

GAHC010096942018



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

Case No. : WP(C)/3001/2018

HARKA BAHADUR CHETRY
S/O- HARI BHAKTA CHETRY, R/O- VILL- BOKAGAON CHAPORI, P.S.
CHARIDUAR, DIST- SONITPUR, ASSAM

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REP. BY THE COMMISSIONER AND SECRETARY, GOVT. OF ASSAM, HOME
DEPTT., DISPUR, GHY-6

2:THE DY. COMMISSIONER
TEZPUR
DIST- SONITPUR
ASSAM
PIN-784001

3:THE SUPERINTENDENT OF POLICE
TEZPUR
DIST- SONITPUR
ASSAM
PIN-784001

4:THE ELECTORATE REGISTRATION
TEZPUR
DIST- SONITPUR
ASSAM
PIN-784001

5:THE UNION OF INDIA
REP. BY THE SECRETARY
MINISTRY OF HOME AFFAIRS
NEW DELHI-110001

6:THE STATE CO-ORDINATOR OF NRC

ASSAM
P.O. AND P.S. BHANGAGARH
GHY-5
DIST- KAMRUP (M)
ASSA

Advocate for the Petitioner : MR. P N SHARMA,

Advocate for the Respondent : ASSTT.S.G.I., SC, NRC,SC, ELECTION COMMISSION.,SC, F.T

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

ORDER

Date : 26.07.2024

[S.Saikia, J]

Heard Mr. R.P. Sarma, learned Senior Counsel assisted by Mr. P.N. Sarma, learned counsel for the petitioner. Also heard Mr. S.S. Roy, learned CGC; Mr. J. Payang, learned Standing Counsel, Foreigners Tribunal; Mr. A.I. Ali, learned Standing Counsel, Election Commission of India and Mr. H.K. Hazarika, learned Junior Government Advocate.

2. Pursuant to a reference made by the Superintendent of Police, Sonitpur, Tezpur, the matters were initially placed/referred to the IMDT (as it then was). The matters were placed before the Foreigners' Tribunal, Tezpur pursuant to the IMDT Act being declared *ultra vires* by the Hon'ble Supreme Court. Notice was issued to the petitioner and the petitioner contested the case by filing his written statement and adduced his defence evidence in support of his case. However, the Tribunal opined that the petitioner failed to discharge his burden to prove his citizenship. The Tribunal declared him to be foreigner/illegal migrant post 25.03.1971 stream. Being aggrieved, the petitioner has preferred the instant writ petition.

3. By order dated 16.05.2018 records of the Foreigners' Tribunal records were called for. As the same have been requisitioned and are available before this Court, the matter is taken up for disposal.

4. The learned counsel for the petitioner submits that there are sufficient documents to project that the father of the petitioner namely, Hari Bhakta Chetry was present in the state prior to 1971. The learned counsel submits that the Voter's List of 1965 enlists the name of the father of the petitioner namely, Hari Bhakta Chetry as serial No. 108. Copy of this Voter's List is enclosed by the petitioner as Annexure 'A' to the writ petition.

5. The learned counsel for the petitioner submits that the Voter's List of 1985 enlists the name of the mother of the petitioner as serial No. 1124. It is also submitted by the learned counsel for the petitioner that in the said voter list the name of the petitioner and his sister's name was wrongly recorded as Birkha Bahadur and Damaru Jumari instead of Harka Bahadur and Damaru Kumari. The learned counsel also refers to the Voter's List of 2017 pertaining to Rangapara, 74, wherein the name of the petitioner is shown at Serial No.281 along with his father's name. It is submitted that when the petitioner's mother tongue is "Nepali" and he was born and educated in Assam, the Tribunal could not have ignored these facts and evidences to arrive at a conclusion that the petitioner is an illegal migrant who had entered Assam post March, 1971. It is submitted that since the petitioner's mother tongue is shown to be "Nepali" he belongs to the "Gorkha" Community.

6. The learned counsel for the petitioner further submits that this Court has held in *Indira Newar & Ors vs- Union of India & Ors* reported in **2019 SCC**

OnLine Gau 5890 : (2020) 5 Gau LR 502 and other connected bunch of writ petitions that persons belonging to the Gorkha community are to be given the benefit of the Central Government Notification dated 24.09.2018 in respect of citizenship.

7. The learned counsel for the parties have been heard. The pleadings on record as well as the Tribunal records requisitioned have been duly perused.

8. From the Tribunal records it is seen that pursuant to a doubt expressed by the Electoral Registration Officer for 74 Rangapara, Assembly Constituency in Assam, in respect of the citizenship of the petitioner, the matter was forwarded to the Superintendent of Police, Tezpur for deciding the question whether the petitioner is a citizen of India or not.

