

(2019) 08 GAU CK 0034
In the Gauhati High Court
Case No : Writ Petition (C) No. 3744 Of 2019

Anowar Hussain

APPELLANT

Vs

Union Of India And 5 Ors.

RESPONDENT

Date of Decision : 14-08-2019

Acts Referred:

Evidence Act, 1872 — Section 165
Constitution Of India, 1950 — Article 226

Citation : (2019) 08 GAU CK 0034

Hon'ble Judges : Manojit Bhuyan, J;Kalyan Rai Surana, J

Bench : Division Bench

Advocate : S.B. Rahman, G. Hazarika, A. Borgohain, J. Payeng, A. Verma

Final Decision : Dismissed

Judgement

1) Heard Mr. S.B. Rahman, learned counsel for the petitioner, Mr. G. Hazarika, learned CGC appearing for respondent No.1, Ms. A. Borgohain, Advocate, SC for Election Commission, Mr. J. Payeng, learned Govt. advocate representing respondents No.3 to 5 and Ms. A. Verma, SC for respondent No.6.

2) By filing this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the opinion dated 25.02.2019 passed by the learned Foreigners Tribunal- 10th, Barpeta, Assam in F.T. Case No. 749/2017, declaring him to be a foreigner entering into Assam from the specified territory after 25.03.1971.

3) The petitioner has projected in his written statement that one Husen Ali is his grand-father and Mamiran Nessa is his grand-mother. Danej Ali is his father and Sabura Khatun is his mother. It is projected that his father had three brothers, namely, (i) Idrif Ali, (ii) Bahadur Ali, (iii) Delwar Hussain. The petitioner has five brothers and two sisters, namely, (i) Sukur Ali, (ii) Sabur Uddin Ali, (iii) Sabder Ali, (iv) Shahjahan Ali, (v) Saheb Ali, (vi) Maleka Khatun, and (vii) Majda Khatun. It is projected that the names of the petitioner's grand-parents appeared

in the voters list of 1966 and 1970 of Village- Srirampur, Mouza- Rupshi, under the then Kamrup District in respect of 51 No. Jania LAC. It is projected that the name of the father of the petitioner appeared in voters list of 1985 along with Bahadur Ali, his brother. It is further projected that along with his family, the father of the petitioner had shifted from Village- Srirampur to Village- Galia in the year 1986 and that the name of his parents and other family members appeared in the voters list of 1989 and 1997. In support of his case, the petitioner had also relied on the copy of jamabandi of landed property and a certificate issued by the Gaonbura of Galia Village. As per the written statement, the age of the petitioner is 41 years.

4) In support of his defence, the petitioner had examined 3 witnesses, including himself (DW-1), Delbar Ali (DW-2) and Mofuzur Rahman (DW-3), Gaonbura of Galia and Srirampur. The petitioner had exhibited the following documents in original, viz., Certified copy of voters list of 1966 containing the names of Husen Ali and Mamiran Nessa (Ext.A), Certified copy of voters list of 1970 containing the names of Husen Ali and Mamiran Nessa (Ext.B), Certified copy of voters list of 1989 containing the names of 8 family members, i.e. Danej Ali, Sabura Khatun, Idrif Ali, Jahura Khatun, Jayada Khatun, Bahadur Ali, Delwar Husen and Jarina Khatun (Ext.C), Certified copy of voters list of 1997 containing the names of 3 family members, i.e. Danej @ Danesh Ali, Sabura Khatun and Sabar Uddin (Ext.D), Jamabandi in respect of land at Village- Mowamari, under Kalgachia Revenue Circle, Dist. Barpeta containing name of Danesh Ali (Ext.E), PAN Card (Ext.F), Certificate dated 04.09.2017 by the Gaonbura of Village- Galia (Ext.G), and Elector photo identity card of Delbar Ali (Ext.H).

5) On examination of the documents filed with the writ petition, it is seen that in the voters list of 1966 and 1970 of Village- Srirampur, only two names are reflected, i.e. Husen Ali and Mamiran Nessa. It does not contain the names of any of their children. The voters list of 1989 is of Village- Galia, which contains 8 names, but the grand-parents of the petitioner are not the voters therein. The date of death of the grand-parents is not pleaded and similarly, the date of birth of children of Husen Ali and Mamiran Nessa is not pleaded. The petitioner has pleaded that due to erosion, his father had shifted from Village- Srirampur to Village- Galia in the year 1986, but it is not pleaded in the written statement as to whether the grand-parents of the petitioner had also shifted their place of residence along with the father of the petitioner. Thus, except for the statement made by the DW-1, DW-2 and 3 in their respective evidence- on- affidavit, there is not a single document where the name of the parents of the petitioner appeared together with the petitioner's grand- parents. The petitioner has relied on the jamabandi to link his name with his projected father. The entries contained therein disclose that pursuant to receipt of premium, vide order under C.P. No. 381 dated 24/6/2013, land measuring 5B-0K-10L, covered by Dag No. 769 of K.P. Patta No. 220(New) was mutated in the names of pattadars. However, in his statement recorded by the learned Tribunal under Section 165 of the Evidence Act, 1872 the petitioner had clearly disclosed that his father had

