



IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

W.P(C) No.2407/2024

Mahammad Ali, aged about 42 years
Son of Makbul Hussain, Permanent
Resident of Village-Barbari, PS
Sipajhar in the District of Darrang
Assam.

.....Petitioner

-Versus-

- 1.** The Union of India, represented by the Secretary to the Government of India, Ministry of Home Affairs, New Delhi.
- 2.** The Election Commission of India, represented by Chief Election Commissioner, Nirbachan Bhawan, New Delhi-1
- 3.** The State of Assam, represented by the Commissioner & Secretary to the Government of Assam, Home Department, Dispur, Guwahati-6.
- 4.** The Deputy Commissioner, Darrang, Assam-784125
- 5.** The Superintendent of Police (Border), Darrang, Assam-784125
- 6.** The Co-ordinator, National Register of Citizens (NRC), Bhangagarh, Guwahati-781005

.....Respondents

- B E F O R E -

**HON'BLE MR. JUSTICE KALYAN RAI SURANA
HON'BLE MR. JUSTICE SOUMITRA SAIKIA**

For the Petitioner : Md. K. Rahman, Advocate.

For the Respondents : Mr. R. Talukdar, GA, Assam
Mr. H.K. Hazarika, Jr. Government
Advocate, Assam
Mr. G. Pegu, CGC
Mr. G. Sharma, SC, FT
Ms. P. Baruah, SC, ECI
Mr. J. Handique, SC, Revenue

Dates of hearing : **03.09.2024**
Date of Judgment & Order : **03.12.2024**

JUDGMENT & ORDER (CAV)

[Soumitra Saikia, J.]

The writ petition is directed against the order passed on 31.08.2023 by the Member of the Foreigner's Tribunal, 4th Darrang, Mangaldai, in FT 4th Case No. 618/SPR/2017. In this order, the Tribunal affirmed the State's reference against the petitioner, concluding that the petitioner had failed to discharge the burden under Section 9 of the Foreigner's Act, 1946. The Tribunal opined that the petitioner could not prove that he was born to genuine Indian parents and had acquired Indian citizenship by birth. As a result, the petitioner was declared a foreigner/illegal migrant of post 25.03.1971, leading to the filing of this writ petition challenging the Tribunal's opinion

2. Before the Tribunal, the petitioner submitted his written statements along with supporting documents. The

petitioner himself appeared as DW1 and also presented two other witnesses, DW2 and DW3. In total, the petitioner exhibited 19 documents, including his voter identity card, in support of his case before the Tribunal.

3. Ultimately, the Tribunal rejected the case presented by the petitioner and, accordingly, answered the reference in the affirmative, declaring the petitioner a foreigner/illegal migrant.

4. In the written statement, the petitioner projected that he was born and raised in the village of Baralakhaity under Rangamati Mouza, P.S. Mangaldai, District Darrang, Assam. He further stated that, due to river erosion, he and his family had relocated to the village of Barbari in 2016. The petitioner identified his grandfather as Hussain Ali, whose name appeared in the 1966 voter list for No. 54 Chenga LAC under Boguribari Mouza, specifically at Village Kachamara Nonke, listed in Part No. 129, Serial No. 25, House No. 9. He also mentioned that Hussain Ali had legacy data, indicating his residence in Kachumari village, District Barpeta, under Barpeta Revenue Circle, and that Hussain Ali was registered in the NRC. The petitioner enclosed a certificate from the Gaonburah of Baralakhaity with his written statement, affirming that the petitioner was the son of Makbul Hussain and that he had cast his vote as a resident of Baralakhaity. Additionally, the petitioner asserted that his grandfather, Hussain Ali, had voted in the 1970 election in No. 54 Chenga LAC under Boguribari Mouza at Village Kachumara Nonke, Part No.

