

WP(C) 360/2017

BEFORE

HON'BLE MR JUSTICE UJJAL BHUYAN

AND

HON'BLE MR JUSTICE PARAN KUMAR PHUKAN

(Ujjal Bhuyan, J)

Both the writ petitions being interrelated, those were heard together and are being disposed of by this common order.

2. Heard Mr A M Barbhuiya, learned counsel for the petitioners in both the cases and Mr D K Saikia, learned Additional Advocate General, Assam, for the respondents.

3. Musstt Aktara Khatun @ Aktara Begum @ Aftara Begum @ Aftatara Begum, is the petitioner in WP(C) No. 360 of 2017, whereas, Abdul Motin, Abdul Kadir and Musstt Sahara Khatun, her brothers and sister are writ petitioners in WP(C) No. 1610 of 2017.

4. In WP(C) No. 360 of 2017, Musstt Aktara Khatun @ Aktara Begum @ Aftara Begum @ Aftatara Begum has challenged the legality and validity of the order dated 31.10.2016, passed by the Foreigners' Tribunal, Nagaon Court No. 10 at Sankardev Nagar, Hojai (Tribunal) in FT (D) Case No. 82 of 2015, declaring her to be a foreigner, who had illegally entered into India (Assam) from the specified territory after 25.03.1971. While passing the order dated 31.10.2016, Tribunal directed the Superintendent of Police (Border), Hojai, to cause a fresh enquiry against the brothers and sisters of Musstt Aktara Khatun @ Aktara Begum @ Aftara Begum @ Aftatara Begum and, thereafter, to submit a fresh reference against the brothers and sisters, because if Musstt Aktara Khatun @ Aktara Begum @ Aftara Begum @ Aftatara Begum is a foreigner, her brothers and sister of the same father also cannot be citizens of India. It is against this part of the order dated 31.10.2016 that WP(C) No. 1610 of 2017 has been filed by the aforesaid 3 (three) petitioners, 2 (two) brothers and 1 (one) sister of Musstt Aktara Khatun @ Aktara Begum @ Aftara Begum @ Aftatara Begum.

5. This Court by order dated 24.01.2017, issued notice in WP(C) No. 360 of 2017 and passed an interim order to the effect that petitioner should not be taken into custody and deported from India subject to her appearance before the Superintendent of Police (Border), Hojai.

6. In WP(C) No. 1610 of 2017, notice was issued on 20.03.2017 and an interim order was passed to the effect that further steps pursuant to the direction of the Tribunal dated 31.10.2016, should not be taken by the Superintendent of Police (Border), Morigaon.

7. Reverting back to WP(C) No. 360 of 2017, it is seen that reference was made by the Superintendent of Police (B), Hojai, under the Foreigners' Act, 1946, with the allegation that petitioner was a foreigner, who had illegally entered into India (Assam) from the specified territory after 25.03.1971, on the basis of which, Case No. FT/H/4714/2012 was registered. After creation of additional Tribunals, the reference was re-registered as FT (D) Case No. 82 of 2015 and assigned to the Foreigners' Tribunal, Nagaon Court No. 10 at Sankardev Nagar, Hojai (Tribunal), for opinion.

8. Notice issued by the Tribunal was served upon the petitioner, whereafter she had entered appearance by filing her written statement, denying the allegation made that she was a foreigner by contending to be a citizen of India by birth. She also deposed as her witness and exhibited a total of 7 (seven) documents. After hearing the matter, Tribunal passed the order dated 31.10.2016, answering the reference in favour of the State in the above manner. Additionally, Tribunal directed the Superintendent of Police (B), Hojai, to cause a fresh enquiry against the surviving brothers and sisters of the petitioner and, thereafter, to make a fresh reference against them.

9. As noticed above, declaration of the petitioner as a foreigner of post 25.03.1971 stream led to filing of WP(C) No. 360 of 2017 and the direction issued to the Superintendent of Police (Border), Hojai, regarding the brothers and sisters of the petitioner led to filing of the second writ petition, i.e., WP(C) No

. 1610 of 2017 by the brothers and sister.

10. Submissions made by learned counsel for the parties have been considered . Also perused the record.

WP(C) No. 360 of 2017

11. In her written statement, petitioner stated that name of her father, Keramat Ali, son of Nurul Hussain was recorded as a voter in the voters' list of 1970 in respect of No. 87 Rupahihat Legislative Assembly Constituency (LAC). His name again appeared in the voters' list of 1985 in respect of the said constituency. Name of her grandfather, Nurul Hussain, son of Minnat appeared in the voters' lists of 1966 and 1970 in respect of the said constituency. It was also stated that Secretary of Saidoria Gaon Panchayat had issued certificate in the name of the petitioner, certifying her as the daughter of Keramat Ali. Similar certificate was issued by the Gaonburah of Saidoria Village. She was born at Village-Telia Chaparitup under Rupahihat Revenue Circle in the district of Nagaon. After her marriage, she started living with her husband, Md Harmuz Ali at Village-Bheluguri, under Doboka Police Station in the then district of Nagaon. This is all what she stated in the written statement.

