

GAHC010147232018



2024:GAU-AS:11238

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

Case No. : WP(C)/4496/2018

MD. SAHJAHAN ALI
S/O- LT MORJAT ALI, VILL/P.O. SATLUNGA, P.S. KACHUA, DIST- NAGAON,
ASSAM, PIN- 782426

VERSUS

THE UNION OF INDIA AND 6 ORS.
REP. BY THE SECY. TO THE GOVT. OF INDIA, MINISTRY OF HOME
AFFAIRS, NEW DELHI- 110001

2:THE STATE OF ASSAM
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY-6

3:THE DY. COMMISSIONER
NAGAON
PIN- 782002

4:THE ELECTION COMMISSION OF INDIA
NEW DELHI- 110001

5:THE STATE COORDINATOR
NATIONAL REGISTER OF CITIZENS
ASSAM
GHY-5

6:THE SUPERINTENDENT OF POLICE (B)
NAGAON
DIST- NAGAON
PIN- 782002

7:THE OFFICER-IN-CHARGE
KACHUA P.S.
DIST- NAGAON
PIN- 78242

Advocate for the Petitioner : MR H R A CHOUDHURY, MR F U BARBHUIYA,MR. A
MATIN,MS S DAS

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

BEFORE

HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE KARDAK ETE

For the petitioner : Mr. H.R.A. Choudhury, Sr. Advocate.
: Mr. F.U. Barbhuiya,
: Mr. A. Matin,
: Ms. S. Das, Advocates.
For respondent no.1 : Ms. B. Sarma, C.G.C.,
For respondents 2, 6 & 7 : Mr. J. Payeng, Spl. Counsel.
For respondent- 3 : Mr. H.K. Hazarika, Jr.G.A., Assam.
Date of hearing : 14.11.2024.
Date of order : 19.11.2024.

JUDGMENT AND ORDER
(CAV)

(K.R. Surana, J)

Heard Mr. F.U. Barbhuiya, learned counsel for the petitioner. Also heard Ms. B. Sarma, learned CGC, appearing for the respondent no.1. Mr. J. Payeng, learned special counsel for the Home Department, representing respondent nos. 3, 6 and 7, Mr. H.K. Hazarika, learned Junior Govt. advocate appearing for respondent no.3. None appears on call for respondent no.5.

2. By an opinion dated 25.05.2018, passed by the learned Member,

Foreigners' Tribunal 2nd Nagaon in F.T. Case No. 820/2011, bearing S.P. Ref. IMDT Case No. 393/2002, the petitioner, Sahjahan Ali, was declared to be a foreigner who has entered into India after 25.03.1971 from the specified territory i.e., Bangladesh. The said opinion has been assailed in this writ petition filed under Article 226 of the Constitution of India.

3. The case record was called for and received from the learned Tribunal. The case record reveals that the Superintendent of Police (B), Nagaon had lodged an FIR which was registered as IM(D)T Case No. 393/2002 dated 29.06.2002, *inter alia*, alleging that the petitioner was an illegal migrant. In this connection, the Inquiry Officer (I.O. for short), who was the then S.I.(B) at Kachua P.S. had examined two witnesses. The case records also reveals that in the Form-I dated 11.07.2002 prepared by the I.O., it has been mentioned that the father of the petitioner is Md. Morjat Ali, and that the petitioner is a male aged 22 years, having a height of 5'- 9" with swarthy complexion and he is a daily rate labour, and that he had entered into India after 25.03.1971, for a better living. In column 12 of the report dated 12.09.2002 of the I.O. under Form-II, it has been stated in that the petitioner had entered from village Laskarpur, P.S. Gowainghat, Dist. Sylhet, Bangladesh after 25.03.1971. In column 18(iii) thereof, it has been stated that the petitioner has entered through unauthorized route. In the note of the I.O., it is stated that during enquiry the petitioner could not produce any documentary evidence in support of Indian national. The said report was forwarded to the S.P. (Border), who had referred the matter to the IM(D)T, Nagaon for a decision as to whether or not the petitioner has entered into India/ Assam after 25.03.1971. The said reference then taken up by the learned Member, Foreigners' Tribunal 2nd, Nagaon.

