

GAHC010128472020



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

Case No. : WP(C)/3788/2020

SARIFUN NESSA @ SARIFAN NESSA
D/O- LT. IMAN ALI, W/O- HAMID ALI, PERMANENT R/O- VILL- PANDITAR
PAM (TANGONMARI), MOUZA- PASCHIM BANGSHAR, P.S. HAJO, IN THE
KAMRUP DISTRICT OF ASSAM

VERSUS

THE UNION OF INDIA AND 5 ORS.
REP. BY THE SECY. TO THE GOVT. OF INDIA, MINISTRY OF HOME
AFFAIRS, NEW DELHI, PIN- 110001

2:THE ELECTION COMMISSION OF INDIA
REP. BY THE CHIEF ELECTION COMMISSIONER
NEW DELHI- 110001

3:THE STATE OF ASSAM
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY-06

4:THE DY. COMMISSIONER
KAMRUP
781031
ASSAM

5:THE SUPERINTENDENT OF POLICE (B)
KAMRUP
781031
ASSAM

6:STATE COORDINATOR
NATIONAL REGISTER OF CITIZENS
BHANGAGARH
GHY-

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.W. Aman, Adv.
Advocates for the respondents : Ms. A. Verma, SC- Home Dept.
Shri H.K. Hazarika, GA, Assam.
Dates of hearing : 27.02.2024
Date of Judgment : 10.04.2024

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 19.05.2020 passed by the learned Foreigners Tribunal no. 4, Kamrup in H.F.T. Case No. 1099/2015. 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 (Border), Kamrup District, against the petitioner giving rise to the aforesaid H.F.T. Case No. 1099/2015.

(ii) As per requirement under Section 9 of the Foreigners Act, 1946 to prove that the proceedee is not a foreigner, the petitioner had filed the written statement on 30.03.2019 along with certain documents in the said H.F.T. case No. 1099/2015 before the learned Foreigners Tribunal No. 4, Kamrup.

(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 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.W. Aman, learned counsel for the petitioner. We have also heard Ms. A. Verma, learned Standing Counsel, Home Department, Assam and Shri P. Sharma, learned Government Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 05.10.2020.

4. Shri Aman, the learned counsel for the petitioner has submitted that the petitioner could prove her case with cogent evidence and in view of the fact that there was no rebuttal evidence, the learned Tribunal should have accepted the said proof and accordingly hold the petitioner to be a citizen of India. In this regard, he has referred to the evidence on affidavit of the three numbers of witnesses and also the following documentary evidence.

- i. Photocopy of voter list of 1966 (Exbt -A)
- ii. Photocopy of voter list of 1970 (Exbt – B)
- iii. Photocopy of voter list of 1977 (Exbt – C)
- iv. Photocopy of voter list of 1989 (Exbt – D)
- v. Certified copy of Voter list of 2005 (Exbt – E)
- vi. Photocopy of certified Voter list of 2010 (Exbt – F)
- vii. Photocopy of certified Voter list of 2016 (Exbt- G)
- viii. Elector Photo Identity Card (Exbt – H)
- ix. Photocopy of Village Headman Certificate (Exbt – I)
- x. Photocopy of Village Headman Certificate (Exbt – J)
- xi. Photocopy of Village Headman Certificate (Exbt – K)
- xii. Photocopy of certificate issued by secretary, Bamuni Gaon Panchayat (Exbt – L)

5. It is submitted that in the voters lists of 1966, 1970, 1977 and 1989, the names of the parents of the petitioner appears. Further, in the voters lists of 2005, 2010 and 2016, the name of the petitioner appears. The Certificates both dated 23.03.2019 issued by the village Headman pertain to the aspect of shifting of the father of the petitioner. The third Certificate also dated 23.03.2019 issued by the village Headman pertains to the petitioner. A certificate dated 26.06.2015 issued by the Secretary, Bamundi Gaon Panchayat was also proved by the said Secretary appearing as DW3.

6. The learned counsel for the petitioner accordingly submits that the impugned opinion is liable to be set aside inasmuch as, the same did not take

into consideration the relevant factors.

7. *Per contra*, Ms A. Verma, learned Standing Counsel, Home Department has categorically refuted the stand taken on behalf of the petitioner. She submits that a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 relate to determination as to whether the proceedee is a foreigner or not. As such, the relevant facts are especially within the knowledge of the proceedee and therefore, the burden of proving citizenship rests absolutely upon the proceedee, notwithstanding anything contained in the Evidence Act, 1872 and this is mandated under Section 9 of the aforesaid Act, 1946. However, in the instant case, the petitioner utterly failed to discharge the burden. It is also submitted that rebuttal evidence is not mandatory in every case and would be given only if necessary. She further submits that the evidence of a proceedee has to be cogent, relevant, which inspire confidence and acceptable and only thereafter, the question of adducing rebuttal evidence may come in.

