

GAHC010200082018



2024:GAU-AS:12940

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

Case No. : WP(C)/6249/2018

PURNIMA SARKAR
W/O. SRI BHABATOSH SARKAR, R/O. VILL. SILKIJHAR, P.S. GORESWAR,
DIST. BAKSA, ASSAM.

VERSUS

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

2:THE STATE OF ASSAM

REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
DEPTT. OF HOME
DISPUR
DIST. KAMRUP (M)
GUWAHATI-781001.

3:THE DY. COMMISSIONER

BAKSA
BTAD
ASSAM.

4:THE SUPDT. OF POLICE (B) BAKSA

DIST. BAKSA
BTAD
ASSAM.

5:ELECTION COMMISSION OF INDIA

NIRBACHAN SADAN
ASHOKA ROAD
NEW DELHI-110001.

6:STATE COORDINATOR NATIONAL REGISTRAR OF CITIZENS

G.S. ROAD
BHANGAGARH
GUWAHATI-781005

Advocate for the Petitioner : MR S CHAKRABORTY, MR. R SARKAR

Advocate for the Respondent : ASSTT.S.G.I., SC, NRC,SC, F.T,SC, ECI

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

ORDER

Date : 11.12.2024
(K.R. Surana, J)

Heard Mr. S. Chakraborty, learned counsel for the petitioner. Also heard Ms. K. Deka, learned counsel, appearing on behalf of Ms. R. Devi, learned CGC, Mr. J. Payeng, learned standing counsel for FT Matters, representing respondent nos. 2, 4 and 8, Mr. H.K. Hazarika, learned Govt. Advocate appearing for respondent no.3 and Mr. H. Kuli, learned counsel, appearing on behalf of Mr. A.I. Ali, learned standing counsel for respondent no.5.

2) By filing this writ petition under Article 226 of the Constitution of India, the petitioner, namely, Smt. Purnima Sarkar, has assailed the opinion dated 31.07.2018, passed by the learned Member, Foreigners' Tribunal, Baksa, Tamulpur, in F.T. Case No. 1132/BAKSA/2016 [arising out of S.P.(B) Baksa Reference F.T. No. 94/2008], by which she was declared to be a foreigner of post 21.03.1971 stream.

3) Upon receipt of the notice of the proceedings of F.T. Case No. 1132/BAKSA/2016, the petitioner had appeared before the learned Foreigners' Tribunal and submitted her written statement, annexing thereto 7 (seven) documents in support of her contention that her projected father, Kshetramohan Raha was a citizen of India and was a resident of Village- Athiabari, P.S. Kalaigaon, in Darrang District and to project that on 05.03.1984 she was married to Sri Bhabatosh Sarkar of Village- Silkijhar, under P.S. Goreswar in present Baksa District. The name Kshetramohan Raha is spelt as Khetra Mohan Raha in few documents.

4) The learned counsel for the petitioner has submitted that the enquiry by the Sub-Inspector of Police (Border), of Goreswar P.S. was casual and although the petitioner's husband was alive, but he was referred to as 'Late' in the enquiry report. It was also submitted that in her cross-examination, the petitioner was never questioned that she was not the daughter of Kshetramohan Raha or that her father was not a citizen of India and that the entries made in the petitioner's PAN Card was not disputed, nor any document was questioned. It has been contended that Certificate issued by a *Gaon Panchayat* was an admissible document in terms of the ratio laid down by the Supreme Court of India in the case of *Rupajan Begum v. Union of India & Ors., (2018) 1 SCC 579*. Hence, it was submitted that the reference was decided mechanically and with premeditated mind, for which the impugned opinion was liable to be interfered with.

5) Per contra, the learned standing counsel for the FT matters has made his submissions in support of the impugned opinion. It was submitted that all the necessary facts ought to have been pleaded by the petitioner in her

written statement and then the relevant was also required to be proved in accordance with law, which was not done. It was submitted that if the petitioner was born in the year 1963, her name should have been entered in the voter's list of 1985, after she had attained majority, but her name has first appeared in the voter list of 1989, which is a single entry voter list at her projected husband's village and the petitioner has not exhibited any document prior to the 1989 voter list, which makes her entry into India very doubtful. It was also submitted that a person named Kshetramohan Raha appeared in the voter list of 1971, but the petitioner has failed to establish her link with the said person. In support of his submission, the following cases have been relied upon, viz., (1) *Bijoy Das v. Union of India & Ors.*, (2018) 3 GLT 118; (2) *Nur Begum v. Union of India & Ors.*, (2020) 3 GLT 347; (3) *Rashminara Begum v. Union of India & Ors.* (2017) 4 GLT 346; and (4) *Musstt. Ayesha Khatun @ Aisha Khatun v. Union of India & Ors.*, (2017) 3 GLR 820.