4. On service of notice of the case, the petitioner appeared before the learned Tribunal and had filed his written statement on 21.12.2017. It was disclosed by the petitioner that his grandfather Hurmat Ali, father of Morjat Ali (father of the petitioner) entered Assam in the year 1931 from East Pakistan and started to live at village- Satlunga, Mouza Garubat, P.S. Kampur and his name appeared in the voter list of 1996, under 92 No. Jamunamukh Constituency, Part No.42, Sl. No. 126 and his name also appeared in the voter list of 1970, under 92 No. Jamunamukh Constituency, Part No.42, Sl. No. 114. It was also stated that subsequently due to division of the constituency, village Satlunga under Kachua P.S. came under 82 No. Raha Constituency and the name of Morjat Ali, the father of petitioner appeared in the voter list of 1997 under 82 No. Raha Constituency at Sl. No. 433, and that the name of the petitioner appeared at sl. No. 437 and since then the petitioner has been casting his vote. It was also stated that the name of his father appeared in voter list under 82 No. Raha constituency at sl. no. 409 and the name of the petitioner appeared in the voter list of 2005 at sl. no. 504 and voter list of 2011 at sl. no. 612. It was also stated that the petitioner had studied at No. 2 Kachua Madrassa of Satlunga village and his date of birth is mentioned as 31.12.1980 in the school certificate. It was also stated that the name of Hurmat Ali, grandfather of the petitioner is mentioned in the Legacy Data of 1951 and 1966. It was also stated that in the year 2008, the petitioner had purchased land measuring half a bigha, which was registered in the Sub-Registry at Kampur, where he has constructed a house and residing there. Accordingly, the petitioner has prayed for dismissal the case.

5. On 07.03.2018, the petitioner had examined himself as DW-1 and he had also examined Md. Keramat Ali, son of Late Hurmat Ali as DW-2 and

both the witnesses had given answers to the query put by the Court. The record does not disclose that the A.G.P. (Assistant Government Pleader) was present on 07.03.2018 or in any other date whenever the matter was taken up. The record also does not reveal that any of the DWs were cross examined by the A.G.P. for the State. The petitioner, as DW-1, had exhibited certified copy of voter lists of 1966 (Ext.1), 1970 (Ext.2), 1997 (Ext.3), 2005 (Ext.4), 2011 (Ext.5) and 1985 (Ext.6), transfer certificate signed by the Headmaster No.2 Kachua M.E. Madrassa (Ext.7).

6. On 11.05.2018, the petitioner had examined as DW-3, one Idrish Ali, projecting him to be the son of Late Hurmat Ali. The said DW-3 gave reply to the Court questions. The record does not disclose that the A.G.P. (Assistant Government Pleader) was present on 11.05.2018, or that the DW-3 was cross examined by the A.G.P. for the State. The DW-3 had exhibited the certified copy of *jamabandi* of the year 1968-69 (Ext.8).

7. The reference case was heard on 25.01.2018, and upon hearing the learned counsel for the petitioner and after appreciating the written statement and evidence available on record, the impugned opinion was rendered on 25.05.2018. On a perusal of the opinion impugned herein, it is seen that the learned Tribunal had discarded the evidence of DW-2 and 3 as not reliable as their evidence was beyond pleadings and it was held that the petitioner has not been able to produce any reliable documentary evidence to establish linkage with DW-2 and 3 that they are his paternal uncles. The contents of Ext.3, voter list of 1997 was discarded on the ground that the age of his purported father was mentioned therein was 50 years and that the age of his projected mother was recorded therein as 70 years and it was held that such a discrepancy cannot be ignored. The *jamabandi* i.e. record of rights (Ext.8) was

discarded on the ground that this Court had held that mere production and marking as exhibit cannot be held due proof of its execution and the execution was required to be proved by admissible evidence. Accordingly, it was held that the petitioner has been unable to discharge his mandatory burden by adducing reliable and cogent evidence to establish his Indian nationality. Resultantly, opinion was expressed by the learned Tribunal that the petitioner is a foreigner, who has entered into India after 25.03.1971 from specified territory (Bangladesh).

