

GAHC010287412019



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

Case No. : WP(C)/9171/2019

MINA DEVI
D/O- LT. GOPILAL SARMAH @ GOPILAL SIWAKOTI SARMAH, W/O-
JAGANNATH SARMAH, R/O- VILL- TUPIA, P.O. NAHARBARI, P.S.
JAMUGURI, MOUZA- MURAH DOL, DIST.- SONITPUR, ASSAM

VERSUS

THE UNION OF INDIA AND 5 ORS.
REP. BY THE SECY., MINISTRY OF HOME AFFAIRS, NEW DELHI-1

2:THE ELECTION COMMISSIONER OF INDIA
THROUGH ITS SECY.
NIRBACHAN BHAVAN
NEW DELHI-1

3:THE CHIEF ELECTORAL OFFICER
ASSAM
DISPUR
GHY-06
ASSAM

4:THE DISTRICT ELECTION OFFICER/DY. COMMISSIONER
SONITPUR DISTRICT
TEZPUR- 784001
ASSAM

5:THE ELECTORATE REGISTRATION OFFICER
SOOTEALAC
DIST.- SONITPUR
TEZPUR
ASSAM
PIN- 784001

6:THE STATE CO-ORDINATOR OF NRC

P.O. AND P.S. BHANGAGARH
DIST.- KAMRUP (M)
GHY- 05
ASSAM

Advocate for the Petitioner : MR. R P SARMAH

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

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

ORDER

Date : 28-06-2023

Heard Mr. S. Upadhyay, learned counsel for the petitioner; Ms. L. Devi, learned counsel representing Mr. R.K. Dev Choudhury, learned Deputy Solicitor General of India [DySGI] for the respondent nos. 1 & 6; and Mr. A.I. Ali, learned Standing Counsel, Election Commission of India [ECI] for the respondent nos. 2 – 5.

2. The petitioner has filed the instant writ petition with a grievance that though the petitioner belongs to the Gorkha community, her name in the Voters List of 75 No. Sootea Legislative Assembly Constituency [LAC] has been pre-fixed with letter 'D'.

3. The petitioner has averred that her father viz. Gopilal Sarmah @ Gopilal Siwakoti Sarmah was originally a resident of Village – Bardikarai, Police Station – Sootea, Mouza – Mudhadal, District – Sonitpur, Assam and his name was enlisted in the Voters List at serial no. 32 for the aforesaid location under 78 No. Balipara Legislative Assembly Constituency [LAC] in the year 1965. It is the further case of the petitioner that the name of the petitioner's father was recorded in the Voters List of 1966 also in respect of the afore-stated location. It is stated that in the year 1983, the petitioner got married to one Jaganath Sarmah, resident of Village – Panpur Hokoma, Naduar Revenue Circle, District – Sonitpur and after the marriage, the petitioner shifted to her in-laws house. Thereafter, the name of the petitioner appeared in the Voters List of 1993 along with her husband at serial nos. 438 and 439 in Village – Panpur Hokoma under 75 No. Sootea Legislative Assembly Constituency [LAC]. In the said Voters List, her name appeared as Premi, which was her nick-name, instead of Mina Devi. A shifting

took place in between the family of the petitioner shifted to another location at Village – Tupia, Post Office – Naharbari, Mouza – Murhadol, Police Station – Jamuguri under the same 75 No. Sootea LAC. But in the Voters List of 2019, though the petitioner's name has been recorded along with her husband the letter 'D' has been pre-fixed against her name. The Superintendent of Police [Border], Biswanath District vide letter bearing memo no. BSN/[B]/2018/1388 dated 20.12.2018 had reported that as per official records/documents, there was no Foreigners Tribunal related case ['D' Voter, F.T. Case, etc.] initiated or pending or disposed of against the petitioner in any Foreigners Tribunal in Biswanath District.

