

GAHC010178402020



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

Case No. : WP(C)/5462/2020

SABURA KHATUN
W/O- NUR HOSEN, D/O- LT. TOSHER ALI @ TOSOR SHEIKH, R/O- VILL-
PATAKATA PT-II, P.O. AND P.S. CHUNARI, DIST.- GOALPARA, ASSAM, PIN-
783101

VERSUS

THE UNION OF INDIA AND 12 ORS
REP. BY THE MINISTRY OF HOME AFFAIRS, GOVT. OF INDIA, NEW DELHI-
01

2:THE CHIEF ELECTION COMMISSIONER OF INDIA
NEW DELHI-01

3:THE STATE OF ASSAM
REP. BY CHIEF SECY. TO THE GOVT. OF ASSAM
DISPUR
GHY-06

4:THE COMM. AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY-06

5:THE STATE CO-ORDINATOR
NRC
ASSAM
BHANGAGARH
GHY-05

6:THE DIRECTOR GENERAL OF POLICE

ASSAM
ULUBARI
GHY-05

7:THE SUPERINTENDENT OF POLICE (B)
DHUBRI
DIST.- DHUBRI
ASSAM
PIN- 783301

8:THE DY. COMMISSIONER
DHUBRI
DIST.- DHUBRI
ASSAM
PIN- 783301

9:THE SUPERINTENDENT OF POLICE (B)
GOALPARA
DIST.- GOALPARA
ASSAM
PIN- 783101

10:THE DY. COMMISSIONER
GOALPARA
DIST.- GOALPARA
ASSAM
PIN- 783101

11:THE OFFICER-IN-CHARGE
SOUTH SALMARA P.S.
DIST.- DHUBRI
ASSAM
PIN- 783301

12:THE OFFICER-IN-CHARGE
CHUNARI P.S.
DIST.- GOALPARA
ASSAM
PIN- 783129

13:THE ELECTORAL REGISTRATION OFFICER
NO. 39 JALESWAR LAC
DIST.- GOALPARA
ASSAM
PIN- 78310

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.U. Mondal, Adv.
Advocates for the respondents : Shri A. Kalita, SC- Home Dept.
Shri R. Talukdar, GA – Assam
Shri H. Kuli on behalf of Mr. A.I. Ali, Adv. ECI

Dates of hearing : **05.02.2024 & 06.02.2024**

Date of Judgment : **23.02.2024.**

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 11.12.2019 passed by the learned Foreigners' Tribunal no. 2, Dhubri in F.T. Case No. 504/S/16 (Ref-FT Case No. 1547/98). 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), Dhubri

District, against the petitioner giving rise to the aforesaid F.T. Case No. 504/S/16.

(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 20.09.2019 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.U. Mondal, learned counsel for the petitioner. We have also heard Shri A. Kalita, 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 R. Talukdar, learned Government Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 11.01.2021.

4. Shri Mondal, 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. Certified extract copy of E/Roll, 1966 (Exbt -1)
- ii. Certified extract copy of E/Roll, 1970 (Exbt – 2)

- iii. Electronic Certified extract translated copy of E/Roll, 1979 (Exbt – 3)
- iv. Computerized Chitha copy of village Patakata part II (Exbt – 4)
- v. Electronic Certified extract translated copy of E/Roll, 1985 (Exbt – 5)
- vi. Electronic Certified extract translated copy of E/Roll, 1989 (Exbt – 6)
- vii. Ration Card (Exbt – 7)
- viii. Electronic Certified extract translated copy of E/Roll, 1997 (Exbt – 8)
- ix. Electronic Certified extract translated copy of E/Roll, 2005 (Exbt – 9)
- x. Electronic Certified extract translated copy of E/Roll, 2010 (Exbt – 10)
- xi. G.P. certificate dated 15-06-15, issued by Secretary, Mankala Shaildhara G.P. (Exbt – 11)

5. He submits that there was no effective cross examination by the prosecution side of the said witnesses who had deposed and therefore, such evidence ought to have been accepted without any difficulty.