128, Serial No. 27, House No. 9. He presented a voter list from 1977 to show that his grandfather Hussain Ali, his father Makbul Ali, and his uncle Akkabar Ali were all enrolled as voters in No. 67 Mangaldai (SC) LAC under Rangamati Mouza at Village Oporiya Chapari, Part No. 177, House No. 28, Serial Nos. 102, 105, and 106, respectively. The petitioner also presented evidence showing that his parents, Makbul Hussain and Nurjahan, were voters in the lists of 1989, 1993, and 1997. He himself was enlisted as a voter in 2005, along with his parents, wife, and brother, at Village Baralakhaity. He further demonstrated that he remained on the voter list in subsequent years 2010, 2011, 2013, 2015, 2017, 2021, and 2022. To substantiate his claim of Indian citizenship, the petitioner attached documents such as his Job Card Registration No. 0416015009006105, NRC final draft ARN No. 10832502148149701109, PAN Card, Aadhaar Card, and Ration Card, all of which he presented to establish his permanent residence and citizenship. In his evidence, the petitioner (DW1) supported his written statement and the documents he submitted. His father, Makbul Hussain, deposed as DW2. In his affidavit, Makbul Hussain confirmed that the petitioner was born and raised in Baralakhaity under Rangamati Mouza. He also corroborated the petitioner's claim that they had moved to Barbari in 2016 due to erosion in Baralakhaity. Furthermore, Makbul Hussain testified that his father, Hussain Ali, had voted in 1966 from Kachumara under Baguribari Mouza in No. 54

Chenga LAC, and that Hussain Ali's legacy data was available in the NRC. He also mentioned that the Gaonburah of Baralakhaity had issued a certificate in favor of the petitioner, affirming his citizenship. Makbul Hussain further testified that he and his wife, Nurjahan, had been enrolled as voters in the years 1989, 1993, 1997, 2005, 2010, 2011, 2015, 2017, 2021, and 2022, with no interruptions, always indicating their residence in Baralakhaity. He also confirmed that his son (the petitioner) had been issued a Job Card, PAN Card, Aadhaar Card, and was included in the NRC final draft, all of which supported the petitioner's claim of being an Indian citizen. Additionally, Makbul Hussain listed the names of his family members who were also registered in the voter lists.

5. One of his brother Ajijul deposed as DW3 in support of the petitioner supported the case as projected by the petitioner and his father.

6. The Tribunal records called for have been carefully examined by this Court. The depositions of the witnesses, namely DW1, DW2, and DW3, as presented in their evidence-in-chief, are available on record. However, it is observed that the State did not cross-examine any of these witnesses, nor did the State raise any inquiries or challenge the evidence presented before the Tribunal. The records also indicate that the State Authority conducted an inquiry and that the petitioner was duly interrogated during this process. The details of the inquiry are available in the records. The statement of the petitioner, along with those

of other witnesses, are also part of the record. During the investigation conducted by the Enquiry Officer, the petitioner failed to produce any valid documents to substantiate his claims, which led to a suspicion that he might be a foreigner or an illegal migrant. Under such circumstances his case was referred by the competent authority before the Tribunal for opinion.

7. The impugned opinion of the Tribunal has been carefully examined. It is seen that the Tribunal discarded the voter lists presented by the petitioner on the only ground that the same lists contained other names of voters other than the petitioner, his father, or his mother. However, there is no explanation as to who are the other voters. Additionally, the certificate of citizenship produced by the petitioner as Exhibit 4 was not proved, as the author of the certificate was not examined before the Tribunal. The Tribunal further noted that the petitioner failed to provide any explanation regarding the timing and circumstances of his grandfather's migration from Kachumari to Baralakhaity, nor did he clarify what happened to his grandfather after 1970. Moreover, the Tribunal rejected the petitioner's claim that his father, grandfather, and uncle were voters in the 1977 electoral roll, as the 1977 voter list was not produced to support this assertion. The Tribunal concluded that the voter lists presented were insufficient to establish a clear link between the petitioner and his projected grandfather, particularly since their names were not found in the

relevant voter lists. There was also no explanation regarding when the petitioner's father had shifted to Baralakhaity. Furthermore, the Tribunal noted discrepancies in the age of the petitioner's mother, as listed in the 1989 voter list, where her age was shown as 70 years. The Tribunal also pointed out that the evidence provided by DW2 the petitioner's father and DW3 his brother did not support the petitioner's claim. As a result, the Tribunal rejected the petitioner's case and answered the reference in the affirmative, declaring the petitioner to be a foreigner/illegal migrant.

8. The evidence projected as available in the tribunal records reveal that the Tribunal has considered the entire evidence presented by the petition.

9. The case projected by the petitioner is primarily based on the voter lists, although a certificate from the Gaonburah was also presented as an exhibit. However, in the absence of the examination of the author of the certificate, it cannot be considered as proved. This principle has long been settled by both the Supreme Court and various High Courts.

