

GAHC010189202024



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

Case No. : WP(C)/4806/2024

RABIA KHATUN @ RABIYA BEGUM
W/O- AJIJUL HOQUE,
D/O- LATE INTAZ ALI,
R/O- VILLAGE HALDHIA GAON,
P.S- KALGACHIA,
MOUZA- RUPSHI,
DIST- BARPETA, ASSAM

VERSUS

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

2:THE ELECTION COMMISSION OF INDIA
NEW DELHI-110001

3:THE STATE OF ASSAM
REP. BY THE GOVT. OF ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI-6

4:THE ASSAM STATE COORDINATOR
OF NATIONAL REGISTER OF CITIZENS
ASSAM
BHANGAGARH
GUWAHATI-05
DIST- KAMRUP (M)

5:THE DEPUTY COMMISSIONER
BARPETA

ASSAM
PIN-781301

6:THE SUPERINTENDENT OF POLICE (B)
BARPETA
ASSAM
PIN-78130

Advocate for the Petitioner : MR. S A AHMED, C S KAMTHONG,A. KHANAM,MR. F A AHMED,MISS M GOGOI

Advocate for the Respondent : DY.S.G.I., GA, ASSAM,SC, ECI,SC, F.T

BEFORE

HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE KARDAK ETE

For the petitioner	: Mr. S.A. Ahmed, Advocate.
For respondent no.1	: Mr. B. Chakraborty, CGC.
For respondent no.2	: Ms. S.T. Khan, Advocate.
For respondent nos.3 and 6	: Mr. G. Sarma, Standing Counsel.
For respondent no.4	: Mr. R. Talukdar, Govt. Advocate.
Date of hearing	: 04.11.2024.
Date of judgment	: 08.11.2024.

JUDGMENT AND ORDER

(CAV)

(K.R. Surana, J)

Heard Mr. S.A. Ahmed, learned counsel for the petitioner. Also heard Mr. B. Chakravorty, learned CGC appearing for respondent no.1; Ms. S.T. Khan, learned counsel appearing for respondent no.2; Mr. G. Sarma, learned standing counsel for Home Department, appearing for respondent nos. 3 and 6; and Mr. R. Talukdar, learned Govt. Advocate appearing for respondent no.5. None appears on call for respondent no.4 despite the fact that respondent no.4

is an establishment under the State Home Department.

2) The petitioner, namely, Rabia Khatun *alias* Rabiya Begum, has assailed the opinion dated 28.02.2024 by the learned Member, Foreigners' Tribunal 5th, Barpeta, in Case No. F.T. (5th) 287/2016, arising out of Reference bearing no. IM(D)T 148/2015, by filing this writ petition under Article 226 of the Constitution of India. As per the said opinion, the petitioner is a foreigner of post 1971 stream and accordingly, the reference made by the Superintendent of Police (Border), Barpeta, was answered in the affirmative and in favour of the State.

3) On receipt of the notice of the proceeding, the petitioner had appeared before the learned Foreigners' Tribunal and submitted her written statement, denying the allegations of being an illegal migrant into Assam and projected herself to be a *bona fide* citizen of India.

4) The petitioner had also filed her evidence-on- affidavit and although in support of her contention, the petitioner had exhibited 12 (twelve) documents, viz., (i) certified copy of electoral roll of 1966 (Ext.A); (ii) certified copy of electoral roll of 1966 (Ext.B); (iii) certified copy of electoral roll of 1970 (Ext.C); (iv) sale deed registered on 10.08.1965 (Ext.D); copy of *jamabandi* of land (Ext.E); (v) certified copy of voter list of 1985 (Ext.F); (vi) certified copy of voter list of 1997 (Ext.G); (vii) certified copy of voter list of 2005 (Ext.H); (viii) certified copy of voter list of 2010 (Ext.I); (ix) Elector Photo Identity Card (Ext.J); (x) *Gaonbura's* certificate (Ext.K); (xi) *Gaonbura's* certificate (Ext.L). However, the petitioner did not appear for her cross-examination before the learned Tribunal.

5) It may also be mentioned that along with her evidence-on-

affidavit, the petitioner had annexed copy of 7 (seven) documents without exhibiting them, being (i) photocopy of N.R.C., 1951 (Annexure-I and II); and (ii) voter list of the year 1953, 1997, 2011, 2017 and 1997 (Annexure-III to VI). It may also be stated that the learned counsel for the petitioner could not show that the petitioner had taken any steps to exhibit the said 7 (seven) annexures.