6. *Per contra*, Shri A. Kalita, learned Standing Counsel, Home Department has categorically refuted the stand taken on behalf of the petitioner. He submits that a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 relates to determination as to whether the proceedee is a foreigner or not. Therefore, the relevant facts are especially within the knowledge of the proceedee and accordingly, 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. He 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.

7. He 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. As regards the Ext. 11 which is found to be the only link document with the father of the petitioner, it is submitted that the said certificate of the Gaon Panchayat, Secretary dated 15.06.2015 has not been proved in accordance with law. He submits that though the certificate was exhibited and the Secretary had deposed as DW3, a bare perusal of the certificate would show that the same has a Disclaimer that the same would be valid only if accompanied by Legacy Data and other admissible documents to establish linkage for inclusion in the updated NRC. He otherwise submits that the admissibility of such documents would depend on the conditions laid down by judicial precedents which he relies upon.

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

i. Ghaus Mohammad Vs. Union of India [AIR 1961 SC 1526]

ii. Fateh Mohd. Vs. Delhi Administration [AIR 1963 SC 1035]

iii. Sarbanand Sonowal Vs. Union of India [(2005) 5 SCC 665]

iv. Rupajan Begum Vs. Union of India [(2018) 1 SCC 579]

v. Judgment dated 29.05.2018 in WP(C)/2641/2017 [Ohab Ali Vs. State of Assam]

vi. Order dated 29.05.2018 in WP(C)/6344/2016 [Rukia Begum Vs. Union of India]

9. The cases of **Ghaus Mohammad, Fateh Mohd. and Sarbanand Sonowal** have been cited to explain the provision regarding burden of proof under Section 9 of the Foreigners Act of 1946.

10. In the case of **Rupajan** (supra), the procedure to be followed including the aspect as to how a document before the Tribunal is to be proved have been laid down. The said tests have been reiterated in the cases of **Ohab Ali** (supra) and **Rukia Begum** (supra). The relevant observations made in the case of **Rukia Begum** (supra) are extracted hereinbelow:

“In so far contention of learned counsel for the petitioner that since the State did not raise any objection as to the filing of such certificate and marking of the same as exhibit, therefore, the said certificate should be accepted as a valid piece of evidence at its face value, we are afraid we can accept such a sweeping contention on behalf of the petitioner. Under paragraph 3A (3) of the Foreigners (Tribunals) Order, 1964, a Foreigners Tribunal shall have the powers to regulate its own procedure for disposal of the references expeditiously in a time bound manner. Therefore, while conducting a proceeding, a Foreigners Tribunal has the power to regulate its own procedure. Paragraph 4 of the said Order says that a Foreigners Tribunal shall have the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 in respect of summoning and enforcing the attendance of any person and to examine him or her on oath; requiring the discovery and production of any document; issuing commissions for the examination of any witness and directing the proceedee to appear before it in person. Therefore, applicability of the Code of Civil Procedure to a proceeding before the Foreigners Tribunal is confined to the four situations as enumerated in paragraph 4. A

proceeding before the Foreigners Tribunal is summary in nature and having regard to the scheme of the Foreigners (Tribunals) Order, 1964, it will be too farfetched to hold that detailed rules and procedure laid down under the Code of Civil Procedure and practiced in the Civil Courts shall be applicable in letter and spirit in a proceeding before the Foreigners Tribunal. A Foreigners Tribunal is not bound by the strict rules and procedure provided under the Code of Civil Procedure. This is more so, because in a proceeding before the Foreigners Tribunal, burden of proof is always on the proceedee and he has to prove that he is not a foreigner but a citizen of India by adducing evidence which are admissible, proved and relevant having regard to the mandate of Section 9 of the Foreigners Act, 1946. This burden which lies upon the proceedee never shifts. Therefore, the evidence that is tendered by the proceedee must be admissible in evidence, must be proved in accordance with law and must have relevancy to the facts in issue. Just because objection to a document marked as exhibit by the proceedee is not taken by the State would not make that document admissible in evidence if it is otherwise inadmissible."

