

WA 133/2017

BEFORE

HON'BLE MR. JUSTICE UJJAL BHUYAN

HON'BLE MR. JUSTICE PARAN KUMAR PHUKAN

(Ujjal Bhuyan, J)

Heard Mr. A. R. Sikdar, learned counsel for the appellant and Mr . N. Goswami, learned Govt. Advocate, Assam.

2. This appeal is directed against the order dated 30.09.2015 passed by the learned Single Judge dismissing the writ petition in WP(C) No. 4953/2012 filed by the appellant assailing the legality and correctness of the order dated 04.08.2012 passed by the Foreigners' Tribunal, Goalpara in FT Case No. 4639/G/2011 (Union of India Vs Momena Khatun) declaring the appellant to be an illegal migrant, liable to be deported.

3. Be it stated in the course of intensive revision of the electoral roll of Goalpara East Constituency with 01.01.1997 as the qualifying date, the Electoral Registration Officer of that constituency expressed doubts regarding the nationality of the appellant and accordingly directed verification of her documents by a local verification officer. In the course of local verification, appellant could not produce any document to prima facie show that she was a citizen of India. Suspecting the appellant to be a foreigner, the Electoral Registration Officer referred her case to the Superintendent of Police (Border), Goalpara. Superintendent of Police (Border), Goalpara after carrying out the necessary exercise made a reference under the Illegal Migrants (Determination by Tribunals) Act, 1983 (IMDT Act) to the Tribunal constituted under the said Act with the allegation that appellant was an illegal migrant.

4. Be it stated that under Section 3 (1) (c) of the IMDT Act, an illegal migrant was defined as a foreigner, who had unauthorizedly entered into India after 25.03.1971.

5. In the meanwhile, the IMDT Act was declared to be unconstitutional by the Supreme Court in Sarbananda Sonowal Vs Union of India reported in (2005) 5 SCC 665 whereafter the reference was re-registered under the Foreigners' Act, 1946 read with the Foreigners' (Tribunals) Order, 1964 as FT Case No. 4639/G/2011 and was assigned to the Foreigners' Tribunal, Goalpara (Tribunal) for opinion.

6. Notice issued by the Tribunal was served upon the appellant whereafter she had entered appearance before the Tribunal by filing written statement denying the allegation made that she was a foreigner by claiming to be a citizen of India by birth. She also adduced evidence. After hearing the matter, Tribunal passed the order dated 04.08.2012 answering the reference in favour of the State by holding that appellant was an illegal migrant who had entered into India (Assam) from Bangladesh on or after 25.03.1971.

7. Assailing the legality and correctness of the aforesaid order dated 04.08.2012, appellant preferred the related writ petition before this Court which was registered as WP(C) No. 4953/2012. Learned Single Judge after due consideration dismissed the writ petition vide the order dated 30.09.2015.

8. Aggrieved, present appeal has been preferred.

9. Submissions made by learned counsel for the parties have received the due consideration of the Court.

10. In the written statement, appellant stated that her grandparents were Asurullah Sheikh and Kamijan Bibi; parents were Amir Hamja and Sokimon Bibi. Grandparents were voters of Dudhnoi Constituency in 1966, 1970 and 1979. Parents became voters in 1985, 1993 and 1997. Appellant herself became a voter in 1997. This is all that the appellant had stated in her written statement which by

any account was wholly inadequate to establish her identity as a citizen of India. There was no mention regarding her date/year of birth as well as her place of birth.

11. In her evidence-in-chief filed by way of affidavit, amongst the voters lists of various years, appellant also relied upon the voters list of 1993. In her cross-examination, she stated that Amir Hamja had one son and four daughters, namely, Abu Salam (son), Momena Khatun (appellant), Samina Khatun, Amina Khatun and Alfa Khatun. In the voters list of 1993, there was one voter by the name of Jamila Khatun. When a question was put to the appellant as to whether she had a step-mother by the name of Jamila Khatun, appellant stated that Jamila Khatun was her younger sister who had expired during her childhood. On further question being put to the appellant, this time she stated that being the elder sister her name appeared in the voters lists for the first time in 1997 whereas Jamila Khatun, the younger sister, became a voter earlier in 1993? Appellant could not explain how this had happened but this time stated that Jamila Khatun was her elder sister who had expired during her childhood. A further question was put to her that if the elder sister had expired in her childhood, how come her name was enrolled as a voter in 1993? There was no explanation to this.

12. Father of the appellant, Amir Hamja was cross-examined. In his cross-examination, he stated that he had one son and four daughters, whose names have been mentioned above. He stated that his eldest son Sokimuddin Sheikh had expired after 3/4 months of his birth. He was categorical in saying that he did not have any daughter called Jamila.

