

GAHC010184712021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/5902/2021

LABIRON @ ABIRON NESSA
D/O LATE HARAN MONDAL
W/O MOKBUL HUSSAIN
R/O VILL-MAYARCHAR
PART-II, P.S. BILASIPARA
DIST. DHUBRI, ASSAM

VERSUS

THE UNION OF INDIA AND 7 ORS
REP. BY THE SECRETARY, MINISTRY OF HOME AFFAIRS, GOVT. OF INDIA,
SHASTRI BHAWAN, NEW DELHI-110001.

2:THE STATE OF ASSAM
REP. BY THE SECRETARY TO THE GOVT. OF ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI-781006

3:THE ELECTION COMMISSION OF INDIA

REP. BY THE CHIEF ELECTION COMMISSION
NIRVACHAN SADAN
ASHOKA ROAD
NEW DELHI-110001.

4:THE STATE COORDINATOR

NATIONAL REGISTRATION OF CITIZENS
ASSAM
1ST FLOOR
ACHYUT PLAZA

G.S. ROAD
BHANGAGARH
GUWAHATI
ASSAM
PIN-781005.

5:THE FOREIGNERS TRIBUNAL NO. 6TH

DHUBRI
BILASIPARA
DIST. DHUBRI
ASSAM
PIN-783348

6:THE DEPUTY COMMISSIONER

DHUBRI
POST OFFICE- DHUBRI
P.S. DHUBRI
DIST. DHBRI
PIN-783301

7:THE SUPERINTENDENT OF POLICE (BORDER)

DHUBRI
P.O.- DHUBRI
P.S. DHUBRI
DIST. DHUBRI
ASSAM
PIN-783301

8:THE OFFICER-IN-CHARGE OF BILASIPARA POLICE STATION

P.O. BILASIPARA
DIST. DHUBRI
ASSAM
PIN-78334

Advocate for the Petitioner : MS. D GHOSH

Advocate for the Respondent : ASSTT.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT & ORDER (ORAL)

Date : 02-05-2023

(A.M. Bujor Barua)

Heard Ms. D Ghosh, learned counsel for the petitioner. Also heard Ms. L Devi, learned counsel for the respondents no. 1 and 4 being the authorities under the Union of India and NRC respectively, Ms. A Verma, learned counsel for the respondents no. 2, 5, 7 and 8 being the authorities under the Home Department of the Government of Assam, Mr. AI Ali, learned counsel for the respondent no. 3 being the authorities under the Election Commission of India and Ms. K Phukan, learned counsel for the respondent no. 6 being the Deputy Commissioner, Dhubri.

2. The petitioner Labiran Nessa @ Abiran Nessa had been referred to the Foreigners' Tribunal No. 6, Dhubri for rendering an opinion as to whether she is a person who entered the State of Assam on or after 25.03.1971, resulting registration of case No. FT. 6th DBB/50/2019. The Tribunal rendered an opinion dated 03.04.2021 declaring the petitioner to be a foreigner.

3. Being aggrieved this writ petition is instituted.

4. In the writ proceeding the petitioner relies on the voters' list of 1966 of village Mayarchar Part II in the Bilasipara Sub-Division of Dhubri district which contains the name of Haran Mondal, S/O Korbor Ali at Sl. No. 20 and that of Golejan Nessa Bibi, W/O Haran Mondal at Sl. No. 21 where both of them are

residing in the same house No. 12. The petitioner claims to be the daughter of Haran Mondal of 1966 voters' list of village Mayarchar Part II. To substantiate that she is the daughter of Haran Mondal of village Mayarchar Part II, reliance is placed on a Kabin Nama available in page-90 of the writ petition which shows the name of the bride to be Abiran Nessa daughter of Haran of village Mayarchar. The Kabin Nama had been exhibited before the Tribunal through the DW7 namely Montaz Ali, who is stated to be a part time LDA cum officer bearer in the office of the Kazi. The Kabin Nama itself bears a number 23 No. (A) 1986 meaning thereby that it is a Kabin Nama that must have been registered in the year 1986.

5. It is noticed that the summons was issued by the Tribunal to the Marriage Registrar cum Quazi but the Quazi deemed it appropriate to depute a part time LDA cum office bearer in his office for rendering the evidence. The power of delegation of a witness summoned by a Court or Tribunal is not available under the law and neither the law of delegation is applicable in such circumstance. If the summon is issued to a given particular person it is that particular person alone who can depose as a witness and not a person who is delegated by a person who is summoned.

6. From such point of view, the evidence of DW7 Montaz Ali who is stated to be a part time LDA cum office bearer in the office of Quazi and had been delegated by the Quazi to depose before the Tribunal cannot be accepted under the law.

