

GAHC010082622019



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

Case No. : WP(C)/2618/2019

ARABINDA BISWAS AND 4 ORS.
S/O LT. BASANTA BISWAS, R/O VILL-RAINAPATHAR, P.S.-MORIGAON,
DIST-MORIGAON, ASSAM

2: SMT. MINU MALU BISWAS
W/O ARABINDA BISWAS
R/O VILL-RAINAPATHAR
P.S.-MORIGAON
DIST-MORIGAON
ASSAM

3: AMARESH BISWAS
S/O ARABINDA BISWAS
R/O VILL-RAINAPATHAR
P.S.-MORIGAON
DIST-MORIGAON
ASSAM

4: AJAY BISWAS
S/O ARABINDA BISWAS
R/O VILL-RAINAPATHAR
P.S.-MORIGAON
DIST-MORIGAON
ASSAM

5: SANJOY BISWAS
S/O ARABINDA BISWAS
R/O VILL-RAINAPATHAR
P.S.-MORIGAON
DIST-MORIGAON
ASSA

VERSUS

THE UNION OF INDIA AND 7 ORS.
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA,
MINISTRY OF HOME AFFAIRS, NEW DELHI-110001

2:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI-781006

3:THE ELECTION COMMISSION OF INDIA
NEW DELHI
PIN-110001

4:THE STATE COORDINATOR
NRC ASSAM
ACHYUT PLAZA
BHANGAGARH
GUWAHATI-781005

5:THE STANDING COUNSEL

SPECIAL F.T. AND BORDER

6:THE DEPUTY COMMISSIONER
MORIGAON
ASSAM
PIN-782105

7:THE SUPERINTENDENT OF POLICE (B)
MORIGAON
ASSAM
PIN-782105

8:THE OFFICER-IN-CHARGE
MORIGAON POLICE STATION
MORIGAON
PIN-78210

B E F O R E

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocate for the petitioner : Shri J. Ahmed, Adv.
Advocates for the respondents : Shri. A. Kalita, SC- Home Dept.
Shri R. Talukdar, GA – Assam
Shri A.I. Ali, SC, ECI

Dates of hearing : 29.02.2024

Date of Judgment : 10.04.2024

JUDGMENT & ORDER

(S.K. Medhi, J.)

The extra-ordinary jurisdiction of this Court has been sought to be invoked by filing this application under Article 226 of the Constitution of India by putting to challenge the opinion rendered vide impugned order dated 25.05.2001 passed by the learned Foreigners Tribunal no. 3rd, Morigaon in F.T. Case No. 279/2015. By the impugned judgment, the petitioners, who were the proceedees before the learned Tribunal, have been declared to be a foreigner post 25.03.1971.

2. The facts of the case may be put in a nutshell as follows:

- (i) The reference was made by the Superintendent of Police (Border), Morigaon District, against the petitioner no. 1 giving rise to the aforesaid F.T. Case No. 279/2015.
- (ii) As per requirement under Section 9 of the Foreigners Act,

1946 to prove that the proceedees were not foreigners, the petitioners had filed their written statement on 18.09.2013 along with certain documents in said F.T. Case No. 279/2015 before the Foreigners Tribunal 3rd Morigaon.

(iii) The learned Tribunal, after considering the facts and circumstances and taking into account of the provisions of Section 9 of the Foreigners Act, 1946 had come to a finding that the petitioners as opposite parties had failed to discharge the burden cast upon them and accordingly, the opinion was rendered declaring the petitioners to be foreign nationals post 25.03.1971.

3. We have heard Shri J. Ahmed, learned counsel for the petitioners. We have also heard Shri A. Kalita, learned Standing Counsel, Home Department, Assam; Shri A.I. Ali, learned Standing Counsel, Election Commission of India and Shri R. Talukdar, learned Government Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 02.02.2024.

4. Shri Ahmed, the learned counsel for the petitioners at the outset has submitted that the proceeding so far as the petitioner nos. 2 to 5 are concerned, is bad in law inasmuch as there was no specific order of reference against them. In this connection, the learned counsel has relied upon the case of ***Sudhir Roy vs. Union of India*** reported in ***2019 (1) GLT 353***. In the said case, a Coordinate Bench of this Court has laid down that though a presumption can be drawn against the family members of a proceedee who has been declared as foreigners, such presumption would *per se* not lead to such a conclusion and there has to be a specific reference in this regard.

