

WP(C) 2972/2017

BEFORE

HON'BLE MR. JUSTICE UJJAL BHUYAN

HON'BLE MR. JUSTICE PARAN KUMAR PHUKAN

(U. Bhuyan, J)

Heard Mr. M. U. Mahmud, learned counsel for the petitioner and Ms. D. Das, Barman, learned Government Advocate, Assam.

By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of order dated 03.03.2012, passed by the Foreigners Tribunal, Goalpara in FT Case No.1959/G/2008 declaring the petitioner to be a foreigner who had illegally entered into India (Assam) from Bangladesh after 25.03.1971.

It is seen that reference was made by the Superintendent of Police (Border), Goalpara under the Illegal Migrants (Determination by Tribunals) Act, 1983 with the allegation that petitioner was an illegal migrant as defined under the said Act. While the reference was pending before the Tribunal constituted under the said Act, the said Act was declared unconstitutional by the Supreme Court in Sarbananda Sonowal vs. Union of India, (2005) 5 SCC 665 whereafter the reference was re-registered under the Foreigners Act, 1946 as FT Case No.1959/G/2008 and was assigned to the Foreigners Tribunal, Goalpara (Tribunal) for opinion.

Notice issued by the Tribunal was served upon the petitioner whereafter he entered appearance before the Tribunal by filing written statement denying the allegation made by claiming to be a citizen of India by birth. He also adduced evidence.

After hearing the matter, Tribunal passed the order dated 03.03.2012 answering the reference in favour of the State in the above manner.

After more than 5 years present writ petition has been filed assailing the legality and correctness of the aforesaid finding of the Tribunal.

In paragraph-10 of the writ petition it is stated that after the order was passed by the Tribunal petitioner became disillusioned and had left his residence. Without informing anybody, he left his wife and 2 minor daughters for an unknown destination. After about 4 years he came back home in October, 2016 when he was arrested by the police on 21.10.2016.

Notwithstanding such absurd contention of the petitioner, writ petition was entertained and notice was issued vide order dated 22.05.2017 with an interim direction that petitioner should not be deported from India until further order(s).

Submissions made by the learned counsel for the parties have been considered. Also perused the materials on record.

At the outset, it would be apposite to refer to the findings of the Tribunal, relevant portion of which is extracted hereunder:---

Thus after discussion on entire cross examination of all 32 witnesses it appears to me that the evidence on record are fully contradictory because respondent, DW 1 in his cross examination stated that at his infant stage his father expired leaving 3 sons and one daughter. He stated name to be Late Sekandar Ali, late Moyna Khatun, Bahez Ali and respondent himself. But as he stated at his age of 2/3 years he heard his mother expired and on death of his parents he was brought up by his eldest maternal uncle Amir Hussain. To corroborate this part the respondent produced Amir Hussain his maternal uncle for his evidence. Though the witnesses furnished their evidence in chief on affidavit practically all witnesses are totally illiterate for which they put their thumb impression on the deposition sheet after preparation of their statement by their concerned learned advocate. So, we are to rely fully upon cross examination part of the witnesses because; the learned advocate prepared their statement with full corroboration to prove the story narrated. During cross examination we fully take long part family history till the date. In the like manner from DW 2 Amir Hussain we got name of his parent to be late Kamal Seikh and Aymona Khatun. We got 4 sons and one daughter which we have discussed above. He was born at Amit Kandi. As per his cross exami

