

Hakim Ali Sikdar Vs State of Assam

Court: GAUHATI HIGH COURT

Date of Decision: Nov. 3, 2015

Acts Referred: Foreigners Act, 1946 - Section 9

Citation: (2016) 2 GauLJ 563 : (2016) 1 GLD 428

Hon'ble Judges: B.K. Sharma, J.

Bench: Single Bench

Advocate: M. Goswami, G. Sarma, I. Kakati, R. Ali, GU Ahmed, R. Begum and RK Bora, Advocates, for the Respondents; M.U. Mahmud/AJ Sikdar, SK Roy, MI Hussain and S. Hoque, Advocates, for the Petitioner

Final Decision: Dismissed

Judgement

B.K. Sharma, J. - Heard Mr. M.I. Hussain, learned counsel for the petitioner and Mr. R.K. Bora, learned State counsel and so also Ms. G.

Sarma, learned counsel appearing on behalf of Mr. S.C. Keyal, learned Assistant Solicitor General of India. Also heard Mr. R. Ali, learned

counsel appearing for the respondent No.4 and Ms. I. Kakati, learned counsel representing the respondent No. 5.

2. The petitioner is aggrieved by the ex-parte order dated 19th December, 2008 of the Foreigners" Tribunal (2nd Tribunal), Barpeta passed in

F.T. (2nd Tribunal) Case No. 471/2006 (Union of India v. Hakim Sikdar), by which answering the reference made to the Tribunal, it has been

held that the petitioner is a foreigner of post 25th March, 1971.

3. There is no dispute that the petitioner was duly served with notice from the Tribunal but he remained absent after the initial appearance and filing

of the written statement along with the photocopies of some documents.

4. As per the provision of Section 9 of the Foreigners Act, 1946, the burden of proof is always on the proceedee to establish that he/she is an

Indian citizen and not a foreigner. In the instant case, the petitioner failed to discharge the said burden in spite of getting the opportunity. The

principle relating to burden of proof has been discussed in detail in Sarbananda Sonowal v. Union of India & Ors. reported in AIR 2005 SC

2920.

5. On perusal of the records received from the Tribunal, it is found that on receipt of the notice, the petitioner appeared on 12th November, 2007

and prayed for time to file written statement. Allowing the said prayer, the matter was fixed on 26th November, 2007, on which date again a

prayer was made to allow time to file written statement. Fixing the matter on 10th December, 2007, on which date the petitioner filed written

statement along with the photocopies of some documents, the matter was fixed for evidence of the 1st party, i.e. the petitioner, on 1st February,

2008. However, it appears that although the engaged counsel of the petitioner remained present on all subsequent date, namely, on 1st February,

2008; 27th February, 2008 and 24th March, 2008 but the petitioner remained absent. Thereafter, the matter was again fixed on 26th May, 2008;

23rd June, 2008; 23rd July, 2008; 10th September, 2008; 18th October, 2008; 29th October, 2008; 19th November, 2008 and finally on 19th

December, 2009, when the ex-parte order was passed. On all these dates, the petitioner remained absent without any steps.

6. In the writ petition, the petitioner has assigned the following ground for non appearance:-

8. That the petitioner begs to state that all of a sudden and giving surprise to the petitioner and the family members as well as the villagers, the

Superintendent of Police, Barpeta brought an allegation against the petitioner that the petitioner is a foreigner. In this regard the Foreigners Tribunal

(2nd) Barpeta registered a case being No.471/06 and issued notices to the petitioner on 20.6.2007 and 10.8.2007, respectively to appear before

the court and to show cause as to why he will declared as foreigner. After receiving the notice, the petitioner engaged an advocate, handed over

relevant papers to him but he did not handle the case properly nor produced the documents at relevant point of time before the Tribunal nor

informed the petitioner to appear before the Court on the date fixed. The name of his lawyer at Barpeta is Mr. Mir Hafiz.