13. Faced with such contradictory testimony, Tribunal took the view that appellant was resorting to falsehood and was adducing false evidence. Thus there was material contradiction in the evidence of daughter and father raising serious doubt in the mind of the Tribunal as to whether the person who was deposing as Amir Hamja was indeed Amir Hamja or not. Tribunal also noticed several other materials contradictions in the evidence of the appellant and therefore disbelieved the version of the appellant.

14. Finding recorded by the Tribunal was a finding of fact based on appreciation of evidence. Ordinarily, a Writ Court would not interfere with such a finding of fact based on appreciation of evidence. Nevertheless, learned Single Judge had requisitioned the record from the Tribunal and re-appreciated the entire evidence on record whereafter the finding of fact recorded by the Tribunal was affirmed by the learned Single Judge. On due consideration, learned Single Judge held as under:-

On perusal of the records received from the Tribunal it is found that the petitioner had produced copies of the voters' lists of 1966, 1970, 1979, 1985, 1993 and 1997. She also produced one marriage certificate issued by the particular organization certifying her marriage on 13/12/1996 with Md. Kohinoor Islam. The case against the petitioner came to be initiated with the publication of the draft electoral roll on 24/07/1997, which was prepared pursuant to the intensive revision of the electoral roll ordered by the Election Commission of India. Such revision was made in reference to 01/01/1997 during the period from 16/01/1997 to 15/04/1997. A doubt arose as to whether the petitioner is an Indian citizen or not. Thereafter, an enquiry was conducted, based on which the reference was made to the Tribunal to determine as to whether the petitioner is an Indian citizen or not.

As discussed in the impugned judgement, the petitioner in her deposition identified one Jamila Khatun as her sister in reference to the 1993 voters list. She first stated that she was her younger sister and died during her childhood. On being pointed out if she was younger to the petitioner, her name could not have been entered in 1993 voters' list, since the name of the petitioner appeared in 1997 voters list, then the petitioner deviated from her earlier stand and projected Jamila Khatun as her elder sister with the further statement that she was given

on marriage with one Fazar Ali. On the other hand, the projected father of the petitioner i.e. DW-2 in his deposition categorically stated that Jamela Khatun was not his daughter. This aspect of the matter will have to be considered in reference to the doubt that was expressed by the Assistant Government Pleader as to whether Jamela Khatun was the another wife of DW-2. While the petitioner identified as sister firstly as younger sister and secondly as elder sister, her father categorically stated that he had no daughter Jamela Khatun by name. Above apart, apart from the production of documents, the petitioner miserably failed to prove the same. As recorded in the impugned judgement, the name of the petitioner's father appeared in the voters list of 1985 recording his age as 40 years, the learned Tribunal rightly question as to why his name did not appear in any other voters lists prior to 1985 including the one of 1966 when he was 21 years of age. On the other hand, in the written statement filed by the petitioner, her stand regarding non-inclusion of name of her father in the voter list of 1966 was that her father's name could not be included in the voters' list of 1966 as he was minor.

Although the petitioner projected the aforesaid names as that of her grandparents and parents but she miserably failed to establish any linkage. Merely placing reliance on certain documents and identified the names therein as that of her parents and/or grandparents without establishing the linkage by satisfactory proof, the petitioner cannot get the benefit of those documents and the names. Mr. Sikdar, learned counsel for the petitioner referring to the documents relating to the marriage of the petitioner which was produced before the Tribunal and also enclosed to the writ petition as Annexure-11, submits that the same having identified the petitioner as daughter of Amir Hamja, the voter list containing the name of Amir Hamja is relatable to the petitioner. In the said documents, there are two dates, one is 13/12/1996 and the other one is 09/04/1997. The document was also not proved as required under the Law of Evidence. Such a document can be filled up by anybody at any point of time. None of the signatories of the document was examined by the petitioner to prove the contents thereof.

15. On thorough consideration of the matter, we do not find any error or infirmity in the view taken by the learned Single Judge. The finding of fact recorded by the Tribunal on appreciation of evidence was affirmed by the learned Single Judge by re-appreciating the evidence on record. The finding recorded by the Tribunal as affirmed by the learned Single Judge cannot be said to be a perverse finding. In such circumstances, there is hardly any scope for the Writ Appellate Court to interfere with a finding of fact returned by the Tribunal which was affirmed by the learned Single Judge.

16. Thus appellant had miserably failed to discharge her burden under Section 9 of the Foreigners' Act, 1946 by proving that she was not a foreigner but a citizen of India, thereby dispelling the charge of the State.

17. Consequently, we do not find any merit in the writ appeal which is accordingly dismissed.

18. Registry to inform the concerned Foreigners' Tribunal, Deputy Commissioner and Superintendent of Police (B) for doing the needful.