

GAHC010104442019



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

Case No. : WP(C)/3193/2019

TAHIRAN NESSA
W/O- ABDUL SAMAD @ ABDUL SAMAD SHIKDAR, D/O- ABDUL MAZID,
VILLAGE- BALAVITA, MOUZA- DAMKA CHAKA BAUSHI, DISTRICT-
BARPETA, ASSAM, PIN- 781301.

VERSUS

THE UNION OF INDIA AND 5 ORS.
REPRESENTED BY THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY
OF HOME AFFAIRS, SHASTRI BHAWAN, NEW DELHI-1.

2:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI-6.

3:THE DEPUTY COMMISSIONER
BARPETA
P.O. AND DISTRICT- BARPETA
ASSAM
PIN- 781301.

4:THE SUPERINTENDENT OF POLICE (B)
BARPETA
P.O. AND DISTRICT- BARPETA
ASSAM
PIN- 781301.

5:THE ELECTION COMMISSION OF INDIA

NEW DELHI
TO BE REPRESENTED BY CHIEF ELECTION COMMISSIONER OF INDIA
NEW DELHI-1.

6:THE STATE COORDINATOR OF NATIONAL REGISTRATION
ASSAM
BHANGAGARH
LACHIT NAGAR
GUWAHATI-5

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 M. Hussain, Adv.
Advocates for the respondents : Shri G. Sarma, SC- FT.
Shri P. Sarma, Addl. Sr. GA – Assam
Shri A.I. Ali, SC, ECI
Date of hearing : 22.02.2024
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 18.02.2019 passed by the learned Foreigners Tribunal no. 9th, Barpeta in F.T. 9th (BPT) Case No. 174/2017. 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.

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), Barpeta District, against the petitioner giving rise to the aforesaid F.T. 9th (BPT) Case No. 174/2017.

(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 13.10.2017 along with certain documents.

(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 petitioner as opposite party had failed to discharge the burden cast upon him and accordingly, the opinion was rendered declaring the petitioner to be a foreign national post 25.03.1971.

3. We have heard Shri M. Hussain, learned counsel for the petitioner. We have also heard Shri G. Sarma, 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 Government Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 02.02.2024.

4. Sri Hussain, the learned counsel for the petitioner has submitted that to establish the linkage of her with her parents, she has produced the voter list of 1966, allegedly containing the names of the projected grandfather and grandmother. He has also referred to the voter list of 1997, allegedly containing the name of the projected father. It is submitted that apart from the two voters list, the Certificate of the Gaonburah of Charge No. 28 Bornagar Circle (Village-

Balabhita) and the Certificate by the Secretary of the No.3 Golapara Banglapara Gaon Panchayat have been proved and therefore, there was no occasion on the part of the learned Tribunal to arrive at the impugned findings against the petitioner. In this regard, he has referred to the evidence on affidavit of the four numbers of witnesses and also the following documentary evidence.

- i. Certified copy of Electoral Roll of 1966 (Ext-A)
- ii. Certified copy of Electoral Roll of 1997 (Ext-B)
- iii. Electoral Photo I.D. Card of Manacher Ali (Ext-C)
- iv. Electoral Photo I.D. Card of Ancher Ali (Ext-D)
- v. Electoral Photo I.D. Card of Nurul Islam (Ext-E)
- vi. Ration Card of Moyful (Ext-F)
- vii. Electoral Photo I.D. Card of Abdul Mazid (Ext. G)
- viii. Ration Card of petitioner (Ext.H)
- ix. 3 No. Goalpara Banglapara G.P. Certificate of (Ext-I)
- x. Certificate of Gaonburah (Ext. K)
- xi. Electoral Photo I.D. Card of Abdul Mazid (Ext.L)
- xii. Register book of Gaonburah of village-Balavita (Ext. M).

5. The learned counsel for the petitioner accordingly submits that the impugned opinion dated 18.02.2019 be interfered with and the petitioner be declared as a citizen of India.

6. *Per contra*, Sri G. Sharma, the learned Standing Counsel, Home Department has submitted that none of the documents produced by the petitioner before the Tribunal and even in this petition are of any evidentiary value. He submits

that the voters lists of 1966 and 1997 are not relevant as those do not contain the name of the petitioner and in any case, both the voters lists are uncertified copies. He submits that there is an unexplained gap in producing the voters lists of relevant years.

7. It is also submitted that translated copies of voters list cannot be treated as certified copies and therefore, cannot be treated as secondary evidence as per the Evidence Act. Reference has also been made to Section 6A (2) of the Citizenship Act, 1955 which lays down the requirement of continuous stay. He further submits that a document has to be proved by contemporaneous records and cannot be on the basis of the personal knowledge of the maker of such documents.

8. 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.

