

(2017) 01 GAU CK 0027
In the Gauhati High Court
Case No : W.P(C)No. 561 of 2015

Akkabar Ali @ Aliakbar

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 31-01-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Foreigners Act, 1946 — Section 9

Citation : (2017) 1 GauLT 752

Hon'ble Judges : Ujjal Bhuyan and Kalyan Rai Surana, JJ.

Bench : Division Bench

Advocate : Mr. M.U. Mondal, Mr. M. Hussain and Mr. H.R. Ahmed, Advocates, for the Petitioner; Ms. G. Sarma and Mr. R. Dhar, G.A, for the Respondents

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J. (CAV) - Heard Mr. M.U. Mondal, learned Counsel for the petitioner, Ms. G. Sarma, learned Counsel for the Central Government and Mr. R. Dhar, learned Government Advocate, Assam.

2. By filing this petition under Article 226 of the Constitution of India, petitioner seek quashing of order dated 31.12.2015 passed by the Foreigners Tribunal, Bongaigaon No. 2, Abhayapuri in BNGN/FT/Case No. 1432/2007 declaring the petitioner to be a foreigner who had illegally entered into India from the specified territory after 25.03.1971.

3. It is seen that on a reference made by the Superintendent of Police (B), Bongaigaon under the Foreigners (Tribunals) Order, 1964 with the allegation that petitioner was a foreigner who had illegally entered into India from Bangladesh after 25.03.1971, BNGN/FT/Case No. 1432/2007 was registered before the Foreigners Tribunal, Bongaigaon No.2, Abhayapuri (Tribunal).

4. Notice issued by the Tribunal was served upon the petitioner who thereafter entered appearance before the Tribunal and submitted written statement along

with copies of certain documents disputing the allegation made and claiming to be an Indian citizen by birth. He also adduced oral evidence besides exhibiting seven documents.

5. After hearing learned Counsel for the parties and considering the evidence and other materials on record, Tribunal passed the order dated 31.12.2015 answering the reference in favour of the State by declaring the petitioner to be a foreigner of post 25.03.1971 stream.

6. Aggrieved, present writ petition has been filed.

7. It is stated that following order passed by the Tribunal, petitioner was taken into custody and is presently lodged in detention centre.

8. Learned Counsel for the petitioner submits that approach of the Tribunal is not correct. Tribunal proceeded as if to find fault with the version of the petitioner and in the process minor discrepancies in the evidence of the petitioner have been blown out of proportion. For small deviation in names, Tribunal held that petitioner had failed to discharge his burden. Learned Counsel submits that if the evidence of the petitioner is considered as a whole dispassionately, it would be clear that petitioner had discharged his burden under Section 9 of the Foreigners Act, 1946. Therefore finding of the Tribunal is erroneous and should be interfered with.

9. On the other hand both learned Government Advocate, Assam and learned Counsel for the Central Government were unanimous in their submissions that the Tribunal had meticulously scanned the record and after a thorough appreciation of the same arrived at a finding of fact that petitioner is a foreigner who had illegally entered into India from Bangladesh after 25.03.1971. There is no error or infirmity in the finding recorded by the Tribunal. Therefore, writ petition should be dismissed.

10. Submissions made by learned Counsel for the parties have been considered. Also perused the LCR.

11. Before proceeding further, it would be apposite to refer to the impugned order of the Tribunal dated 31.12.2015, the relevant portion of which is extracted hereunder

"I have heard the argument of learned advocate appeared on behalf of the O.P., perused also the evidence on record.

Point for determination : Whether the O.P. had entered into India after 25th March, 1971 stream ?

