

GAHC010127802017



IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)
WP(C)/2480/2017

Hasina Khatun
W/O Nur Ali,
D/O Late Kapasu Sheikh,
Village-Kheluapara, Part-IV,
P.O. Kheluapara, P.S. Jogighopa,
District Bongaigaon

.....Petitioner

-Versus-

1. The Union of India,
Represented by the Secretary to the Ministry of
Home Affairs,
Government of India, Sastri Bhawan,
New Delhi.
2. The State of Assam,
Represented by the Commissioner and
Secretary to the Government of Assam
Department of Home,
Dispur-Guwahati-6.
3. The Deputy Commissioner,
Bongaigaon
P.O. and District-Bongaigaon
Assam.
4. The Superintendent of Police (B),
Bongaigaon P.O. and District-Bongaigaon
Assam.

.....Respondents

For Petitioner : Ms. R. Choudhury, Advocate
For Respondent(s) : Mr. S. K. Mehdi, CGC (R.1)
Mr. J. Peyang, SC, Home Department (R.2 & 4)
Mr. H. K. Hazarika, Government Advocate (R.3)
Mr. H. Kuli, SC, ECI (R.5)

Date of Judgment : **20.09.2024**

BEFORE
HON'BLE MR. JUSTICE MANASH RANJAN PATHAK
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

JUDGMENT

(MRIDUL KUMAR KALITA, J)

1. Heard Ms. R. Choudhury, learned counsel for the petitioner. Also heard Mr. S. K. Mehdi, learned Central Government Counsel, appearing for Respondent No.1, Mr. J. Peyang, learned Standing Counsel, Home Department, Assam, appearing for Respondent No. 2 and 4, Mr. H. K. Hazarika, learned Government Advocate, Assam, for Respondent No. 3 as well as Mr. H. Kuli, learned Standing Counsel, Election Commission of India appearing for the Respondent No.5.
2. This writ petition has been filed by the petitioner, namely, Musstt. Hasina Khatun, impugning the order/opinion dated 20.08.2017, passed by learned Member, Foreigners Tribunal, Bongaigaon 2, Abhayapuri, in Case No. BNGN/FT/1476/07, whereby the petitioner has been declared as a foreigner under the Foreigners Act, 1946, who had illegally entered into India

(Assam) on or after 25.03.1971.

3. Notice in this case was issued on 04.05.2017 and the original case record of Case No. BNGN/FT/1476/07 was called for from the learned Foreigners Tribunal, Bongaigaon No. 2 at Abhayapuri. The said record has been received by this Court by the order dated 04.05.2017, the petitioner was granted interim protection against arrest as well as against deportation from India.
4. The fact which transpires on perusal of the Case record of Case No. BNGN/FT/1476/07, relevant for consideration of the instant writ petition, in brief, are as follows.
 - i. Suspecting the petitioner, Musstt. Hasina Khatun, wife of Nur Ali, of Village-Kheluapara, under Jogighopa police station of Bongaigaon District, to be a foreigner, an inquiry was conducted and during which, *prima facie*, it was found that the petitioner, Musstt. Hasina Khatun, is a foreigner who entered into India from Bangladesh.
 - ii. On the basis of the inquiry report submitted by the Inquiry Officer, a reference under the provisions of Foreigners (Tribunal) Order, 1964 was made to the learned Foreigners' Tribunal, Bongaigaon by the Superintendent of Police (Border) Bongaigaon for determining the nationality of above-named petitioner, as per the provisions of the Foreigners Act, 1946.

