

WA 237/2015

BEFORE

HON'BLE MR JUSTICE UJJAL BHUYAN

HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN

This case was heard on 15.09.2016 and today is fixed for delivery of judgment. Accordingly, judgment is dictated in the open Court.

2. We have heard Mr. N. Ahmed, learned counsel for the appellant, Mr. R. Dhar, learned Govt. Advocate, Assam and Mr. S.C. Keyal, learned Assistant Solicitor General of India.

3. Though this appeal was earlier dismissed on 26.10.2015, the said order was set aside by the Supreme Court vide order dated 23.08.2016 passed in Civil Appeal No.8325/2016 and the matter was remanded back to the Division Bench for hearing the appeal afresh. Accordingly, appeal has been heard afresh and the record of the case was requisitioned from the Foreigners Tribunal-II, Barpeta which has been perused.

4. It appears that initially a reference was made by the Superintendent of Police, Barpeta under the Illegal Migrants (Determination by Tribunals) Act, 1983 suspecting the appellant to be an illegal migrant having illegally entered into India. After the said Act was declared as unconstitutional by the Supreme Court in Sarbananda Sonowal Vs. Union of India, (2005) 5 SCC 665, reference was re-registered under the provisions of the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 before the Foreigners Tribunal-II, Barpeta (Tribunal) as FT (Second) Case No.1118/2011.

5. Notice issued by the Tribunal was served upon the appellant whereafter appellant had entered appearance before the Tribunal and had submitted written statement. Appellant also adduced evidence of four witnesses including himself and exhibited certain documents. On due consideration, Tribunal came to the conclusion that appellant had failed to discharge his burden to prove that he was a citizen of India and not a foreigner and accordingly vide the order dated 06.02.2014 declared the appellant to be a foreigner within the meaning of Section 2(a) of the Foreigners Act, 1946 having illegally entered into India (Assam) after 25.03.1971.

6. Appellant preferred a writ petition before this Court challenging the legality and validity of the aforesaid order of the Tribunal dated 06.02.2014. The writ petition was registered as WP(C) No.2449/2014. Single Bench on perusal of the materials on record did not find any good ground to intervene with the decision of the Tribunal and accordingly dismissed the writ petition.

7. This led the appellant to file the present appeal before the Division Bench. Division Bench vide the judgment and order dated 26.10.2015 on going through the order of the Tribunal as well as that of the Single Bench, found no good ground to entertain the appeal and accordingly the appeal was dismissed. Thereafter, appellant preferred Special Leave Petition before the Supreme Court and on leave being granted, Civil Appeal No.8325/2016 was registered. By order dated 23.08.2016, order of the Division Bench was set aside and the Supreme Court remanded back the matter to the Division Bench for consideration afresh. This is how the appeal came to be heard afresh on 06.09.2016 and on the subsequent date, i.e., 15.09.2016.

8. The appellant, who was taken into custody following his declaration as a foreign national, was produced before the Court by the detaining authorities on the dates of hearing.

9. Learned counsel for the appellant strenuously argued that the Tribunal as well as the Single Bench had failed to consider the Gaonburah certificate which has been annexed to the writ appeal as Annexure-6, an important document establishing his Indian citizenship, and thereby committed a manifest error in disbelieving the version of the appellant. Placing reliance on the said certificate, he submits that name of the appellant's father is Jasimuddin who was also known a

s Mamo Dewani. The documents on record clearly disclosed linkage of the petitioner with Jasimuddin @ Mamo Dewani. Both the authorities below overlooked this aspect of the matter which has vitiated the finding of the Tribunal as affirmed by the Single Bench. He submits that appellant is a citizen of India by birth and all the documents placed on record would go to prove his Indian citizenship. Therefore, order of the Tribunal as affirmed by the Single Bench should be interfered with and appellant should be declared to be a citizen of India.