5. The learned counsel for the petitioners has otherwise submitted that the

petitioners more specifically the petitioner no. 1 could prove their case with cogent evidence and in view of the fact that there was no rebuttal evidence, the learned Tribunal should have accepted the said proof and accordingly hold the petitioners to be a citizen of India. In this regard, he has referred to the evidence on affidavit of the two numbers of witnesses and also the following documentary evidence.

- i. Voter list of 1966 of Basanta, father of OP1 (Exbt -A)
- ii. Voter list of 1970 of Basanta (Exbt – B)
- iii. Voter list of 1989 OP1 (Exbt – C)
- iv. Voter list of 1990 OP1 (Exbt – D)
- v. Voter list of 1997 of OP1/OP2 (Exbt – E)
- vi. Voter list of 1966 of Subal Malu, father of OP2 (Exbt – F)
- vii. Voter list of 1970 of Subal Malu, father of OP2 (Exbt- G)
- viii. Gaonbura Certificate of OP2 (Exbt – H)
- ix. Gaonbura Certificate of OP1 (Exbt – I)
- x. Birth Certificate of OP3 (Exbt – J)
- xi. Birth Certificate of OP4 (Exbt – K)
- xii. Birth Certificate of OP5 (Exbt – L)

6. It is submitted that there was no effective cross examination by the prosecution side of the said witnesses who had deposed and therefore, such evidence ought to have been accepted without any difficulty.

7. Shri Ahmed, the learned counsel submits that in the written statement, it was stated that the petitioner no. 1 was born in village-Jengpari whereas the

petitioner no. 2 (wife of the petitioner no. 1) was born at village Banmuri. The petitioner nos. 3, 4 & 5 are their sons who were born at Malputa. The father of the petitioner no. 1 is stated to be one Basanta Biswas, son of Kashinath Biswas and his name appears in the voters list of 1966. Similarly, the name of the father of the petitioner no. 2 has been stated to be Subal Malu, son of Har Kichar Malu whose name also appear in the voter list of 1966. The voter list of 1970 has been exhibited containing the name of Basanta. It is stated that in 1978, there was a shift to Malputa and in 1980, the said Basanta had died. A voter list of 1990 has been relied upon containing the name of the petitioner no. 1. The petitioner no. 1 had deposed as DW1 and had proved the voter list of 1970 containing his name. In support of his submissions, the learned counsel for the petitioners has relied upon the following case laws:

(i) Order dated 22.10.2019 in WP(C) 2926 of 2019 [Talebar Rahman @ Talu Munshi vs UOI]

(ii) 2020 (1) GLT 330 (Motior Rahman vs. Union of India)

(iii) (2021) 3 GLT 85 (Haidar Ali vs. Union of India)

(iv) (2008) 4 SCC 75 (Bant Singh v. Niranjan Singh)

(v) (2008) 4 SCC 520 (Tulsa v. Durghatiya)

(vi) AIR 1959 SC 914 (Dalgobinda Paricha v. Nimai Charan Misra)

8. The cases of **Talebar Rahman** (supra) and **Motior Rahman** (supra) have been cited to bring home the contention that minor discrepancy in names, age etc. may be ignored. The following observations made in the said case are relied upon:

“11. We also find from the record that the learned Tribunal has declared

the petitioner as a foreigner based on some minor discrepancies in recording of age and also for non-mentioning of the date of second marriage of the father of the petitioner. However, such discrepancies, in our opinion, are minor in nature and hence, even if found correct, would not have any material bearing in the outcome of this writ petition. Moreover, in the decision of the Hon'ble Supreme Court rendered in the case of Sirajul Hoque Vs. The State of Assam & Ors. in connection with Criminal Appeal No. 267/2019 arising out of SLP (Crl) No. 4500/2018 it has been held that minor discrepancies in recording of names, age and address of the family members of the proceedee cannot be ground to doubt his case.

9. In the case of **Haidar Ali** (supra), it has been laid down as to how the onus is to be discharged by a proceedee.

10. The case of **Bant Singh** (supra) has been pressed into service to bring home the contention that oral evidence is required to be taken into consideration. In the case of **Tulsa** (supra), it has been laid down that presumption can be drawn regarding marriage if the parties have cohabited for a long period of time which however is a rebuttable presumption.

11. The case of **Dalgobinda** (supra) has been cited wherein oral evidence has been accepted on the aspect of relationship.