7. As submitted by Mr. RK Bora, learned State counsel and so also Ms. G. Sarma, learned Central Government counsel, the above ground

cannot be said to be good, sufficient and/or exceptional ground towards setting aside the ex-parte order about which a Full Bench of this Court in

State of Assam & Anr. v. Moslem Mondal & Ors. reported in 2013 (1) GLT 809, has held thus

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.

8. As discussed above, as per the requirement of Section 9 of the Foreigners Act, 1946, it is always on the proceedee to discharge the burden of

proof. Merely by filing written statement and producing photocopies of some documents, the petitioner was not absolved of the said burden.

9. As the experience of this Court goes, in most of the cases after failure to respond to the proceeding before the Tribunal, the proceedees take the

plea of improper guidance by the engaged counsel unmindful of the legal position enjoined under Section 9 of the Foreigners Act, 1946. In any

case, the ground assigned in paragraph 8 of the writ petition cannot be said to be special/exceptional circumstances for setting aside the ex-parte

order in terms of the directions contained in Moslem Mondal (supra).

10. In the written statement that was filed before the Tribunal, the petitioner contended that he was minor in 1966 and thus his name did not enter

in the voter list. On the other hand, in the school certificate annexed to the writ petition (Annexure-3), his date of birth is shown recorded as ""1-9-

73"". However, as per the clarification produced by the Board of Secondary Education, Assam and so also by the respondent No.5, the

petitioner's actual date of birth is 1st September, 1970 and he passed the HSLC (Special) Examination in 1991 and not in 1994, as shown

recorded in the said certificate.

11. Above aspect of the matter was recorded in the order passed on 6th October, 2015 and the learned counsel for the petitioner was directed to

obtain instruction.

12. Mr. Hussain, learned counsel for the petitioner submits that although the petitioner passed the HSLC (Special) Examination in 1991 and his

date of birth is 1st September, 1970 but at the time of entering into the services of a venture school, the petitioner altered the date of birth to 1st

September, 1973 and year of passing of the HSLC (Special) Examination in 1994 as against the original 1st September, 1970 and 1991,

respectively. As is evident from the Annexure-3 school certificate, the letters ""73"" and ""94"" are the products of manipulation.

13. Along with the written statement, the petitioner had annexed photocopies of 3(three) documents, which are voter lists of 1966; 1977 and

2006. However, mere production of photocopies of the documents did not lead to discharge of the burden of proof as envisaged under Section 9

of the Foreigners Act, 1946. In this connection, I may refer to the decision of the Apex Court in Life Insurance Corporation of India & Anr. v.

Ram Pal Singh Bisen reported in (2010) 4 SCC 491 that mere filing or accepting a document in Court does not amount to proof of its contents.

Admission of documents in Court may amount to admission of its contents but not the truth. For a ready reference, paragraph 31 of the said

judgment is quoted below:-

31. Under the Law of Evidence also, 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 amount to admission of contents but not its truth. Documents having not been produced and

marked as required under the Evidence Act cannot be relied upon by the Court. Contents of the document cannot be proved by merely filing in a

court.

14. Above being the position, I see no reason to interfere with the impugned ex-parte order dated 19th December, 2008 passed by the

Foreigners' Tribunal (2nd Tribunal), Barpeta in F.T. (2nd Tribunal) Case No. 471/2006 (Union of India v. Hakim Sikdar) and accordingly, the

writ petition is dismissed. Consequently, the Superintendent of Police (B), Barpeta shall take the petitioner into custody and detain him in the

detention camp forthwith till such time he is deported to his country of origin, i.e. Bangladesh. Simultaneously, the Deputy Commissioner, Barpeta

shall ensure deletion of the name of the petitioner from the voter list, if found.

15. The Registry shall transmit the case records to the Foreigners' Tribunal (2nd Tribunal), Barpeta, Assam along with a copy of this order.

16. Copies of this order shall also be sent to the Superintendent of Police (B), Barpeta and the Deputy Commissioner, Barpeta. Another copy of

this order shall also be furnished to Mr. R.K. Bora, learned State counsel, for his necessary follow up action.

17. List the matter after 1(one) month for submission of reports by the Superintendent of Police (B) and the Deputy Commissioner, Barpeta.