10. Per contra, learned State Counsel as well as learned Assistant Solicitor General of India argued that certificate of the Gaonburah (Annexure-6 to the memo of appeal) on which much reliance has been placed by learned counsel for the appellant is not the same certificate which was exhibited before the Tribunal. The certificate which was exhibited before the Tribunal is dated 07.09.2011 whereas the certificate, which has been annexed as Annexure-6 to the memo of appeal, is dated 07.07.2013. It is further submitted that in the certificate dated 07.09.2011, Gaonburah did not mention that Jasimuddin was also known as Mamo Dewani. The Tribunal had come to the conclusion that Jasimuddin and Mamo Dewani were two different persons and were shown as two different persons in the voters list. Therefore, the view taken by the Tribunal that appellant is not son of Jasimuddin @ Mamo Dewani is a correct and plausible view which has been upheld by the Single Bench. Thus, no interference is called for and the appeal should be dismissed.

11. We have heard learned counsel for the parties and also perused the materials on record.

12. Before advertng to the certificate of the Gaonburah, a brief reference to the stand taken by the appellant in the written statement filed before the Tribunal as well as in the evidence may be noted.

13. In his written statement, appellant stated that name of his father appeared in the voters lists of 1965 and 1970 in respect of No.47 Sarbhog Legislative Assembly Constituency (LAC). Appellant's name appeared in the voters list of 1989 from the said constituency. His father's name again appeared in the voters list of 1989. Appellant stated that a residentship certificate issued by the Gaonburah was annexed to the written statement. Though in the verification as well as in the affidavit sworn in support of the written statement appellant disclosed himself as son of Mamo Dewani @ Jasimuddin, he did not mention his age in both the verification as well as in the affidavit. Even in the written statement, appellant did not mention about his date or year of birth or place of his birth.

14. Ext. A is a photocopy of voters list of 1989 in respect of Sarbhog LAC. In this Exhibit, in respect of the name of the petitioner, there is clear overwriting whereafter it is recorded as Sah Ali, son of Jasimuddin. In this Exhibit, petitioner is shown as aged about 22 years. Ext. B is again a photocopy of voters list of 1970 of Sarbhog LAC. In this Exhibit, Mamo Dewani is shown as a voter bearing Serial No.190 and son of Neru Sheikh being 65 years of age. The voters at Serial Nos.191, 192 and 193 were shown related to Mamo Dewani whereas the voter at Serial No.226 Suleman Khan was shown as son of Jasimuddin. Voter at Serial No.227 Suhela Khatun was shown as wife of Suleman. From this Exhibit, a view can be taken that Mamo Dewani and Jasimuddin were two different persons as there was no reason for showing the voter at Serial No.226 as son of Jasimuddin if Jasimuddin and Mamo Dewani was one and the same person as the voters at Serial Nos.191, 192 and 193 were shown related to Mamo Dewani. Ext. D, which is quite crucial, is a certificate dated 07.09.2011 of Gaonburah Kanu Ram Brahma. Said Brahma was the Gaonburah of Charge No.9 comprising of five villages. In this Exhibit D, the Gaonburah stated that Md. Sah Ali was the son of Late Jasimuddin of village Gamariguri under Mouza Gobardhana, PS. Barpeta Road. In this certificate (Ext.D), Gaonburah did not say that Jasimuddin (sic) was also known as Mamo Dewani.

15. While we are at the Gaonburah certificate, we may immediately refer to the Annexure-6 certificate of the Gaonburah on which much reliance has been placed by the learned counsel for the appellant. This certificate is dated 07.07.2013 and in this certificate, it is stated that Suleman and Saha Ali are sons of Late Jasimuddin @ Mamo Dewani. Suleman Ali is elder brother of Saha Ali and he died on 05.02.2010. We have carefully compared the certificate appearing as Annexure

-6 and the certificate which is on record as Ext. D. Not only the dates are different as noticed above, photographs of the Gaonburah appearing in the two certificates are totally different. Signatures also do not tally. While Ext. D appears to be the original certificate, Annexure-6 to the memo of appeal is a photocopy.

16. When we queried the learned counsel for the appellant regarding the original of Annexure-6, he submitted that he did not have the original copy in his record.

