

GAHC010076502021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3644/2021

MUSSTT JAMILA KHATOON
W/O FAKRUL ISLAM,
D/O FAJAR ALI FAKIR
VILLAGE BABARA ATI,
PS KACHUA, 782426, DIST NAGAON, ASSAM,

VERSUS

THE UNION OF INDIA AND 5 ORS
REPRESENTED BY THE SECRETARY TO THE GOVT. OF INDIA,
DEPARTMENT OF HOME AFFAIRS, NEW DELHI

2:THE STATE OF ASSAM

REPRESENTED BY THE COMMISSIONER AND SECRETARY . HOME AND
POLITICAL (B) DEPARTMENT
DISPUR GUWAHATI 781006

3:THE FOREIGNERS TRIBUNAL
4TH NAGAON
ASSAM
782124

4:THE SUPERINTENDENT OF POLICE (B)
NAGAON ASSAM
782001

5:THE DEPUTY COMMISSIONER
NAGAON
ASSAM
782001

6:THE OFFICER IN CHARGE
PS KACHUA
DIST NAGAON
ASSAM
78242

Advocate for the Petitioner : MR. B C DAS, MS M D MEDHI

Advocate for the Respondent : ASSTT.S.G.I., SC, F.T,SC, ECI,SC, NRC

BEFORE

HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

For the petitioner	: Mr. B.C. Das Advocate.
For State respondents	: Mr. S.K. Medhi, CGC.
	: Mr. A.I. Ali, SC, ECI.
	: Mr. G. Sharma, SC, FT.
Date of hearing	: 27.08.2024.
Date of judgment	: 10.09.2024.

JUDGMENT AND ORDER

(CAV)

(K.R. Surana, J)

Heard Mr. Bipin Chandra Das, learned counsel for the petitioner. Also heard Mr. S.K. Medhi, learned CGC, Mr. A.I. Ali, learned Standing Counsel for the Election Commission of India and Mr. G. Sharma, learned Standing Counsel for Foreigners' Tribunal matters.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner, namely Musstt. Jamila Khatoon, has assailed the opinion dated 16.03.2000, passed by the learned Member, Foreigners Tribunal 2nd, Nagaon in F.T. Case No. 1865/2011 [corresponding to S.P. Ref. Case No.

1471/1998], by which she was declared to be foreigner of post 25.03.1971 stream.

3. In her written statement, the petitioner has projected Miya Box as her grandfather, Fajar Ali @ Fajar Ali Fakir as her father and Kadbhanu as her mother. It was stated that name of her father appears in the voter list of 1965 in 86 Dhing L.A.C., Village Amlakhi, Mouza- Batradaba and that the name of the petitioner's father and mother appears in the voter list of 1970 of same village. She has stated that her own name appears in the voter list of 1989 of 82 Roha L.A.C., Village- Babara Ati as Jamila Khatoon, wife of Fakrul and that the name of her husband Fakrul, son of Rejak appears in the voter list of 1997 of 82, Roha L.A.C. The petitioner has also placed reliance on her PAN Card and Aadhaar Card.

4. The petitioner had submitted her evidence-on-affidavit and had disclosed that her father had two other brothers, and she had four brothers and including her, there were five sisters. She had exhibited the following documents:-

- a. Certified copy of voter list of 1966 of 86 Dhing L.A.C., containing the name of her father as Fajar Ali Fakir, son of Miya Box and name of her mother as Kad Bhanu, wife of Fajar Ali in village- Amlakhi, Dist. Nagaon (Ext.1);
- b. Certified copy of voter list of 1970 of 86, Dhing L.A.C., containing the name of her father as Fajar Ali Fakir, son of Miya Box and name of her mother as Kad Bhanu, wife of Fajar Ali of village- Amlakhi Dist. Nagaon (Ext.2);

- c. Photocopy of voter list of 1985 of 82 Raha L.A.C., containing the name of her father as Fajar Ali, son of Miya Box, the name of her mother as Kad Bhanu, wife of Fajar Ali, and the name of one brother, namely, Abdul Halim, son of Fajar Ali of village- Charaijuria, Dist. Nagaon. It was stated that she had applied for certified copy but due to non-delivery, photocopy of said voter list was submitted;
- d. Photocopy of voter list of 1989 of 82 Raha L.A.C., containing the name of her father as Fajar, son of Miya Box, and the name of her mother as Kad Bhanu, wife of Fajar of village- Charaijuria, Dist. Nagaon. It was stated that she had applied for certified copy but due to non-delivery, photocopy of said voter list was submitted;
- e. Photocopy of voter list of 1997 of Raha L.A.C., containing the name of her brother Abdul Jalil, son of Fajar, and the name of her mother as Kad Bhanu, wife of Fajar of village- Charaijuria, Dist. Nagaon. She had stated that due to death of her father, his name did not appear in the voter list. It was also stated that she had applied for certified copy but due to non-delivery, photocopy of said voter list was submitted;
- f. Photocopy of voter list of 2010 and 2017 of Raha L.A.C., containing the name of her brothers and other family members of village- Charaijuria, Dist. Nagaon.
- g. Certified copy of voter list of 1989 of 82 Raha L.A.C., containing the name of the petitioner as Jamila Khatun as 'D' voter, wife of Fakrul of village- Babura Ati, Dist. Nagaon (Ext.3);
- h. Govt. *Gaonbura's* certificate dated 21.11.2018 of Babura Ati village