nation at Amit Kandi only Bahaton, Amir Hussain and Badshah Ali were born at Amit Kandi and at his 7/8 years ago due to erosion at Amit Kandi they shifted to Chakla Beel within revenue village Khonar Purba Par. We further got from his cross examination that at Chakla Beel after 3/4 years his mother expired and his father did not further marry. He further added that for another 22/23 years at Chakla Beel no child was born to his parents. After such answers of witness we did not further require cross examination of this witness because this witness himself stated about his 4 brothers and one sister where as he stated above birth of his eldest sister Bahaton and 2 brothers. From his cross examination it is clear that at Amit Kandi Bahaton, Amir and Zamal Badshah were born. He concluded that after shifting to Chakla Beel no more child was born to his parent and after 3/4 years his mother expired. This Amir Hussain stated his age to be 66 years and we cannot presume a fact that he lost his memory due to his old age. We got story from respondent Taher Miah from his very childhood, his maternal uncle brought up him. In the midst of cross examination of Amir Hussain sudden full stop has fallen. Evidence in chief of one Rahizudin was furnished but in absence of ocular evidence about bring up respondent since his childhood other evidence cannot prove the case. So, evidence of Rohizuddin was not pressed. After cross examination of Amir Hussain vide order dated 23.12.2011, I have given one more chance to the respondent to abridge the part left by Amir Hussain. Accordingly the respondent side furnished evidence in chief of one Azibor Seikh which name we got among the names of father of Amir Hussain i.e., late Kamal Seikh. Let us consider the cross examination part of his Azibor Seikh. In his cross examination we find that he was born at Chakla Beel para. In his cross examination also we find at Amit Kandi (Ramharir Char) one daughter 2 sons were born to his parent and due to erosion his father shifted to Chakla Beel where 2 sons were born. Amir Hussain DW 2 is the eldest among them but his evidence clearly shows that no further issue was born to his parent at Chakla Beel. Whatever case may be in his cross examination he disclosed that till his age of about 10 years he was at Chakla Beel. Then his father along with Omar Ali, Badshah, Amir Hussain, Bahaton with witness himself went to Mongoldoi and his mother expired at Chakla Beel. They were at Dolgaon for 7/8 years and thereafter they shifted to Krishnai. At Dolgaon his father and Bahaton expired. Bahaton is mother of respondent as we get. As per evidence of DW 1, at the age of 2/3 years of respondent Bahaton expired at Bangaljar under Lakhipur PS. Then how this Azibor Seikh got Bahaton to take her to Dolgaon under the Darang district to kill her at Dalgaon? This witness was clearly interrogated about shifting to Darrang district and he did not utter anything about taking Taher Miah with them to Mongoldoi. On the other hand we got something in the cross examination of DW 1 that he was taken to Mongoldoi. In the cross examination of DW 3 we clearly find that they were at Mongoldoi for 7/8 years. On the other hand at age of 2/3 years mother of DW 1 expired at Bangaljar and thereafter he was taken to the house of Amir Hussain. We do not clearly find any picture as to after how many years of taking Taher Miah to the house of Amir Hussain they shifted to Mongoldoi. Further picture is clear that at age of 2/3 years of Taher Miah he was brought to the house of his maternal uncle Amir Hussain and thereafter he was taken to Mongoldoi where with his maternal uncle he also spent 7/8 years at Mongoldoi. Thus till his 10/11 years Taher Miah was at Darang, Mongoldoi, Dolgaon as the case may be. Thereafter how we can rely on evidence of Taher Miah that he does not remember anything about his stay at Mangaldoi? Yes, it would have been practicable if within 1/2 years they again shifted to Krishnai. A 10/11 years aged boy can fully remember the entire period at the Mongoldoi. In the cross examination of respondent we find that at his age 13/14 years he came out from house of his maternal uncle and spent 5 years at Nalanga in the house of Jelal Master as house servant. Thereafter he married daughter of one another Jelal Hussain and became domesticated in law and his name was proposed in electoral roll. We get a life history 19/20 years till enrolment of name of Taher Miah at Nalanga with family members of Jelal Hussain. But name of Taher Miah which is shown to be 'D' voter at Nalanga Pahartoli was a man of 33 years aged. After considering facial appearance we recorded as of respondent to be 42/43 years. The respondent is unable to furnish any earlier electoral roll of his own. If at all a

t age of above 30 years when name of such person entered into the voter list first, certainly it is matter of doubt as to why his name was not enrolled earlier whereas since 1989 the required age for adult franchise becomes 18 years.

In view of above discussion in my opinion the respondent failed to prove his own claim that he is son of Indian national. On the other hand though DW 2, DW 3 disclose their birth at Ramharir Char and Chakla Beel not a single voter list from that place furnished before us. So, I am unable to hold any opinion that respondent is Indian national. So, I am of opinion that the respondent is not found to be Indian national and as such he is an illegal migrant and as such he is liable to be pushed back forthwith from territory of India.

From a careful analysis of the findings of the Tribunal it is seen that Tribunal had appreciated the evidence on record whereafter it has returned a finding of fact. Ordinarily a Writ Court would not interfere with such a finding of fact based on appreciation of evidence. It is not a case that there was violation of the principles of natural justice or that the procedure prescribed was not followed by the Tribunal. Moreover, grievance of the petitioner is not that admissible evidence were not considered or inadmissible evidence were taken into consideration. It is also not the case of the petitioner that the impugned order is not based on any evidence; in other words, it is not a case of perversity. In such circumstances, scope of interference with a finding of fact recorded by the Tribunal by the Writ Court is virtually ruled out.

Notwithstanding the same, to re-assure ourselves about the correctness or otherwise of the finding recorded by the Tribunal we have once again looked into the materials on record.

