

WP(C) 5166/2008
BEFORE
THE HON'BLE MR. JUSTICE B.P. KATAKEY

JUDGMENT & ORDER (Oral)

These writ petitions being against the common judgment and order dated 26th March, 2008 passed by the learned Member, Foreigners Tribunal, Hojai at Sankardev Nagar in Case Nos. FT/H/711/2007; FT/H/712/2007 and FT/H/754/2007, are taken up together for hearing and disposal, as agreed to by the learned counsel appearing for the parties.

[2] On the basis of 3(three) references made by the Superintendent of Police (Boarder), Nagaon vide Exhibit-2 series, the aforesaid proceedings were registered in the Foreigners Tribunal, Hojai at Saknardev Nagar against the present petitioners, doubting their citizenship. The Tribunal, in due course, issued notices to the writ petitioners, who were the opposite parties in the aforesaid proceedings, under the provisions of the Foreigners Act, 1946. The petitioners accordingly, appeared and contested the said proceedings contending inter-alia that they are Indian nationals by birth and the name of the father of the petitioner in WP(C) No.4976/2008 and grand-father of the petitioners in WP(C) Nos.5164/2008 and 5166/2008 appeared in the voters list of 1966, apart from the name of the petitioner in WP(C) No.4976/2008 in the voters list of 1970. While the respondent authority examined Abdul Minar, the Sub-Inspector of Police (Border), the writ petitioners/opposite parties examined Md. Ismail Ali (the petitioner in WP(C) No.4976/2008). Altogether 5(five) documents were marked as Exhibits, out of which, 3(three) documents, namely Exhibits-1, 2 and 3, were marked at the instance of the respondent authority and 2(two) documents, namely Exhibits-A and B, were marked at the instance of the writ petitioners/opposite parties. Exhibit-1 is the communication dated 30th August, 2001 issued by the Superintendent of Police (B), Nagaon to the Sub-Inspector (B), PW-1, directing him to make an enquiry relating to the citizenship status of the writ petitioners. Exhibit-2 is the particulars furnished by the PW-1 in Form No.I and Exhibit-3 is the report of the enquiry submitted by PW-1 in Form No.II with endorsement of the Superintendent of Police (B) referring the question of citizenship of the writ petitioners to the Tribunal for opinion. Exhibit-A is the voter list of 1966 in respect of No. 56 Chhaigaon Legislative Assembly Constituency pertaining to Part 56, Village- Mohmari, PS- Chhaigaon in the district of Kamrup, Assam and Exhibit-B is the voter list in respect of the said Constituency for the year 1970. Though both the parties have adduced evidence of 1(one) witness each, they were, however, not cross-examined by either of the parties.

[3] The learned Member, Foreigners Tribunal vide judgment and order dated 26th March, 2008 opined that the writ petitioners/ opposite parties are foreigners coming from Bangladesh after 25th March, 1971 without any valid document, which was exactly the reference made to the Tribunal for determination. Exhibits-A and B voters list pertaining to the year 1966 and 1970 were held to be not in respect of the father of Md. Ismail Ali [the petitioner in WP(C) No.4976/2008] and hence those held to be not relevant for the purpose of the claim of the writ petitioners/opposite parties that they are Indian citizens. Such finding has been recorded by the learned Member on the basis of the alleged claim of Md. Ismail Ali [petitioner in WP(C) No.4976/2008] that his father's name is Murtab Ali, whose name, the Tribunal has found, does not appear in the voters lists of 1966 and 1970, Exhibit-A and B, respectively.

[4] I have heard Mr. MU Mahmud, learned counsel for the petitioners and Mr. BJ Ghosh, learned State counsel appearing for the respondents.

[5] Mr. Mahmud, learned counsel for the petitioners leading me to the evidences adduced by the parties, both oral and documentary, in the proceeding

before the Tribunal, has submitted that the grounds on which the Tribunal has refused to place reliance on Exhibits-A and B, voters list, being contrary to the evidences on record, is not sustainable in law. According to Mr. Mahmud, Md. Ismail Ali in his evidence has made categorical statement that his father's name is Murtab Ali @ Latif Ali, which fact was not taken into consideration by the Tribunal while recording the finding that the father's name of Ismail Ali is Murtab Ali, whose name does not figure in the voters lists of 1966 and 1970 (Exhibits - A and B). Mr. Mahmud, therefore, submits that the evidences adduced by the parties have not been appreciated in its proper perspective by the Tribunal and hence the judgment passed by the learned Member, Foreigners Tribunal needs interference of this Court in exercise of the certiorari jurisdiction.

[6] Mr. Ghosh, learned State counsel appearing for the respondents, per contra, supporting the judgment and order passed by the learned Member, Foreigners Tribunal, has submitted that since the burden lies on the persons, who are alleged to be foreigners, the writ petitioners/opposite parties are to prove that they are not foreigners but Indian nationals. According to Mr. Ghosh, the writ petitioners/ opposite parties have miserably failed to substantiate their plea that they are Indian nationals by birth. It has also been submitted that it is evident from the finding recorded by the learned Member, Foreigners Tribunal that the father's name of the petitioner, namely Md. Ismail Ali, [petitioner in WP(C) No.4976/2008], is Murtab Ali and since the name of Murtab Ali does not appear in the voters lists of 1966 and 1970 (Exhibits-A and B), no credence rightly was given to those documents in support of the claim of the writ petitioners/opposite parties that they are Indian nationals.