- iii.** On receipt of the reference by the Foreigners Tribunal, Bongaigaon, BNGN/FT/ Case No. 1476/07 was registered and notice was issued to the petitioner.
- iv.** The petitioner appeared before the Tribunal and filed her written statement along with the supporting documents.
- 5.** On 06.08.2014 the learned Foreigners Tribunal, Bongaigaon finding that the name of the father of the petitioner/proceedee has not been mentioned in the reference or in the inquiry report submitted by the Superintendent of Police (B), Bongaigaon, directed the police to re-investigate the matter to ascertain the name of the father of the petitioner and to submit a report.
- 6.** Accordingly, the matter was investigated and a report was furnished by one Shri Dalim Medhi, SI (B) Jogighopa Police Station, wherein it was mentioned that the name of the father of the petitioner is Kapasu Sheikh.
- 7.** During inquiry before the learned Foreigners Tribunal, Bongaigaon the petitioner adduced the evidence of two witnesses in support of her claim of being an Indian national.
- 8.** In her written statement, the petitioner, Hasina Khatun has stated that she is an Indian citizen having permanent residence in the Village-Kheluapara in Bongaigaon district.
- 9.** She has stated that her father's name is Kapasu Sheikh and

mother's name is Phool Bhanu Nessa and the name of both the parents of the petitioner were recorded in the voter list of 1966 of Village-Kheluapara Part 2 under 43 No. Bongaigaon Legislative Assembly Constituency the then Goalpara district, (now Bongaigaon District).

- 10.** She has also stated in her written statement that name of her parents are also included in the voter list of 1970 in respect of Village-Kheluapara Part 2 under 43 No. Bongaigaon Legislative Assembly Constituency in erstwhile Goalpara district, (now Bongaigaon district). She has also stated in her written statement that she was married to one Nur Ali of Village-Kheluapara Part 4 and her name is recorded in the voter list of 1997 along with her husband Nur Ali in respect of Village-Kheluapara Part 4 under 35 No. Abhayapuri South (SC) Legislative Assembly Constituency in Bongaigaon District.
- 11.** She has also stated that her name is also included in the voter list of 2010 of Village-Kheluapara Part 4 under 35 No. Abhayapuri South (SC) Legislative Assembly Constituency in Bongaigaon District.
- 12.** In support of contentions made by the petitioner in her written statement, she has adduced her own evidence as DW-1 as well as evidence of her projected mother, namely, Musstt. Fulbhanu Khatun as DW-2.

- 13.** In her deposition, as DW-1, the petitioner has deposed that her father's name is Late Kapashu Sheikh and her mother's name is Fulbhanu Bewa and her father's residence is at Sutirmukh Village and she was born in Sutirmukh Village. She has also deposed that her father was also born in Sutirmukh village. The petitioner, as DW-1, has exhibited following documents.
- A. Exhibit 1, Voter List of 1966;
 - B. Exhibit 2, Voter List of 1970;
 - C. Exhibit 3, Voter List of 1997;
 - D. Exhibit 4, Voter List of 2010.
- 14.** DW-1 has also deposed that presently, she is residing with her husband, Nur Ali, at Village-Kheluapara. She has also deposed that her parents are Indian citizen and she is also an Indian citizen.
- 15.** The projected mother of the petitioner, namely, Fulbhanu Khatun, has deposed as DW-2, that the petitioner, Hasina, is her daughter. She has also stated that she was married about 60 years ago. However, very surprisingly, she has also stated her age to be 60 years only, on the date of deposing before the learned Tribunal.
- 16.** She has also deposed that she has three daughters, namely, Kasiran Khatun, Hasina Khatun and Begum Khatun. All of them are married. She has deposed that Hasina has been married to Noor Ali about 25 years ago. She has also stated that the

approximate age of her daughter Hasina would be about 40 to 45 years. She has also deposed that in the year 1966, her name was reflected in the voter list along with her husband's name and at that time, she was residing along with her husband at Sutirmukh.

- 17.** She has also stated that she has furnished the photocopy of her voter ID card before the Tribunal.
- 18.** Ms. R. Choudhury, learned counsel for the petitioner, has submitted that the petitioner is the daughter of late Kapashu Sheikh and Fulbhanu Khatun. Her mother is also known as Fulbhanu Bewa after the death of her husband Kapashu Sheikh. She has also submitted that the petitioner has exhibited one Jamabandi in respect of a plot of land covered by Patta No.108 under Dag No. 391/798 of Village-Kheluapara, wherein the name of the petitioner has been mutated in place of her deceased father, late Kapashu Sheikh, along with her other sisters. She has further submitted that the said document clearly shows that the petitioner is the daughter of late Kapashu Sheikh.
- 19.** She has also submitted that her mother, who deposed as DW-2, has also categorically stated in her testimony that she is the daughter of Kapashu Sheikh. She has also submitted that the petitioner is the daughter of late Kapashu Sheikh.

