

(2009) 09 GAU CK 0035

Gauhati High Court

Case No: Writ Petition (C) No. 2919 of 2009

Amena Khatoon

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: Sept. 23, 2009

Acts Referred:

- Foreigners Act, 1946 - Section 9

Citation: (2010) 1 GLR 551 : (2009) 5 GLT 468

Hon'ble Judges: Biplab Kumar Sharma, J

Bench: Single Bench

Advocate: A.M. Mazumdar and A. Choudhury, for the Appellant; R. Chakraborty and M. Huda, for the Respondent

Judgement

B.K. Sharma, J.

This writ petition has been filed assailing the legality and validity of the ex parte Judgment and Order dated 24.12.2008, passed by the learned Foreigners" Tribunal (II), Barpeta, declaring the petitioner to be a foreigner (Bangladeshi national), entering into Assam after the cut off date, i.e., 25.3.1971.

2. According to the petitioner, she was not served with any notice from the Tribunal and thus the impugned ex parte Judgment and Order is liable to be set aside and quashed. In paragraph 5 of the writ petition, it has been stated that the notice was issued by the Tribunal fixing the matter on 1.12.2006 but the same was not served on her. Further stand is that the notice was re-issued fixing the case on 31.7.2007 but on that occasion also, notice could not be served on her. However, in spite of such a position, the Tribunal passed the impugned Judgment and Order dated 24.12.2008. Hence, this writ petition.

3. According to the petitioner, she was born and brought up at village Budanpur Reserve and she is the eldest daughter of one Gaj Nabi, who is an Indian citizen, by birth. She is married to one Md. Zamir Ali and has begotten 5 (five) children from the

said marriage.

4. In paragraph 4 of the writ petition, it has been stated that her father's name Gaj Nabi, who is an Indian citizen, by birth, appeared in the electoral Roll of 1997. The petitioner has also named her grandfather as Late Mafiz Uddin, as an Indian citizen and that his name appeared in the electoral Roll of 1966-1970. In support of her such claim, the petitioner has annexed the Annexure - "A", "B" and "C" photocopies (extracts only) of the Voter Lists of 1966, 1970 and 1997, showing names of Mafiz Uddin and Gaj Nabi respectively. However, there is no document including any Voter List indicating the name of the petitioner except the notice from the Tribunal.

5. It is on the above basis, the petitioner claims to be an Indian citizen, by birth, and has assailed the ex parte impugned Judgment and Order dated 24.12.2008, on the ground that no notice was served on her.

6. I have heard Mr. A.M. Mazumdar, Learned Senior Counsel, assisted by Mr. A. Choudhury, Learned Counsel for the petitioner as well as Ms. R. Chakraborty, learned Additional Senior Government Advocate, Assam and Ms. M. Huda, learned Central Government Counsel. I have also carefully gone through the entire records of the Tribunal.

7. From the records of the Tribunal, the fact which has emerged and withheld by the petitioner is that the case against the petitioner was registered initially under the IMDT Act, 1983, on the basis of the report furnished by the Superintendent of Police (B), Barpeta, which was again based on the report furnished by the Electoral Registration Officer on 8.11.1997. It was on the basis of the intensive revision of Electoral Roll for 47, Chenga Assembly Constituency in Assam with reference to 1.1.1997, as was ordered by the Election Commission of India, it was detected that in the draft Electoral roll of the said constituency, the name of the petitioner was illegally included. During enquiry she could not produce any document to establish her Indian citizenship.

8. Pursuant to the aforesaid position, the IMDT case No. 1073 of 2003 was registered against the petitioner before the IMDT. Notice was duly served on the petitioner and accordingly the petitioner's husband Md. Jamir Ali filed an application on her behalf, seeking adjournment on 17.12.2003. The ground for adjournment was the purported illness of the petitioner. Considering the prayer so made, the Tribunal allowed time up to 30.01.2004 for submitting written statement. However, on all subsequent dates, the petitioner remained absent without any steps. In between 14 dates had gone by.

9. After the scrapping of the IMDT Act by the Apex Court, the case was re-registered as FT(II) Case No. 426 of 2006 and once again notice was issued to the petitioner. Notice could be served on the petitioner with much difficulty. Notice was served on 23.6.2007 and the same was recorded in the order of Tribunal dated 3.7.2007. In spite of such service of notice, the petitioner remained absent on all the subsequent

dates, which are 2.8.2007, 6.9.2007, 9.10.2007, 6.11.2007, 29.11.2007, 29.12.2007,, 5.2.2008, 26.2.2008, 24.3.2008, 22.4.2008, 26.5.2008, 23.6.2008, 23.7.2008, 10.9.2008, 10.8.2008, 29.10.2008, 19.11.2008, 24.12.2008 and eventually on 24.12.2008, when the Tribunal passed the impugned Judgment and Order.