6) Considered the submissions and also carefully perused the records received from the learned Foreigners' Tribunal.

7) On a perusal of the records, it is seen that the petitioner has submitted her written statement. Thereafter, she has submitted her evidence-on-affidavit and she has exhibited 7 (seven) documents, viz., photocopy of Citizenship Registration Certificate dated 25.10.1967 in the name of Kshetramohan Raha, issued by Sub-Divisional Officer, Mangaldai (Ext.I), certified copy of voter list of 1971 containing single entry of Kshetramohan Raha (Ext.II), photocopy of link certificate dated 20.06.2015, issued by the Secretary, Namkhala Gaon Panchayat (Ext.III), certified copy of voter list of 1989 containing single entry of the name of the petitioner (Ext.IV), photocopy of PAN

Card (face-up side) in the name of the petitioner (Ext.V), affidavit sworn by the petitioner on 26.03.2018 for her statement that prior to marriage, her name was Purnima Raha, which became Purnima Sarkar after her marriage with Bhabatosh Sarkar (Ext.VI), photocopy of Elector voter identity card (EPIC for short) of husband of the petitioner, Bhabatosh Sarkar (Ext.VII).

8) In support of the petitioner, Sri Bhabatosh Sarkar, the husband of the petitioner had filed his evidence-on-affidavit as DW-2, who had exhibited his EPIC as Ext.1. The petitioner had also examined Sri Bina Ram Daimary, Secretary of Namkhola Gaon Panchayat as DW-3 by filing his evidence-in-affidavit. However, no document was exhibited by DW-3. They were cross-examined and discharged.

9) In her cross-examination, the petitioner had stated that she was born in the year 1965 at Namkhola, Athiabari District, Udalguri. She does not know where her mother and father were born. She does not know from where her father came to Tangla. She had stated that Late Arjun Raha and Smt. Anjali Dutta, aged 80 years are the brother and sister of her father and Anjali Dutta is residing at Athiabari. She does not know the name of her grand parents. She has disclosed the names of two brothers and five sisters. However, it is seen that in her written statement, though the petitioner has stated that the name of her father is Kshetramohan Raha, who had entered into Assam in the year 1967, but she has not disclosed the names of her mother and siblings and she has also not disclosed the names of the siblings of her father and mother. In connection with the proceedings before the Foreigners' Tribunal, it is incumbent for the petitioner to disclose all relevant facts, including the names of her family members. In this regard, it would be apposite to refer to the decision of this

Court in the case of *Rashminara Begum v. Union of India & Ors.*, 2017 (4) GLT 346. The relevant paragraphs thereof are quoted below:-

20. *Explaining the rationale behind Section 9 of the Foreigners Act, 1946, Supreme Court in Sarbananda Sonowal v. Union of India, (2005) 5 SCC 665, held that there is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of his date of birth, place of birth, name of his parents, place of birth and citizenship. Sometimes the place of birth of his grandparents may also be relevant. All these facts would be necessarily within the knowledge of the person concerned and not of the authorities of the State. After he has given evidence, the State authorities can verify the facts and lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship of a person and assert that he is a foreigner, it will not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act.*

21. *At this stage it may be mentioned that the regime which has been put in place for identification for foreigners in the State of Assam is fundamentally different from the rest of the country. This fact was taken note of by the Supreme Court in the subsequent case of Sarbananda Sonowal vs Union of India, (2007) 1 SCC 174, where in para 26 it was mentioned that Foreigners Tribunal has not been set up in any other part of India except the State of Assam. A different regime therefore exists in Assam from the rest of the country. In the rest of the country foreigners are identified by the executive machinery of the State. Thus the province of Assam only has been singled out for adopting a different procedure. The problem in regard to illegal migration faced by Assam is also faced by other States including the States of West Bengal, Tripura etc.*

*

*

*

25. *Written statement is the basic statement of defence of a proceedee before the Foreigners Tribunal. Keeping in mind the mandate of Section 9 of the Foreigners Act, 1946, it is incumbent upon the proceedee to disclose at the first instance itself i.e., in his written statement all relevant facts specially within his knowledge having a material bearing on his claim to citizenship of India. Material facts pleaded in the written statement are thereafter required to be proved by adducing cogent and reliable evidence. It is also trite that a party cannot traverse beyond the pleadings made in the written statement.*

10) Thus, it is seen that although the mother and siblings of the petitioner was introduced by the petitioner during her cross-examination, they had not been examined. Although Ext.II, i.e. voter list of 1971 contains the name of the projected father's father, yet the petitioner could not state her projected grandfather's name.