8. The learned counsel the petitioner has submitted that the evidence of DW-2 and 3 was perfunctorily discarded on the ground that those were beyond pleadings though the said DW-2 and DW-3 had established before the learned Tribunal that the petitioner was their nephew and that they were both sons of Late Hurmat Ali, the grandfather of the petitioner. It is submitted that after recording the examination-in-chief, the DW nos. 1, 2 and 3 were also examined by the learned Tribunal and that all the three DWs had answered the questions put by the learned Tribunal. Accordingly, it was submitted that the oral evidence of the three DWs could not be demolished during examination by the Tribunal. Hence, it was submitted that the Tribunal erred in law in discarding and disbelieving the evidence of the three DWs.

9. In support of his submissions that the impugned opinion is liable to be set aside, the learned counsel for the petitioner has placed reliance on the following cases, viz., (i) *Sirajul Hoque v. State of Assam and Ors.*, (2019) 5 SCC 534, (ii) *Shyamlal @ Kuldip v. Sanjeev Kumar & Ors.*, (2009) 12 SCC 454, (iii) *Seth Ramdayal Jat v. Laxmi Prasad*, (2009) 11 SCC 545, (iv) *Sarbananda Sonowal v. Union of India*, (2007) 1 SCC 174 [hereinafter referred to as *Sarbananda Sonowal (II)*], (v) *R.V.E. Venkatachala Gounder v. Arulmigu*

Viswesaraswami & V.P. Temple, (2003) 8 SCC 752: AIR 2003 SC 4548, (vi) Motior Rahman v. State of Assam & Ors, 2020 (1) GLT 330, (vii) Abdul Matali v. Union of India & Ors., (2015) 2 GLT 617, (viii) Abdul Khalique v. Union of India & Ors., 2013 (1) GLT 941, (ix) Chandrabhan Singh v. Janaki Singh, 2013 (2) GLT 916.

10. Per contra, the learned special counsel for the Home Department has submitted that in paragraph 26 of the case of *Sarbananda Sonowal Vs. Union of India & Ors., (2005) 5 SCC 665* [hereinafter referred to as *Sarbananda Sonowal (I)*], it has been held by the Supreme Court of India that there are good and sound reasons for placing a burden of proof upon the person concerned who asserts to be a citizen of a particular Country and that in order to establish one's citizenship, normally a person may be required to give evidence of (i) his date of birth, (ii) place of birth, (iii) name of his parents, and (iv) their place of birth at citizenship and it has been further observed that sometimes the place of birth of his grandparents may also be relevant like under Section 6A (1) (d) of the Citizenship Act.

11. In the said context, it is submitted that the petitioner has neither pleaded nor give any evidence as to when he or his parents were born or where they lived and the petitioner has also not disclosed his in the written statement or his evidence so as to disclose that his father had any siblings and moreover, the petitioner has not pleaded that his predecessors had held any land. It is also submitted that the existence of Morjat Ali, the father of the petitioner is only from year 1985, which was shown from certified copy of voter list containing only one entry and therefore, the petitioner has failed to show that Morjat Ali whose name appeared in the voter list of 1985 is in any manner related to the petitioner as his father. It is further submitted that name of the petitioner

appeared for the first time with his projected father in the voter list of 1997, but prior to that there is no voter list of the petitioner, his father or grandfather together. The other voter list of the petitioner and his projected father is of the year 2005 and the certified copy of the said voter list contains only two names. Accordingly, it is submitted that as it is well settled that entries in the voter list is neither a proof of citizenship nor a proof of parentage, the petitioner has to show any other document to link himself with his projected parents and grandfather.

