

GAHC010192642017



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

Case No. : WP(C)/547/2017

MD. ABDUL MOTLIB @ MOTLIB ALI
S/O LT. ABDUL HOQUE @ KALA MIA, VILL. MODERTOLI, P.S. DOBOKA,
DIST- NAGAON, NOW - HOJAI, ASSAM

VERSUS

THE UNION OF INDIA and 6 ORS
REP. BY THE SECY. TO THE GOVT. OF INDIA, HOME DEPTT., NORTH
BLOCK, NES DELHI

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

3:ADDL. DIRECTOR GENERAL OF POLICE
ASSAM BORDER
BHANGAGARH
GHY-5

4:DY. COMMISSIONER
NAGAON
ASSAM

5:DY. COMMISSIONER
HOJAI
SHANKARDEV NAGAR
ASSAM

6:SUPERINTENDENT OF POLICE B
NAGAON

ASSAM

7:SUPERINTENDENT OF POLICE B
HOJAI
ASSA

Advocate for the Petitioner : MS.L WAJEEDA, MR.K MIRA,MR.N H MAZARBHUYAN,MR.N ISLAM

Advocate for the Respondent : ASSTT.S.G.I., GA, ASSAM

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

ORDER

Date : 05.09.2024
(K.R. Surana, J)

Heard Ms. L. Wajeeda, learned counsel for the petitioner. Also heard Ms. B. Sarma, learned CGC for the respondent no.1, Mr. G. Sarma, learned standing counsel. F.T., representing respondent nos. 2, 3, 6 and 7, as well as Mr. H.K. Hazarika, learned Govt. Advocate, representing respondent nos. 4 and 5.

2) By filing this writ petition under Article 226 of the Constitution of India, the petitioner, namely, Md. Abdul Motlib @ Motlib Ali, has assailed the opinion dated 31.10.2016, passed by the learned Foreigners' Tribunal, Nagaon No. 10th, Sankardev Nagar, Hojai in F.T.(D) Case No. 24/2015, thereby answering the reference in the affirmative and declaring the petitioner to be a foreigner of post 25.03.1971 stream as per section 2(1)(a) of the Foreigners' Act, 1946, who had illegally entered into the territory of India (Assam) without any legal document. Resultantly, the consequences that was to follow thereafter, was also ordered.

3) The records revealed that the Superintendent of Police (B), Nagaon had sent a reference in respect of the petitioner to the learned Foreigners Tribunal, Hojai, bearing Foreigners Tribunal Case No. 103/06/B dated 30.01.2006. Accordingly, vide order dated 13.12.2012, the reference, so received, was registered as Case No. FT/ H/1251/2012 and notice was issued to the petitioner.

4) It appears from the order dated 17.08.2015, passed by the learned Foreigners' Tribunal, Nagaon No.10th at Doboka that the record was received on transfer from the Foreigners' Tribunal, Hojai and the case was re-registered as F.T.(D) Case No. 24/2015.

5) In the notice issued to the petitioner, he was informed that he is a suspected foreigner residing illegally at Modartoli village under Doboka P.S., Dist. Nagaon, and had illegally entered into India without any passport. In response to the said notice, the petitioner had filed his written statement on 07.09.2015, wherein he had, *inter alia*, stated that his actual name is Motlib Ali, son of Late Abdul Hoque, but his name was wrongly recorded in the notice of the Tribunal as Md. Abdul Motalib, son of Md. Abdul Hoque.

6) On 07.09.2015, the learned counsel for the petitioner made a verbal prayer for correction of the petitioner's name by submitting that his name was incorrectly entered in the notice. The oral prayer could not be considered without a written prayer, and the case was fixed on 10.09.2015 for filing evidence-on-affidavit and for correction of the petitioner's name.