- 20.** Learned counsel for the petitioner has further submitted that the evidence adduced by the petitioner has not been contradicted or questioned by the State before the learned Tribunal and therefore, the same remains uncontroverted.
- 21.** Learned counsel for the petitioner has also submitted that the learned Tribunal had not relied upon the testimony of DW-2 as she failed to mention the exact age of the petitioner, however, she submits that as the mother of the petitioner is a rustic villager, minor discrepancy in stating correct age by her may not be a ground to totally discard her testimony when otherwise her evidence had remained uncontroverted.
- 22.** Learned counsel for the petitioner has also submitted that when the name of the petitioner is reflected in the Jamabandi, which is exhibited as Exhibit-5, wherein her father's name has been shown as Kapashu Sheikh and as the said Jamabandi has not been questioned at all by the state, nor the correctness of the contents of the said Jamabandi was ever questioned by the state respondents. Therefore, she submits that a presumption regarding genuineness of said Jamabandi arises and said Jamabandi may be regarded as a linked document to show that the petitioner is the daughter of late Kapashu Sheikh.
- 23.** The learned counsel for the petitioner has, therefore, submitted that the learned Tribunal was wrong in discarding the evidence of the petitioner and arriving at a finding that the petitioner is a

foreigner, who entered into India on or after 25.03.1971. She submits that the said finding is, therefore, liable to be set aside.

24. In support of her submissions, learned counsel for the petitioner has cited a ruling of this Court in the case of "***Munir Uddin Ahmed Vs. Union of India***, [Judgment dated 17.08.2022 in WP(C)/2131/2018].
25. On the other hand, Mr. J. Payeng, learned Standing Counsel, Home Department Assam, has submitted that the learned Tribunal has correctly arrived at the finding that the petitioner is a foreigner who entered into India on or after 25.03.1971 as the petitioner has failed to relieve the burden to show that she is an Indian citizen.
26. The learned Standing Counsel for the respondent Home Department has submitted that all the four exhibited voter lists are not the certified copy of voter lists. They are only the translated copy of voter lists which are not admissible in evidence.
27. Learned Standing Counsel, Home Department, Assam has also submitted that that only certified copy of voter lists may be relied upon and an unauthenticated or uncertified copy of voter lists would not be admissible in evidence.
28. In support of his submission, learned Standing Counsel, Home Department has cited a ruling of this Court in the case of

"Borhan Ali Vs. Union of India and Others" reported in 2018 (4) GLT 392. He has also cited a ruling of this Court in the case of **"Issiran Nessa Vs. Union of India"** [Judgment dated 10.04.2018 passed in WP (C) No. 2460/2016].

29. Learned Standing Counsel, Home Department, Assam has also submitted that that the learned Tribunal was right in not relying upon the testimony of the DW-2, whom the petitioner/proceedee projected as her mother, due to the inherent inconsistencies in her testimony. He has submitted that though, the DW-2 who claims herself to be the mother of the petitioner (DW-1), she has stated that age of her daughter, i.e., the petitioner is about 40-45 years whereas the petitioner herself deposing as DW-1 has stated that her age is 27 years. Moreover, DW-2 has also deposed that her age is 60 years whereas in her testimony she has also stated that she was married about 60 years ago, which makes her testimony unreliable and therefore, learned Standing Counsel, Home Department, Assam has submitted that her testimony is not reliable.
30. Learned Standing Counsel, Home Department, Assam has also submitted that though, the learned counsel for the petitioner has tried to rely on the copy of Jamabandi, which according to her, has been exhibited as Exhibit-5, however, he has deposed that in the case record of Case No. BNGN/FT/1476/07, there is

nothing to show that the petitioner was allowed to adduce additional evidence and the copy of Jamabandi produced by her was ever exhibited as Exhibit-5.