17. From the above, what is clearly discernible is that the Annexure-6 document was not before the Tribunal. It is a document which was obtained subsequently. On a comparison with Ext. D, particularly with reference to the photographs of the Gaonburah and the signatures, we have grave doubts about the genuineness of the Annexure-6 certificate which is further fortified by the inability of the learned counsel for the appellant to produce the original copy. Therefore, such certificate (Annexure-6) cannot be relied upon. We leave it at that.

18. Proceeding further, we find from the record that there is another certificate of the Gaonburah but without any photograph and this certificate is dated 15.07.2013 with an endorsement 'seen'. As per this certificate, Suleman had expired about three years back.

19. We may now briefly analyse the evidence adduced by the four witnesses adduced on behalf of the appellant.

20. DW1 was the appellant himself and he deposed on 16.08.2012. On this date, he disclosed his age as about 38 years. He stated that his father Jasimuddin passed away during his childhood and that his mother Chandra Bhanu was still alive. He also stated that his father Jasimuddin, known as Mamo Dewani, was a voter in the voters list of 1985 in respect of Sarbhog LAC. His name appeared in the subsequent voters list of 1989 besides the voters list of 1970.

21. DWs 2 and 3 were Sahjahan Ali and Aftab Ali, both brothers of the appellant. They also stated that their father's name was Jasimuddin.

22. DW4 is Chandra Bhanu, mother of the appellant. She stated that in the voters list of 1970, her name appeared with her husband in respect of Sarbhog LAC. Her husband Jasimuddin was also known as Mamo Dewani. On further examination, she stated that appellant was her son and his name appeared in the voters list of 1989.

23. On a cumulative assessment of the evidence tendered by the appellant, it is seen that the evidence is contradictory. While on the date of deposition before the Tribunal, i.e., on 16.08.2012, appellant was 38 years of age, appellant has claimed to be a voter in the voters lists of 1985 and 1989. If the appellant was 38 years of age as on 2012, in 1985, he would have been 11 years of age and in 1989, he would have been 15 years of age. Nobody in this country at the age of 11 and 15 can become a voter. This is an inherent contradiction which remained unexplained. In the light of the above materials, Tribunal held as follows:

But on the other hand, Sri Kanu Ram Brahma, gaon-burha of village Gamariguri in his certificate, Ext. D stated that Sah Ali (OP/2nd party) is the son of Jasimuddin, resident of Vill-Gamariguri. But the gaon-burha in his said certificate never stated that Jasimuddin was also known as Mamo Dewani.

Now, let me consider the voter list of 1970 (Ext.B) which has been submitted by the OP/2nd party Sah Ali.

In the voter list of 1970 (Ext.B) for 47 No. Sarbhog LAC vill-Gamariguri in house No.60, the name of Mamo Dewani has been shown in serial Nos.190, 191, 192 and 193. In the same voter list

of 1970 (Ext.B) in serial No.226, the name of Jasimuddin has also been shown as another person. On perusal of the voter list of 1970 (Ext.B), it appears that the persons namely Jasimuddin and Mamo Dewani are shown individually as two separate persons.

Under the Evidence Act, contents of the documents are required to be proved either by the primary and secondary evidence.

Sec. 9 of the Foreigners Act, 1946 casts the burden upon the OP/2nd party or all aged person to establish his or her Indian citizenship.

All the witnesses including the OP/2nd party specifically deposed that his father

r is also known as Mamo Dewani.

But here in this case in hand, OP/2nd party Sah Ali has failed to show any reasonable cause in his evidence as to why the names of Jasimuddin and Mamo Dewani were shown as separate two individual persons in the voter list of 1970 (Ext.B). It appears that the OP/2nd party Sah Ali made a false statement regarding the name of his father.

Considering the above, I am of the opinion that the OP/2nd party Sah Ali, son of Jasimuddin, is a foreigner within the meaning of Sec. 2(a) of the Foreigners Act, 1946, who entered into India on or after 25th day of March, 1971.