7) On 10.09.2015, the petitioner had filed his evidence-on-affidavit. The petitioner had also submitted an affidavit filed to the effect that he is known as Motlib Ali, Abdul Motlib and Md. Abdul Motlib. Accordingly, by marking

the said affidavit as Ext. 6, the learned Tribunal ordered that the petitioner's name be corrected to Motlib Ali in the case record.

8) In support of his contention that he is a citizen of India, along with his evidence-on-affidavit as DW-1, the petitioner had submitted the following exhibits, viz., (a) certified copy of voter-list of 1985 (Ext.1), (b) certified copy of voter-list of 1997 (Ext.2), (c) certified copy of voter-list of 1966 (Ext.3), (d) school certificate (Ext.4), (e) certified copy of voter-list of 2005 (Ext.5), (f) affidavit regarding name of the petitioner (Ext.6).

9) The petitioner had exhibited the certified copy of the voter-list of 1985 (Ext.1) to prove that it contained the names of his grandfather, grandmother, father and mother. Vide Ext.1, the petitioner had projected that the name enlisted at voter serial no. 91 was of Late Wajed Ali, his projected grand-father; the name enlisted at serial no. 92 was that of his grand-mother, Asiya Khatun, wife of Wajid; the name appearing at serial no. 94 was that of A. Hoque, his projected father; and that Amina Khatun, wife of A. Hoque, whose name appeared at serial no. 55 was the petitioner's wife. However, the said evidence was disbelieved because in his cross-examination, the petitioner could not recognize the persons whose names appear at serial nos. 93, 96, 99 and 100 of the voter list, even though they also reside in the same house no.26 and are therefore, members of the same paternal family.

10) By the certified copy of voter list of 1997 (Ext.2), the petitioner had projected that it contained the names of his parents, i.e. Abdul Hoque and Musstt. Halima Khatun, wife of Abdul Hoque, his brother- Damshed Ali, son of Abdul Hoque and brother's wife- Rahima Khatun, wife of Damshed Ali, his brother- Noor Ali, son of Abdul Hoque and his brother's wife- Uslima Khatun, wife of Noor Ali. However, Ext.2 was disbelieved because in his cross-

examination, the petitioner (DW-1) had stated that the name of his mother is Musstt. Amina Khatun, but as per Ext.2, his mother's name was Musstt. Halima Khatun. Moreover, the learned Tribunal has also mentioned that in his evidence-on-affidavit or in his cross-examination, the petitioner (DW-1) had not stated that his father had two wives.

11) By the certified copy of the voter list of 1966 (Ext.3), the petitioner had projected that it contained the names of his grand-parents. On evaluation of the said exhibit, the learned Tribunal had discarded the same because in the said exhibit on the ground that as per the evidence of the petitioner, his grand-mother was Asiya Khatun, but from the name appearing at serial no. 143, it appears that his grand-father had two wives, which was suppressed by the petitioner. Moreover, by referring to the cross-examination of DW-1, where he had stated that his grandfather had died 20 years back, i.e. 1995 at the age of 120 years and that his grandmother, Late Asiya Khatun had died prior to his grand-father at the age of 105 years, it was held that if in the year 1995, the age of his grandparents was 120 years and 105 years, then their age in the year 1966 should have been 91 years and 76 years respectively, but their age was recorded in the voter list of 1966 as 40 years and 30 years respectively. The learned Tribunal had held that the wide age gap of 51 years for grandfather and 36 years for grandmother was not explained by the petitioner in his written statement or evidence-on-affidavit. The voter list of 1966 was also disbelieved because of the age gap between his projected grandmother, Abiya Khatun (30 years), wife of Wajid (voter serial no.142) and Tabrak Ali (age 23 years), son of Wajid (voter serial no. 140), i.e. father's brother, which disclosed an age gap of only 7 years.

12) It may be stated that the name of petitioner is Asiya Khatun, but

in the voter list of 1966 (Ext.3), the name is written as Abiya Khatun, which is being ignored as a minor mistake.