9. In support of his submissions, Shri Sarma, the learned Standing Counsel has placed reliance upon the following case laws-

(i) *Isiran Nessa vs. Union of India & Ors. [Order dated 10.04.2018 passed in WP(C)/2460/2016]*

(ii) *(2019) 5 GLR 768 (Monoduti Nandi vs. Union of India)*

10. In the case of ***Isiran Nessa*** (supra), it has been laid down that translated copy of a voter list cannot be treated as an evidence.

11. In the case of ***Monoduti Nandi*** (supra), the requirement of continuous stay has been emphasized so as to meet the requirement of establishing

citizenship. In this case, there is a long gap from 1970 to 1985 with regard to the voter list of the projected father. A detailed discussion on the provisions of Section 6 A of the Citizenship Act has also been made in the said decision, the relevant part of which is extracted herein below:

“6. We have perused the provisions of Section 6A(3) which is as follows:

(3)Subject to the provisions of sub-sections (6) and (7), every person of Indian origin who—

(a) came to Assam on or after the 1st day of January, 1966 but before the 25th day of March,1971 from the specified territory; and

(b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and

(c) has been detected to be a foreigner, shall register himself in accordance with the rules made by the Central Government in this behalf under section 18 with such authority (hereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll for any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom. Explanation.—In the case of every person seeking registration under this sub-section, the opinion of the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 holding such person to be a foreigner, shall be deemed to be sufficient proof of the requirement under clause (c) of this sub-section and if any question arises as to whether such person complies with any other requirement under this sub-section, the registering authority shall,—

(i) if such opinion contains a finding with respect to such other requirement, decide the question in conformity with such finding;

(ii) if such opinion does not contain a finding with respect to such other requirement, refer the question to a Tribunal constituted under the said Order hang jurisdiction in accordance with such rules as the Central Government may make in this behalf under section 18 and decide the question in conformity with the opinion received on such reference.

7. The requirement of registering with the Foreigners Registration Authority under Section 6A(3) of the Citizenship Act is subject to the following conditions precedent:

(i) that the proceedee came to Assam after 01.01.1966 but before 25.03.1971;

(ii) and since the date of his entry into Assam, been ordinarily resident in Assam; and

(iii) has been detected to be a foreigner.

8. In the instant case, as per the order of the Tribunal dated 16.06.1993, it is taken note of that there is no finding of a fact that since the date of their entry into Assam, the petitioners had ordinarily been residing in Assam. The only finding arrived is that the petitioners have entered India between 01.01.1966 and 25.03.1971. As the requirement of the conditions precedent of Section 6 A(3) had not been fulfilled in the case of the petitioners as revealed from the order of the Tribunal, we are of the view that there is a requirement of law to arrive at a finding of fact that the petitioners have ordinarily been residing in Assam since the date of their entry."

12. The rival contentions made by the learned counsel for the parties have been duly considered. The records of the Tribunal placed before this Court have been carefully perused.

13. 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.”

14. 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."

15. 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.

16. 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."

17. This Court has noticed that in the Written Statement filed, no date of marriage has been mentioned. In the Voters List of 1997, the name of the petitioner is not there though it is claimed that the name of the projected father of the petitioner is there. Considering the present age of the petitioner, her name ought to have been reflected in the voters list of 1997 which has not been there.

18. This Court has also noticed that both the voters list of 1996 and 1997, apart from not being relevant, are uncertified copies and only translated copies. This Court finds force in the argument of Shri G. Sharma, the learned Standing Counsel, who by relying upon the case law of ***Isiran Nessa*** (supra) has submitted that such copies do not have any evidentiary value. The deposition of the Secretary of the Gaon Panchayat is clear that he does not have the contemporaneous records and therefore, the Certificate issued by him as Exhibit-I has been rightly discarded by the learned Tribunal.

19. As regards the Certificate of the Gaonburah, this Court has noticed that the Gaonburah is of a different village. Further, there is no statement in the Certificate as to how he knows that the petitioner is the daughter of A. Mazid. The Gaonburah, in fact, in his cross-examination has admitted that he has been keeping data only from the year 2015.

20. This Court has also noticed that the age of the father has been declared to be 58 years in the year 2018 and making a rough deduction, his year of birth would be approximately 1960. The said year of birth is not at all consistent with the voter list of 1997 wherein names of certain persons who are projected to be

the son of A. Mazid appears.

21. This Court finds force in the contention of the learned Standing Counsel who had cited the case laws of ***Isiran Nessa*** (supra) and ***Monoduti Nandi*** (supra) with regard to the procedure to be followed for proving a voter list as well as of the aspect of requirement of continuous stay.

22. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 18.02.2019 passed by the learned Foreigners Tribunal no. 9th, Barpeta in F.T. 9th (BPT) Case No. 174/2017 does not call for any interference. Accordingly, this writ petition being devoid of merits stands dismissed.

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

24. The records of F.T. 9th (BPT) Case No. 174/2017 be returned to the Foreigners Tribunal No. 9th Barpeta forthwith along with a copy of this order. Copy of this order be also forwarded to the Superintendent of Police (Border) Barpeta for information.

JUDGE

JUDGE

Comparing Assistant