Accordingly, this reference is answered in the positive.

24. This view taken by the Tribunal cannot be said to be based on no evidence or based on misreading of the evidence on record. It is a plausible view based on the materials on record.

25. When it was put to challenge before the Single Bench, Single Judge went through the entire materials on record as well as the decision of the Tribunal and affirmed the same.

26. Though the Division Bench had upheld the finding of the Single Bench, the same has been set aside by the Supreme Court remanding the matter back for decision afresh by the Division Bench. Remand order of the Supreme Court dated 23.08.2016 is as under:

Heard learned counsel for the parties.

Leave granted.

Our attention was drawn to the impugned order passed by the Court of Foreigners Tribunal with regard to the finding holding that the appellant had not proved that he is not a foreigner. That finding is questioned seriously placing strong reliance upon the certificate issued by the Gaonbura. Therefore, the finding recorded by the Tribunal is erroneous. The said finding is concurred by the learned Single Judge and the Division Bench of the High Court.

Both the Tribunal as well as the High Court have not referred to the certificate issued by the Gaonbura to show that the father's name of the appellant is Jasimuddin @ Mamo Dewani is one and the same person as per the certificate referred to supra upon which strong reliance is placed by the learned counsel for the appellant. In our considered view, the impugned order passed by the Division Bench of the High Court is liable to be set aside and is hereby set aside. The matter is remanded back to the Division Bench of the High Court with a request to consider the matter afresh and pass appropriate order in accordance with law. The Division Bench may also consider the other evidence on record. The parties shall appear before the Division Bench of the High Court on 6.9.2016.

The jail authorities are directed to produce the appellant before the High Court on the date fixed for hearing.

The appeal is allowed in the aforesaid terms. IA No.4 stands disposed of.

27. In so far certificate of the Gaonbuarh relied upon by the appellant is concerned, the same has already been discussed above and perhaps further discussion on the same may not be necessary.

28. Under Section 9 of the Foreigners Act, 1946, burden is on the proceedee to prove by adducing cogent and reliable evidence that he is a citizen of India and not a foreigner. Having regard to the evidence adduced by the appellant, it cannot be said that the appellant had discharged his statutory burden under Section 9 of the Foreigners Act, 1946.

29. In Sarbananda Sonowal (supra), the Supreme Court in paragraph 63 has held that there can be no manner of doubt that the State of Assam is facing 'external aggression' and 'internal disturbance' on account of large-scale illegal migration of Bangladeshi nationals. It has become the duty of the Union of India to take all measures for protection of the State of Assam from such 'external aggression' and 'internal disturbance' as enjoined in Article 355 of the Constitution. In paragraph 64 of the said judgment, the Supreme Court reiterated that presence of such a large number of illegal migrants from Bangladesh, which runs into millions, is in fact an 'aggression' on the State of Assam and has also contribut

ed significantly in causing serious 'internal disturbances' in the State. In paragraph 70, it is stated that influx of Bangladeshi nationals who have illegally migrated into Assam pose a threat to the integrity and security of the North-Eastern region. Their presence has changed the 'demographic character' of that region.

30. Regarding the procedure adopted under the Foreigners Act, 1946, and the Foreigners (Tribunals) Order, 1964, the Supreme Court held such procedure to be just, fair and reasonable and that it does not offend any constitutional provision(s). While declaring the Illegal Migrants (Determination by Tribunals) Act, 1983 as ultra-vires the Constitution, the Supreme Court made it clear that Passport (Entry into India) Act, 1920, Foreigners Act, 1946, Immigrants (Expulsion from Assam) Act, 1950 and the Passport Act, 1967 shall apply to the State of Assam.

31. In the second Sarbananda Sonowal case, i.e., Sarbananda Sonowal (II) Vs. Union of India, (2007) 1 SCC 174, the Supreme Court noticed that Foreigners Tribunals have not been set up in any other part of India except in the State of Assam and acknowledged that a different regime exists in Assam from the rest of the country. While in the rest of the country, foreigners are identified by the executive machinery of the State, in the State of Assam, foreigners are identified by the Foreigners Tribunals. Having said that, Supreme Court again reiterated that Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 contain inbuilt procedures which are fair and reasonable. Only because burden of proof is on the proceedee would not render such procedure ultravires Article 21 of the Constitution.

