

GAHC010189642018



undefined

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

Case No. : WP(C)/5911/2018

ABDUL GAFUR
SON OF LATE MAGBAR FAKIR @ MAKBUL FAKIR @ MAGBAR ALI @
MAGBAR @ MAGBUL, VILLAGE- NONKE PUB-KAZIA (N.C. PUB-KAZIA),
P.S. BHANGNAMARI, DIST. NALBARI, ASSAM.

VERSUS

THE UNION OF INDIA AND 5 ORS.
REP. BY THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY OF HOME
AFFAIRS, SHASTRI BHAWAN, TILOK MARG, NEW DELHI-1.

2:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
MINISTRY OF HOME DEPARTMENT
DISPUR
GUWAHATI-6.

3:THE DEPUTY COMMISSIONER
KAMRUP(METRO)
ASSAM
PIN- 781001.

4:THE SUPERINTENDENT OF POLICE (B)
KAMRUP (M)
ASSAM
PIN- 781001.

5:ELECTION COMMISSION OF INDIA

NEW DELHI-1.

6:THE STATE CO-ORDINATOR

NRC
ASSAM
BHANGAGARH
GUWAHATI-5

Advocate for the Petitioner : MR. A R SIKDAR, MR J HUSSAIN,MD A ALI

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

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

ORDER

26.11.2024

(K.R. Surana, J)

Heard Mr. A. R. Sikdar, learned counsel for the petitioner. Also heard Mr. J. Payeng, learned Standing Counsel, FT and Home Department representing respondent nos. 2, 4 and 6; and Mr. P. Sarmah, learned Additional Senior Govt. Advocate representing respondent no.3; and Mr. A.I Ali, learned standing counsel, Election Commission of India, representing respondent no.5.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has assailed the opinion dated 01.08.2018, passed by the learned Member, Foreigner's Tribunal No.2, Kamrup (M), Guwahati in F.T Case No.434/2015 [arising out of IM(D)T Case No.89/2000], by which the petitioner has been declared to be a foreigner from Bangladesh who has illegally entered in Assam, India after 24.03.1971.

3. In this case, the inquiry was conducted by the Sub-Inspector of Police (Border) and an inquiry report dated 06.09.2000 was submitted. However, the Superintendent of Police (Border), City, Guwahati had impliedly disagreed with the report of Inquiry Officer and as there was no documentary evidence in support of entry into India, the case of the petitioner was referred to the Illegal Migrants (Determination) Tribunal for determination of the nationality of the petitioner under the Illegal Migrants (Determination by Tribunals) Act, 1983.

4. In course of time, the said reference was referred for determination before the learned Member, Foreigner's Tribunal No.2, Kamrup(M), Guwahati.

5. Upon issuance of notice, the petitioner appeared before the said learned Tribunal and filed his written statement to deny that he is a foreigner and to accept that he is a bonafide citizen of India, claiming that his grandfather and father were also the citizens of India. In support of his contention, the petitioner has submitted 16 (sixteen) documents by marking the same as Annexure - A to Annexure - P respectively.

6. In support of his contention, the petitioner, namely, Abdul Gafur *alias* Gafur Ali, deposed as DW-1 and filed his evidence-on-affidavit and has exhibited 17 (seventeen) documents by marking it as Exhibit- A to Exhibit- Q and the relevant entries in those exhibits were also exhibited. The petitioner has also examined his mother, Aibhan Bidhaba @ Aiban Bidhaba @ Aibhan Nessa as DW-2. The petitioner has also examined one Keramat Ali, as DW-3, projecting him to be one of his paternal uncle and he had exhibited Identity Card by marking it as Exhibit-R and he had also exhibited his name contained therein. The petitioner has also examined one Md. Jahangir Alam, his projected cousin brother as DW-4, by filing his evidence-on-affidavit and he has also exhibited his Identity Card

as Exhibit-S and also exhibited his name contained therein. The petitioner has also examined one Abdul Matlib, the *Gaonburah* of village Bangnaputa, Lawtalipura, Balarchar, Kalarchar (N. C. Pub Kazia) as DW-5 who has exhibited a certificate dated 14.04.2018, issued by him as Exhibit-N and its contents as well as his signature as contained therein. It may be stated that all these 5 (five) witnesses were examined by the learned Tribunal, by putting questions on the same day i.e. 13.06.2018. It may also be stated that as per the order sheet dated 13.06.2018, the Govt. Pleader/ Assistant Govt. Pleader) for the State was not present. Thereafter, the case was fixed on 03.07.2018 and even on that date Govt. Pleader/ Assistant Govt. Pleader) was not present and therefore, only the learned counsel for the petitioner was heard and the case was fixed for opinion.