In the written statement petitioner stated that his father was late Mayan Ali, son of late Iman Ali. Name of his mother was late Bahaton Nessa. They were residents of village Bangaljar under Lakhipur Police Station in the district of Goalpara. Their names appeared in the voters list of 1966 in respect of Goalpara West Legislative Assembly constituency. Their names also appeared in the voters list of 1970 in respect of the said constituency. Petitioner was born and brought up in the same village. Though it was stated that petitioner's parents had expired, the date or year of expiry of parents were not mentioned. Petitioner's name appeared in the voters list of 1997 in respect of Goalpara West Legislative Assembly constituency. In the affidavit sworn by the petitioner on 26.10.2010 in support of the written statement, petitioner disclosed his age as 47 years.

This is all that the petitioner stated in his written statement.

If the petitioner was 47 years of age as on 2010, it would mean that he was born sometime in the years 1963. Petitioner also filed evidence-in-chief by way of an affidavit saying more or less the same thing as stated in the written statement. Additionally, he stated that his parents had expired when he was an infant and he was brought up by his maternal grandparents. He disclosed that Amir Hussain is his maternal uncle who was a resident of Ashadubi, Krishnai. He stated that he had married at the age of 18 years. One Amir Ali, son of Kamal Sk, deposed as witness No.2 on behalf of the petitioner. In his evidence-in-chief he stated that petitioner was his nephew. He was the maternal uncle of the petitioner.

As already noticed above, in his cross examination, petitioner described his maternal uncle as Amir Hussain, but the person who deposed as his maternal uncle was Amir Ali, son of Kamal Sk. According to him, petitioner's parents had expired during the year 1969/1970. Therefore their names did not appear in the voters list of 1970. This is contrary to what the petitioner stated in his written statement where he had categorically stated that names of his parents appeared in the voters list of 1970 in respect of Goalpara West constituency.

One Rahiz Uddin, son of late Rajab Ali, deposed as witness No.3 on behalf of the petitioner before the Tribunal. In his evidence-in-chief filed by way of affidavit he stated that petitioner Taher Ali was his cousin. Petitioner's father was his paternal uncle.

One Azibor Sk, son of Kamal Sk, also deposed as witness No.4 claiming to be the maternal uncle of the petitioner.

Reverting back to the written statement of the petitioner we find that there was no mention at all by the petitioner regarding his brothers and sisters. As a ma

tter of fact, no such brother or sister had deposed before the Tribunal in support of the petitioner. All those who deposed before the Tribunal claimed to be the maternal uncles and cousin brother of the petitioner.

Proceeding to the documents filed by the petitioner before the Tribunal we find that none of the documents were proved and exhibited. Those were simply filed before the Tribunal. Mere filing of documents is not enough; those would have to be proved in accordance with law. Though petitioner stated in his cross examination that his parents died while he was an infant whereas Amir Hussain (witness No .2) stated that petitioner's parents died in 1969/1970, one of the documents i.e., extract of the voters list of 1970 indicates that names of Mayan Ali, son of late Iman Ali, and Bahatun Nessa, i.e., wife of Mayan Ali, i.e., parents of the petitioner appeared as voters. This is contradictory. In so far the petitioner is concerned, first time his name appeared was in the voters list of 1994 as Taheer Miah, son of Mayan Sk, aged 33 years. If the petitioner was 33 years of age in 1994 it would mean that he was born sometime in the year 1961 which contradicts his own declaration of age in the affidavit sworn by him in support of the written statement. That apart, if petitioner was born in 1961, he became eligible to cast his vote in 1982. Likewise, if petitioner was born in 1963, he became eligible to cast his vote in 1984 but for the first time petitioner's name appeared as a voter in 1994. Question is why he was not registered as a voter when he became eligible to cast his vote? This position remained unexplained by the petitioner. That apart, in 1994, petitioner was shown as a resident of No.111, Nalanga Pahartoli village under Baguan Police Station in the district of Goalpara whereas Mayan Ali, as claimed by the petitioner to be his father, was a resident of village 271 Bongaljar under Lakhipur Police Station in the district of Goalpara. Though certain explanations were given by the petitioner regarding the change of residence, the same does not appear to be convincing and was rightly rejected by the Tribunal.

Thus, it is evident that there was no evidence on record, as required under the law, to prove the contention of the petitioner that he was not a foreigner but a citizen of India. In such circumstances, narrative presented by the petitioner appears to be highly improbable and was rightly disbelieved by the Tribunal. On due consideration we do not find any error or infirmity with the view taken by the Tribunal.

Consequently, writ petition is dismissed.

Registry to send down the LCR forthwith and inform the concerned Foreigners Tribunal, Deputy Commissioner and Superintendent of Police(Border) for doing the needful.