6) The learned counsel for the petitioner had submitted that the voter's lists disclosed that she was the daughter of Late Intaz Ali Dewan and Late Jarina Khatun and that the petitioner was born and brought up at village-Haldiapathar, Mouza- Rupshi, in the then undivided Kamrup District, which presently falls under Barpeta district. The petitioner's paternal grand-father was Late Jonab Ali and she had two grand-mothers, Late Khodeja Khatun and Late Haitan Nessa. Moreover, it was stated that the petitioner had disclosed her detailed family tree in her written statement. It was also submitted that the sale deed and land *jamabandi* disclosed that her father had land since 10.08.1965. Accordingly, it was submitted that the petitioner has sufficient documents to prove that she is a *bona fide* citizen of India and not a foreigner.

7) It has been submitted that the petitioner had filed her evidence-on- affidavit as DW-1 on 04.09.2017 and she had taken steps in the proceedings till 20.10.2022, but she defaulted in taking steps after 20.10.2022 till the opinion was given by the learned Foreigners' Tribunal on 28.02.2024 due to gynecological disease, which was beyond her control.

8) Accordingly, it was submitted that one last opportunity may be granted to the petitioner to appear before the learned Tribunal and to face cross-examination and accordingly, it was prayed that the impugned opinion be set aside and the matter be remanded back for a fresh opinion after giving one opportunity of being cross-examined and heard.

9) In support of his submissions, the learned counsel for the petitioner has placed reliance on the case of (1) *Poonnamma Jagadamma & Ors. v. Narayanan Nair & Ors.*, (2017) 6 SCC 778 (para-11 and 13), and 2) *Avinash Singh Bagri & Ors. v. Registrar, IIT, Delhi & Anr.*, (2009) 8 SCC 220 [para 36, 39 and 44(f)], and *Musstt. Sufia Khatoon @ Suruj Bhanu v. The Union of India & 6 others*, W.P.(C) 2708/2021, decided by a co-ordinate Bench of this Court on 24.06.2022.

10) Per contra, the learned standing counsel for the Home Department has submitted that this Court is not exercising appellate powers, but is examining the matter in exercise of certiorari jurisdiction and therefore, it is impermissible to interfere with the opinion of the learned Tribunal unless the same is found to be vitiated by any perversity whatsoever. It is also submitted that the decision of this Court in the case of *Musstt. Sufia Khatoon @ Suruj Bhanu* is per *in curium* because the earlier order of this Court in the case of *Sajiran Nessa v. The Union of India & 5 Ors.*, W.P.(C) 1293/2020, decided on 05.01.2021 was perhaps not placed for consideration of the Court. In support of her submission, reliance is placed on the case of *Central Council for Research in Ayurvedic Sciences & Anr. v. Bikartan Das & Ors.*, (2023) 0 Supreme(SC) 763: (2023) 0 INSC 733.

11) It is seen that though the petitioner has stated in her writ petition that she was suffering from gynecological illness, but she has not stated about the nature of her ailment and therefore, vague. Moreover, the petitioner has also not annexed any medical document to show that she was suffering from any disease whatsoever from 20.10.2022 till the impugned opinion was given on 28.02.2024.

12) The records received from the learned Tribunal reveals that the

petitioner had last appeared and taken steps in connection with the proceeding on 20.07.2022. After allowing repeated prayers for adjournment, the learned Tribunal had granted one last opportunity to the petitioner by order dated 20.09.2023. Thereafter, on 30.11.2023, the learned counsel for the petitioner had filed a petition for withdrawing his vakalatnama, which was allowed and the proceeding was fixed on 21.02.2024. However, on 21.02.2024, the petitioner was absent without steps and thereafter, on 28.02.2024, the opinion was passed.

13) The petitioner has not alleged in this writ petition that she had no knowledge that her learned counsel was allowed to withdraw his vakalatnama by order dated 30.11.2023 and she has not even alleged that her learned counsel before the learned Tribunal was in default or had not informed the petitioner about the dates fixed the said proceeding.

14) Therefore, as the petitioner did not appear before the learned Foreigners' Tribunal for her cross-examination without any reasonable or good cause, on merit, no case is made out by the petitioner to show that the learned Foreigners' Tribunal has committed any error of perversity in rendering of its opinion, impugned in this writ petition. The petitioner has not been able to show that she has been able to discharge her burden under section 9 of the Foreigners' Act, 1946.

15) The case of *Poonnamma Jagadamma & Ors. (supra)* and *Avinash Singh Bagri & Ors. (supra)*, cited by the learned counsel for the petitioner are out of context and on facts, those cases have no relevance and thus, it would be a wastage of time to discuss the said cases. In so far as the case of *Musstt. Sufia Khatoon @ Suruj Bhanu (supra)* is concerned, the learned standing counsel for the Home Department and correctly pointed out that the previous

decision of this Court in the case of *Sajiran Nessa (supra)*, was not placed for consideration of the Court when the case of *Musstt. Sufia Khatoon @ Suruj Bhanu (supra)* was decided.

