

(2018) 05 GAU CK 0033
In the Gauhati High Court
Case No : WP(C) 1073 of 2016

ABDUL KUDDUS

APPELLANT

Vs

THE UNION OF INDIA and 5 ORS

RESPONDENT

Date of Decision : 07-05-2018

Acts Referred:

Foreigners Act, 1946 — Section 2(a), 9
Constitution of India, 1950 — Article 226

Citation : (2018) 05 GAU CK 0033

Hon'ble Judges : UJJAL BHUYAN, NELSON SAILO

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J.

1.This case was heard on 18.04.2018 and today is fixed for delivery of order.

2. We have heard Ms. S.P. Hussain, learned counsel for the petitioner and Mr. UK Nair, learned Senior Special Counsel, Foreignersâ?? Tribunal (FT).

3. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of order dated 30.01.2016 passed by the

Foreignersâ?? Tribunal No.3, Morigaon in FT (D) Case No. 19 of 2015 (State â??vs- Abdul Kuddus) declaring the petitioner to be a foreigner who

had illegally entered into India (Assam) from Bangladesh after 25.03.1971.

4. This Court by order dated 25.02.2016 had issued notice while requisitioning the case record and passed an interim order to the effect that petitioner

should be allowed to remain on bail subject to his appearance before the Superintendent of Police (Border) , Morigaon and furnishing of adequate

surety.

5. One Nijamuddin Khan Choudhury, Inspector of Police (B), Morigaon has filed an affidavit on behalf of Superintendent of Police (Border),

Morigaon supporting the order passed by the Tribunal. It is stated that an intensive revision of electoral roll was carried out in 1997 in respect of

Morigaon constituency. During verification of nationality, petitioner could not produce any document in support of his Indian nationality. Therefore, the

local verification officer had submitted report to the Electoral Registration Officer suspecting the petitioner to be a foreigner. On the basis of such

report, Electoral Registration Officer forwarded the matter to the Superintendent of Police (Border), Morigaon for making a reference under the

Illegal Migrants (Determination by Tribunals) Act, 1983 (IMDT Act). Consequently, reference was made to the Illegal Migrants (Determination),

Nagaon suspecting the petitioner to be an illegal migrant i.e. a foreigner who had unauthorizedly entered into India after 25.03.1971. After the IMDT

Act was declared unconstitutional by the Supreme Court with the further direction that the references pending before the Tribunals constituted under

the IMDT Act should be transferred to the Tribunals constituted under the Foreigners Act 1946. Accordingly, the related reference was

transferred to the Tribunal.

6. Petitioner has filed an additional affidavit in support of the writ petition.

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

requisitioned from the Tribunal.

8. Before we proceed to examine the materials on records, it would be useful to examine the impugned order dated 30.01.2016 passed by the

Foreigners Tribunal No.3, Morigaon (Tribunal), relevant portion of which is extracted herein: :7. The Exhibit Kha and Exhibit Ga are

voter list of 1966 and 1970 in the name of Abdul Kadir, Son of Fazar Ali purported father of O.P. whose age is shown as 40 and 44 at the relevant

periods. Exhibit Gha and Exhibit Unga are voter list of O.P. namely Abdul Kuddus along with his wife Joygun Nessa. In the voter list of

1997 the Opposite Party's age is shown as 40 and in 1989, his age is recorded as 59. In Exhibit Unga (of Assamese version) voter list for

the year 1997 was submitted in Honorable Foreigners Tribunal No.2 showing the

voter's name in SI-I as Md. Abdul Kadir, son of Fazar Ali bearing his age as 75 along with his wife and other family members. In SI.5 of the said voter list, the same of present proceedee is indicated wherein his age is shown as 40. Interestingly, the said exhibit 'Unga' (Assamese version) so exhibited was for another case bearing F.T (D) case No.935/11 as has been marked. Moreover, the proceedee though averred in paragraph 4 and paragraph 5 of the Written Statement of having 1951 N.R.C. and landed documents, the records of the same has not been submitted/produced /exhibited during evidence. Having regard to the facts and circumstances of the matter in hands, if we remotely consider the linkage of Exhibit 'Kha' with the Exhibit 'Unga' (Assamese version) which is voter list of 1966 and 1997, the age Opposite Party's father Abdul Kadir recorded in the year 1966 as 40 years and 75 years recorded in the voter list of 1997 caste heavy doubts. There is no voter list of the proceedee with his father in the intervening period and if we calculate the age of his father from 1966 at 40 years to 1997, his age would be 90(nic) whereas in the voter list of 1997 his age is shown as only 75. Thus the discrepancies in the age of the Proceedee's father and not having any voter list between in the intervening period from 1966 to 1997 clearly indicates that Abdul Kadir is a projected father of OP Abdul Kudus so far the present voter list is concerned. Further the proceedee himself stated that his is a Rickshaw puller. A descendent of 1951 having no land record is unbelievable and thus I came to conclusion that the Opposite party Abdul Kuddus, son of Abdul Kadir is a Foreigner having entered into India (Assam) after 25.03.1971 and have miserably failed to prove his case as required under Section 9 of the Foreigners Act, 1946.