7. The learned Tribunal, in its opinion dated 01.08.2018, examined all the exhibited documents and has also considered the examination of the witnesses by the learned Tribunal. The ultimate analysis of the pleadings and evidence, as made by the learned Tribunal in the impugned opinion, is extracted below :

In analyzing it is seen that in voter list of 1966 (Exhibit-C) contains name of Jarina Bibi W/o Akbar 42 yrs, Mogbar Fakir S/o Akbar 35 yrs, Aivan Nessa W/o Mokbar 25 yrs and others. In the voter list of 1970 (Exhibit-D) contains name of Jarina Bibi W/o Akbar 47 yrs, Mogbar Fakir W/o Akbar 40 yrs, Aivan Nessa W/o Mokbar 30 yrs. In the voter list of 1979 (Exhibit-E) contains name of Aivan Nessa W/o Mokbar 40 yrs and Jinnat Ali S/o Mokbar 40 yrs. In the voter list of 1985 (Exhibit-F) contains name of Mogbul Fakir S/o Akbar 60 yrs, Aivin Nessa W/o Mokbul 53 yrs, Jinnat Ali S/O Mogbul 40 yrs. In the voter list of 1993 (Exhibit-G) contains name of Mokbar Ali S/o Akbar 68 yrs, Aivan Nessa W/o Mokbar 54 yrs. In the voter list of 1997 (Exhibit-H) contains name of Aiban Bidhawa W/o Mogbul 50 yrs, Gofur Ali S/o Mogbul 21 yrs. In the voter list of 2005 (Exhibit-I) contains name of Aiban Bidhawa W/o Mogbul 57 yrs, Abdul Gofur S/o Mogbul 30 yrs. In the voter list of 2010 (Exhibit-J) contains name of

Aiban Bidhawa W/o Mogbul 60 yrs, Abdul Gofur S/o Mogbul 33 yrs. In the voter list of 2017 (Exhibit-K) contains name of Aivan Bidhawa W/o Mogbul 66 yrs and Abdul Gofur S/o Mogbul 39 yrs. (Exhibit-P) is voter list of 2005 contains name of Keramat Ali S/o Agbar 47 yrs and Jahangir Alam S/o Kuddus 27 yrs.

The Opposite party has exhibited as (Exhibit-A) Annual Khira) Patta of Land covered by Dag No. 110 of village- Damdama, Dist. Kamrup in the name of Abdul Fakir for the year 1930-31. (Exhibit-B) Land Revenue Receipt of Land covered by Eksona Patta No. 19 dated 20.03.1952 paid by Akbar Fakir. (Exhibit-L) Voter ID Card of Abdul Gofur S/o Magabul aged 36 yrs issued on 01.10.213. (Exhibit-M) is Land Revenue Receipt dated 02.09.2014 of Land covered by Patta No. 424 Tauji received from Abdul Gofur for Mokbar Fakir. (Exhibit-N) is Residence certificate dated 14.04.2018 of village N.C. Pub Kajia by Gaonbura in the name of Abdul Gofur S/o Mogbul. (Exhibit-O) is Affidavit sworn by Abdul Gafur @ Gafur Ali stating discrepancies in names of his and his father in the exhibits. (Exhibit-Q) is voter ID card of Ayaban Bidhaba W/o Mogobul aged 63 yrs issued on 01.10.2013. (Exhibit-R) is Identity Card of Keramat Ali who adduced evidence as DW3. (Exhibit-S) is ID Card of Jahangir Alam who adduced evidence as DW4.

The Opposite party has not mentioned present status of the Annual Patta Land (Exhibit-A) covered by Dag No. 110 of village Damdama for the year 1930-31. From the (Exhibit-A) it is not possible to ascertain if person name Akbar Fakir in the (Exhibit-A) is the same person whom the Opposite party has stated as his grandfather.