10. Mere production of a document is not sufficient; the contents of the document must be proved in a manner permissible under the law of evidence.

11. The entries made in the Gaon Burah Certificate have no probative value unless the author who had issued the certificate was examined along with all relevant records

and materials on the basis which the information in the certificate has been tendered into. The truth or otherwise of the facts certified in the said certificate must be proved by persons who can vouch for the veracity of the facts in issue on the basis of which the said certificate has been issued. In the absence of any such materials before the Tribunal his document cannot be considered to be reliable to support the contentions of the petitioner.

12. In *Rabia Khatun Vs. Union of India [WP(C) 4986 of 2016]* a Co-ordinate Bench has held that EPIC Card and PAN Card cannot be accepted as valid piece of evidence.

13. This court, in numerous judgments and orders, has held that Voter Identity Cards, Aadhaar cards, and particulars of the draft NRC are not sufficient to establish the link between the petitioner and his projected parents or grandparents, who are claimed to be citizens of India. A mere perusal of the Ration Card and the Job Card reveals that these documents do not contain any particulars that can support the petitioner's claim that he is the son of his projected parents, who are Indian citizens, or that he was born in India.

14. In *Ahitan Nessa Vs. Union of India [W.P.(C) No. 6443/2017]*, a Division Bench of this Court has held that NRC legacy data besides being inadmissible evidence, is a computer generated statement, and therefore, Sub-Section 65 B(4) of the Indian Evidence Act, 1872 would be applicable.

15. The petitioner has enclosed documents such as school leaving certificates, board certificates, and birth certificates; however, no explanation has been provided as to why these documents were not presented as exhibits before the Tribunal. Documents that were not produced before the Tribunal cannot now be examined by this Court in exercise of its jurisdiction, unless it is established that these documents although were available before the Tribunal were never considered during the proceedings. Such a situation does not arise in the present case. Upon careful perusal of the materials available in the record, it is noted that the names of the petitioner's projected grandfather and grandmother appear in the voter lists of 1966 and 1970 from village Kachamara Nonke. However, the voter list of 1977, which was exhibited before the Tribunal to project the names of the grandfather namely Hussain Ali, grandmother namely Sahera, and father namely Makbul, pertains to village Oporiya Chapari under Mouza Rangamati, District Darrang.

16. In the written statement, as well as in the evidence presented by affidavit, the petitioner claimed that his father and grandfather had shifted from Kachumari Nonke to Baralakhaity under Baguribari Mouza in the Barpeta Sub-division (as it then was), and later to Baralakhaity under Rangamati Mouza in the Mangaldai Sub-Division. However, there is no mention or explanation regarding any period during which the petitioner's family resided in the village Oporiya Chapari under Rangamati Mouza before moving to

Baralakhaity. In the absence of such an explanation, the voter list of 1977, which the petitioner claims includes the names of the petitioner's grandfather and father from the village of Oporiya Chapari, raises doubts regarding the accuracy and linkage of these records to the petitioner's claim.

17. All the voter lists produced are after the cutoff date of 25.03.1971. Between 1970 and 1989, only voter list showing the names of the petitioner's projected father and grandparents is the voter list of 1977, which enlisted them as voters showing them to be residents of Oporiya Chapari in the Mouza of Rangamati. However, there is no explanation as to why their names do not appear in any voter lists from 1977 until 1989. Furthermore, the Tribunal records do not indicate any application having been filed seeking the production of additional documents to support the petitioner's claims. While the petitioner now presents several documents before the court, it is not evident from the Tribunal records that these documents were previously submitted or considered before the Tribunal.

18. While it is true that strict rules of evidence are not always applied before the Tribunal in matters of this nature, it is important to remember that the standard of proof before the Tribunal is based on the preponderance of probabilities, and not beyond a reasonable doubt. The burden of proof lies on the petitioner in proceedings before the Tribunal under Section 9 of the Foreigner's Act, 1946. How this burden is to be discharged has been elaborated

upon in various judgments of both this Court and the Apex Court. For instance, in *State of Assam and Others Vs. Moslem Mandol and Others* reported in 2013 (1) GLT 809, a Full Bench of this Court extensively discussed the nature and extent of the burden of proof that must be discharged by a person appearing before the Tribunal.