- 31.** Learned Standing Counsel, Home Department has submitted that the copy of Jamabandi, which the petitioner intends now to be relied upon as the link document to show her linkage with her projected father was never adduced as evidence and said document was never proved by any witness. Hence, the learned Tribunal was correct in discarding this said document. Learned Standing Counsel, Home Department, Assam has also deposed that the petitioner has not disclosed in her written statement that her father had ever purchased any land in Kheluapara Part VII. He also submits that the petitioner has also not stated anything regarding the date of death of her father and the fact that on the death of her father her name was mutated in his place.
- 32.** He also submits that the petitioner has also not disclosed anything regarding her siblings in the written statement as was mandated.
- 33.** He submits that the disclosure of all material facts in the written statement is mandatorily required before the petitioner intends to adduce evidence in that regard. He further submits that as the petitioner has not stated anything regarding the purchase of land by her projected father or regarding the date

of death of her father, in her written statement, hence, treating the land document produced by the petitioner, as evidence would amount to traversing beyond the pleading, which is not permissible under the law.

- 34.** Learned Standing Counsel, Home Department, Assam has also submitted that the petitioner has failed to adduce any documentary evidence to show that her projected mother stayed in India after 1970, as apart from the voter list of 1970 which is exhibited as Exhibit-2, No other document is there to show that the projected mother of the petitioner continuously remained in India after 1970.
- 35.** Learned Standing Counsel, Home Department, Assam has thus, submitted that the learned Tribunal has correctly assessed the evidence on record and come to the finding that the petitioner has failed to establish that she is an Indian citizen and therefore, has correctly opined that the petitioner is a foreigner who had entered into India on or after 1971. He has also submitted that the said finding of the petitioner does not warrant any interference by this Court in exercise for issuance of its writ jurisdiction.
- 36.** We have considered the rival submissions of learned counsel for both the sides and have perused the materials available on record including the case record of BNGN/FT/ Case No. 1476/07 which was requisitioned from the concerned Tribunal

by this Court in connection with the instant writ petition.

- 37.** While considering a prayer for issuance of the writ of certiorari, this Court is not supposed to reweigh or re-appreciate the evidence upon which the finding of learned Tribunal is based in its writ jurisdiction. It can invoke such power for issuance of such a writ only if the findings of the learned Tribunal is found to be palpably erroneous or there is an error of law which is apparent on the face of the order of the learned Tribunal.
- 38.** However, for our own satisfaction, we have gone through the materials on record including the pleadings as well as the evidence produced by the petitioner in the reference proceeding before the learned Tribunal in support of her contention that she is a citizen of India.
- 39.** Section 9 of the Foreigners Act, 1946 mandates that the onus of proving citizenship of a person is upon that person who claims to be a citizen of India.
- 40.** In order to do so, normally the petitioner shall have to disclose all the material facts which would be necessarily within his personal knowledge only, in the written statement filed by him or her. In the instant case, though, the petitioner has stated in the written statement that one Kapasu Sheikh and one Fulbanu Nessa are her parents, however, she has not stated her own date of birth as well as date of birth or year of her projected

parents.

41. It also appears that the projected father of the petitioner, namely, Kapasu Sheikh, is no longer alive. However, the petitioner has not stated anything regarding the date of death and place of death of her projected father in her written statement. She has also not uttered, in her written statement, a single word regarding her siblings, though, her projected mother has stated in her testimony that the petitioner had two other sisters who have been married. The petitioner has also not uttered anything about any land owned by the father of the petitioner at Village- Kheluapara 7th, Boitamari, North Salmara, in which the name of the petitioner is claimed to have been mutated.
42. It appears that all the four exhibited documents namely the voter lists are the translated copies of electoral roll and they are not the certified copies. As already held by this Court earlier, in the case of **"Burhan Ali Vs. Union of India and Others" (Supra)**, the said voter lists which are not certified copies and which are not proved by any of the officials of the Election Commission of India would not be admissible in evidence.
43. Regarding the submission made by learned counsel for the petitioner that the State had not raised any objection regarding the admissibility of the aforesaid exhibits during the inquiry

before learned Tribunal, it is no longer res integra is that so far as the admissibility of a document is concerned, if a document is per se inadmissible in evidence, non-raising of objection by State would not render such inadmissible evidence as admissible.