11) It is further seen that although the petitioner had examined the Secretary of Gaon Panchayat as DW-3, but the contents of photocopy of certificate dated 20.06.2015 (Ext.III), issued by Gaon Panchayat Secretary were not proved. Moreover, in his evidence-on-affidavit, DW-3 had categorically stated in paragraph 2 thereof that the said linkage certificate was given for the purpose of NRC i.e. National Register of Citizens. The original of the said certificate was not proved. The document marked as Ext.III does not contain a mention that the document was "proved in original". In his cross-examination, DW-3 had stated that the certificate was issued on the basis of NRC voter details of 1971, *Gaonbura's* certificate dated 17.06.2015 and voter list of 1971 of Kshetramohan Raha. However, neither the said *Gaonbura* was examined, nor the *Gaonbura's* certificate dated 17.06.2015 was exhibited and proved.

12) The records received from the learned Tribunal also discloses that except for the certified copy of the voter list of 1971 (Ext.II), certified copy of voter list of 1989 (Ext.IV) and affidavit sworn by the petitioner on 26.03.2018 (Ext.VI), no other documentary exhibits were proved by the petitioner, either by producing the original (and proving it in original), or its certified copy.

13) It may also be mentioned that in paragraph-4 of the written

statement as well as in paragraph-2 of the evidence-on-affidavit, it is stated by the petitioner that her father, namely, Khetramohan Raha had entered into Assam in 1967 and is a permanent resident village-Athiabari. However, in contrast in her cross-examination, the petitioner (DW-1) had stated that she was born in 1965 at Namkhola, Athiabari. Both the statements cannot stand together as the petitioner could not have been born in the year 1965 at Namkhola, Athiabari when the father of the petitioner purportedly entered Assam in the year 1967.

14) As stated above, Ext.I, which is a certificate of registration, is a photocopy. The said certificate is dated 25.10.1967. However, Ext.I (photocopy) does not contain the entry of petitioner or her mother into India. Accordingly, there is no record of entry of the petitioner or her mother into India. Therefore, as Ext. Nos.I, III, V, VII (same document marked as Ext.1 by DW-2, Shri Bhabatosh Sarkar) are photocopies, are not admissible in evidence. Therefore, it cannot be said that the said Ext. Nos.I, III, V, VII or the contents thereof were duly proved in accordance with law.

15) It is a well settled legal position that mere filing of written statement and oral testimony or evidence by way of affidavit in a proceeding under the Foreigners Act, 1946 would not be enough. The relevant facts are required to be proved by the proceedee by adducing documentary evidence which are admissible and relevant. In this regard, we may refer to paragraph-16 of the case of *Bijoy Das v. Union of India & Ors., 2018 (3) GLT 118*. In this case, out of 7 (seven) documents exhibited by the petitioner, Ext. Nos.I, III, V, VII were photocopies. Therefore, the petitioner has reasonably failed to show that her father had entered in India (Assam) prior to the cutoff date of 25.03.1971.

16) The scope of certiorari jurisdiction under Article 226 of the Constitution of India is limited. In this regard, we may refer to the decision of the Supreme Court of India in the case of *Central Council for Research in Ayurvedic Sciences & Anr. v. Bikartan Das & Ors.*, 2023 INSC 733, wherein it has been held as under:

“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) Under the circumstances, the Court is of the considered opinion that the petitioner has failed to demonstrate that the impugned opinion suffers from any jurisdictional error or it is a case where any admissible evidence was not considered or there was any error in appreciation of the pleadings and evidence or that the opinion impugned in this writ petition is vitiated by considerations of extraneous materials.

18) In view of the discussion above, this writ petition fails and the same is dismissed without any interference whatsoever in respect of the opinion dated 31.07.2018, passed by the learned Member, Foreigners' Tribunal, Baksa, Tamulpur, in F.T. Case No. 1132/BAKSA/2016 [arising out of S.P.(B) Baksa Reference F.T. No. 94/2008].

19) Parties are left to bear their own cost.

20) Send back the records of the Tribunal.

JUDGE

JUDGE

Comparing Assistant