12. *Per contra*, Shri A. Kalita, learned Standing Counsel, Home Department has categorically refuted the stand taken on behalf of the petitioner. He submits that a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 relate to determination as to whether the proceedee is a foreigner or not. As the relevant facts are especially within the knowledge of the proceedee and therefore, the burden of proving citizenship rests absolutely

upon the proceedee, notwithstanding anything contained in the Evidence Act, 1872 and this is mandated under Section 9 of the aforesaid Act, 1946. However, in the instant case, the petitioners utterly failed to discharge the burden. It is also submitted that rebuttal evidence is not mandatory in every case and would be given only if necessary. He further submits that the evidence of a proceedee has to be cogent, relevant, which inspire confidence and acceptable and only thereafter, the question of adducing rebuttal evidence may come in.

13. He further submits that so far as the documents relied upon by the petitioners are concerned, a part of the same cannot be relied upon and the document as a whole is to be read. It is also submitted that there are major discrepancies in the voters list regarding the names, age and address.

14. The learned Standing Counsel further submits that this Court in exercise of its Certiorari jurisdiction does not act as an Appellate Court and it is only the decision making process which can be the subject matter of scrutiny. He submits that there is no procedural impropriety or illegality in the decision making process and therefore, the instant petition is liable to be dismissed. The learned Standing Counsel has however fairly submitted that the opinion may not hold good for the petitioner nos. 2 to 5 in view of the law laid down in the case of ***Sudhir Roy*** (supra).

15. The rival contentions have been duly considered and the materials placed before this Court have been carefully examined.

16. With regard to the aspect of burden of proof as laid down in Section 9 of the Act of 1946, the law is well settled that the burden of proof that a proceedee is an Indian citizen is always on the said proceedee and never shifts. In the said Section, there is *non-obstante* clause that the provisions of the

Indian Evidence Act would not be applicable. For ready reference, Section 9 is extracted herein below-

“9. Burden of proof.—If in any case not falling under Section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person.”

17. In this connection, the observations of the Hon’ble Supreme Court in the case of ***Fateh Mohd. Vs. Delhi Administration [AIR 1963 SC 1035]*** which followed the principles laid down by the Constitutional Bench in the case of ***Ghaus Mohammad Vs. Union of India [AIR 1961 SC 1526]*** in the context of Foreigners Act, 1946 would be relevant which is extracted herein below-

“22. This Act confers wide ranging powers to deal with all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner for prohibiting, regulating or restricting their or his entry into India or their presence or continued presence including their arrest, detention and confinement. The most important provision is Section 9 which casts the burden of proving that a person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall lie upon such person. Therefore, where an order made under the Foreigners Act is challenged and a question arises whether the person against whom the order has been made is a foreigner or not, the burden of proving that he is not a foreigner is upon such a person. In Union of India v. Ghaus Mohd. the Chief Commissioner of Delhi

served an order on Ghaus Mohammad to leave India within three days as he was a Pakistani national. He challenged the order before the High Court which set aside the order by observing that there must be prima facie material on the basis of which the authority can proceed to pass an order under Section 3(2)(c) of the Foreigners Act, 1946. In appeal the Constitution Bench reversed the judgment of the High Court holding that onus of showing that he is not a foreigner was upon the respondent.”

18. Before embarking to adjudicate the issue involved *vis-a-vis* the submissions and the materials on record, we are reminded that a Writ Court in exercise of jurisdiction under Article 226 of the Constitution of India would confine its powers to examine the decision making process only. Further, the present case pertains to a proceeding of a Tribunal which has given its findings based on the facts. It is trite law that findings of facts are not liable to be interfered with by a Writ Court under its certiorari jurisdiction.

19. Law is well settled in this field. The Hon'ble Supreme Court, after discussing the previous case laws on the jurisdiction of a Writ Court *qua* the writ of certiorari, in the recent decision of ***Central Council for Research in Ayurvedic Sciences and Anr. Vs. Bikartan Das & Ors [Civil Appeal No. 3339 of 2023]*** has laid down as follows:

“49. Before we close this matter, we would like to observe something important in the aforesaid context: Two cardinal principles of law governing exercise of extraordinary jurisdiction under Article 226 of the Constitution more particularly when it comes to issue of writ of certiorari.

50. The first cardinal principle of law that governs the exercise of extraordinary jurisdiction under Article 226 of the Constitution, more particularly when it comes to the issue of a writ of certiorari is that in

granting such a writ, the High Court does not exercise the powers of Appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The writ of certiorari can be issued if an error of law is apparent on the face of the record. A writ of certiorari, being a high prerogative writ, should not be issued on mere asking.