4. The learned counsel for the petitioner has submitted that though the petitioner belongs to the Gorkha community, pre-fixing her name with letter 'D' in the voters' list is wholly unwarranted and is liable to be interfered with. The learned counsel for the petitioner has also placed before this Court a recent notification of 28th July, 2021 whereby the Revenue Department has incorporated the Gorkha Community as a part of Chapter X of the Assam Land and Revenue Regulation, 1886.

5. Mr. Ali, learned Standing Counsel, Election Commission of India [ECI] has submitted that the notification dated 28th July, 2021 placed before this Court pertains to only the Sadiya Tribal Belt and is not applicable in the other parts of Assam. Mr. Ali has, however, fairly submitted that a Division Bench of this Court in a batch of connected matters reported in 2020 [1] GLT 413 [Indira Newar & Ors. Vs Union of India & Ors.] vide Judgment and Order dated 29.11.2019 has laid down as follows:-

4. We have undertaken the rigorous exercise to look into the facts appearing in each individual writ petition to find out whether in any way any of the writ petitioners are shown to have any connection or origin or traceable to any territories included in Bangladesh, within the meaning of 'specified territory' under Section 6-A (1) (c) of the Citizenship Act, 1955. In the case of each of the writ petitioners they are shown to belong to places within the State of Assam, as variously recorded in the Reports of the Local Verification Officer. The mother tongue of the writ petitioners is 'Nepali', which is the language spoken by the citizens of the neighbouring country Nepal, and which language

is also specified in the Eighth Schedule to the Constitution of India. This is not to say that a Nepali speaking individual can only have his/her origin at Nepal and not at Bangladesh. However, for the purpose of initiating proceeding against a Nepali speaking person, for examination as to whether he/she is a foreigner or not, in respect of references made under sub-section (3) of Section 6-A of the Citizenship Act, 1955 to a Tribunal constituted under the Foreigners (Tribunals) Order, 1964 having jurisdiction over a district or part thereof in the State of Assam, in terms of Rule 21 of the Citizenship Rules, 2009, the primary and necessary ingredient or the condition precedent is that reference can only be in respect of persons who have come to Assam from the 'specified territory', meaning the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985, and also having regard to the cut-off date of migration into Assam as prescribed under the aforesaid Section 6-A of the Citizenship Act, 1955.

5. Law being clear, as above, there are neither any suspicion expressed by the Referral Authority nor any findings recorded by the concerned Tribunals that any of the writ petitioners are persons who have come into Assam from the 'specified territory'. In Section 6-A, particularly at sub-sections (2) and (3), the expression 'specified territory' is predominant.

6. It would be apposite to make reference to the Notification dated 23.08.1988 of the Government of India in the Ministry of Home Affairs, whereby the misconception noticed by the Central Government about the citizenship at the commencement of the Constitution of India, of certain classes of persons commonly known as Gorkhas, who had settled in India at such commencement, was clarified. Clarification made was that as from the commencement of the Constitution i.e. from 26.01.1950, every Gorkha who had his domicile in the territory of India and who was born in the territory of India or either of whose parents was born in the territory of India or who had been ordinarily been a resident in the territory of India for not less than five years before such commencement, shall be a citizen of India as provided in Article 5 of the Constitution of India. There is yet another Notification dated 24.09.2018 of the Government of India in the Ministry of Home Affairs (Foreigners Division), perhaps as a guidance while making future references in respect of individuals claiming to belong to the Gorkha community of Nepali origin, on the subject of a Memorandum dated 30.07.2018 submitted by the All Assam Gorkha Students' Union to the Hon'ble Home Minister. It is seen that the

