

GAHC010101202018



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

**Case No. : WP(C)/3159/2018**

MALEKA KHATOON  
W/O- SAFIQL HAQUE, R/O- DABLUGAON, P.S- KAMPUR, DIST- NAGAON,  
ASSAM

VERSUS

THE UNION OF INDIA AND 6 ORS.  
REP. BY THE SECRETARY TO THE GOVT OF INDIA, DEPTT OF HOME  
AFFAIRS, NEW DELHI, INDIA

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

3:ELECTION COMMISSION OF INDIA  
REP. BY THE ELECTION OFFICER  
NAGAON  
ASSAM

4:NATIONAL REGISTER OF CITIZENS  
ASSAM  
REP. BY THE STATE COORDINATOR  
1ST FLOOR  
ACHYUT PLAZA  
BHANGAGARH  
GUWAHATI  
ASSAM

5:THE DEPUTY COMMISSIONER

NAGAON  
ASSAM

6:THE DISTRICT FOREIGNERS TRIBUNAL  
NAGAON  
ASSAM

7:THE SUPERINTENDENT OF POLICE(B)  
NAGAON  
ASSAM  
PIN- 78200

**B E F O R E**

**HON'BLE MR. JUSTICE MANASH RANJAN PATHAK**

**HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI**

Advocates for the petitioner : Shri A. Chamuah, Adv.  
Advocates for the respondents : Ms. A. Verma, SC- Home Dept.  
Shri P. Sarma, Add. Sr. GA  
Shri A.I. Ali, SC, ECI.

Date of hearing : **28.02.2024**

Date of Judgment : **07.03.2024**

**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 23.02.2011

passed by the learned Foreigners Tribunal Nagaon in F.T. Case No. 41/2003. By the impugned judgment, the petitioner who was the proceedee before the learned Tribunal has been declared to be a foreigner post 25.03.1971. As per the projection made in the petition, the aforesaid order is an *ex-parte* one.

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

(i) The reference was made by the Superintendent of Police (B), Nagaon District, against the petitioner giving rise to the aforesaid F.T. Case No. 41/2003.

(ii) As per requirement u/s 9 of the Foreigner's Act, 1946 to prove that the proceedee is not a foreigner, the petitioner had filed the written statement on 17.04.2009 along with certain documents. Thereafter, though sufficient opportunity has been given to the petitioner till 13.12.2010 for filing of evidence on affidavit, neither the petitioner nor his counsel had appeared and accordingly on 23.02.2011, the impugned order has been passed.

(iii) The learned Tribunal after noticing the aforesaid 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 petitioner as opposite party had failed to discharge the burden cast upon her and accordingly, the opinion was rendered declaring the petitioner to be a foreign national post 25.03.1971.

**3.** We have heard Shri A. Chamuah, learned counsel for the petitioner. We have also heard Ms. A. Verma, learned Standing Counsel, Home Department, Assam, Shri H. Kuli, learned counsel appearing on behalf of Shri A.I. Ali, learned Standing Counsel, Election Commission of India and Shri P. Sarma, learned

Additional Senior Government Advocate, Assam.

**4.** Shri Chamuah, the learned counsel for the petitioner has submitted that there are sufficient and cogent reasons for which the petitioner could not contest the proceedings after filing of the written statement. He submits that there are documents to show that the petitioner is a *prima facie* a citizen of the country. By referring to certain voter lists, Shri Chamua submits that the said documents would show that the petitioner is a citizen of India. He further submits that an application under Order 47, Rule 1, read with Section 151 of the Code of Civil Procedure was filed for review of the *ex-parte* order dated 23.02.2011. However, the learned Tribunal had rejected the said application which was registered as Misc. Case No. 10 / 2015 vide order dated 15.09.2016.

