

(2015) 09 GAU CK 0028
In the Gauhati High Court
Case No : WP(C) No. 425 of 2010

Koddar Ali and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 29-09-2015

Acts Referred:

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

Citation : (2015) 4 GLT 873

Hon'ble Judges : Biplab Kumar Sharma, J.

Bench : Single Bench

Advocate : M.U. Mondal, Advocates, for the Appellant; N. Mohammed, G.A. and P. Baruah, ASGI, for the Respondent

Final Decision : Dismissed

Judgement

Biplab Kumar Sharma, J.—I have heard Mr. M.U. Mandal, learned counsel for the petitioners. Also heard Mr. N. Mohammed, learned State Counsel and Ms. P. Barua, learned counsel appearing on behalf of Mr. S.C. Keyal, learned ASGI. I have also considered the entire materials on record including the records received from the Tribunal. The petitioners are aggrieved by order dated 18.11.2009 of the Foreigners Tribunal (1st), Morigaon passed in F.T. Case No. 73/07 (State of Assam Vs. Md. Kuddus Ali & 3 Ors.). By the said order, the learned Tribunal has opined that the petitioners are foreigners of post 25.3.1971.

2. In the writ petition, the petitioners have placed reliance on the purported copy of NRC, 1951 (Annexure-1). On the face of it, the same is not an official document. The same is dated 10.10.1966 under the seal of Assam Provincial Jamate - OLAMAI HIND. Mr. Mondal, learned counsel for the petitioners fairly admits the same. This document has been relied upon to show the name of Fazor Ali, S/o. Nochrat, whom the petitioner No. 1 claims to be his father. On the other hand, in Annexure-2 voter list of 1965, Fazar Ali is son of Nachar. Annexure-3 is another voter list of 1965, which the petitioners have relied upon so as to project

the name of Achomotali appearing therein to be father of the petitioner No. 2.

3. Annexure-7 is the voter list of 2004 showing the name of one Kuddus Ali, Son of Fazar Ali, aged 50 years. On the other hand in the affidavit filed by the petitioner in support of the writ petition, he has declared his age as 37 years as on 21.1.2010. Mr. Mondal, learned counsel led by Mr. H.R.A. Choudhury, learned Sr. Counsel for the petitioner could not furnish any satisfactory explanation.

4. Although in the writ petition, the petitioners have referred to some other documents, but the same are of no relevance. Firstly because they do not establish the Indian citizenship of the petitioner and secondly, the documents which are not exhibited and proved in the proceeding before the tribunal, cannot be relied upon [refer paragraph-41 of Moslem Mondal Vs. State of Assam reported in 2010 (2) GZ, 77].

5. In the proceeding before the Tribunal, the petitioners filed written statement and produced the following documents (photocopies):

(i) Voter list of 1965 containing the name of Achomotali (projected father of petitioner No. 2)

(ii) Voter list of 1970 containing the name of Fazar Ali, Son of Nachar, aged 50 years (projected father of the petitioner No. 1)

(iii) Birth certificate purportedly issued by Nellie State Dispensary (relating to petitioners No. 3 and 4).

(iv) Certificates, certifying the petitioners to be residents of particular area.

(v) School certificate certifying that the petitioner No. 1 had studied in the primary school upto Class-IV and his date of birth is 10.4.1972.

6. The documents produced before the Tribunal were all photocopies and the petitioners could not produce the originals. This aspect of the matter has been discussed by the learned Tribunal in its impugned judgment dated 18.11.2009. Mr. Mondal, learned counsel for the petitioner submits that since the documents were compared with the originals, the Tribunal could not have held that the same were not proved as required under the law of evidence. On perusal of the above referred photocopies of the voter list, an endorsement is found as "compared with original" under the signature of UDA-cum-Accountant, FT-I, Morigaon. Such endorsement could not have been given by UDA-cum-Accountant without authorization of the learned Member of the Foreigners Tribunal. In a court proceeding, more particularly in the Foreigners Tribunal, the documents are to be exhibited and proved in original with the endorsement of the Presiding Officer.

7. That apart, mere production of certain documents does not lead to discharge the burden of proof as envisaged under Section 9 of the Foreigners Act, 1946. As has been held by the Apex Court in L.I.C. of India and Another Vs. Ram Pal Singh Bisen, , mere filing of some documents does not amount to its proof. In the said case, the Apex Court has held thus:

31. Under the Law of Evidence also, it is necessary that contents of documents are required to be proved either by primary or by secondary evidence. At the most, admission of documents may amount to admission of contents but not its truth. Documents having not been produced and marked as required under the Evidence Act cannot be relied upon by the Court. Contents of the document cannot be proved by merely filing in a court.