issues raised in the Memorandum had been examined by the Ministry of Home Affairs and decision thereof was also taken, with approval of the competent authority. While reiterating the conditions of citizenship of classes of persons known as Gorkhas, as specified in the earlier Notification dated 23.08.1988, the later Notification dated 24.09.2018 clearly laid down that " Since the members of the Gorkha community originally hail from Nepal, it may not be appropriate to declare all of them as from the 'specified territory' as defined under Section 6-A (1) (c) of the Citizenship Act, 1955. Only those who have come from Bangladesh and living in the State of Assam can be treated as from the 'specified territory' in accordance with Section 6-A of the Citizenship Act, 1955." Further, "Only cases of members of Gorkha community living in Assam who do not fall in any of the categories mentioned above may be referred to the Foreigners' Tribunal for its opinion as to whether the person is or is not a 'foreigner' within the meaning of the Foreigners Act, 1946." The categories are duly mentioned in the said Notification dated 24.09.2018.

7. We may also take notice of the provisions of Section 8 of the Foreigners Act, 1946, which relates to determination of nationality. A reading of said Section 8 in the context of the present bunch of cases, it is seen that where for any reason it is uncertain what nationality, if any is to be ascribed to a foreigner, in such cases that foreigner may be treated as the national of the country with which he appears to the prescribed authority to be most closely connected for the time being in interest or sympathy or if he is of uncertain nationality, of the country with which he was last so connected. This provision would be relevant to the extent that even if the most extreme view is taken that the petitioners can never claim to be citizens of India, however, having regard to the status of the petitioners as recorded in the Verification Reports to be persons having their mother tongue and spoken dialect as 'Nepali', they can only be treated as the national of the country to which they appear to be closely connected i.e. Nepal. Under no circumstances, that too, in the absence of any reports of being persons coming into Assam from the 'specified territory', the provisions of Section 6-A of the Citizenship Act, 1955 cannot be made applicable to the petitioners.

8. For all the aforesaid reasons, we have no hesitation but to allow all the 29 writ petitions by setting aside the impugned opinions in all the said 29 writ petitions. As a necessary corollary, reference made against each of the writ petitioners by the respective Referral Authority are also interfered with.

The said observations/findings were made after recording the facts of the cases.

6. The learned Standing Counsel has, however, submitted that the aforesaid judgments were rendered in matters where opinions were already rendered by different Foreigners Tribunals declaring the incumbents as foreigners. However, in the instant case the stage is much prior to that and the grievance is only with regard to pre-fixing the name of the petitioner with 'D'. The learned Standing Counsel has accordingly submitted that since the issue has been substantially settled by this Court, the only activity which is to be fulfilled is that the petitioner has to demonstrate that she has not come from the "specified territory" under the meaning of Section 6A[1][c] of the Citizenship Act, 1955. The other learned Counsel has endorsed the submissions of Mr. Ali, learned Standing Counsel, ECI and has submitted that appropriate direction may be issued in that regard.

7. After hearing the parties and after going through the decision rendered by the Division Bench of this Court in the case of *Indira Newar* [supra], the writ petition is disposed of by directing the petitioner to approach the Electoral Representation Officer [ERO] in her respective district by way of a representation annexing all materials to demonstrate that she has not come from the "specified territory".

8. In this connection, Mr. Ali, the learned Standing Counsel, ECI has also placed before this Court a communication dated 2nd June, 2022 issued by the Home and Political Department to the Joint Chief Electoral Officer, Assam on the subject of marking of 'D' voter against people belonging to the Gorkha Community not belonging to the specified territory. In that communication, certain guidelines have been laid down as to how the respective cases are to be dealt with and the said guidelines are found in a notification dated 24th September, 2018 which is annexed to the aforesaid communication. It is accordingly directed that such representation may be filed within a period of 15 [fifteen] days from today before the Electoral Representation Officer [ERO] who would take on board and consider the same and pass appropriate orders expeditiously and in any case, within an outer limit of 2 [two] months

from the date of receipt of the representation.

9. The authority is also directed to give a personal hearing to the petitioner before taking a final decision on the representation which is required to be submitted alongwith the supporting documents and a certified copy of this order.

10. The writ petition stands disposed of in terms of the aforesaid directions.

JUDGE

Comparing Assistant