16) However, be that as it may, in the present case in hand, the petitioner has referred to a copy of the sale deed registered on 10.08.1965, which is stated to have been filed before the learned Foreigners' Tribunal as Exhibit-D. In the said context, without making comment on the evidentiary value of the said sale deed, the Court is of the considered opinion that the said document is of a period prior to 25.03.1971, which if considered after the petitioner is subjected to cross-examination, may help the learned Tribunal in proper adjudication of the issue involved in the determination before it i.e. to render a fresh opinion whether or not the petitioner is a foreigner who has entered into India (Assam) illegally from the specified territory after 25.03.1971 stream. We do so because the issue of citizenship of the petitioner is involved.

17) Hence, the Court is of the considered opinion that under the facts and circumstances of the case, the petitioner has been able to demonstrate that she may be afforded one last opportunity to appear before the learned Member, Foreigners' Tribunal 5th, Barpeta in Case No. F.T. (5th) 287/2016 to face cross-examination on the basis of the pleadings and her evidence-on-affidavit on record, on conditions as enumerated below:-

- a. That upon remand of the proceedings of Case No. F.T. (5th) 287/2016 before the learned Member, Foreigners' Tribunal 5th, Barpeta, the petitioner, namely, Rabia Khatun *alias* Rabiya Begum shall appear before the said learned Tribunal on or before 28.11.2024 without fail or any default whatsoever and without

any requirement of the learned Tribunal to issue any notice whatsoever to the petitioner.

b. On failure of the petitioner to appear before the said learned Tribunal within the outer limit of time allowed, this order would stand revoked, rescinded and recalled without any further reference to the Court and the impugned opinion dated 28.02.2024, passed by the learned Member, Foreigners' Tribunal 5th, Barpeta in Case No. F.T. (5th) 287/2016, arising out of Reference bearing no. IM(D)T 148/2015 shall stand revived and restored.

c. On appearance of the petitioner, it would be open to the said learned Foreigners' Tribunal either to allow the petitioner to be cross-examined on the same date, if its quasi-judicial business so permits, or to fix another date for the cross-examination of the petitioner on the basis of her evidence already on record.

d. The petitioner is further/also directed to appear before the Superintendent of Police (Border), Barpeta within 10 days from the date of this order and furnish bail for a sum of Rs.5,000/- with one local surety of the like amount to the satisfaction of the said authority. Further, the Superintendent of Police (Border), Barpeta, is directed that on appearance of the petitioner within the period indicated above, the biometrics of the iris of both eyes, the fingerprints of both hands and the photographs of the petitioner shall be obtained, whereafter, she shall be allowed to remain on bail. Further, on her appearance before the

Superintendent of Police (Border), Barpeta, as directed above, the said authority shall obtain necessary information and documentation as required under the Rules from the petitioner for securing her presence.

e. It is made clear that the obligation of the petitioner to obtain bail from the Superintendent of Police (Border), Barpeta, within the time allowed is a made a condition precedent for the learned Foreigners' Tribunal for giving the petitioner an opportunity to face cross-examination. Therefore, in the event the petitioner does not appear before the Superintendent of Police (Border), Barpeta and take bail, this order shall stand revoked, rescinded and recalled without any further reference to this Court.

f. As the petitioner is found to have willfully defaulted in appearing before the learned Tribunal without any good cause, as a pre-condition for the restoration of the proceedings of Case No. F.T. (5th) 287/2016 to file, the petitioner shall also deposit a cost of Rs.10,000/- (Rupees ten thousand only) before the Secretary, District Legal Services Authority, Barpeta and produce the receipt/acknowledgment before the learned Member, Foreigners' Tribunal 5th, Barpeta.

18) Subject to compliance of the conditions as enumerated in paragraph 17 above, the impugned opinion dated 28.02.2024 by the learned Member, Foreigners' Tribunal 5th, Barpeta in Case No. F.T. (5th) 287/2016, arising out of Reference bearing no. IM(D)T 148/2015, is conditionally set aside without finding fault with the impugned opinion. It is again reiterated that non-

compliance of the condition of obtaining bail, the direction contained in paragraph 17(e) shall become operative. Resultantly, the proceeding of Case No. F.T. (5th) 287/2016, arising out of Reference bearing no. IM(D)T 148/2015, is restored back to the file of the learned Member, Foreigners' Tribunal 5th, Barpeta, for a fresh opinion after affording an opportunity to the petitioner to appear for her cross-examination.

19) This writ petition stands disposed of on terms as indicated in paragraph 17 and 18 above.

20) The petitioner shall produce a certified copy of this order before the learned Foreigners' Tribunal 5th, Barpeta, within the time allowed and await further order from the said learned Tribunal. It shall be open to the learned Tribunal to take up the matter on remand as expeditiously as its quail-judicial work may permit.

21) The parties are left to bear their own cost.

22) Before parting with the records, it is also clarified that this order has been passed on the unique facts of this case and therefore, this order shall not constitute a precedent for being cited in any other case.

JUDGE

JUDGE

Comparing Assistant