regarding her marriage and address of her husband and father (Ext.4);

i. Govt. *Gaonbura's* certificate dated 20.11.2018 of Amlakhi village regarding the address of her father (Ext.5);

j. Aadhaar Card (Ext.6);

k. PAN Card (Ext.7).

5. The petitioner had stated that the name of her father was written as Fajar Ali Sheikh in voter list of 1965 and 1970 and in her PAN card, in the voter list of 1985, it was written as Fajar Ali and it was written as Fajar in voter list of 1989 and that the same were the names of her deceased father, and were of one and same person. Similarly, it was stated that her mother's name was written in the voter list of 1965 and 1970 as Kad Banu, and in the voter list of 1985, it was written as Kad Banu Bibi. It was stated that Kad Banu and Kad Banu Bibi are the name of her mother and of the same and one person. It has also been stated that her husband Fakrul Islam is also known as Fakrul and both are name of one and same person.

6. The petitioner had also stated that there were age discrepancies in the electoral rolls which were written by enumerators and printed by the Election Officer. In her cross-examination. DW-1 had stated that she had six sons and two daughters. She had stated that she had studied a little but not produced the school certificate. She had stated that her father had two brothers and two sisters, namely, Kasem Ali, Sadr Ali, Kutubjan and Vabejan. She lived on Govt. land. Her father had land in Amlakhi village but she does not know why he had sold it and shifted to Charaijuria. She did not have any documents of her father's land at Amlakhi. She had denied that she had come from Bangladesh

after 25th March, 1971.

7. The projected brother of the petitioner, namely, Abdul Jalil was examined as DW-2. He had reiterated the statement made by the petitioner (DW-1) and had also exhibited all the documents which DW-1 had exhibited. Moreover, he had also exhibited the following documents:-

- a. *Jamabandi* of the year 1931-32 of in respect of land covered by Dag No. 218 and 219 of village- Amlakhi, Mouza- Dhing, in the name of Miya Box Fakir, son of Madari Fakir (Ext.8).
- b. Certified copy of voter list of 1965 of 86 Dhing L.A.C., of village Amlakhi to prove the entry of the petitioner's father and mother (Ext.9).
- c. Certified copy of voter list of 1985 under 82 Raha L.A.C. of village Charaijuria to prove the entry of the petitioner's father, mother and brother, Abdul Hakim (Ext.10).
- d. Certified copy of voter list of 1985 under Raha L.A.C. of village Charaijuria to prove the entry of his name and name of mother (Ext.11). It was also stated that as his father had died, his name was not in the said voter list.
- e. School Certificate of Amlakhi Balika L.P. School to prove that the petitioner had passed Class-II in the year 1977 and had left the school.

8. DW-2 had also stated that his grandfather Miya Box was also known as Miya Box Fakir and that due to want of money his father had sold the land. By exhibiting the certified copy of voter list of 2010 and 2017 of Raha

L.A.C. of village- Charaijuria, it was stated that his name was written as A. Jalil, son of Fajar Ali. He had also exhibited a school certificate of the petitioner as Ext.14 to project that in the year 1977, the petitioner had passed Class-II examination from Amlokhi Balika L.P. School and left the school, which contained the signature of the Headmistress and counter-signed by Block Elementary Education Officer, Batradava, Nagaon. In his cross-examination, he had stated the name of grandfather, father, his two paternal uncles and two paternal aunts and gave the name of all nine siblings including the name of a deceased brother, Late Abdul Jalil. His evidence could not be demolished during cross-examination.