32. Referring to the first Sarbananda Sonowal case, i.e. Sarbananda Sonowal (I), Supreme Court held that burden of proof would be upon the proceedee as he would be possessing the necessary documents to show that he is a citizen not only within the meaning of the provisions of the Constitution of India but also within the provisions of the Citizenship Act.

33. Though a proceeding before the Foreigners Tribunal is of civil nature, it is not a civil suit or a proceeding of such nature. The Foreigners (Tribunals) Order, 1964, as amended, lays down a summary procedure following which the Foreigners Tribunal is required to render an opinion on the reference made, whether the proceedee is a foreigner or not. As noticed above, this procedure has been held by the Supreme Court to be just, fair and reasonable, not offending any constitutional provision.

34. A Full Bench of this Court in State Vs. Moslem Mondal, 2013 (1) GLT 809, had examined various aspects relating to the proceeding before a Foreigners Tribunal including the scope of interference by a writ Court against an order passed by a Foreigners Tribunal. It has been held that while the High Court certainly has the power under Article 226 of the Constitution to issue a writ of certiorari to quash the decision of the Foreigners Tribunal in an appropriate case, however, the scope of such power is limited. Certiorari jurisdiction of the writ Court is supervisory and not appellate jurisdiction. Writ Court would not review findings of fact reached by the Foreigners Tribunal. The only exception to the above general proposition would be in a case where the Tribunal had acted on inadmissible evidence or had refused to admit admissible evidence or if the finding is not supported by any evidence at all because in such an eventuality, it would amount to an error apparent on the face of the record. This would be in addition to the general grounds of interference, such as, violation of the principles of natural justice, etc. The other errors of fact, howsoever grave it may be, cannot be corrected by a writ Court.

35. Applying the above yardstick, we do not find that the decision arrived at by the Tribunal can be faulted on the above grounds. Notwithstanding the same, writ Court, i.e., Single Bench had gone into the evidence examined by the Tribunal and after re-apprising the same, had upheld the finding of fact arrived at by the Tribunal.

36. Supreme Court in Management of Narendra & Co. Vs. Workmen of Narendra & Company, reported in (2016) 3 SCC 340, has held that in an intra-court appeal, on a finding of fact, unless the Appellate Bench reaches a conclusion that the finding of the Single Bench is perverse, it shall not disturb the same. Merely bec

ause another view or a better view is possible, there should be no interference or disturbance with the order passed by the Single Bench.

37. Before concluding, we may also refer to the decision of the Apex Court in Life Insurance Corporation of India Vs. Rampal Singh Bisen, reported in (2010) 4 SCC 491, wherein the Apex Court has held that contents of the documents are required to be proved either by primary or by secondary evidence. Admission of documents may amount to admission of contents but not its truth. Contents of a document cannot be proved by merely filing in a Court. Mere marking of exhibit on a document does not dispense with its proof, which is required to be done in accordance with law.

38. Appellant has relied upon a certificate of the Gaonburah and as we have noticed above, there are three certificates of the Gaonburah. Gaonburah was not before the Tribunal to prove the authenticity of those certificates. As noticed above, mere filing of the documents is not enough. Documents must be proved in accordance with law. We have already held in paragraph 17 that the certificate relied upon by the appellant, i.e., Annexure-6 to the memo of appeal does not at all inspire the confidence of the Court and cannot be relied upon.

39. Upon thorough consideration of the matter, we do not find any error or infirmity in the view taken by the Tribunal as affirmed by the Single Bench. This appeal is devoid of merit and is accordingly dismissed.

40. Office to send back the LCR and inform the concerned Deputy Commissioner & Superintendent of Police (Border) for taking immediate follow-up steps.