19. As discussed above, the Gaonburah certificate was never proved in accordance with the requirements of law, and therefore, it cannot be relied upon by the petitioner to support his case. Similarly, the Voter Identity Card, Ration Card, draft NRC, and Job Card are not documents that can substantiate the petitioner's claim of being a citizen of India. The only documents remaining that could potentially support the petitioner's case are the voter lists presented before the Tribunal.

20. The burden of proof that the proceedee is required to discharged is in respect of the link between his parents or grandparents and their status as Indian citizens. In doing so, the proceedee must demonstrate that, as a descendent of these Indian citizens, he too acquired citizenship by birth.

21. The petitioner has attempted to discharge the burden of proof by presenting 19 exhibits and one document. However, as discussed earlier, except for the voter lists, the other documents do not substantiate the petitioner's claims. The voter lists are crucial, particularly the ones from 1966, 1970, and 1977, which could have linked the petitioner to his grandparents and father, but the

petitioner's family's shifting from one village to another remains unexplained, specifically the shifting from Kachumari Nonke to Oporiya Chapari before finally settling in Baralakhaity. The voter lists of 1966 and 1970 contain the names of the petitioner's grandparents, while the 1977 voters list includes his father and grandparents, although there are discrepancies in the spelling of names and ages. However, the absence of any explanation regarding the family's stay in Oporiya Chapari before their shifting to Baralakhaity raises doubts about the petitioner's claims. Notably, the petitioner and his witnesses namely his father and brother adduced evidence-in-chief by affidavits before the Tribunal. The evidences adduced by affidavits was in support the petitioner's claims, but the State did not cross-examine these witnesses. In the absence of any contradiction or cross-examination, the evidence presented by the petitioner should have been accepted by the Tribunal, as it stands unchallenged. The petitioner's father's age, as reflected in his affidavit filed with the court, suggests he was born around 1957, which would have made him eligible to be enlisted as a voter in 1978. However, since the 1978 voter list was not produced, the petitioner relies on the 1977 list to establish him link to his father and to his grandparents. While there are discrepancies in the records, particularly regarding the family's residence in Oporiya Chapari, this issue was not addressed by the Tribunal in the impugned order. Further, the Tribunal failed to properly consider the evidence

adduced by the petitioner and his family, which should have been accepted, especially since there was no cross-examination or rebuttal. If the witness is not put to any cross-examination, the evidence adduced by the witness in examination-in-chief cannot be ignored. Therefore, in the absence of any rebuttal or challenge to the evidence, the petitioner's case, based on the available records, should be given due consideration.

22. Under the circumstances, this Court is of the view that the impugned opinion of the Tribunal fails to adequately address why the evidence of DW1, DW2, and DW3 should not be accepted, especially in the absence of cross-examination or any legal contradiction. This conclusion has been reached considering the peculiar facts of the case, particularly regarding the projected date of birth of the petitioner which is 1982 and the approximate birth year of the petitioner's father is 1957. Given these facts, it would be impossible for any voter list prior to the cutoff date of 25.03.1971 to show the names of the petitioner and his father together as voters.

23. The Tribunal rejected the voter lists, stating that although the petitioner mentioned in his written statement that his father, grandfather, and uncle had voted in 1977, he failed to adduce any evidence in this regard. In the opinion of this Court, this conclusion does not appear to be correct, as it overlooks the evidence that was properly presented before the Tribunal.

24. Under such circumstances, this Court is of the view that the Tribunal fell in error while appreciating the evidence, to that extent the impugned order fails for any justification for the rejection of the evidence adduced by DW1, DW2, and DW3 in their evidence-in-chief, especially in the absence of any contradictions through cross-examination or even through examination by the Tribunal itself. Given that the evidence presented by these witnesses were not contradicted in the absence of any cross examination, the Tribunal's failure to explain why this piece of evidence should not be accepted calls for reconsideration. In light of the fact that the issue at hand concerns the fundamental and valuable right of citizenship of the petitioner, the Court deems it necessary to set aside the impugned order dated 31.08.2023. The matter is therefore remanded to the Tribunal for re-consideration and a proper re-assessment of the evidence presented before it.

25. The writ petition therefore stands allowed. The petitioner will appear before the tribunal on 16.12.2024 and the tribunal to proceed in the matter afresh after considering the evidences produced as per procedure prescribed in the law.

26. Tribunal records be returned back forthwith by the Registry.

JUDGE

JUDGE

Comparing Assistant