8. Therefore in my considered opinion O.P. Abdul Kuddus, son of Abdul Kadir , resident of village Morimusalmangaon under Morigaon P.S. of Morigaon district is declared as a Foreigner, under Section 2 (a) of the Foreigners Act. 1946 having illegally entered into India (Assam) after the cut of date i.e. 25.03.1971.

9. A careful perusal of the impugned order as extracted above would go to show that Tribunal had appreciated whatever evidence were tendered by the petitioner and thereafter had returned a finding that petitioner was a foreigner who had illegally entered into India (Assam) from Bangladesh after

25.03.1971. Such a finding based on appreciation of evidence is a finding of fact. Ordinarily, the writ Court would not interfere with such a finding of

fact because the jurisdiction exercised is supervisory and not appellate. Notwithstanding the same, to re-assure ourselves about the correctness or

otherwise of the finding returned by the Tribunal, we have once again looked into the materials on record.

10. In his written statement filed before the Tribunal on 28.02.2013, petitioner stated that he was born at Falihamari Pam village under Bhuragaon

police station in the district of Morigaon. His father was Md. Kadir @ Abdul Kadir and paternal grandfather was Fazar Ali. Their names were

included in the National Register of Citizens (NRC), 1951. Father was a voter in 1966 and 1970 in respect of Bokani constituency. About a few years

back, because of erosion by the river Brahmaputra, petitioner shifted to Morimusalmangaon village, also in Morigaon district.

11. This was all that the petitioner stated in his written statement which was wholly inadequate to establish his identity as a citizen of India having

regard to the mandate of Section 9 of the Foreigners Act, 1946 as explained by the Supreme Court in paragraph-26 of Sarabananda Sonowal

vs- the Union of India , (2005) 5 SCC 665.

12. Be that as it may, from the written statement what is discernible is that according to the petitioner, his father Md. Kadir @ Abdul Kadir was a

citizen of India and he being the son of Md. Kadir @ Abdul Kadir was therefore a citizen of India.

13. Let us examine whether petitioner could prove the above facts in issue.

14. Petitioner deposed before the Tribunal as DW-1 on 29.01.2015 disclosing his age as 58 years which would mean that he was born sometime in the

year 1957. Nothing substantial was stated by the DW-1 in his deposition.

15. Exhibit-Ka (1) is a certificate issued by the Gaonburah on 02.08.2010. He certified that A Kuddus was son of late A Kadir and that he was a

resident of Botalimari village. Father was voter of Lahorighat constituency. A Kaddus was born in Botalimari village but shifted his residence to

village Sarar Pathar village. Though the Gaonburah deposed as DW-2, he did not bring the official register or record to prove the contents of Exhibit-

Ka(1). Therefore, the contents of Exhibit-Ka (1) cannot be said to have been proved. It is trite that documentary evidence has to be proved on the

basis of the contemporaneous record and not on the basis of personal knowledge through oral testimony. From the document as well as from the

deposition of the Gaonburah, what transpires is that the certificate was issued without reference to any official record. However, notwithstanding the

same, even if we take the certificate at its face value, what it says is that A Kuddus was a resident of Batalimari village but later on shifted to Sarar

Pathar village. This contradicts petitioner's own narrative that he was a resident of Falihamari Pam village but shifted to Morimusalmangon village

because of erosion . Therefore, this certificate is not believable, besides not being proved.

16. Exhibit-Kha (2) is a certified copy extract of the voters list of 1966 in respect of Bokuni constituency. Here the sole voter is Abdul Kader, son of

Fazar Ali, aged 40 years. He was a resident of village Falihamari Pam under Lahorighat police station. If we compare Exhibit-Kha (2) to Exhibit-

Ka(1), we find that in Exhibit-Ka (1), the Gaonburah had stated that father of A Kuddus i.e. A Kadir was a voter of Lahorighat constituency. But

Exhibit Kha (2) states that Abdul Kadir was a voter of Bokani constituency.

17. Similar is the position in respect of Exhibit-Ga (3) which is a certified copy extract of the voters list of 1970 in respect of Bokani Constituency.