[7] I have considered the submissions of the learned counsel appearing for the parties and also perused the record including the evidences, both oral and documentary.

[8] Section 6-A of the Citizenship Act, 1955 (in short, the Act) has been inserted by way of amendment Act of 65 of 1985 with effect from 7th December, 1985. Sub-Section (2) of Section 6-A provides that subject to the provisions of Sub-Sections (6) and (7), all persons of Indian origin who came before the 1st day of January, 1966 to Assam from the specified territory (including such of those whose names were included in the electoral rolls used for the purpose of the General Election to the House of the People held in 1967) and who have been ordinarily resident in Assam since the dates of their entry into Assam shall be deemed to be citizens of India as from the 1st day of January, 1966.

[9] Sub-Section (3) of Section 6-A of the Act provides that subject to the provisions of Sub-Sections (6) and (7), every person of Indian origin who (a) came to Assam on or after 1st day of January, 1966 but before 25th day of March, 1971 from the specified territory; (b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and (c) has been detected to be a foreigner, shall register himself in accordance with the Rules made by the Central Government in this behalf under Section 18 with such authority, as may be specified in such Rules. It also provides that if the name of such person is included in any electoral roll for any Assembly or Parliamentary Constituency in force on the date of such detection, his name shall be deleted therefrom.

[10] Section 6-A, which is the outcome of the Assam Accord, therefore, envisaged 2(two) classes of person, (a) who came to Assam from the specified territory, namely Bangladesh prior to 1st day of January, 1966 and (ii) the persons who came to Assam after 1st day of January, 1966 but before 25th March, 1971 from the specified territory and have been ordinarily resident in Assam since the date of their entry. The second class of persons would, however, lose the voting rights for a period of 10(ten) years from the date of their detection as for foreigners and they are required to register their names in accordance with the Rules framed. Those 2(two) classes of persons coming from the specified territory,

subject to the conditions as specified above, are to be treated as Indian citizens. The persons, who came to Assam from the specified territory after 15th day of March, 1971 are foreigners, who are to be deported from India.

[11] In the instant cases, the reference was that the writ petitioners/opposite parties are foreigners coming to India from Bangladesh after 25th March, 1971, which, however, has been denied and disputed by the writ petitioners/opposite parties in the proceedings before the Tribunal.

[12] As noticed above, 2(two) witnesses, 1(one) from each side, were examined in the proceedings before the Tribunal. While the Sub-Inspector of Police (B), (PW-1) has stated in his deposition that while making an enquiry, it was found that the writ petitioners/ opposite parties are foreigners coming to Assam from Bangladesh after 25th March, 1971, who could not produce any proof of their being Indian citizens, Md. Ismail Ali, [petitioner in WP(C) No.4976/2008] in his deposition has stated that all the writ petitioners were born in India and as such, Indian citizens and in fact his father's name appeared in the voters lists of 1966 and 1970 (Exhibits-A and B), apart from his name in the voters list of 1970. It has further been stated in the deposition that his father's name is Murtab Ali @ Latif Ali. In the voters lists of 1966 and 1970 (Exhibits- A and B), the name of Abdul Latif Ali appears.

[13] It is opined by the Tribunal that since the father's name of the writ petitioner [petitioner in WP(C) No.4976/2008] is Murtab Ali, Exhibits- A and B cannot be linked to the writ petitioners and hence this cannot be the basis for claiming that the writ petitioners are Indian nationals. The learned Member, Foreigners Tribunal, however, while recording such finding has ignored the statement of Md. Ismail Ali recorded in the proceedings that his father's name is Murtab Ali @ Latif Ali. The Tribunal also did not take into consideration whether Murtab Ali @ Latif Ali is Abdul Latif Ali, whose name appeared in the voters lists of 1966 and 1970, which were marked as Exhibits-A and B at the instance of the writ petitioners/opposite parties. Without recording any finding to that effect, the Tribunal ought not to have recorded such opinion vide the aforesaid judgment and order.

[14] A writ of certiorari can be issued by the High Court if it is shown that in recording the finding, the Tribunal had erroneously refused to admit admissible and material evidences or had erroneously admitted inadmissible evidence which has influenced the finding. The writ of certiorari can also be issued if a finding of fact is based on no evidence as the same has to be regarded as the error of law which can be corrected by a writ of certiorari. The adequacy or sufficiency of evidence led on a point and interference of fact to be drawn from the said finding being within the exclusive jurisdiction of the Tribunal, those, however, cannot be agitated before a Writ Court. A writ of certiorari can be refused if no failure of justice is occasioned.

[15] In the instant cases, as discussed above, the very important evidence adduced by the writ petitioners/opposite parties were not taken into consideration by the Tribunal while recording the finding and opining that the writ petitioners/opposite parties are foreigners coming to Assam, India after 25th March, 1971 from Bangladesh.

[16] That being the position, the common judgment and order dated 26th March, 2008 passed by the Tribunal is set aside. The matter is remitted to the Foreigners Tribunal, Hojai at Sankardev Nagar to decide the proceedings afresh on the basis of the evidences available on record. The parties are directed to appear before the Tribunal on 10th January, 2012.

[17] The writ petitions are accordingly allowed to the extent indicated above. No costs.

[18] The Registry is directed to send down the records forthwith, so as to reach the Registry of the Tribunal on or before 5th January, 2012.