12. From this written statement, it is evident that petitioner did not disclose basic material facts, which were within her specific knowledge. Petitioner did not say when she was born. Consequently, there was no mention about her age. She remained completely silent as regards her mother as well as about her brothers and sisters. Though she mentioned Md Harmuz Ali as her husband, she did not mention when she got married and whether post-marriage she had any children. When one's citizenship is being questioned, that too, by the State, one has to disclose all material facts, which are within his special knowledge to prima facie establish his citizenship of India, which are thereafter required to be proved by adducing cogent and reliable evidence. Failure to disclose such material facts at the first instance itself, i.e., in the written statement, which is the basic defence statement of the proceedee, may lead to drawing of adverse inference against the proceedee. Moreover, it is a well settled proposition that a party cannot traverse beyond the pleadings. What is pleaded can only be proved and not something which is not pleaded.

13. Having noticed the above, we find that petitioner more or less repeated the same thing in her evidence-in-chief, which she filed by way of affidavit, but interestingly here also, she neither disclosed her date of birth nor her age. During her cross-examination on 08.02.2016, she disclosed her age as 33 years. She also stated that Nurul was her grandfather and Samarta Banu was her grandmother. Grandfather died 15 (fifteen) years ago and grandmother died 5 (five) years ago. Her father's name was Keramat Ali and mother's name was Rashida Khatun. Her father had died about 10 (ten) years ago while he was about 50 years of age. She disclosed her mother's age as 60 years and being alive. She stated that she had 3 (three) elder brothers, Md Abdul Motin, Md Abdul Kadir and Md Abdul Latif. But she could not say anything about their age. She also stated that she had married Harmuz Ali about 10 (ten) years ago.

14. Having noticed her deposition, we may now advert to the documents exhibited by the petitioner.

15. Exhibit-1 is an extract of the voters' list of 1966 in respect of No. 87 Rupahihat Legislative Assembly Constituency. In this exhibit, name of only Nurul Hussain, son of Minnat, aged about 55 years appeared. If Nurul Hussain was 55 years of age in 1966 his name ought to have appeared in the prior voters' lists from 1947 itself. Interestingly, name of the grandmother, Samarta Banu does not appear in Exhibit-1 though as per Exhibit-3, which is an extract of the voters' list of 1985, she was 45 years of age. If she was 45 years of age in 1985 she would have been 26 years of age in 1966, but she was conspicuous by her absence in the 1966 voters' list (Exhibit-1) or in any of the voters' list up to 1985. Interestingly, in Exhibit-3, Nurul Hussain was shown as 60 years of age (Exhibit-3, 1985). If he was 55 years in Exhibit-1, i.e. in 1966, he ought to have been 74 years of age in 1985 and not 60 years as recorded.

16. Again, both Nurul Hussain and Samarta Banu are conspicuous by their absence

nce in Exhibit-2, which is extract of the voters' list of 1970. Here names of Keramat Ali and Rashida Khatun stated to be father and mother of the petitioner appeared. Keramat Ali is shown as 35 years of age and Rashida Khatun is shown as 23 years of age. If Keramat was 35 years of age in 1970 (Exhibit-2), his name ought to have appeared in Exhibit-1, i.e., voters' list of 1966 as he would have been 31 years of age then. In fact, his name ought to have appeared in the voters' lists even prior to 1966, but that is not to be. Interestingly, in Exhibit-3, as noticed above, name of Rashida Khatun, wife of Keramat Ali, does not appear.

17. Exhibits- 4 and 5 are computer print-outs of voter details of Nurul Hussain and Keramat Ali stated to have been issued by the office of the State Coordinator, National Register of Citizens (NRC). These 2 (two) documents are not certified copies of the original. These were also not proved in accordance with law. Consequently, these 2 (two) documents have got no evidentiary value and cannot be of any assistance to the petitioner. Therefore, Tribunal rightly did not give any credence to these 2 (two) documents.

18. In so far Exhibit-6 is concerned, it is a certificate issued by the Secretary of Saidaria Gaon Panchayat dated 13.07.2015, and countersigned by the Block Development Officer (BDO), Rupahihat Development Block, certifying that petitioner was the daughter of Late Keramat Ali and Rashida Khatun and got married to Harmuz Ali on 10.05.2003. No reliance can be placed on such a certificate as the author of the said certificate did not appear before the Tribunal to vouch safe for the truthfulness of the contents of the said document. This Court in Manowara Bewa -Vs- Union of India; WP(C) No. 2634 of 2016, decided on 28.02.2017, has held that such a certificate has no statutory sanctity being beyond the mandate of Assam Panchayat Act, 1994 and the rules framed thereunder, besides being contrary to the mandate of the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 and would not be in the national interest. At the most, it would be a private document and being a private document, the Gaon Panchayat Secretary would have to take full responsibility as to the contents of the certificate. As stated above, he did not appear before the Tribunal to prove the document in accordance with law.

