisted by Mr. SG Bhattacharjee, learned counsel for the petitioner and Mr. N Goswami, learned Govt. Advocate, Assam.

By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of order dated 08.12.2015, passed by the Foreigners' Tribunal No.5, Dhubri in FT Case No.FT-5/G/15/2015 (Union of India Vs. Basiron Bibi), declaring the petitioner to be a foreigner who had illegally entered into India (Assam) from Bangladesh after 25.03.1971.

From the materials on record, it is seen that initially the reference was made by the Superintendent of Police (Border), Dhubri under the Illegal Migrants (Determination by Tribunals) Act, 1983 (IMDT Act) with the allegation that petitioner was an illegal migrant as defined under the said Act. The reference was registered as IMDT Case No.6404/1998 before the Tribunal constituted under the IMDT Act. Under the aforesaid Act, an illegal migrant was defined as a foreigner who had unauthorizedly entered into India after 25.03.1971.

Be it stated that the IMDT Act was declared unconstitutional by the Supreme Court in Sarbananda Sonowal Vs. Union of India, reported in (2005) 5 SCC 665 whereafter, it was re-registered as Case No.FT-5/G/15/2015 under the Foreigners' Act, 1946 read with the Foreigners' (Tribunals) Order, 1964 and after creation of additional Tribunals, it was assigned to the Foreigners' Tribunal No.5, Dhubri (Tribunal) for opinion. Notice issued by the Tribunal was served upon the petitioner whereafter, petitioner had entered appearance before the Tribunal and filed written statement along with copies of certain documents denying the allegation that she was a foreigner by claiming to be a citizen of India. She also adduced evidence, both oral and documentary.

After hearing the matter, Tribunal passed the order dated 08.12.2015 answering the reference in favour of the State by declaring the petitioner to be a foreigner who had illegally entered into India (Assam) from the specified territory i.e., Bangladesh on or after 25.03.1971.

This Court by order dated 08.03.2016 had issued notice while requisitioning the case record. An interim order was passed to the effect that petitioner should not be deported from India subject to her appearance before the Superintendent of Police (Border), Dhubri.

Thereafter, petitioner filed an affidavit on 24.08.2017, which will be adverted to in due course.

Mr. Bhattacharjee, learned Senior Counsel submits that Tribunal had adopted a too technical approach in answering the reference. For minor discrepancies in the names and age of persons in the voters' list, Tribunal had disbelieved the entire version of the petitioner. Referring to a judgment of this Court in Abdul Matali @ Matalieb (Md.) Vs. Union of India, reported in 2015 (2) GLT 617, he submits that such discrepancies should not be given undue weightage by the Tribunal to discard the evidence of the petitioner. He has referred to the averments made in the additional-affidavit as well as the documents annexed thereto i.e., school certificate issued by the Headmaster of No.1783 Sater Alga LP School, Dhubri and contends that the said document establishes linkage of the petitioner with her father. Therefore, the case should be remanded back to the Tribunal for a fresh consideration.

On the other hand, learned Govt. Advocate, Assam strongly supports the order passed by the Tribunal and submits that Tribunal had considered whatever evidence were tendered by the petitioner and thereafter had returned a finding of fact that petitioner is a foreigner of post 25.03.1971 stream who had illegally entered into India (Assam) from Bangladesh. Such a finding of fact may not be interfered with by the writ court in a proceeding under Article 226 of the Constitution of India. Therefore, writ petition is liable to be dismissed.

Submissions made by learned counsel for the parties have been considered. Also perused the materials on record, including the record requisitioned from the Tribunal.

In her written statement, petitioner stated that she was born and brought up at village-Sater Alga under Gouripur Police Station in the district of Dhubri. Name of her father was Abdul Barek Khan. After she had attained the age of majority, she was married to one Kader Ali, son of Cheru Sk of the same village. After her marriage, she has been permanently residing in her husband's house. Name of the father, Md. Abdul Barek Khan, was included in the National Register of Citizens (NRC) of 1951. His name was enlisted as a voter of Dhubri constituency in the year 1966 as well as in the year 1975. Father's name again appeared as a voter in the voters' list of 2015 from Gouripur Constituency. Petitioner's name appeared as a voter of Gouripur Constituency in the year 2015. Petitioner's father owned two plots of land, one measuring 1 bigha 2 lechas, covered by periodic khiraj patta No.9, dag No.245 of village-Sater Alga and another 3 katha 7 lechas, covered by periodic khiraj patta No.110, dag No.244 of the said village. In the affidavit sworn on 21.09.2015 in support of the written statement, petitioner disclosed her age as 43 years.