- 44.** Even if for the sake of argument, it is assumed that the name of the projected father of the petitioner appears in the voter list of 1966, the petitioner has not exhibited any admissible documentary evidence to prove her linkage with her projected father. Though, the learned counsel for the petitioner has submitted that the petitioner has exhibited a copy of Jamabandi in respect of a plot of land, covered by patta No. 108 Dag No. 391/798 in Village-Kheluapara 7th, Boitamari, North Salmara, Bongaigaon, however, on perusal of the records, it appears that the said document was only produced before the learned Tribunal on 16.06.2016 after the evidence of the petitioner's side was completed and even after the argument was heard. It also appears from record, that though, on that day the said document, i.e., the Jamabandi, was produced before the Court, however, same was neither exhibited by any witness nor it was proved in any manner. Hence, the said document was rightly not taken into consideration by the Tribunal. We are, therefore, of the considered opinion that the petitioner has failed to prove any documentary evidence to prove her linkage with her projected father.

- 45.** As regards the oral testimony of the DW-2 who has been projected as the mother of the petitioner, it is also settled proposition of law, that in cases where the citizenship of a person is questioned, only oral evidence would not be sufficient to prove the citizenship of a such a person unless such oral evidence is corroborated by reliable, cogent and admissible documentary evidence. This proposition of law has been settled by a catena of judgment passed by this Court earlier. In case of **"Bijoy Das Vs. Union of India"**, reported in **2018 3 GLT 118**, this Court has observed as follows: *"It is right that mere filing of written statement and oral testimony in a proceeding under the Foreigners Act, 1946 would not be enough. The fact in issue would have to be proved by the proceedee by adducing documentary evidence which are admissible and relevant"*.
- 46.** Moreover, in the instant case, even the oral testimony of DW-2 does not appear to be reliable due to the inherent inconsistencies, which are apparent on perusal of the deposition of DW-2, wherein she had deposed that her age to be 60 years before the learned Tribunal, however, she also deposed that she was married to late Kapasu Sheikh about 60 years ago, which means that she was married, immediately on her birth which is highly improbable. She has also stated that the age of her daughter, i.e., the petitioner, Hasina, is about 40-45 years whereas, the petitioner has stated in her

testimony, which was recorded only about two months prior to the deposition of DW-2, that her age to be 27 years only. This huge gap in the age as stated by DW-1 and DW-2 is irreconcilable and it makes the testimony of DW-2 very unsafe for reliance. Thus, we are of considered opinion that the learned Tribunal was right in not relying upon the oral testimony of the DW-2.

- 47.** We are also, of the considered opinion that the submissions made by learned Standing Counsel, Home Department, Assam, as discussed in the foregoing paragraphs appears to have force in it and are acceptable.
- 48.** For the reasons discussed in the foregoing paragraphs, we are constrained to hold that the petitioner had failed to discharge her burden under Section 9 of the Foreigners Act, 1956 to prove that she was not a foreigner but a citizen of India.
- 49.** Consequently, we do not find any valid reason to interfere with the impugned Order dated 28.02.2017 passed by learned Foreigners Tribunal, Bongaigaon No.2 at Abhayapuri in BNGN/FT/Case No. 1476/2007 (Ref.: FT BNGN 132/2005).
- 50.** As such this writ petition stands dismissed being devoid of merit.
- 51.** Interim protection and bail granted to the petitioner earlier on 06.09.2022 is hereby recalled/stands vacated.

- 52.** The Registry is directed to send back the case records of BNGN/FT/Case No. 1476/2007 to the learned Foreigners Tribunal, Bongaigaon No.2 at Abhayapuri forthwith along with a copy of this judgment.
- 53.** The concerned Superintendent of Police (B) Bongaigaon and the Deputy Commissioner, Bongaigaon be also furnished with a copy of this judgment for their use.

JUDGE

JUDGE

Comparing Assistant