19. The last exhibit, i.e., Exhibit-7 is a certificate, issued by the Gaonburah, but the Gaonburah also did not appear in the witness box to prove the contents of the said certificate.

20. The net result of the above discussion is that there is no admissible evidence establishing linkage of the petitioner with her parents or grandparents to a period prior to 25.03.1971, which is the cut-off date for detection of foreigners in Assam as per Section 6-A of the Citizenship Act, 1955. As a matter of fact, petitioner's name has not been enrolled in any voters' list till date, which itself is a reflection of her status. Though in her cross-examination she stated that she had 3 (three) brothers, none of them came forward to depose before the Tribunal. Her mother stated to have been 60 years of age on the date of her cross-examination (i.e. 08.02.2016) and alive, also did not depose in her support. There were glaring inconsistencies and contradictions in the version of the petitioner which remained unexplained, rendering the same completely unreliable.

21. Consequently, it is evident that petitioner had failed to discharge her statutory burden under Section 9 of the Foreigners' Act, 1946, and, therefore, the Tribunal was fully justified in answering the reference in favour of the State. We do not find any error or infirmity in the aforesaid decision of the Tribunal. Thus, writ petition fails and is dismissed. Interim order passed on 24.01.2017 stands vacated.

WP(C) No. 1610 of 2017

22. Now, coming to the second writ petition, i.e., WP(C) No. 1610 of 2017, the challenge made therein has already been taken note of. However, for better appreciation, relevant portion of the order of the Tribunal dated 31.10.2016 in the case of Musstt Aktara Khatun @ Aktara Begum @ Aftara Begum @ Aftatara Begum, is extracted hereunder:-

The SP(B), Hojai, is also further directed to order a fresh enquiry against the surviving brothers and sisters of the OP herein and to submit a fresh reference against them so as to proceed against them in accordance with law more particul

arly, in view of the fact that while relying upon the documents of her father, if she (OP) can be shielded as a foreigner national then, how could her remaining brothers and sisters who are the sons and daughters of her same father can be termed as the lawful citizen of India? The Inquiry Report whatsoever may be submitted through a formal reference, so that the remaining legal heirs of Late Keramoth Ali (OP's father) can be delinked from this soil before they could take a chance to vanish.

23. Under the scheme of Foreigners' Act, 1946, read with the Foreigners' (Tribunal) Order, 1964, a reference may be made by the concerned Superintendent of Police to the duly constituted Foreigners' Tribunal if there is suspicion that the concerned person is a foreigner. Once the reference is made, the competent Foreigners' Tribunal is required to render its opinion on the reference by answering it either in favour of the State or in favour of the proceedee. If the reference is answered in favour of the State, it would lead to the declaration that the proceedee is a foreigner. On the other hand, if the reference is answered in favour of the proceedee, it would mean that the proceedee is not a foreigner. The Tribunal gets the jurisdiction to opine as above only when a reference is made by the Superintendent of Police. Therefore, to our mind, directing the Superintendent of Police (Border) to cause enquiry regarding the citizenship status of certain persons by the Foreigners' Tribunal may not be justified. Instead of issuing direction, the concerned Foreigners' Tribunal may bring this aspect of the matter to the notice of the referral authority, i.e., the Superintendent of Police (Border) for doing the needful either by making observation in the order itself or taking up the issue in the periodic meetings held between Members of Foreigners' Tribunal, Superintendent of Police and Deputy Commissioner.

24. However, having said that, it has also to be borne in mind that once a proceedee is declared to be a foreigner it would only be a logical corollary to such declaration that his brothers, sisters and other family members would also be foreigners. Therefore, it becomes the duty of the jurisdictional Superintendent of Police (B) to cause enquiry in respect of the brothers, sisters and other family members of the declared foreigners and thereafter, to make a reference to the competent Foreigners' Tribunal against such brothers, sisters and other family members. As a matter of fact, State may issue general direction to all the Superintendents of Police (Border) to initiate follow up steps as above.

25. Having regard to the discussions made above, that portion of the order dated 31.10.2016 as extracted in paragraph-22 above would now stand modified. Consequently, we direct the Superintendent of Police (Border), Hojai, to cause an enquiry into the citizenship status of the petitioners, viz, Abdul Motin, Abdul Kadir and Musstt. Sahara Khatun and other family members, following which consequential steps should be taken. The enquiry should be conducted in accordance with law, keeping in mind, the order passed by the Tribunal dated 31.10.2016 in case of their sister Musstt Aktara Khatun @ Aktara Begum @ Aftara Begum @ Aftatara Begum, which order has been upheld by us.

26. Consequently, WP(C) No. 1610 of 2017 is disposed of in the above terms. Interim order passed on 20.03.2017, stands vacated.

27. Registry to send down the LCR forthwith and inform the concerned Foreigners' Tribunal, Superintendent of Police (Border) and Deputy Commissioner for taking necessary follow-up steps.

28. Registrar (Judicial) shall also bring this order, more particularly the discussions made in paragraphs-23 and 24 above, to the notice of the Commissioner and Secretary to the Government of Assam, Home and Political Department, for doing the needful.