

GAHC010162152018



2024:GAU-AS:11551

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

Case No. : WP(C)/5072/2018

JAHARUL HOQUE @ MD. JAHIRUL HOQUE
S/O. BOYEJ UDDIN SHEIKH, VILL. TISTARPAR, P.O. TISTARPAR, P.S.
DHUBRI, DIST. DHUBRI, ASSAM

VERSUS

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

2:THE ELECTION COMMISSIONER
ASSAM
DISPUR
GUWAHATI-06.

3:THE NODAL OFFICER
NRC
ASSAM.

4:THE DY. COMMISSIONER
KAMRUP (M)
DIST. KAMRUP (M)
ASSAM.

5:THE COMMISSIONER OF POLICE (B)
KAMRUP (M)
GUWAHATI
ASSAM.

6:THE OFFICER IN CHARGE
PALTANBAZAR POLICE STATION
GUWAHATI
DIST. KAMRUP (M)
ASSAM

Advocate for the Petitioner : MR. J AHMED, MS. M AHMED,MS. S R SAIKIA,MS. H BEGUM

Advocate for the Respondent : ASSTT.S.G.I., SC, NRC,MS. A VERMA,SC, ECI,MR. D BARUAH,SC, F.T,MR J PAYENG

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

ORDER

Date : 21-11-2024
K.R. Surana, J)

Heard Mr. J. Ahmed, learned counsel for the petitioner. Also heard Mr. K.K. Parasar, learned CGC appearing for the respondent no. 1; Mr. H. Kuli, learned counsel appearing on behalf of Mr. A.I. Ali, learned counsel for the respondent no. 2; Mr. H.K. Hazarika, learned Government Advocate appearing for the respondent no. 4; and Mr. G. Sarma, learned Standing Counsel for F.T. and Home Department appearing for respondent nos. 5 and 6.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner namely, Jahirul Hoque *alias* Jaharul Hoque, has assailed the opinion dated 12.06.2018, passed by the learned Member, Foreigners' Tribunal No. 2, Kamrup (M), Guwahati, by which the petitioner was declared to be a foreigner, who has illegally entered into Assam, India from Bangladesh after 25.03.1971.

3. For the purpose of the order, it would suffice to mention that upon receipt of notice of the proceedings, the petitioner had appeared before the learned Tribunal and had submitted his written statement, wherein he has annexed 13

(thirteen) documents. Thereafter, the petitioner had examined himself as D.W.1 and he has exhibited 14 (fourteen) documents. By filing additional evidence as D.W.1, the petitioner has exhibited another document which is marked as Exhibit-15. Moreover, the petitioner has examined his projected father as D.W.2, who had exhibited two documents as Exhibit-16 and Exhibit-17 respectively.

4. It may be mentioned that although the D.W.1 and the D.W.2 were not cross-examined by the Government Pleader (i.e. GP) and/or Assistant Government Pleader (i.e. AGP), but the learned Tribunal had put questions to both the witnesses. It would suffice to mention that in so far as the oral evidence of the petitioner that he is the son of Boyej Uddin Sheikh is concerned, which is also supported by the voters lists of 2005, 2010 and 2017 (Exhibit-9, Exhibit-10 and Exhibit-11), wherein the name of the petitioner appears as a voter along with his projected father, has not been demolished in course of the examination by the Tribunal.

5. On a perusal of the opinion impugned in this writ petition, we have noticed the following observations of the learned Tribunal in internal page 6 of the certified copy of the said opinion in connection with the report of the Election Officer, which is quoted below:

“The Election Officer, Dhubri submitted a report dated 01.09.2017 authenticating 8 nos. of voter lists. The Election Officer has mentioned some mistakes in the Computer generated voter list 1997 and 2010 showing as oversight.

I have found discrepancy in the contents of the voter lists exhibited by the Opposite party. The Election Officer, Dhubri has mentioned mistakes in exhibited voter lists which render exhibits unreliable.”

6. The notice to the Election Officer, Dhubri to produce authenticated copy of

the voter list is available at page 91 of the records of the proceedings, received from the Tribunal and the forwarding letter of the Election Officer, Dhubri is available at page 92 of the records and the authentication copy of the voter lists are annexed in the continuing pages thereafter. The report of the Election Officer, Dhubri in respect of the voters list of 1997 and 2010 are as follows:-

While authenticating the certified copy of the Electoral Roll in respect of Voter List of 1997 the following notice may by the Election Officer, Dhubri :-

Authenticated

But due to oversight the age of Jahuron Bibi will be '44' in place of 47.

Sd/-

Election Officer,
Dhubri

While authenticating the certified copy of the Electoral Roll in respect of Voter List of 2010 the following notice may by the Election Officer, Dhubri :-

Authenticated

But due to oversight the Part No. will be '72' in place of 196 Tistapar.

Sd/-

Election Officer,
Dhubri

7. On account of the discrepancy of the contents of the voters list, the learned Tribunal has held that the mistakes in the exhibited voters list render those exhibits unreliable.