8. She further submits that so far as the documents relied upon by the petitioner are concerned, a part of the same cannot be relied upon and the document as a whole is to be read. It is also submitted that there are major discrepancies in the voters lists regarding the names etc. She points out that though one Iman Ali has been projected to be the father of the petitioner and one Fulmoti Bibi as the mother, there is not a single document which can be treated as a legal evidence to establish a linkage of the petitioner with the aforesaid two persons. Though the voters lists of 1966 and 1978 contained the names of the projected parents, in the voter list of 1977, two more names have been included and there is no disclosure or explanation of the said aspect. The voter list of 1989 contains the names of the projected parents as M. Himan Ali and Ms. Fulmoti Begum respectively. It is also submitted that the three

certificates by the village Headman which are all dated 23.03.2019 were not proved in accordance with law. It is also submitted that the deposition of DW3 - the Gaon Panchayat Secretary would make it clear that such deposition would not be of any aid to the petitioner.

9. 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. She submits that there is no procedural impropriety or illegality in the decision making process and therefore, the instant petition is liable to be dismissed.

10. In support of her submissions, Ms Verma, the learned Standing Counsel has placed reliance upon the following case laws-

(i) Order dated 26.04.2018 passed in WP(C) 7756/2016 [Khudeja Khatoon vs UOI and Ors.]

(ii) Rupajan Begum vs. Union of India [(2018) 1 SCC 579]

11. In the case of ***Khudeja Khatoon*** (supra) it has been stated that Gaon Panchayat is not authorised to use a letter head with "Govt. of Assam" printed therein.

12. In the case of ***Rupajan*** (supra), it is held that Certificate of Gaon Panchayat is no proof of Citizenship. The relevant part of the said judgment is extracted herein below:

"16. The certificate issued by the G.P. Secretary, by no means, is proof of citizenship. Such proof will come only if the link between the claimant and the legacy person (who has to be a citizen) is established. The certificate has to be verified at two stages. The first is the authenticity of the certificate itself; and the second is the authenticity of the contents thereof. The latter process of verification is bound to be an exhaustive process in the course of which the source of information of the facts and

all other details recorded in the certificate will be ascertained after giving an opportunity to the holder of the certificate. If the document and its contents is to be subjected to a thorough search and probe we do not see why the said certificate should have been interdicted by the High Court, particularly, in the context of the facts surrounding the enumeration and inclusion of the documents mentioned in the illustrative list of documents, as noticed above. In fact, the said list of illustrative documents was also laid before this Court in the course of the proceedings held from time to time and this Court was aware of the nature and effect of each of the documents mentioned in the list."

13. The rival contentions have been duly considered and the materials placed before this Court have been carefully examined.

14. 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 hereinbelow-

"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."

15. 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.”

16. 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.

17. 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."

18. As regards the projection made by the petitioner towards her parents, we have noticed that one Iman Ali has been projected to be the father and one Fulmoti Bibi as the mother. However, there is not a single document which can be treated as a legal evidence to establish a linkage of the petitioner with the

aforesaid two persons. We have seen that though the voters lists of 1966, 1970 and 1977 contained the names of the projected parents but in the voter list of 1977, two more names have been included and there is no disclosure or explanation of the said aspect. The next voter list is after 10 years of 1989 which contains the names of the projected parents. However, the names are given as M. Himan Ali and Ms. Fulmoti Begum respectively. This Court has also noticed that in the translated version, the name of the mother of the petitioner have been wrongly typed as Fulmoti Bibi instead of Fulmoti Begum as would appear from the vernacular copy. With regard to the three certificates of the village Headman all dated 23.03.2019, this Court has noted that none of the authors of such certificates had adduced evidence and therefore, those certificates and their contents are inadmissible in evidence. So far as the deposition of DW3 is concerned, it is noticed that though the certificate issued by him as the Secretary of the Bamundi Gaon Panchayat (Exbt-L) was sought to be proved by him, in his cross-examination, he has stated that he does not know the petitioner personally and the certificate was issued on the basis of the certificate of the Gaonburah. This Court has also noted that while the certificate by the GP Secretary is dated 26.06.2015, all the three certificates by the Gaonburah are of much later point of time and dated 23.03.2019 and therefore, the deposition appears to be wholly inconsistent.

19. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 19.05.2020 passed by the learned Foreigners Tribunal No. 4, Kamrup in H.F.T. Case No. 1099/2015 does not call for any interference. Accordingly, this writ petition being devoid of merits is dismissed.

20. The actions consequent upon the opinion rendered by the learned Tribunal

would follow, in accordance with law.

21. The records of the H.F.T. Case No. 1099/2015 of the learned Foreigners Tribunal No. 4, Kamrup be returned to the concerned Foreigners Tribunal forthwith along with a copy of this order.

JUDGE

JUDGE

Comparing Assistant