9. Surendra Bora, the Senior Assistant in the Office of the Deputy Commissioner, Nagaon was examined as DW-3. He had brought the documents mentioned in the summons. He had stated that there was a difference in the remark/ note in the *jamabandi* and the *jamabandi* exhibited. However, he had stated that Ext.8 was given by their office and he had exhibited the signature of ___(illegible) Baruah, Revenue Sheristadar, who is known to him as Ext.8(1). He had stated that the *jamabandi* of 1930-31 of Village- Amlakhi, Mouza- Dhing was in respect of Patta No. 165, Dag Nos. 218, 219 and name of *pattadar* is Miya Box Fakir, son of Madari Fakir and the said *pattadar* Miya Box Fakir had sold 2 katha- 10 lessa land of Dag No. 219. In his cross-examination, DW-3 had stated that the total area of land was 7 bigha- 2 katha- 5 lessa, which was mutated in the name of one Munka as per order dated 08.06.1937. There was no similarity of the notes of original *jamabandi* and notes of Ext.8 and that notes in Ext.8 was not similar to the note in original *jamabandi*. He had stated that it was not a fact that Ext.8 was not given from their office.

10. Jawaharlal Pator, who was examined as DW-4 was the *Gaonbura* of Amlakhi Village. He had exhibited his identity card as Ext.14. He had issued a certificate (Ext.4) to the petitioner and his signature was exhibited as Ext.4(1). He knows about the marriage of Jamila Khatoon with Fakrul Islam of Village Barbara Ati. He had stated that the name of name of the father of petitioner is Fajar Ali of Charaijuria. He knows Jamila Khatoon and Fajar Ali. He knows them for inviting him to her marriage. He meets Fajar Ali when he goes to Nagaon by the side of his house. Fajar Ali was originally from village Amlakhi and he came to Charaijuria after selling his land at Amlakhi village and started residing on Government land. Fajar Ali had casted his vote. In his cross-examination he had stated that he does not remember the year when he had seen Fajar Ali. He had no record of certificate issued by him and there is no counterfoil of the certificate. He was born in 1961 but he did not proof of that with him. He had learnt from Fajar Ali that he had come from Amlakhi and he does not know from where Fajar Ali actually came from. He had denied that he had deposed falsely.

11. Tota Miya, the *Gaonbura* of village Amlokhi was examined as DW-6. He had exhibited his identity card as Ext.16 and had stated that he had issued the certificate (Ext.5) and Ext.5(1) was his signature. He had stated that the father of Jamila Khatoon had shifted to village Charaijuria from village-Amlakhi with his family. Fajar Ali has casted his vote in Amlakhi village in 1970. He had written it after perusing voter list. Fajar Ali is his neighbour and had seen Jamila Khatoon since her birth. In his cross-examination, DW-5 had stated that he does not know the date and year of birth of Jamila Khatoon. He had got the name of father of Fajar Ali as Miya Box from the voter list. He did not have any Government document regarding shifting of Fajar Ali from Amlakhi to Charaijuria. He was born in 1961 and knew Fajar Ali since his birth. He does not

know where Fajila was presently residing. He had not issued the certificate from Government records and had not issued the certificate in the name of Jamila and that he had issued the certificate as Jamila had approached him for it. He had denied that he had deposed falsely.

12. The learned Tribunal had briefly discussed the evidence of the DW Nos.2, 3, 4, 5 and Ext.8, and the evidence of the defence witnesses were discarded. It was held that the *Gaonburas* were not examined with authentic documents and that as per evidence of DW-3, there were differences between original and certified copy of Ext.8 for which it was inadmissible. It was also held that the petitioner had not pleaded about her family status and regarding her siblings and that the evidence of Abdul Jalil was beyond pleadings. It was held that the petitioner did not state about the date of her birth in the pleadings and did not clearly state about the name of her parents. Accordingly, it was held that the petitioner had failed to discharge her burden to prove that she was a citizen of India and accordingly, he was declared to be a foreigner of post 25.03.1971 stream and was liable to be pushed back to the specified territory.

13. The learned standing counsel for the FT matters has defended the opinion impugned in this writ petition and has submitted that in this case, the petitioner had not pleaded in her written statement about her siblings and therefore, beyond pleadings, the petitioner had examined Abdul Jalil as DW-2 by projecting him as her elder brother. It is further submitted that even if it is assumed that DW-2 was the petitioner's elder brother, but there was a discrepancy in his age, for which the learned Tribunal had found the evidence of DW-2 untenable to prove the citizenship of the petitioner. It is also submitted that admittedly there was a difference in the remark/note contained in the

certified copy of *jamabandi*, when compared with the original. Accordingly, the learned Tribunal had rightly rejected the certified copy of *jamabandi* (Ext.8). Accordingly, it is submitted that the petitioner has miserably failed to show that her father was Fazar Ali @ Fazar Ali Sheikh @ Fazar Ali Fakir, or with her projected grandfather Miya Box.

14. It is a trite law that in a writ petition filed under Article 226 of the Constitution of India to challenge the order of the Tribunal, the Court does not act under appellate or revision jurisdiction, but the High Court exercises supervisory jurisdiction over the Courts and Tribunal under its administrative jurisdiction. Therefore, under Article 226 of the Constitution of India, the Court is not required to examine the evidence and to give a finding thereon.