This is all that the petitioner stated in the written statement, which by any account was wholly inadequate to establish the identity of the petitioner as a citizen of India when the same was questioned by none else, but by the State, having regard to the mandate of section 9 of the Foreigners' Act, 1946, as explained by the Supreme Court in paragraph 26 of Sarbananda Sonowal (supra). As would be evident from the above, petitioner did not mention the date or year of her birth. However, from the affidavit, what is discernible is that she was 43 years of age in 2015, which means that she was born some time in the year 1972. She did not disclose the particulars of her grand-parents, mother, brothers and sisters. All that she disclosed was that she was born and brought up at village-Sater Alga under Gouripur Police Station in the district of Dhubri. Name of her father was Md. Abdul Barek Khan, whose name was included in the NRC of 1951 and in the voters' lists of 1966, 1975 and 2015. Her own name appeared as a voter in 2015. Father had two plots of land at village-Sater Alga.

In Rashminara Begum Vs. Union of India, reported in (2017) 4 GLR 282, this Court has held that written statement is the basic statement of defence of a proceeding facing a proceeding before the Foreigners' Tribunal. Material facts relevant for establishing his citizenship of India have to be pleaded in the written statement, which are thereafter required to be proved by adducing cogent and reliable evidence.

This Court has also in Momin Ali Vs. Union of India, reported in 2017 (2) GLT 1076 held that where a proceedee fails to set up a case in his pleadings, he would be debarred from adducing evidence in his support at the stage of trial. As a matter of principle, variance between pleading and proof is not permissible.

In Ayesha Khatun Vs. Union of India, reported in (2017) 3 GLR 820, it has been held that failure to disclose material facts in the written statement by itself will raise a serious question mark on the citizenship status of the proceedee.

Having noticed the above, we may now advert to the evidence tendered by the petitioner.

Petitioner submitted her evidence-in-chief by way of affidavit on 01.10.2015. In this affidavit, she disclosed her age as 45 years, which means that she was born some time in the year 1970, which is at variance with her declaration of age in her written statement, as per which, she was born in the year 1972. Rest of the averments were more or less identical as in the written statement. She was also subjected to cross-examination where she disclosed that she had five sons and one daughter. Her eldest son, Baser Ali, was 27 years of age.

Barek Ali Khan deposed as witness No.2 on behalf of the petitioner. In his evidence-in-chief by way of affidavit, he stated that petitioner was his daughter. He was also subjected to cross-examination wherein, he disclosed that he had four children, namely, Basiron Bibi, Rohema Bibi, Somer Khan and Sobatan. He also stated that name of his wife was Gulzan Bibi.

Proceeding to the exhibits, we find that Ext-1 is a certificate dated 09.09.2015

, issued by the Secretary of Baraibari Gaon Panchayat certifying that petitioner is the daughter of Barek Ali Khan. This certificate cannot be accepted for more than one reason. As already noticed above, the reference was made as far back as in the year 1998. 17 years after the reference was made, the said certificate was issued in the year 2015. Belated obtaining of such a certificate naturally casts grave doubts about its bona-fides. Moreover, in Monowara Bewa Vs. Union of India, reported in (2017) 2 GLR 632, this Court has already held that such a certificate has got no statutory sanctity and at best can be treated as a private document; in which event, the author of the certificate would not only have to prove the contents of the certificate, but also the truthfulness thereof. In the instant case, the Secretary of Baraibari Gaon Panchayat did not testify before the Tribunal to vouch safe the contents and truthfulness of Ext-1 wherein, the name Barek Ali Khan appears. In the absence of any certification or authentication, such a certificate has got no evidentiary value.

Ext-2 is a computer generated statement of NRC details where the name of Md. A Barek Khan, son of P. Mohammad Ali appears. Such a statement without any certification by the competent authority has got no evidentiary value having regard to the mandate of section 65B of the Evidence Act, 1872.

Ext-3 is an extract of the voters' list of Dhubri Constituency for the year 1966. Here the name which appears is Abdul Bari Kha, son of Mohammad Ali. Here Abdul Bari Kha is shown as a resident of Baghmara village of Dhubri Constituency.

In Ext-4, which is an extract of the voters' list of Gouripur Constituency of 1975, Abdul Bari Kha is shown as 20 years old. Be it stated that in 1975, the lawful age for casting vote was 21 years. Therefore, Abdul Bari Kha being 20 years of age in 1975, his name could not have appeared in the said voters' list. If he was not eligible to be a voter in 1975 (Ext-4), he could not have been eligible to be a voter of 1966 (Ext-3).

In Ext-5, Abdul Barek Khan becomes 35 years of age. But he is the only voter in this exhibit, which is an extract of the voters' list of 1985. What about his wife or other family members?

Ext-6 is an extract of the voters' list of 1993 in respect of Gouripur Constituency. Here names of Barek Khan and Sobahan Ali appear as voters. Barek Khan is shown as 40 years of old and Sobahan Ali 20 years of old. What happened to the wife of Barek Khan? In his cross-examination, he had disclosed the name of his wife as Gulzan Bibi. Why her name did not appear as a voter in Ext-5 or in Ext-6, there is no explanation to this. But, more importantly, in Ext-5 and in the previous exhibits, Abdul Barek Khan was shown as a resident of Baghmara village whereas, in Ext-6, he becomes a resident of Sater Alga village. How this is possible or how this had happened has not been explained.