Decision & reasons thereof : In this case no prosecution witness has been examined. But to prove himself not to be a foreigner, the O.P. has given his statement on oath before this Tribunal. He stated that he was born at village No.IV Uchungar Char; he stated that his father was also born there. He deposed that his father's name appeared in the Legacy Data of 1951 at House No. 189 at

Serial No.7. He further deposed that his father's name appeared in the voter list of 1966 at serial No. 152, House No.47 at 43 Bongaigaon LAC. Exhibit (I) is the copy of voter list of 1966. Exhibit-11 is the copy of voter list of 1970 where his father's name appeared in 43 Bongaigaon LAC. Opposite party deposed that his name appeared in the voter list of 1990, 1994, 1999, 2008 and 2014 which has been exhibited as Exhibits (III), (IV), (V), (VI) and (VII).

To come to a just conclusion, let me first appreciate the evidence on record along with the aforesaid seven Nos. of documents (Exhibit - 1, II, III, IV, V, VI and VII) to determine the nationality of O.P. Md. Ali Akbar.

From record, it appears that O.P. has projected Kurman Ali, S/o Jinnad Ali of village 20, Uchungar Char Pt. IV as his father whose name appears in the voter list of 1966 along with Jasiron Bibi under Bongaigaon LAC-43 (Exhibit I). In (Exhibit II) voter list of 1970, Kurman Ali's name appears with Jasiron Bibi. In (Exhibit III) voter list of 1990, one Akkabar Ali, S/o Kurban Ali's name appears along with two other persons, namely, Jasimuddin Sheikh 31 years and Amjad Ali 46 years shown as S/o Kurban Ali at village 190 Boltur Char under 26, Bilashipara West LAC. In voter list of 1994 (Exhibit IV), one Ali Akbar, S/o Kurman appears along with Hunufa Bibi at village 190 Boltur Char under Bilashipara West LAC. Again, in the voter list of 1997 and 2008 (Exhibit V and Exhibit VI) Akkabar Ali, S/o Kurman Ali have appeared at village 13, Nachanguri Pt-I under 34 Abhayapuri North LAC. In voter list of 2014 (Exhibit VII) one Ekabbar Ali, S/o Lt. Kurman Ali's name appeared at village 106 Jogighopa Bhatipara under 35-Abhayapuri South (SC) LAC along with 6 (six) different persons' name whose names do not appeared in earlier any voter lists submitted by the O.P.

During the proceeding, the O.P. has filed one affidavit for correction of his name along with names of his father and grandfather. According to this affidavit, OP's father's actual and correct name is "Kurman Ali". O.P.'s name first appears in the voter list of 1990 (Exhibit III) wherein his father's name is shown Kurban Ali. But O.P. has not stated anything in this regard in the affidavit filed whether he is son of Kurman Ali or Korban Ali.

O.P. has submitted one certificate issued by Secretary Garaimari Gaon Panchayat as Annexure VIII of his written statement wherein his father's name is written as Late Kurban Ali not Kurman Ali. Though O.P. has submitted this certificate, but he has not proved the same by adducing any witness.

Again, though O.P. has submitted one Voter Identity Card in the name of "Ekabbar Ali", S/o late Kurban Ali, he has not proved the same.

O.P. has not stated anything regarding his correct and actual name in his written statement but in the affidavit he declared that his actual and correct name is Akkabar Ali not Ali Akbar.

For the reasons and discussion above, the evidence and the documents filed by

the O.P. in support of his version are found to be not sufficient and trustworthy to prove that he is a citizen of India by birth.

Considering the entire materials on record and the discussion above, I am of the considered opinion that the evidence of O.P. is not trustworthy at all and that the O.P. has miserably failed to discharge his burden to prove that he is an Indian citizen by birth and termed to be foreigner/illegal migrant of post 25-03-1971 stream. The case is decided accordingly."