**5.** Shri Chamuah further submits that the documents which are available and annexed to the writ petition would *ex facie* demonstrate her citizenship. In this connection, the Voter Lists of 1965 and 1970 have been referred to containing the name of the projected father of the petitioner. Reference has also been made to the Voter Lists of 1993, 1997 and 2011 by contending that the same contain the name of the petitioner.

**6.** The learned counsel for the petitioner has accordingly submitted that she was deprived from an opportunity to contest the case which proceeded *ex parte* and therefore, the instant petition may be allowed and the matter be remanded back for a fresh adjudication on merits.

**7.** *Per contra*, Shri J. Payeng, learned Standing Counsel of the Department has however submitted that the reasons cited are not at all sufficient for interfering with the order dated 23.02.2011. He submits that there is a clear admission on the part of the petitioner of receipt of notice of the proceedings and the

petitioner had also filed her written statement on 17.04.2009. By referring to the said written statement which has been brought to record by way of an additional affidavit, the learned Standing Counsel has submitted that there is no disclosure at all regarding the claim for citizenship of the petitioner. The said written statement also does not refer to any documents in support of the aforesaid claim. It is also submitted that a proceeding before a Foreigners Tribunal cannot be an endless process and in this case in spite of granting adequate opportunity, the petitioner had neglected in contesting the case. He accordingly submits that there is no error on the order dated 23.02.2011 of the learned Tribunal and accordingly the writ petition is required to be dismissed. He also submits that the order dated 15.09.2016 passed by the Tribunal by which the application for review was dismissed has not been challenged.

**8.** Rival submissions made on behalf of the parties have been duly considered and the materials placed on record have been carefully examined.

**9.** 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.

**10.** 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."*

**11.** It is an admitted fact that the petitioner had not only received notice of the proceedings before the learned Foreigners Tribunal but had also filed her written statement on 17.04.2009. Though the aforesaid written statement was not annexed to the writ petition initially, vide an additional affidavit, the said written statement has been brought on record. It appears that after filing of the written statement, the petitioner did not appear before the Tribunal any further. A perusal of the written statement would however show that there is no disclosure of the relevant facts at all by the petitioner towards her claim for citizenship. There is no reference to any documents in support of the said claim.

**12.** In the case of ***Rashminara Begum vs. Union of India*** reported in ***2017 (4) GLT 346***, it has been laid down that it is the duty of a proceedee to make all disclosures in the written statement.

**13.** In the case of ***Ijjat Ali Vs. Union of India [Order dated 12.10.2020 in WP(C)/8361/2019]*** it has been laid down that a proceeding before the Foreigners' Tribunal cannot be an endless exercise. The relevant part of the aforesaid judgment is extracted herein below-

*“Having regard to the undisputed facts, as above, we find that sufficient opportunities had been granted to the petitioner to establish his claim as not being foreigner or to refute the allegation that he had illegally entered into the territory of India after 25.03.1971. In this context, we may observe that although the procedure of identification and for declaring an individual to be a foreign national cannot be relegated to a mechanical exercise and that fair and reasonable opportunity must be afforded to a proceedee to establish claim that he/she is a citizen of India, however, such grant of opportunity cannot be enlarged to an endless exercise. A person who is not diligent and/or is unmindful to take steps to safeguard his interest, he does so at his own risk and peril.”*

**14.** In the case of ***Sajiran Nessa Vs. UOI [Order dated 05.01.2021 in WP(C)/1293/2020]*** the meaning of sufficient opportunities *qua* a proceedee before a Foreigners' Tribunal have been explained. For ready reference, the relevant part is extracted herein below-

*“Having regard to the facts, as above, we find that sufficient opportunities had been granted to the petitioner to establish her claim as not being a foreigner or to refute the allegation that she had illegally entered into the territory of India after 25.03.1971. In this context, we may observe that although the procedure of identification and for declaring an individual to be a foreign national cannot be relegated to a mechanical exercise and that fair and reasonable opportunity must be afforded to a proceedee to establish claim that he/she is a citizen of India, however, such grant of opportunity cannot be enlarged to an endless exercise. A person*