died about 20 years ago, as such, it was not possible for the deceased father of the petitioner to have paid any premium for settlement of land. Moreover, in the present case it is seen that the Electoral Registration Officer of 44 No. Jania LAC having doubted the citizenship of the petitioner got the spot verification conducted and matter was referred to the concerned Superintendent of Police (B), Barpeta, who had made a reference to the Illegal Migrants (Determination) Tribunal, Barpeta, where I.M.(D.) T Case No. 5759(A)/98 was registered, which was later on assigned to the learned Foreigners Tribunal-11th, Barpeta, Assam and thereafter to the learned Foreigners Tribunal- 10th, Barpeta, Assam. Thus, in view of the admission made by the petitioner that his father had died about 20 years ago, the correctness of the contents of the jamabandi in respect of land in question was obtained during the pendency of reference made against the petitioner stands "disproved".

6) The DW-2 does not remember the date of death of his father. DW-1 had given a statement before the learned Tribunal under Section 165 of the Evidence Act, 1872 that that his mother had died about 7 years ago, but the DW-2 in his statement made under Section 165 of the Evidence Act, 1872 had stated that the mother of the petitioner had died 17/18 years ago. The statement of DW-2 and DW-1 is also contradictory in respect of children of Husen Ali and Mamiran Nessa (projected grand-parents of the petitioner). While the petitioner has stated in his written statement that father had three brothers, namely, (i) Idrif Ali, (ii) Bahadur Ali, (iii) Delwar Hussain, but the person deposing as DW-2 is one Delbar Ali, who has given a statement to the learned Tribunal under Section 165 of the Evidence Act, 1872 that they were four brothers and three sisters. The existence of sisters of the father of the petitioner is not seen from the written statement filed by the petitioner. There is also no explanation by the DW-1 and DW-2 as to why the names of the all children of Husen Ali and Mamiran Nessa are not found in any voters list together with their parents i.e. Husen Ali and Mamiran Nessa. Moreover, from the materials available on record, there is nothing to show that Delbar Ali who had deposed as DW-2 and Delwar Hussain stated to be the brother of the petitioner's father are the same and one person. Thus, no reliance can be placed on the evidence tendered by DW-2 without his identity being first established because neither the petitioner nor the DW-2 had made any statement that Delbar Ali and Delwar Hussain are two names of one person.

7) The Gaonbura's certificate (Ext.G) is prima facie inadmissible in evidence because of the fact that the State Emblem i.e. "State Seal of Lion Capital of Ashoka at Sarnath with words Government of Assam" has been used in the said certificate. This Court in the case of Diluwara Khatun Vs. Union of India, 2019 (1) GLT 382, after discussing the various provisions of the applicable Acts and Rules in respect of use of "State Emblem", has categorically held that any document or certificate issued by an authority using the State Emblem, who are otherwise not authorized to use the State Emblem under the Act and the Rules are inadmissible piece of evidence and therefore, no reliance can be placed on such document. We are bound to follow the said ratio in this case as the said Gaonbura's Certificate

(Ext.G) contains State Emblem printed on the document and there is nothing to show that the DW-3 is authorized to use State Emblem. Thus, the evidence tendered by the DW-3 is of no help to the petitioner.

8) Thus, the Court does not find any fault with the finding recorded by the learned Tribunal that there are no documents to link the petitioner with his grandparents. Moreover, except for Ext.A and Ext.B, all other exhibited documents are post 1971. As indicated herein before, Ext.A and Ext.B are the voters list of Village- Srirampur, but the next voters list of 1989 (Ext.C) and 1999 (Ext.D) are both of Village- Galia. As indicated herein before, the petitioner has not explained in his written statement, how Husen Ali, who had died 17/18 years prior to the year 2018 when DW-2 had deposed before the learned Tribunal, could have got land allotted in his name in the year 2013 and that on what basis land was mutated in the name of all the purported children of Husen Ali by order dated 21.01.2014. Thus, the jamabandi (Ext.E) is found to be not reliable. The petitioner (DW-1) had stated that he was a daily wage worker, and yet he has a PAN Card (Ext.F), as such, the said document is of no help to the petitioner in the absence of proof of filing of Income Tax return. As discussed herein before, the Gaonbura's certificate (Ext.G) is not admissible.

9) Therefore, in light of discussions above, this Court does not find that the impugned opinion rendered by the learned Tribunal is vitiated by any jurisdictional error or that there was any failure of giving opportunity of hearing to the petitioner. Therefore, as the Court is exercising supervisory jurisdiction and not appellate jurisdiction, no case is made out for substituting the opinion rendered by the learned tribunal with the view of the Court. This is not a case where the learned Tribunal had refused to admit admissible evidence or that its finding is dehors the evidence on record.

10) Hence, this writ petition fails and the same is dismissed, leaving the parties to bear their own cost.

11) A copy of this order may be made a part of the records of the learned Tribunal for future reference.