Exts-7 to 11 are illegible copies of some documents relating to land which have been rightly disbelieved by the Tribunal. Ext-7 is an illegible copy of some sale deed, which was a photo copy and was not proved in accordance with law. The other exhibits, such as cattle purchase challan (Ext-9), chowkidari receipt (Ext-10) and land revenue receipt paid to Jyotdar (Ext-11) cannot be accepted as proof of one's citizenship. Ext-12 is an extract of the voters' list of 2015 in respect of Gouripur Constituency. Here for the first time, name of Gulzan Bibi appeared as a voter along with Barek Ali Khan. Gulzan Bibi is shown as 58 years of age, which means that she was born some time in the year 1957. If that be so, her name ought to have appeared in the previous voters' lists, but it was not to be. In Ext-13, which is also an extract of the voters' list of 2015 in respect of Gouripur Constituency, name of Basiran Bibi appears as a voter. She is shown as wife of Kader Ali, aged 35 years. This means that she was born some time in the year 1980. This position is more or less reiterated in Ext-14, which is an Elector Photo Identity Card. Interestingly, till Ext-5 i.e., voters' list of 1985, Abdul Barek Khan was shown as resident of Baghmara village. Now from Exts-13 and 14, it appears that petitioner was born some time in the year 1980. Reverting to the written statement and examination-in-chief of the petitioner, it was her case that she was born and brought up at village Sater Alga. But the residence of her father till 1985 was shown as at village Baghmara. This discrepancy of residence was not explained by the petitioner. That apart, petitioner being born in the

year 1980 as discernible from Exts-13 and 14, is at complete variance from what she disclosed in the written statement (year of birth 1972) and in the evidence-in-chief (year of birth 1970).

Exts-15 & 16 are periodic khiraj patta of certain land in the name Abdul Barek Khan and Tayab Ali Mollah. These two exhibits in no way can assist the petitioner in establishing her Indian citizenship. Likewise, Ext-17 is a Special Family Id entity Card, issued by the Food & Civil Supplies Department, Govt. of Assam wherein, the card holder's name is mentioned as Abdul Barek Khan. There is one more exhibit i.e., Ext-19, issued by the Secretary of Baraibari Gaon Panchayat, dated 06.11.2015 stating that Abdul Bari Kha, Abdul Barek Khan and Barek Khan is one and the same person. This exhibit cannot be accepted for the same reason as Ext-1.

Though petitioner had submitted huge number of documents to prove her Indian citizenship, it is a settled proposition of law that it is not the quantity of evidence but quality of evidence which is material. On due appreciation of the evidence adduced, we are convinced that petitioner had failed to establish her linkage with Barek Ali Khan, whom she claimed to be her father by any admissible evidence.

Petitioner tried to improve the situation by filing the additional-affidavit wherein, petitioner has annexed a certificate dated 22.06.2017, issued by the Headmaster of 1783 No. Sater Alga LP School, certifying that petitioner is the daughter of Md. A Barek Khan and that she had left the school on 01.01.1982 in Class-I. This certificate can be of no assistance to the petitioner inasmuch as it was issued on 22.06.2017, one and half years after the Tribunal had passed the impugned order dated 08.12.2015. That apart, the certificate was issued 35 years after the petitioner had left the school and the Headmaster did not testify to vouch safe the truthfulness of the certificate by producing the relevant record [Please see Birad Mal Singhvi Vs. Anand Purohit, 1988 (Supp) SCC 640].

Reliance placed in the case of Abdul Matali @ Matalieb (Md.) (supra), can be of no assistance to the petitioner inasmuch, as it has already been clarified by this Court in previous decisions that the said decision did not lay down any law and was a decision confined to the facts and circumstances of that case. Regarding discrepancies in the voters' lists which the petitioner contended were not her creation being entered into by officials of Election Commission and therefore should not be used adversely against the petitioner, such contention is without any substance. The voters' lists were adduced as evidence by the petitioner herself to prove her case that she was not a foreigner but a citizen of India. Petitioner cannot insist that only that portions of the voters' lists which are in her favour should be accepted and those portions going against her should be overlooked. This is not how a document put forward as a piece of evidence should be examined. The document has to be appreciated as a whole.

Net result of the above discussion is that petitioner has failed to establish her linkage to an Indian parent or grand-parent relatable to a period prior to 25.03.1971, which is the cut of date for identification of foreigners in the State of Assam as per section 6A of the Citizenship Act, 1955, as amended. The narrative presented by the petitioner suffers from multiple material contradictions rendering the same highly improbable.

Consequently, we do not find any merit in the writ petition, which is accordingly dismissed. Interim order passed earlier stands vacated.

Registry to inform the concerned Foreigners' Tribunal, Deputy Commissioner and Superintendent of Police (Border) for necessary follow-up steps.