*who is not diligent and/or is unmindful to take steps to safeguard his/her interest, he/she does so at his own risk and peril. In the instant case several opportunities were granted to the petitioner to establish her claim, which she utterly failed to do so. In this context, we may observe that in a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964, the primary issue for determination is whether the proceedee is a foreigner or not. The relevant fact being especially within the knowledge of the proceedee, as such, the burden of proving citizenship absolutely rests upon the proceedee, notwithstanding anything contained in the Indian Evidence Act, 1872. This is mandated under section 9 of the aforesaid Act, 1946. The said position would not change even in an ex-parte proceeding before the Tribunal as the burden never shifts but continues to be upon the proceedee. In a situation where no evidence is adduced or the burden is not discharged, the only option left to the Tribunal would be to declare the proceedee to be a foreigner, based on the grounds of reference upon which appropriate proceeding was initiated, where notice was issued and duly served upon the proceedee. In the instant case, the petitioner utterly neglected to participate/contest in the proceedings.”*

**15.** This Court has also noticed that after about five years from the opinion, Misc Case No. 10 / 2015 was filed for review of the said order. The said application was however rejected by the learned Tribunal, vide order dated 15.09.2016. This Court has also noticed that the said order of dismissal of the Misc Case is not the part of challenge in this writ petition.

**16.** Though this Court is of a *prima facie* opinion that no case for interference

is made out as the reasons cited for non-appearance before the learned Tribunal are absolutely vague and unacceptable and rather the same reflects the negligence on the part of the petitioner to contest the proceedings, this Court, in the interest of justice have also looked into the materials which have been annexed to the writ petition. In the writ petition, voters list of 1965 and 1970 have been annexed which according to the petitioner contains the name of one Lokman Ali who has been projected to be the father of the petitioner. However, there is not even a single document to show any link of the petitioner with the said Lokman Ali. The rest of the voters lists are post 1971, i.e., of 1993, 1997 and 2011. In the year 1993, the voters lists contain the name of the petitioner with her alleged husband and the voters list of 1997 and 2011 contain the name of the petitioner. None of the aforesaid documents establish any semblance of link of the petitioner to her projected father and therefore there is no material to even indicate that the petitioner is a citizen being the daughter of the said Lokman Ali. As indicated above, the voters list of the petitioner is from the year 1993 onwards and not prior to that. This Court has also noticed that the age of the petitioner has been disclosed as 68 years in 2018 as has been declared in the affidavit filed in support of the writ petition. There is no explanation as to whether, as to why the voters list prior to 1993 are not been annexed.

**17.** This Court has carefully looked into the grounds cited for not contesting the proceedings. None of the grounds are acceptable, cogent and reliable and the same, on the other hand indicate utter negligence on the part of the petitioner to contest the proceedings.

**18.** Under those facts and circumstances, we are of the opinion that no interference is called for with the order dated 23-02-2011 passed by the learned Foreigners Tribunal Nagaon in F.T. Case No. 41/2003. We have also noticed that

there is no prayer on the part of the petitioner for giving further time for her registration in the voters list in the FRRO. Even otherwise, it appears that more than 13 years have passed since the order of the opinion and the petitioner is availing full benefits that of a citizen and therefore this Court is not inclined to make any observation in that regard. This Court has noticed that a time is prescribed in the statute holding the field to get oneself registered which the petitioner has failed to do.

**19.** In view of the aforesaid facts and circumstances, we are of the opinion that the final impugned order dated 23.02.2011 passed by the learned Foreigners Tribunal Nagaon in F.T. Case No. 41/2003 does not call for any interference. Accordingly, this writ petition being devoid of merits stands dismissed.

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

**21.** Let a copy of this be transmitted to the learned Foreigners Tribunal Nagaon and concerned authorities including the Superintendent of Police (Border), Nagaon.

**JUDGE**

**JUDGE**

**Comparing Assistant**