On analyzing the voter list it is seen that in the voter list of 1966 name of Jarina Bibi 42 yrs and Mogbar Fakir 35 yrs and others appears. As per statement of the Opposite party Abdul Gafur @ Gafur Ali his grandmother is Jarina Bibi and father is Magbar Fakir. As per voter list of 1966 age gap between Jarina Bibi and Mogbar Fakir is 7 yrs. Similarly in the voter list of 1970 name of Jarina Bibi 47 yrs and Mogbar Fakir 40 yrs and others appears. As per voter list - the age gap

between Jarina Bibi and Mogbar Fakir is 7 yrs who are mother and son.

In the voter list of 1979 name of Aivan Nessa W/o Mokbar 40 yrs and Jinnat Ali S/o Mogbar 30 yrs appears. The age gap between Aivan Nessa and Jinnat Ali is 10 yrs who are mother and son.

From the above analysis it is seen that paternal grandmother of Opposite party has a age difference of 7 yrs with the father of the Opposite party. It is not possible to have age gap of 7 yrs between mother and son.

In some documents name of father of the Opposite party is written as Mogbar Fakir and in some documents Mogbul Fakir and in some documents Magbor Ali is written and also name of Opposite party Abdul Gafur and somewhere Gafur Ali is written.

8. On the aforesaid analysis of the evidence on record, the learned Tribunal had concluded that the petitioner has failed to establish that the he or his ancestors are residing in Assam and accordingly, he was declared to be a foreigner of post 24.03.1971 stream.

9. We have heard the learned counsel appearing for both sides and have also considered the materials available on record. Also perused the records of the learned Tribunal.

10. While the learned counsel for the petitioner contends that by taking into account certain discrepancies in the age and names, the entire evidence was discarded. Moreover, it was submitted that while appreciating the pleadings and evidence on record, the learned Tribunal did not take into account the explanation of those discrepancies which was fully explained in the written statement as well as in the evidence-on-affidavit filed on behalf of the DW-1, DW-2, DW-3 and DW-4. Per contra, the learned Standing Counsel for the FT

matters has submitted that while the appreciation of facts and law by the learned Tribunal cannot be faulted with because of the fact that in the voter list of 1966, the age of the petitioner's grandmother was 42 (forty two) years, his father was 35 (thirty five) years and the age of the mother was 25 (twenty five) years which is not believable in view of the 7 (seven) years age difference between the mother and the son. Similarly, it has been submitted that there are discrepancies in the name and age of the persons whose name appear in the subsequent voters list of 1970 (Exhibit-D), 1979 (Exhibit-E), 1985 (Exhibit-F), 1993 (Exhibit-G), 1997 (Exhibit-H), 2005 (Exhibit-I), 2010 (Exhibit-J), 2017 (Exhibit-K) and 2005 (Exhibit-P). It is also submitted that till 1966 up to the voters list of 1970, the persons whose names appear in the voters list, resided in the different village and thereafter, the petitioner claims to have shifted but the name of the father of the petitioner does not appear in the voters list of 1979, but his name appeared in the voters list of 1966 and 1970. Accordingly, it is submitted that the petitioners has picked up names from different few voters list from here and he has projected the persons appearing there as the members of his family.

11. On a perusal of the records, the Court is inclined to observe that in the written statement as well as evidence-on-affidavit filed by the DW-1 to DW-4, the stand of the petitioner as well his witnesses are consistent, that the petitioner have explained about the shifting of their family from the previous village of Domdoma under P.S Tarabari within Constituency No.54 Chenga LAC to village - Pub Kazia Nonke under P.S- Mukalmua, falling under Constituency No.60 Barkhetri LAC. The Court also takes note of the fact that the petitioner has given the name of his projected grandfather, grandmother, father and mother and has also stated in the written statement as well as in the evidence