51. The second cardinal principle of exercise of extraordinary jurisdiction under Article 226 of the Constitution is that in a given case, even if some action or order challenged in the writ petition is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it with a view to doing substantial justice between the parties. Article 226 of the Constitution grants an extraordinary remedy, which is essentially discretionary, although founded on legal injury. It is perfectly open for the writ court, exercising this flexible power to pass such orders as public interest dictates & equity projects. The legal formulations cannot be enforced divorced from the realities of the fact situation of the case. While administering law, it is to be tempered with equity and if the equitable situation demands after setting right the legal formulations, not to take it to the logical end, the High Court would be failing in its duty if it does not notice equitable consideration and mould the final order in exercise of its extraordinary jurisdiction. Any other approach would render the High Court a normal court of appeal which it is not."

20. This Court has noted that though it has been stated in his written statement that the father of the petitioner no. 1 had passed away in 1980 but in his cross-examination, the DW1 had stated that his father expired in 1972.

Further, though the 1970 voter list was proved as Exbt. B, it is found that the said voter list contains three other names including the name of one Aswini Biswas, aged 45 years and one Nani, wife of Aswini, aged 77 years which itself appears to be unreasonable. The age of the petitioner has been shown to be 27 years. However, there is no voter list of any previous years containing the name of the petitioner in spite of the fact that he was eligible to vote earlier. Further, there is no voter list of even the elder brother of the petitioner with the projected father.

21. In the case ***Borhan Ali vs. Union of India*** reported in **2018 (4) GLT 392** it has been laid that a voter list is to be read in its entirety and not in part.

“27.1. Extending this principle, if a proceedee relies on a voters list, he has to rely on the same in its entirety and not in part. He cannot say that he will rely upon that part of the voters list which is favourable to the proceedee but would not rely upon that part of the voters list which goes against him, for example, vital discrepancies in name, residence and age. A document has to be appreciated as a whole; not in bits and pieces.”

22. As regards the case laws cited on behalf of the petitioners, so far as the case of ***Bant Singh*** (supra) is concerned, the subject matter was wholly different and the observations were made in context of the facts of the case which pertained to a civil suit on partition. On the other hand, the instant case is one under the Foreigners Act of 1946 wherein under Section 9, it is provided that the burden of proof that a proceedee is an Indian citizen is always on the said proceedee and the said burden never shifts.

23. The case of ***Tulsa*** (supra) will have no application in the facts of the present case as the same relates to a marital relationship and drawal of a presumption of such marriage.

24. As regards the case of ***Dalgovinda***, the proposition of acceptance of oral

evidence on relationship was in the context of a declaratory suit wherein the ordinary rules of evidence apply.

25. As indicated above, the opinion in respect of the petitioner nos. 2 to 5 would not be sustainable in view of the expression by a Coordinate Bench in the case of ***Sudhir Roy*** (supra) wherein the following observations were made.

“9. As regards the declaration of the wife, sons and daughters of the petitioner to be foreigners, we have perused the records and have taken note of that the reference was made only against the petitioner and not against his wife, sons and daughters. Although the law in this respect has been settled by this Court in Aktara Khatun Vs. State of Assam & Ors., reported in 2017(2) GLT 974 that a presumption can also be drawn against the family members of the proceedee who has been declared as foreigner, but at the same time we are also of the view that such presumption would by itself not lead to a conclusion that the family members of a proceedee who has been declared to be a foreigner are also foreigners. The same may be a good cause for initiating an enquiry and making a reference against the family members, but without following the due procedure of law of conducting an enquiry and making a reference and being adjudicated by the Tribunal, the family members cannot be declared to be foreigners.”

26. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 25.05.2001 passed by the learned Foreigners Tribunal No. 3rd, Morigaon in F.T. Case No. 279/2015 does not call for any interference so far as the petitioner no. 1 is concerned. However, the same is not sustainable so far as the petitioner nos. 2 to 5 are concerned but the respondents are at liberty to make separate reference against the said petitioners in accordance with law.

27. The actions consequent upon the opinion rendered by the learned Tribunal would follow, in accordance with law.

28. The interim protection and bail granted to the petitioners no.1 Arabinda

Biswas granted earlier in this proceeding on 13.05.2019 is hereby recalled / stands vacated. Further, the said order of interim protection dated 13.05.2019 with regard to the petitioner nos. 2 to 5, namely, Smti. Minu Malu Biswas, Shri Amaresh Biswas, Shri Ajay Biswas and Shri Sanjoy Biswas stands merged with this order.

29. The records of the aforesaid F.T. Case No. 279/2015 be returned to the learned Foreigners Tribunal no. 3rd, Morigaon forthwith along with a copy of this order.

JUDGE

JUDGE

Comparing Assistant