11. Shri Kalita, 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.

12. Rejoining his submissions, Shri Mondal, the learned counsel for the petitioner however submits that the cases of **Ohab Ali** (supra) and **Rukia Begum** (supra) are *per incuriam* the decision laid down by a Full Bench of this Court in the case of **Muslim Mondal Vs. State of Assam** reported in

2013(1) GLT 809. He also relies upon a decision of the Hon'ble Supreme Court dated 02.03.2020 passed in **WP(C)/109/2019 [Dr. Shah Faesal Vs. Union of India]** to elaborate the concept of *per incuriam*.

13. The rival contentions have been duly considered. The records of the Tribunal placed before this Court have been carefully perused.

14. 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.

15. 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."

16. The principal ground of challenge in the present writ petition is that the documents have not been properly appreciated and without there being any

rebuttal evidence, the depositions made on behalf of the petitioner should have been deemed to be accepted. The submission has also been made that the case laws of ***Ohab Ali*** (supra) and ***Rukia Begum*** (supra) are *per incuriam* a Full Bench Judgment of this Court. This Court has also noticed that though the document regarding the ration card was marked as Ext. 7, the learned Tribunal has rightly not taken the same into consideration as the same is only a photocopy which has been verified from the original records.

17. As regards the first contention, it is seen that the only link document is a certificate by the Gaon Panchayat Secretary which has been exhibited as Ext. 11 and was proved by the Secretary as DW3. The records however would show that the said exhibit was issued without any register and further though there was a carbon copy, the counter signature of the BDO (Block Development Officer) was not there. This Court has also noticed that the said certificate does not contain the name of her mother. It appears that the proceedee had wholly failed to prove her link with her projected father- Tosher Ali. The petitioner has not proved any Kabin Nama with regard to her marriage and the evidence adduced are all hearsay. The settled law in this field is that the burden of proof that a proceedee is an Indian citizen is always on the said proceedee and the said burden never shifts. The said procedure is clearly laid down in Section 9 of the Act of 1946 and 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.”

18. In this connection, the observation of the Hon’ble Supreme Court in the case of **Fateh Mohd.** (supra) which followed the principles laid down by the Constitutional Bench in the case of **Ghaus Mohd.** (supra) in the context of Foreigners Act, 1946 would be relevant which is extracted hereinbelow-

“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."

19. With regard to the plea that the case laws relied upon by the respondents are *per incuriam* a Full Bench judgment, this Court has carefully read the relevant part of the judgment of the Full Bench which were relied upon namely, paragraph 119.1, 121.1 and 122.1. We are however of the view that not only the facts are different, with regard to the burden of proof, the principles laid down in the cases of **Ohab Ali** (supra) and **Rukia Begum** (supra) are consistent with the ratio laid down by the Full Bench in the case of **Muslim Mondal** (supra).

20. The requirement of adducing of rebuttal evidence would only arise when a proceedee discharges his / her burden of proof by cogent, reliable and acceptable evidence and in this case, the said burden has not been discharged. As observed above, the certificate of the Gaon Panchayat Secretary dated 15.06.2015 has been rightly held by the Tribunal as not proved in accordance with law. As regards the case law of **Dr. Faesal** (supra), this Court is in humble agreement with the principles of *per incuraim* which have been explained. However, the facts of the instant case do not support the submission made on behalf of the petitioner on the aforesaid aspect.

21. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 11.12.2019 passed by the learned Foreigners' Tribunal No. 2, Dhubri in F.T. Case No. 504/S/16 (Ref-FT Case No. 1547/98) does not call for any interference. Accordingly, this writ petition being devoid of merits being dismissed.

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

23. The records of the aforesaid F.T. Case No. 504/S/16 (Ref-FT Case No. 1547/98) be returned to the learned Foreigners Tribunal No. 2, Dhubri forthwith along with a copy of this order.

JUDGE

JUDGE

Comparing Assistant