that the father of the petitioner was earlier married to one Jilisha Khatun (since deceased) and out of their conjugal life, one Jinnat Ali (since deceased) was born and that after the death of Jilisha Khatun, his father had married Aibhan Nessa, who is the mother of the proceedee. He has also given the particulars of other members of the family. The discrepancy in the age is also shown to be explained both in the written statement as well as in the evidence-on-affidavit of the DW-1 to DW-4. In order to prove the existence of the family prior to the cutoff date of 25.03.1971, the petitioner has also relied on a copy of Annual Khiraj Patta relating to plot of land under village Domdoma under Mouza Chenga in the erstwhile district of Kamrup, now bifurcated and falling under district Barpeta. The said Patta purportedly refers to the revenue year 1930-31 in respect of which a land revenue paying receipt dated 20.03.1952, corresponding to year 1358 is recorded. The Court takes note of the fact that the State did not take the effort of cross-examining all the 5 (five) DWs, who had filed their respective evidence-on-affidavit in favour of the petitioner. In the absence of any cross-examination, the learned Tribunal had put questions to all the 5 (five) witnesses on 13.06.2018 and all the queries put by the learned Tribunal were answered. It is seen that none of the so called discrepancies in the evidence of the petitioner on which the evidence of the 5 (five) witnesses were discarded were asked to the petitioner as a circumstances appearing against him so as to disbelieve his evidence.

12. A perusal of the opinion of the learned Tribunal goes to indicate that the opinion has been rendered in ignorance of the oral evidence adduced by the petitioner (as DW-1) and his 4 (four) other witnesses viz. DW-2 to DW-5. It is seen that there is no discussion on the elaborate testimonies of the 5 (five) witnesses who were conspicuously not cross-examined by the State. It is too

well established that when evidence-on-affidavit is filed by the witnesses and then their oral evidence and/or questions are also recorded by the learned Tribunal, it is incumbent on part of the learned Tribunal to discuss the probative value of the oral evidence apart from the probative value of the documentary evidence which are available on record. In the present case in hand, such an appreciation is not done is found lacking.

13. As there was no cross-examination of the 5 (five) witnesses of the petitioner with regard to the purported age and name discrepancies, the said part of the evidence remains uncontroverted and could not have been discarded without referring to any appropriate material on record on which these discrepancies were accepted as a ground for discarding the entire evidence. It is not a case where strangers were examined as DW-1 to DW-4. Their reference is made in the written statement as well as in the evidence-on-affidavit filed by the DW-1. The DW-1 had relied on the certificate issued by the *Gaonburah* and therefore, the said *Gaonburah* was examined as DW-5.

14. Therefore, the Court is of the considered opinion that the impugned opinion, rendered by the learned Tribunal is clearly suggestive of a situation where the relevant evidence was not taken into consideration while deciding the reference and the learned Tribunal had taken note of some irrelevant considerations while rendering of the opinion.

15. 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.

16. 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.

17. 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.

18. Therefore, the scope of the Court in exercise of jurisdiction under certiorari is limited to examine whether the opinion of the learned Tribunal is sustainable or not. Having found from the discussions above that the said opinion is untenable, the only option available to this Court is to remand the matter back for a fresh consideration by the consideration and opinion by the learned Tribunal by setting aside the impugned opinion dated 01.08.2018, passed by the learned Member, Foreigner's Tribunal No.2, Kamrup(M), Guwahati

in F.T Case No.434/2015.

19. Resultantly, the proceedings of F.T Case No.434/2015 is restored back to the file of the learned Member, Foreigner's Tribunal No.2, Kamrup(M), Guwahati. The petitioner shall now appear before the said learned Tribunal within a month from the date of the order and by producing a certified copy of this order and await for further directions from the learned Tribunal.

20. In order to compel appearance of the petitioner before the learned Tribunal, the Court is inclined to direct that the petitioner shall appear before the Assistant Commissioner of Police (Border), Kamrup (M), Guwahati within 15 (fifteen) days from the date of the order and shall furnish a bail bond of Rs. 5000/- (Rupees five thousand only) with one local surety of the like amount to the satisfaction of the said authority. Further, the Superintendent of Police (Border), Kamrup (M), Guwahati 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.

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

22. On release of petitioner on bail, he is prohibited from leaving the territorial jurisdiction of the Superintendent of Police (Border), Kamrup (M), Guwahati without prior written intimation.

23. It is made clear that, if the conditions imposed by this order is not

complied with, and if the petitioner does not appear before the said learned Tribunal within the time allowed, this order would stand revoked and recalled lapse by afflux of time and resultantly, the impugned opinion dated 01.08.2018, passed by the learned Member, Foreigner's Tribunal No.2, Kamrup (M), Guwahati, shall stand restored and revived as if there was no interference with the impugned opinion.

24. Accordingly, this writ petition stands partly and conditionally allowed to the extent as indicated above.

25. There shall be no orders to cost.

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

JUDGE

JUDGE

Momi

Comparing Assistant