18. Exhibit- Gha (4) is a certified copy extract of the voters list of 1997 in respect of Lahorighat Constituency. Here the two voters were Md. A

Kaddus, son of A Kadir, aged 40 years; and Mustt. Joygun Nesa, wife of A Kuddus, aged 32 years. Both the voters are residents of village No.1

Botalimari under Lahorighat police station. Firstly, A Kuddus was a resident of No.1 Botalimari village but Abdul Kadir of Exhibits Kha (2) and Ga (3)

was a resident of village Falihamari Pam under Lahorighat police station, two different addresses together. Though petitioner tried to explain the

discrepancy in the residence by saying that because of erosion by river Brahmaputra, petitioner had shifted his residence to Morimusalmangaon village

but in Exhibit-Gha (4), A Kuddus was a resident of village No.1 Botalimari and not a resident of village Morimusalmangaon village. Secondly, A

Kuddus was 40 years of age in 1997 which would mean that he was born sometime in the year 1957. If A Kaddus is the petitioner, then he was born

in the year 1957, in which case he had become eligible to cast his vote in 1978 but his name appeared in the voters list for the first time in 1989

(Exhibit-Unga (5)) along with Joygun Nessa. But in 1989 Kuddus was shown as 57 years which is at considerable variance with his age mentioned in

Exhibit-Gha (4).

19. While we have noticed that Exhibit-Gha (4) was certified copy extract of the voters list of 1997, petitioner again exhibited another voters list

extract of the year 1997 in respect of Lahorighat constituency which only added to the confusion. Here name of A Kadir appears as a voter and his

age was recorded as 70 years. For the first time, name of one Musstt. Sakina Khatun appeared as wife of A Kadir and she was shown was 55 years.

In fact, this is the first time that Musstt. Sakina Khatun appears in any document. We have already noticed that neither in his written statement nor in

his evidence in-chief, petitioner mentioned that his mother was Sakina Khatun. Be that as it may, the absurdity of the situation is further highlighted

when we compare Exhibit Unga (5) with the voters list of 1997 as above. In 1989 Kuddus was 57 years whereas in 1997 his mother Sakina Khatun

was 55 years. If Kuddus was 57 years of age in 1989, it would mean he was born sometime in the year 1932; if Sakina Khatun was 55 years of age in

1997, it would mean that she was born sometime in the year 1942. In other words, Kuddus was born 10 years before his mother was born. Such an

absurd situation makes the narrative of the petitioner totally unbelievable.

20. A contention was raised during the hearing that discrepancies in the name and age in the voters list should not be given undue weightage as

because the entries were made by the electoral authorities and not by the proceedee. However, this aspect of the matter was gone into by this Court

in the case of Basiron Bibi vs- Union of India, 2018 (1) GLT 372 wherein it was held as under:

Reliance placed in the case of Abdul Matali @ Matalieb (Md.) (supra), can be of no assistance to the petitioner inasmuch, as it has already been

clarified by this Court in previous decisions that the said decision did not lay down any law and was a decision confined to the facts and circumstances

of that case. Regarding discrepancies in the voters' lists which the petitioner contended were not her creation being entered into by officials of

Election Commission and therefore should not be used adversely against the petitioner, such contention is without any substance. The voters' lists

were adduced as evidence by the petitioner herself to prove her case that she

was not a foreigner but a citizen of India. Petitioner cannot insist that only that portions of the voters' lists which are in her favour should be accepted and those portions going against her should be over-looked. This is not how a document put forward as a piece of evidence should be examined. The document has to be appreciated as a whole.â??

20.1 That apart, draft voters lists are notified for objections and corrections before finalisation. Therefore, such contention of the petitioner has no substance at all.

21. We therefore do not find any merit in the writ petition to disturb the finding of fact returned by the Tribunal, though for the additional reasons mentioned above.

22. In so far the additional affidavit filed by the petitioner is concerned, learned counsel for the petitioner had relied upon a copy of the Jamabandi of

surveyed villages wherein the name of Abdul Kadir was shown as a pattadar. In this copy of Jamabandi, we find that name of Abdul Kadir was

recorded as a pattadar as successor to Fazar Ali following order dated 11.03.1986 passed by the Circle Officer. But interestingly, in paragraph -2 of

the writ petition, petitioner had stated that his grandfather Fazar Ali had died in the year 1990 and after his death, father Abdul Kadir got the property

mutated in his name along with other names. When Fazar Ali had expired in the year 1990, question of mutation prior to that date on 11.03.1986 did

not and could not have arisen. This only adds to the untenability of the narration put forward by the petitioner.

23. In such circumstances, we find no good reason to interfere with the impugned order passed by the Tribunal. Consequently, writ petition is dismissed. Interim order passed earlier stands vacated.

24. Registry to send down the LCR forthwith and inform the concerned Foreignersâ?? Tribunal, Deputy Commissioner and the Superintendent of

Police (Border) for doing the needful.

25. A copy of this order may be furnished to the learned Standing Counsel, Election Commission of India and State Coordinator, NRC.