7. Ms. D Ghosh, learned counsel for the petitioner states that these proceedees have a very poor financial background and it is difficult for them to again bear the cost of the witness to come and depose before the Tribunal. We appreciate such stand being taken that requiring a witness to come and depose

before the Tribunal and to bear the cost is also a financial burden on the proceedees.

8. It is stated that the proceedee had paid a cost of Rs.4000/- (Four Thousand) to the office of the Marriage Registrar cum Quazi at Doraimari for appearing before the Tribunal on two dates inasmuch as the Tribunal Member was absent on the first date. The payment of cost is sought to be justified by referring to Section 35, Order 16 Rule 2 of the CPC which provides that the party applying for a summons shall, before the summons is granted and within a period to be fixed which shall not be later than seven days from the date of making application under Rule 1 (4) of Order 16 pay into Court such sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance. In other words, the provisions under Order 16 Rule 2 makes it explicit that the amount of cost to be paid to a witness summoned before a proceeding would have to be determined by the Court, which in this case would be the Tribunal itself, and the determination of the cost cannot be left to the discretion of the person who is summoned as a witness before the Tribunal. In the circumstance above, as we have rejected the evidence of DW7 who is a part time LDA cum office bearer in the office of the Marriage Registrar cum Quazi, Doraimari and who had been delegated by the Office of the Marriage Registrar cum Quazi, we remand the matter back to the Tribunal to issue a fresh summon to the Marriage Officer cum Quazi of Doraimari, so as to enable the Quazi to appear before the Tribunal along with the original marriage register based on which the Kabin Nama at page-90 had been issued.

9. While issuing fresh summons to the Marriage Officer cum Quazi of

Doraimari the Tribunal will examine as to what may be the possible cost to be paid to the Quazi which should be sufficient to defray the travelling and other expenses of the witness in passing to and from the Court that is the Tribunal in the present case for rendering the evidence. The cost to be assessed should be reasonable and actual cost and it should not in any manner reflect to be a financial gain of the possible witness for appearing before the Tribunal.

10. Further Order 16 Rule 2 (3) provides for the scale of expenses which provides that where the Court is sub-ordinated to a High Court, in fixing the scale of such expenses, regard should be made to any rules that may be made on that behalf. In the present case, it is stated that the Civil Court Rules do provide for the procedure for evaluating the expenses. But we have noticed that the cost had already been paid by the proceedee to the Marriage Registrar cum Quazi on two earlier occasions and it is the Marriage Officer cum Quazi who had acted beyond the provision of law in not personally appearing by delegating the responsibility to a part time LDA cum office bearer in his office.

11. From such point of view, for the further appearance, no cost is required to be paid to Quazi in the present case and the Tribunal to issue summon to the Quazi for his appearance along with the marriage register but for the general purpose for requiring the attendance of any witness it is hereby directed that the Tribunal shall follow the law and procedure laid down in Order 16 Rule 2 read with provisions of the Civil Court Rules for defraying the costs in respect of any witnesses that is required to appear before the Tribunal meaning thereby that the Tribunal would make a true assessment of the actual cost that may be required to be deposited and that the proceedee to deposit such cost before the Tribunal and thereafter, issue summons to the witness for appearance and upon appearance of the person concerned, to handover the cost so deposited to the

witness.

12. It is stated that the DW2 is the brother of the proceedee who had casted vote along with his mother and he is also a witness. If it is so, the Tribunal may also look into the evidence of DW2 for rendering its opinion. Upon the Quazi appearing before the Tribunal and rendering his evidence as well as after considering the evidence of DW2 the Tribunal may pass a reasoned order. It is further clarified that under Clause 4 of the Foreigners' Tribunal Order, 1964, the Foreigners' Tribunals shall have the powers of a Civil Court while trying a suit under the Code of Civil Procedure and that of the powers of a Judicial Magistrate First Class under the Code of Criminal Procedure in respect of the matters including summoning and enforcing the attendance of any person and examining him or her on oath. As the power under the Code of Civil Procedure and Criminal Procedure had already been bestowed upon the Tribunal, in the event of any non appearance pursuant to the summons issued, appropriate action under the Code of Civil Procedure and Criminal Procedure may be taken by the Tribunal and their appearance should not be made subject to payment of any cost or amount being demanded by the witnesses. If any of the proceedee has any difficulty in making the appearance of any witness because of the aforesaid reason of some exorbitant cost being insisted upon, the same be brought to the notice of the Tribunals and the Tribunals to take appropriate action as per the relevant provision of law as indicated above.

13. A copy of this order be provided to Ms. A Verma, learned counsel for the Home Department of the Government of Assam for circulation amongst the Tribunals.

Send back the LCR.

Writ petition stands disposed of in the above terms.

JUDGE

JUDGE

Comparing Assistant