10. Mr. A.M. Mazumdar, Learned Senior Counsel for the petitioner during the course of arguments and on being pointed out that the notice was duly served on the petitioner, fairly admitted that the notice was duly served on the petitioner. However, he submitted that possibly because the petitioner is a lady and there was no help to her, she did not appear before the Tribunal.

11. The above explanation furnished by the Learned Counsel for the petitioner cannot help the case of the petitioner. At the first instance, there is suppression of material fact in the writ petition in not mentioning the proceeding before the IMDT and the appearance of the petitioner through her husband filing adjournment petition.

Secondly, in spite of service of notice from the Foreigners" Tribunal, she did not appear before the Tribunal, but in Paragraph 5 of the writ petition, she has taken the plea that the notice was never served on her. Such statement being false, the writ petition is liable to be dismissed, on that score alone.

12. Irrespective of the above position, I have considered the case of the petitioner on merit. As per the records of the Tribunal, at the time of verification of the case of the petitioner, she was 23 years of age. Such verification was conducted in the year 1997-98. If that be so, her present age is 34/35 years. In the writ petition, the petitioner has stated that she is the mother of five children. However, in the affidavit sworn in support of the writ petition, she has declared her age as 27 years.

13. If the petitioner is an Indian citizen, by birth, she could have produced the documents indicating her name. She could have at least produced the Voter List showing her name instead of placing reliance on 1966, 1970 and 1997 Voter Lists, claiming the names Mafiz Uddin and Gaj Nabi to be that of her grandfather and father respectively. It has become a matter of convenience for all such Bangladeshi nationals to produce any number of Voter List identifying any name to be his or her grandfather, grandmother, father-in-law, mother-in-law, father, mother, etc. In the writ petition, there is no proof that Mafiz Uddin and Gaj Nabi are the petitioner's grandfather and father. There is also no explanation as to why her name is not included in any of the Voter Lists published so far.

14. There is also no explanation as to why the name Gaj Nabi does not appear in any other voter List other than 1970 and 1997.

15. There is another aspect of the matter. Large scale infiltration from Bangladesh and the porous border permit Bangladeshi nationals to maintain families both in Bangladesh and India. In such a situation, family members in Bangladesh cannot

claim Indian citizenship merely because other half of the family members are in Assam, India.

16. Section 9 of the Foreigners' Act, 1946 casts the burden on the person concerned to establish his or her Indian citizenship. The petitioner having measurably failed to discharge the said burden, both before the Tribunal and this Court, is not entitled to any relief from this Court. Placing reliance on some documents/extracts of Voter Lists, that too photocopies, coupled with the failure of the petitioner to establish any linkage to the same and so also any linkage to pre 25.3.1971, cannot help the case of the petitioner. Section 9 of the Act requires the person concerned to discharge the burden of proof on the sound principle on which the said test rests.

17. For all the aforesaid reasons, I do not find any merit in the writ petition and accordingly, it is dismissed.

18. While entertaining the writ petition by order dated 22.7.2009, an order was passed, directing the petitioner to report to the Superintendent of Police fortnightly. The interim protection not to deport the petitioner from India was subject to further satisfaction of the Superintendent of Police, Barpeta, that the petitioner will be available for further action in the event of declaring her to be a foreigner. By the interim order, it was further provided that due intimation should be furnished by the Superintendent of Police, Barpeta, on the returnable date. However, from the materials on record, it appears that no such intimation has been furnished.

19. Now, the Superintendent of Police, Barpeta, shall ensure apprehension of the petitioner and her judicial custody till such time, she is deported to Bangladesh.

20. Let the compliance report be furnished by the Superintendent of Police (B), Barpeta, on or before 2.11.2009.

21. Let the matter be listed again on 6.11.2009 for perusal of the compliance report. Let copies of this Judgment and Order be sent to the Superintendent of Police (B), Barpeta and extra copy of the Judgment and Order shall also be furnished to Ms. R. Chakraborty, learned Additional Senior Government Advocate, Assam.

22. The LCRs may be sent down to the Tribunal immediately alongwith the copy of this judgment and order.