9. The Superintendent of Police, Tezpur could not ascertain the nationality of the person but instead strongly suspected that the petitioner was an illegal migrant. Consequently, the matter was referred to the IMDT Tezpur (as it then was). Consequent to the Judgment of the Apex Court declaring the IMDT to be ultra virus, the matter was registered as F.T. DC Case No. 522/2016. This case was taken up by the Foreigners' Tribunal-7, Tezpur, Balipara, and decided by the Tribunal vide order dated 07.07.2017 which is impugned in the present proceedings.

10. It is seen from the Foreigners' Tribunal records requisitioned that in respect of the petitioner, the Local Verification Officers' Report did not reveal anything to suggest that the petitioner was an illegal migrant from the specified territory. Rather at serial No.13, Enquiry Officers' assessment on the dialect

spoken is shown as “*Nepali*”. At serial No.15, in reply to the query “*whether migrated into Assam*”, the answer was shown to be in negative. No other finding is seen recorded in the Local Verification Officers’ Report as is evident from the Tribunal records.

11. Be that as it may pursuant to Notice being issued the Tribunal on the petitioner vide Notice dated 06.02.2017, the petitioner appeared before the Tribunal and contested the case.

12. The Tribunal upon considering the materials before it held that the proceedee had failed to prove his case and therefore the proceedee had failed to discharge the burden under Section 9 of the Foreigners’ Act. The Tribunal held that the proceedee failed to avail the opportunities given to him to prove his case. Accordingly, Foreigners’ Tribunal opined that the petitioner is Foreigner of Post 1971 stream.

13. At this stage a reference to the Judgment of this Court rendered in *Indira Newar and Ors (Supra)* would be apposite. A Co-ordinate Bench of this court in that case decided a similar question wherein the contentions of the petitioners therein were that the mother tongue of the petitioners were “Nepali” which is a language spoken by the citizen of neighbouring country—Nepal and is also included as language in the 8th schedule of the Constitution of India and therefore they could not have been treated to be migrants from the ‘*Specified Territory*’ i.e. Bangladesh. This court upon perusal of the information recorded by the Referral Authorities came to the conclusion that there was no suspicion expressed by the Referral Authorities nor any findings recorded by the Tribunals that any of the petitioners therein were persons who had come into Assam from

the '*Specified Territory*' as defined under Section 6A (1)(c) of the Citizenship Act, 1955. This Court held that unless there are findings arrived at by the Referral Authorities and/or by the Tribunal that the petitioner migrated to Assam from the '*Specified Territory*' namely, from any place in the country of Bangladesh, the benefit of the Notification dated 24.09.2018 issued by the Government of India by the Ministry of Home Affairs that it will not be appropriate to declare all members of Gorkha community hailing from Nepal to be from the '*Specified Territory*' as defined under Section 6A (1)(c) of the Citizenship Act, 1955, cannot be denied. Only those persons who came from the '*Specified Territory*' and are living in the State of Assam can be treated as persons migrating from the '*Specified Territory*' in accordance with Section 6A of the Citizenship Act, 1955. This Court held that only cases of members of Gorkha community living in Assam, who do not fall in any of the categories mentioned in the Notification dated 24.09.2018 issued by the Home Ministry, 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 Foreigners Act, 1946.

14. As discussed above from the records of the Tribunal it is seen that there is no other finding in the Local Verification Officer's report besides the particulars that the petitioner's dialect spoken is 'Nepali'. The report also reveals that he did not illegally migrate from the specified territory. No finding to that effect is also recorded in the order dated 07.07.2017 passed by the Tribunal and impugned in the present proceedings. The respondent counsel also does not dispute the contention that if the petitioner indeed belongs to the Gorkha community then he will have to be given the benefit of the Central Government Notification dated: 24.09.2018.

15. Coming to the facts of this case, from the Verification Report, there are no materials seen which can prima facie suggest that the petitioner had migrated from the '*Specified Territory*'. It is not the view of this Court that people whose mother tongue is "Nepali" can under no circumstances be from the '*Specified Territory*'. But from the materials available from the Tribunal Records and the facts pleaded before this Court, it can be said that there is a strong presumption in favour of the writ petitioner that he did not migrate from the '*Specified Territory*'.

16. Accordingly, in view of the above discussions, and in view of the Judgment dated 29.11.2019 passed in the case of *Indira Newar (Supra)* by a Co-Ordinate Bench, this writ petition is allowed. It is evident that the present petitioner is also similarly placed and is therefore entitled to the benefits conferred by the Notifications dated 24.09.2018. The respondents do not dispute the settled position of law as had been laid down by this Court in *Indira Newar (supra)*. Accordingly, for the reasons elaborated above, this writ petition is allowed. The impugned order dated 07.07.2017 passed by Foreigners' Tribunal-7, Tezpur, at Balipara in F.T. DC Case No. 522/2016 passed is hereby set aside and quashed. It is held that the petitioner will be entitled to the benefit of the Notification dated 24.09.2018 issued by the Central Government.

17. Records of the Tribunal be sent back along with a copy of this order.

18. This writ petition is accordingly allowed as indicated above. No order as to cost.

JUDGE

JUDGE

Comparing Assistant