8. In the proceeding before the learned Tribunal, the State examined three witnesses. P.W.-3 in his deposition stated that on enquiry he found that the petitioner came illegally from village-Kundura, P.S. Sumanganj, Dist-Sylhet of Bangladesh after 25.3.1971 and settled at Village-Baihati on Government land. He also proved the report submitted by him on completion of the enquiry. The other two prosecution witnesses also supported the version of the P.W.-3. The petitioner No. 1 as the head of the family examined himself as OP W-1. He in his deposition stated that his father was a voter in 1970 and that he obtained ration card from Silchang Samabay Samiti. He also stated that his father-in-law Asmat Ali was a voter in 1965. However, in the cross examination he disclosed his father-in-law as Amjat Ali. Contradicting his own statement in examination-in-chief he stated that he married his wife Musstt Sakina Khatun from Nelli Barpaik village. Significantly, although according to his evidence, he along with his wife has been casting votes in the election since 1990, he could not produce any voter list containing his name.

9. Although, the petitioners claim Fazor Ali to be the father of the petitioner No. 1, but they measurably failed to establish the linkage. The certificates produced as evidence were also not proved by producing and examining the issuing authority. It has rightly been held by the learned Tribunal that photocopies of documents are not admissible evidence. The petitioners also could not produce any voter list containing their names. Mere filing of some documents so as to project certain names therein as ones father or mother or grandfather or grandmother cannot establish ones Indian citizenship.

10. The learned Tribunal having appreciated the entire evidence on record and having recorded the findings on the basis of the said evidences, I see no reason to interfere with the same exercising writ jurisdiction.

11. Above being the position, this Court exercising writ jurisdiction cannot re-appreciate the evidence on the basis of which the learned tribunal arrived at the impugned finding. Scope, ambit and jurisdiction of Writ Court is well defined, about which detail discussions have been made in The State of Assam and Others Vs. Moslem Mondal and Others, . For a ready reference, paragraphs-112 and 113 of the said judgment are quoted.

"112. Article 226 of the Constitution confers on the High Court power to issue appropriate writ to any person or authority within its territorial jurisdiction. The Tribunal constituted under the 1946 Act read with the 1964 Order, as noticed above, is required to discharge the quasi-judicial function. The High Court,

therefore, has the power under Article 226 of the Constitution to issue writ of certiorari quashing the decision of the Tribunal in an appropriate case. The scope of interference with the Tribunal's order, in exercise of the jurisdiction under Article 226, however, is limited. The writ of certiorari can be issued for correcting errors of jurisdiction, as and when the inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it or if such Court or Tribunal acts illegally in exercise of its undoubted jurisdiction, or when it decides without giving an opportunity to the parties to be heard or violates the principles of natural justice. The certiorari jurisdiction of the writ Court being supervisory and not appellate jurisdiction, the Court cannot review the findings of facts reached by the inferior Court or Tribunal. There is, however, an exception to the said general proposition, in as much as, the writ of certiorari can be issued and the decision of a Tribunal on a finding of fact can be interfered with if in recording such a finding the Tribunal has acted on evidence which is legally inadmissible or has refused to admit admissible evidence or if the finding is not supported by any evidence at all, because in such cases such error would amount to an error of law apparent on the face of the record. The other errors of fact, however grave it may be, cannot be corrected by a writ court. As noticed above, the judicial review of the order passed by the inferior Court or the Tribunal, in exercise of the jurisdiction under Article 226 of the Constitution, is limited to correction of errors apparent on the face of the record, which also takes within its fold a case where a statutory authority exercising its discretionary jurisdiction did not take into consideration a relevant fact or renders its decision on wholly irrelevant factors. Hence, the failure of taking into account the relevant facts or consideration of irrelevant factors, which has a bearing on the decision of the inferior court or the Tribunal, can be a ground for interference of the Court or Tribunal's decision in exercise of the writ jurisdiction by the High Court.

113. The Apex Court in *Sant Lal Gupta and Others Vs. Modern Co-operative Group Housing Society Ltd. and Others*, , reiterating the grounds on which a writ of certiorari can be issued, has opined that such a writ can be issued only when there is a failure of justice and cannot be issued merely because it may be legally permissible to do so. It is obligatory on the part of the petitioners to show that a jurisdictional error has been committed by the statutory authority. There must be an error apparent on the face of the record, as the High Court acts merely in a supervisory capacity and not as the appellate authority. An error apparent on the face of the records means an error which strikes one on mere looking and does not need long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matters to show its incorrectness. Such error may include giving reasons that are bad in law or inconsistent, unintelligible or inadequate. It may also include the application of a wrong legal test to the facts found, taking irrelevant consideration into account and failing to take relevant consideration into account, and wrongful admission or exclusion of evidence as well as arriving at a conclusion without any supporting evidence. Such a writ can also be issued

when there is an error in jurisdiction or authority whose order is to be reviewed has acted without jurisdiction or in excess of its jurisdiction or has failed to exercise the jurisdiction vested in him by law."

12. In view of the above, I do not find any merit in the writ petition and accordingly, it is dismissed. The SP(B), Morigaon is directed to apprehend the petitioner immediately and keep him in detention camp till deportation to his country of origin. His name shall also be deleted from the voter list, if any.

13. Let copies of this order be furnished to Ms. N. Mohammed, learned State Counsel and SP (Border), Morigaon and Deputy Commissioner, Morigaon for necessary follow up action. Copies may also be sent to the Government of Assam in the Home Department and Union of India in the Home Department for appraisal and necessary action. Send down the LCR along with a copy of this order.