12. To test the correctness of the decision of the Tribunal, the materials as available in the LCR may be scrutinized.

13. In his written statement petitioner stated that he was born at village 20 Uchungar Char Part-IV under North Salmara Police Station (PS) in the then district of Goalpara. Now he is residing at village Jogighopa Bhatipara under PS-Jogighopa in the district of Bongaigaon. His father's name Kurman Ali Sheikh was recorded in the National Register of Citizens (NRC) of 1951. Father's name was included as a voter in the voters list of 1966 in respect of Bongaigaon Legislative Assembly Constituency. His name again appeared in the voters list of 1970 of the said constituency. Petitioner stated that his name appeared in the 1997 voters list in respect of Abhayapuri North Legislative Assembly Constituency and again in the voters list of 2008 of the said constituency. He further stated that he has been issued ration card by the competent authority. He stated that he shifted his residence along with his family to village Jogighopa Bhatipara and in this connection transfer certificate was issued by the Goraimari Gaon Panchayat. He therefore stated that he was a citizen of India by birth and denied the allegation of being a foreigner.

14. Petitioner deposed before the Tribunal on 09.09.2015 disclosing his name as Akkabar Ali, son of Kurman Ali and aged about 50 years. His oral testimony is identical to the stand taken in the written statement.

15. In support of his case, petitioner exhibited the following documents :-

- (1) Ext.-I - Extract of voters list of 1966 in respect of Bongaigaon Constituency.
- (2) Ext.-II - Extract of voters list of 1970 in respect of Bongaigaon Constituency.
- (3) Ext.-III - Extract of electoral roll of 1990 in respect of Bilasipara West Constituency.
- (4) Ext.-IV - Extract of voters list of 1994 in respect of Bilasipara West Constituency.
- (5) Ext.-V - Extract of voters list of 1997 in respect of Abhayapuri North Constituency.
- (6) Ext.-VI - Extract of voters list of 2008 in respect of Abhayapuri North Constituency.
- (7) Ext.-VII - Extract of voters list of 2014 in respect of Abhayapuri South

Constituency

16. From a careful analysis of the evidence on record it is seen that both in his written statement as well as in his oral testimony, petitioner did not disclose the year of his birth, not to speak of the date of birth. Though the written statement was supported by an affidavit petitioner did not mention his age therein. On the other hand in his deposition before the Tribunal on 09.09.2015 he disclosed his age as 50 years. If the petitioner was 50 years of age in the year 2015, it would mean that he was born sometime in the year 1965. But there is no documentary evidence or oral evidence on this aspect which is a crucial one when one asserts that he is a citizen of India by birth. Moreover, both in his written statement as well as in his deposition he disclosed his name as Akkabar Ali, son of Kurman Ali.

17. Having noticed the above, the documentary evidence may be analysed. Exhibit-I is the voters list of 1966 in respect of Bongaigaon Constituency. Here Kurman Ali, son of Zinnad Ali is shown as a voter having residence at village 20 No. Uchungar Char Part-IV under North Salmara Police Station. Exhibit-II also discloses name of Kurman Ali as a voter of Bongaigaon Constituency in the year 1970 from the same village but from a different police station, this time Abhayapuri. In exhibit-III name of the petitioner appears for the first time as Akkabar Ali, son of Korban Ali. But this exhibit is an extract of voters list of 1990 in respect of 26 Bilasipara West Constituency. Here residence of the petitioner was shown as 190 Boltur Char under Bilasipara Police Station in the district of Dhubri. As already noticed above, in his written statement and in his oral testimony petitioner stated that he was born at village 20 Uchungar Char Part-IV under North Salmara Police Station but subsequently shifted his residence along with his family to village Jogighopa Bhatipara under Police Station Jogighopa in the present district of Bongaigaon. If that be so, how petitioner became a voter of 26 Bilasipara West Constituency in the voters list of 1990 having residence at 190 Boltur Char under Bilasipara Police Station in the district of Dhubri has not been explained. This is the same position in exhibit IV but additionally here, name of one Ali Akbar appears who is shown to be son of Korman. Then again name of one Hunufa Bibi appears as wife of Ali but she is conspicuously absent in exhibit III.