8. If there was any mistake in the certified copy of the voters list, it was open to the learned Tribunal to have made comment on the nature of the

discrepancies noted or observed by it. However, in the present case in hand, the learned Tribunal had *suo moto*, issued an order dated 10.08.2017 and forwarded it to the Election Officer, Dhubri, seeking authenticated copies of the Electronic Voter List of the Years : 1966, 1970, 1975, 1985, 1997, 2005, 2010 and 2017. It is not in dispute that under the provisions of para 4 of the Foreigners (Tribunal) Order, 1964, the Tribunals exercises the powers of the Civil Court to require the discovery and production of any document. Therefore, once a document is produced by the concerned authority and the discrepancies are explained, the Court is of the considered opinion that the Tribunal could not have rejected the authenticated copies of documents, which were called by virtue of the order dated 10.08.2017 and duly produced by the Election Officer, Dhubri.

9. It is evident from the two paragraphs of the opinion quoted hereinbefore that the learned Tribunal had found discrepancy in the contents of the voters list exhibited by the petitioner. However, there is no finding of fact as to what was the discrepancy and on what ground, all the voters list were held to be unreliable when no such questions were put to the witnesses.

10. Therefore, the finding of fact recorded by the learned Tribunal is not supported by any evidence either oral or documentary. The learned Tribunal had asked questions to D.W.1 and D.W.2, but the said D.W.1 and the D.W.2 were not questioned on the so called discrepancy, which though purportedly found by the learned Tribunal but not stated in the opinion. Moreover, there was no attempt by the learned Tribunal to recall the said witnesses or to call the Election Officer, Dhubri and examine him and put questions to them having noted the discrepancies. Therefore, the Court is of the considered opinion that the learned

Tribunal has the duty to appreciate the evidence on record and to assign reasons for rejecting the exhibited documents as not reliable. Having not done so, the Court is inclined to hold that the impugned opinion is not sustainable and is required to be set aside.

11. At this juncture, the Court is inclined to refer to the decision of three-Judges Bench of the Hon'ble Supreme Court of India in *T.C. Basappa vs. T. Nagappa*, AIR 1954 SC 440, wherein it has been observed that in exercise of writ jurisdiction of certiorari, the superior court does not exercise the power of an appellate tribunal and that it does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. Accordingly, it was held that it demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal.

12. In the Constitution Bench of the Supreme Court of India in the case of *Syed Yakoob vs. K.S. Radhakrishnan*, AIR 1964 SC 477, has held that in regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit inadmissible evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. It was also held that similarly, if a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by a writ of certiorari.

13. The Supreme Court of India in the recent decision of *Central Council for Research in Ayurvedic Sciences and another vs. Bikartan Das and others*, 2023 SCC OnLine SC 996, has clarified that findings of fact based on 'no evidence' or

purely on surmises and conjectures or which are perverse points could be challenged by way of a certiorari as such findings could be regarded as an error of law.

14. In this present case in hand, despite noticing some discrepancies in the certified copies of the voters list, the learned Tribunal had in its record the authenticated the voters list, which ought to have been looked into by the learned Tribunal as the said documents were called vide order dated 10.08.2017 from the lawful custodian.

15. Nevertheless, the finding of the learned Tribunal is that it had found discrepancies in the contents of the voters list exhibited by the petitioner, but what are those discrepancies has not been made a finding of fact.

14. The Court has already held that the impugned opinion by the learned Member, Foreigners Tribunal No. 2, Kamrup (Metro), Guwahati dated 12.06.2018 passed in F.T. Case no. 13/2017 is not sustainable in the light of the discussions made above. Accordingly, the same is hereby set aside.

15. Under such circumstances, the Court did not deem it appropriate to refer to the evidence and the contents of the exhibits and burden this order with unnecessary facts.

16. Resultantly, the matter is remanded back to the learned Member, Foreigners Tribunal No. 2, Kamrup [Metro], Guwahati, by restoring the said proceedings of the learned Tribunal.

17. The petitioner is on interim projection by the order dated 02.08.2018 of not to be arrested and deported. In order to ensure that the petitioner appears before the said learned Tribunal, the Court is inclined to provide that the petitioner shall appear before the Deputy Commissioner of Police (Border), Kamrup (Metro) within 15(fifteen) days from the date of this order and furnish a bail bond of Rs. 5,000/- (Rupees Five Thousand Only) with one surety of the like amount to the satisfaction of the said authority.

18. Further, the Deputy Commissioner of Police (Border), Kamrup (Metro), 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.

19. Further, on appearance of the petitioner before the Deputy Commissioner of Police (Border), Kamrup (Metro), as directed above, the said authority shall obtain necessary information and documentation as required under the Rules from the petitioner for securing his presence.

20. It is made clear that if the petitioner does not appear before the said authorities within the time allowed and take bail, the order of bail shall stand revoked by efflux of time.

21. The petitioner is directed to appear before the learned Member, Foreigners Tribunal No. 2, Kamrup (M), Guwahati on or before 13.12.2024, and by producing a certified copy of this order, await for further directions from the learned Tribunal.

22. The records of the learned Tribunal be sent back expeditiously.

JUDGE

JUDGE

Comparing Assistant