13) The petitioner claims to have studied upto Class-IV and had exhibited a school certificate issued by the Headmaster of Uttar Changmaji L.P. School as Ext.4. However, on being summoned by the Tribunal, the Headmaster of the said school had denied that the records produced by him contained the issuance of Ext.4. The witness also denied knowing the petitioner during his service period. Accordingly, the Ext.4 was discarded by the learned Tribunal.

14) The petitioner had exhibited the voter list of 2005 as Ext.5, which contained the name of projected parents, his projected brother and himself. However, the said exhibit was discarded in light of discrepancies in the Ext. nos. 1, 2, and 3 and it was held that the petitioner had failed to establish linkage through any document prior to 25.03.1971.

15) In respect of the affidavit regarding discrepancies in the petitioner's name, marked as Ext.6, it was held to be of no use.

16) Accordingly, the reference was decided against the petitioner, holding him to be a foreigner of the post 25.03.1971 stream and that the petitioner had failed to discharge his mandatory burden to prove that he is an Indian citizen and not a foreigner, as envisaged in section 9 of the Foreigners' Act, 1946. Accordingly, it was ordered that consequences as mentioned in the said order would follow.

17) Although the learned counsel for the petitioner made elaborate submissions in support of the petitioner being a citizen of India, but she has not been able to demonstrate how and in what manner the finding of the learned Tribunal is perverse or vitiated by non-application of judicial mind.

18) It is also observed that none of the members of his projected family had come forward to give evidence in favour of the petitioner, to show that they are the members of paternal and/or maternal family of the petitioner, or to otherwise prove that the petitioner is a citizen of India.

19) The Court has perused the records received from the learned Tribunal and on appreciation of the exhibited documents, the Court is of the considered opinion that through the voters list of 1966 (Ext.3), voter list of 1985 (Ext.1) and voter list of 1997 (Ext.2), the petitioner has not been able to prove his linkage to his projected parents and grand-parents. The Court finds force in the submission of the learned standing counsel for FT matters that if Ext. nos. 1, 2 and 3 i.e. voter lists of 1985 1997 and 1966 fails to prove that the persons whose names are entered therein are the projected parents and grand-parents, the petitioner cannot establish his link with his projected parents whose name appear in the voter list of 2005 (Ext.5) because the petitioner must prove that his grand-parents and parents had their existence in Indian soil prior to 25.03.1971.

20) The discussions by the learned Tribunal for rejecting Ext.4 cannot be faulted with in any manner whatsoever.

21) In the absence of any documentary evidence to establish relationship, oral evidence by the petitioner is not sufficient to prove that the petitioner is the son of Abdul Hoque and Amina Khatun or that his grand-father was Wajed Ali and his grand-mother was Asiya Khatun.

22) The primary issue in a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 relates to determination as to whether the proceedee is a foreigner or not. Therefore, as the relevant facts are

within the knowledge of the proceedee, notwithstanding anything contained in the Evidence Act, 1872, the burden of proving citizenship absolutely rests upon the proceedee as per the provisions of Section 9 of the Foreigners Act, 1946. In the present case in hand, the petitioner has failed to discharge the burden and to prove that he is a citizen of India or that he is the offspring of parents of Indian origin.

23) In the case of *Sarbananda Sonowal v. Union of India*, AIR 2005 SC 2920: 2005 STPL 11372 (SC), the Supreme Court of India had observed and held as follows:-

17. *There is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Sometimes the place of birth of his grand parents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

18. *Though in a criminal case the general rule is that the burden of proof is on the prosecution but if any fact is especially within the knowledge of the accused, he has to lead evidence to prove the said fact. In Shambhu Nath Mehra v. The State of Ajmer, AIR 1956 SC 404 it was held as follows:*

"Section 106 is an exception to S. 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and S. 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and

which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

In Collector of Customs, Madras v. D. Bhoormull, AIR 1974 SC 859, proceedings were initiated under Section 167(8)(c) of the Customs Act for confiscation of contraband or smuggled goods and it was observed:

"... Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the accused, it is not obliged to prove them as part of its primary burden." (Paragraph 31)

"... On the principle underlying S. 106 Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. In state of West Bengal v. Meer Mohd. Umar, (2000) 8 SCC 382, it was held that the legislature engrafted special rule in Section 106 of the Evidence Act to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. This principle was reiterated in Sanjai @ Kaka v. State (NCT of Delhi), (2001) 3 SCC 190 and Ezhil v. State of Tamil Nadu, AIR 2002 SC 2017.

In R. v. Oliver, 1943 All ER 800, the accused was charged with having sold sugar as a whole-sale seller without the necessary licence. It was held that whether the accused had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him. It was further held that in the circumstances of the case the prosecution was under no necessity to give prima facie evidence of non-existence of a licence. In this case reference is made to some earlier decisions and it will be useful to notice the same. In R. v. Turner, (1916) 5 M & S 206: 14 Digest 430, the learned Judge observed as follows: "I have always understood it to be a general rule, that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative."

In Williams v. Russel, (1993) 149 LT 190, the learned Judge held as under: "On the principle laid down in R. v. Turner and numerous other cases where it is an offence to do an act without lawful authority, the person who sets up the lawful

authority must prove it and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute."

19. *Section 9 of the Foreigners Act regarding burden of proof is basically on the same lines as the corresponding provision is in U.K. and some other Western nations and is based upon sound legal principle that the facts which are peculiarly within the knowledge of a person should prove it and not the party who avers the negative.*

(extracted from STPL)

24) The scope for interference with the finding of fact by the Foreigner's Tribunal in a writ proceeding and under certiorari jurisdiction is in a very narrow campus. Unless the petitioner is able to demonstrate that the opinion of the learned Tribunal is perverse, or vitiated by jurisdictional error, or otherwise grossly incorrect, the writ Court would be slow in re-appreciation of the evidence as if it is exercising appellate jurisdiction. In this regard, the decision of the 3-Judge Bench of the Supreme Court of India in the case of *Central Council for Research in Ayurvedic Sciences & Anr. v. Bikartan Das & Ors., 2023 INSC 733 (para-49 to 51)*, may be referred to. The said decision has been followed by this Court in the case of *Jahanara Khatun v. Union of India & Ors., 2024 (3) GLT 246..*

25) In light of discussions above, this Court does not find that the impugned opinion rendered by the learned Tribunal is vitiated by any jurisdictional error or that there was any failure of giving opportunity of hearing to the petitioner. Therefore, as the Court is not exercising appellate jurisdiction, no case is made out for substituting the opinion rendered by the learned Foreigner's Tribunal with the view of the Court. This is not a case where the learned Tribunal had refused to admit admissible evidence or that its finding is *dehors* the evidence on record.

26) It may be mentioned that even in this writ proceeding, no prayer has been made to appreciate and/or examine any other document by which any link could be established by the petitioner with his projected parents or grandparents. The petitioner has also not made any prayer before this Court to provide him with an opportunity to adduce any further evidence before the learned Tribunal.

27) Thus, there are no grounds on which the opinion impugned herein is liable to be interfered with.

28) Hence, this writ petition fails and the same is dismissed, leaving the parties to bear their own cost.

29) Resultantly, the actions consequent upon the opinion dated 31.10.2016, rendered by the learned Foreigners' Tribunal, Nagaon No. 10th, Sankardev Nagar, Hojai in F.T.(D) Case No. 24/2015 would follow, in accordance with law.

30) The bail granted in the interregnum by order dated 02.02.2017, passed by this Court would stand vacated. The learned Standing Counsel for the F.T. matters shall inform the Superintendent of Police (Border), Nagaon.

31) Let the case records be returned together with a copy of this order for future reference.

JUDGE

JUDGE.

Comparing Assistant