15. However, in the present case in hand, the evidence of DW-2 was discarded by the learned Tribunal only because there was no pleading in the written statement filed by the petitioner.

16. The learned Tribunal has also discarded the *jamabandi* (Ext.8) on the ground that the remarks/note therein was in variance with the entries contained in the original *jamabandi*, which was produced by DW-3. In this case, the DW-3 had not stated that the *jamabandi* (Ext.8), produced by the petitioner was forged or that any entry contained therein was forged or tampered. Rather, DW-3 had stated in his examination-in-chief that Ext.8 was given from their office and in his cross-examination also, he has denied that Ext.8 was not given from his office. Therefore, the only plausible explanation would be that the incorrect remark in the certified copy of *jamabandi*, which was exhibited by the petitioner (DW-1) as Ext.8 was a mistake made by the copying assistant, over which the petitioner had no control. Even if the remark column was wrong or

incorrect, from the evidence of DW-3, it was not dislodged that the said *jamabandi* pertain to the year 1931-32 and that the name of the *pattadar* was Miya Box Fakir, who is the projected grandfather of the petitioner. It is not the evidence of DW-3 that the land was never mutated in the name of Miya Box Fakir or that the *jamabandi* (Ext.8) was not of the year 1931-32. Moreover, if the learned Tribunal had found from the evidence of DW-3 that the remark contained in the certified copy of the *jamabandi* (Ext.8) was incorrect and did not match with the remark/note contained in the original record, the respondent State and/or the learned Tribunal ought to have brought the copy of the *jamabandi*, as produced by the DW-3 on record by exhibiting it. However, the original *jamabandi* was not exhibited and therefore, there is nothing on record to show what is the actual difference in the remark/note in the original *jamabandi* produced by DW-3. Thus, it appears that the learned Tribunal had placed reliance on oral evidence of DW-3 regarding non-matching of remarks/note in Ext.8 without exhibiting the document, which is held to be not in accordance with law.

17. In the impugned opinion, there is no reference made to Ext.1 to 7 and 9 to 16. The evidence of DW-4 and 5, who were the *Gaonburas* was discarded on the ground that they were not examined with an authentic document. It is not the finding of the learned Tribunal that the *gaonbura* certificates (Ext.4 and Ext.5) was inadmissible in evidence or that such evidence was rejected for reasons assigned. The evidence of DW-4 and 5 was held to be inadmissible as they were not examined with an authentic document, however, it is not the finding of the learned Tribunal that Ext.4 and Ext.5 did not prove anything.

18. In of the discussion above, the Court is of the considered opinion that as the learned Tribunal had not discussed in the opinion about Ext. Nos.1 to 4 and 9 to 16. Moreover, the learned Tribunal did not consider that in the jamabandi of 1931-32, the name of the projected grandfather of the petitioner was available.

19. The evidence of DW-2 was discarded on the ground of discrepancy in the age by disbelieving that DW-2 could have cast his vote in the year 1970.

20. In the case of *Haidar Ali v. Union of India & Ors., 2021 (3) GLT 85*, the Division Bench of this Court has held to the effect that the principles contained in the CPC relating to the scope of written statement and limitations placed thereon cannot be strictly applied in the proceedings before the Tribunal though the principles may generally be applied. Therefore, when the evidence of the supporting DW-2, DW-4 and DW-5 have otherwise remained unshaken, the Court does not find the reason assigned to discard their evidence to be sustainable on facts and in law.

21. Accordingly, the impugned opinion dated 16.03.2000, passed by the learned Member, Foreigners Tribunal 2nd, Nagaon in F.T. Case No. 1865/2011 [corresponding to S.P. Ref. Case No. 1471/1998] is set aside and the matter is remanded back to the said learned Tribunal for a fresh hearing and opinion in accordance with law after considering all the evidence on record.

22. The petitioner is directed to appear before the learned Foreigners' Tribunal 2nd, Nagaon on or before 29.09.2024 and await further order from the said learned Tribunal.

23. It would be open to the parties to make an appropriate prayer before the learned Tribunal including prayer for re-examination of witnesses, as they may be so advised.

24. By order dated 12.08.2021, the petitioner was directed to appear before the Superintendent of Police (Border), Nagaon and to take bail. If such bail has been taken, it would operate till the disposal of the proceedings of F.T. Case No. 1865/2011.

25. However, it is provided that in the event the petitioner does not appear before the learned Tribunal on or before 29.09.2024, it would be open to the learned Tribunal to direct the Superintendent of Police (Border) to take the petitioner into custody in the interest of expeditious disposal of the proceeding.

26. The Registry shall return the TCR expeditiously.

27. The writ petition stands allowed to the extent as indicated above.

JUDGE

JUDGE

Comparing Assistant