12. It is submitted that the school certificate contains impression of State emblem which the Headmaster of the school was not authorized to use and therefore, the said document is inadmissible evidence. Moreover, the school certificate does not proved in accordance with law. In this regard, the learned counsel for the petitioner has submitted that the school certificate is a public document as held by the Supreme Court of India in the case of *Shyamlal (supra)*.

13. Considered the submissions and also perused the records received from the learned Tribunal.

14. We take note of the fact that in the written statement the petitioner has referred to the entry of his grand-father, Hurmat Ali into Assam in the year 1931 from East Pakistan and it is claimed that he had started residing in village- Satlunga, Mouza- Garubat under PS Kampur and that his name appeared in the voter list of 1966 and 1970. The petitioner has not disclosed the names of his grandmother, his father's siblings or the names of his own siblings. Therefore, in short, the petitioner has not disclosed in his written statement that DW-2 and DW-3 were his uncle i.e. father's brothers.

15. Upon perusal of the record, we take note of the fact that the proceeding was taken up by the learned Tribunal on 9 (nine) dates between 01.12.2018 and 21.05.2018. However, the presence of A.G.P. is not recorded in any of the daily orders. The examination-in-chief of the three DWs were recorded by the learned Tribunal and thereafter, instead of cross-examination of the said DW nos. 1, 2 and 3 by the State, the said witnesses were orally examined by the learned Tribunal. The evidence of the DW nos. 1, 2 and 3, could not be shaken during examination by the learned Tribunal.

16. Thus, it appears that the learned Member, Foreigners' Tribunal 2nd, Nagaon, acted both as a prosecutor and the Judge in the same proceeding. This violates the principles of natural justice.

17. Accordingly, the Court has no hesitation to set aside the impugned opinion dated 25.05.2018, passed by the learned Member, Foreigners' Tribunal 2nd, Nagaon in F.T. Case No. 820/2011, bearing S.P. Ref. IMDT Case No. 393/2002 against the petitioner, Sahjahan Ali. Resultantly, the matter is remanded back to the said learned Tribunal for a fresh decision.

18. The said proceeding is restored to the file of the learned Member, Foreigners' Tribunal 2nd, Nagaon from the stage of cross-examination of DWs, if the State is so advised.

19. We hope that the State Government in the Home Department would examine if the said question requires to be pondered upon and whether it is necessary for the State to take appropriate remedial measures. We therefore, request the learned standing counsel for the Home Department to send a copy of this order to the concerned authority who is in-charge of Foreigners' Tribunal matters.

20. The Registry shall return back the Tribunal's record along with a copy of this order, which shall be made a part of record by the learned Tribunal.

21. The petitioner is directed to appear before the Foreigners' Tribunal 2nd, Nagaon on or before 09.12.2024, and by producing a certified copy of this order, seek further instructions from the said learned Tribunal.

22. The petitioner is also directed to appear before the Superintendent of Police (Border), Nagaon within 04.12.2024 during office hours along with a certified copy of this order and furnish a bail bond of Rs.5,000/- (Rupees Five thousand only) with one solvent surety of like amount to the satisfaction of the said authority.

23. Further, the Superintendent of Police (Border), Nagaon is directed that on appearance of the petitioner within the period indicated above, the biometrics of the iris of both eyes, the fingerprints of both hands and the photographs of the petitioner shall be obtained, whereafter, he shall be allowed to remain on bail.

24. On his appearance before the Superintendent of Police (Border), Nagaon, as directed above, the said authority shall obtain necessary information and documentation as required under the Rules from the petitioner for securing his presence.

25. On failure of the petitioner to appear before the Superintendent of Police (Border), Nagaon and before the learned Foreigners' Tribunal 2nd, Nagaon within the time allowed, such default would result in automatic revoking of the order of bail by efflux of time without any further order from the Court. Thereupon, it would be open to the Superintendent of Police (Border), Nagaon to secure the presence of the petitioner before the learned Tribunal for

rendering fresh opinion in the presence of the petitioner.

JUDGE

JUDGE.

Comparing Assistant