18. Moving on to exhibit V, it is an extract of the voters list of 1997 in respect of No.34 Abhayapuri North Constituency. In this exhibit petitioner's name appears as Akkabar Ali, son of late Kurman Ali. But residence of the petitioner is shown at 13 Nachanguri Part-I under Bijni Police Station in the district of Bongaigaon. Similar is the position in respect of exhibit VI which is an extract of the voters list of 2008 in respect of No.34 Abhayapuri North Constituency. The last exhibit i.e. exhibit VII is an extract of the voters list of 2014 in respect of No.35 Abhayapuri South Constituency where name of one Ekabbar Ali appears as son of late Kurman Ali with his residence shown as village-106 Jogighopa Bhatipara under Jogighopa Police Station.

19. If we traverse through the evidence we find that in 1966 and 1970, Kurman

Ali, son of Jinnad Ali had his residence at village 20 Uchungar Char Part-IV under North Salmara Police Station within Bongaigaon Constituency. According to the petitioner, Kurman Ali is his father. In the next two exhibits i.e. exhibits 3 and 4 name of Akkabar Ali, son of Korban Ali appears having residence at 190 Boltur Char Part-I under Bilasipara Police Station within Bilasipara West Constituency. Thereafter, name of the said Akkabar Ali appears but this time shown as son of late Kurman Ali and not Korban Ali. Even if that is ignored, what is glaring is that residence of Akkabar Ali is shown as 13 Nachanguri Part-I village under Bijni Police Station in Abhayapuri North Constituency, a different village and constituency altogether. In the last exhibit, this time it is Ekabbar Ali, son of late Kurman Ali but most interestingly shown as having his residence at village 106 Jogighopa Bhatipara under Jogighopa Police Station in Abhayapuri South Constituency. Petitioner could not explain as to how Kuiman Ali became Korban Ali and how Akkabar Ali became Ali Akbar and then Ekabbar Ali. But most importantly it remained a mystery as to how residence of Kurman Ali, as claimed by the petitioner and that of father, changed from 20 Uchungar Char Part-IV under North Salmara Police Station in Bongaigaon Constituency to 190 Boltur Char Part-I under Bilasipara Police Station in Bilasipara West Constituency in 1990 and 1994, then to 13 Nachanguri Part-I village under Bijni Police Station in Abhayapuri North Constituency in 1997 and 2008, to again change thereafter to village 106 Jogighopa Bhatipara in Abhayapuri South Constituency in 2014. Such material discrepancy remained unexplained rendering the version of the petitioner a bundle of contradictions and totally unbelievable. Besides there is no cogent and tangible evidence to establish linkage between petitioner and Kurman Ali. In such circumstances, finding of the Tribunal that the version of the petitioner a bundle of contradictions and was not sufficient and trustworthy to prove that he was a citizen of India by birth cannot be faulted.

20. Section 9 of the Foreigners Act, 1946 mandates that burden is on the proceedee to prove that he is not a foreigner but a citizen of India. Considering the petitioner's evidence as a whole, it cannot be said that petitioner had discharged his burden under Section 9.

21. The finding arrived at by the Tribunal is a finding of fact and cannot be said to be based on no evidence. Notwithstanding the same, we independently scrutinized the evidence and our independent appreciation of the evidence only reinforced the conclusion reached by the Tribunal.

22. A Full Bench of this Court in *State v. Moslem Mondal*, 2013 (1) GLT 809, has explained that a writ Court exercising certiorari jurisdiction under Article 226 of the Constitution of India would not interfere with a finding of fact returned by a Foreigners Tribunal unless it can be demonstrated that the proceedee was not served notice or that the finding is based on no evidence or that the Tribunal acted on irrelevant materials or failed to consider relevant evidence. As noticed above, the conclusion returned by the Tribunal is a finding of fact based on the evidence on record with which we agree.

23. For the aforesaid reasons we do not find any error or infirmity in the view taken by the Tribunal. There is no merit in the writ petition which is accordingly dismissed.

24. Registry to send down the LCR forthwith and inform the concerned Foreigners Tribunal, Superintendent of Police (B) and Deputy Commissioner for necessary follow up action.