

GAHC010216252019



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

WP(C) No. 7101 of 2019

Sri Nirakul Sarkar, age 49 years
Son of Late Paresh Sarkar ,
Permanent Resident of
Village – Karchowabori (Santali),
Post Office – Jargaon,
Police Station - Jagiroad (Mayong)
District – Morigaon, Assam.

.....Petitioner

-Versus-

1. The Union of India,
Represented by the Secretary to the
Ministry of Home Affairs, New Delhi – 1.
2. The Commissioner and Secretary to the
Government of Assam, Home Department,
Dispur, Guwahati-06.
3. The Deputy Commissioner, Morigaon,
District – Morigaon, Assam, PIN- 782105.

4. The Superintendent of Police, Morigaon,
District – Morigaon,
Assam, PIN- 782105.
5. The Assam State Election Commission,
Represented by its
Registrar, Bhangagarh, Guwahati – 05.
6. The State Coordinator of National Registration (NRC),
Assam, represented by its Registrar,
Bhangagarh, Ghy-05.
7. The Foreigners Tribunal (1st), Morigaon,
PIN – 782105.

.....Respondents.

Advocates for the petitioner: Mr. H.N. Sarma.

Advocate for the respondents: Mr. G. Sarma, SC, Home Dept.
Mr. P. Sarma, Addl. Sr. Govt.
Advocate, Assam,
Mr. A I Ali, SC, ECI.

BEFORE

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of Hearing : 08.04.2024

Date of Judgment : 03.10.2024

JUDGMENT AND ORDER (CAV)

(Susmita Phukan Khaund, J.)

1. Heard Mr. H.N. Sarma, learned counsel for the petitioner. Also heard Mr. G. Sarma, learned Standing Counsel, Home Department, Assam for the respondent Nos. 2 & 4, Mr. P. Sarma, learned Additional Senior Government Advocate, Assam for the respondent No. 3 as well as Mr. A.I. Ali, learned Standing Counsel, Election Commission of India for the respondent No. 5.

2. The petitioner Sri Nirakul Sarkar has filed this application under Article 226 of the Constitution of India, praying for issuance of a writ in the nature of mandamus, or certiorari or any other appropriate writ and set aside the impugned order/opinion dated 30.04.2011 passed by the learned Member, Foreigners Tribunal (1st) at Morigaon, Assam in F.T. (D) Case No. 229/2006. The Union of India, Commissioner & Secretary to the Government of Assam – Home Department, Deputy Commissioner – Morigaon, the Superintendent of Police (SP for short) – Morigaon, Commissioner – Assam State Election Commission, the State Coordinator of NRC and the Foreigners Tribunal (1st), Morigaon are arrayed as respondent Nos. 1, 2, 3, 4, 5, 6 and 7 respectively.

3. It is submitted that the petitioner is a layman and a poor fisherman, who did not have the privilege of education. He was born in the year 1970 but he is unable to produce any school certificate or birth certificate due to his financial condition. However, the concerned

Gaonburah of No. 1 Jhargaon village has issued a certificate that the petitioner is a permanent resident of the aforesaid locality. He was born in village - Dhipuji Jan Pam under the present Morigaon district, Mouza – Mayong and after his marriage, the petitioner temporarily shifted to Karchowabori (Santali) P.O.- Jhargaon and has been residing in the said village. His name was enlisted in the Voters List of 1997 and was shown as D-Voter.

4. On 05.12.2006, notice was issued to the petitioner by the Member, Foreigners Tribunal No. 1, Morigaon (hereinafter referred to as the Tribunal) in connection with F.T. (D) Case No. 229/2006, PRO No. 18/2006, directing him to appear before the Tribunal on 16.01.2007 with valid documents and supporting evidence to prove that he is a citizen of India. The petitioner, after receiving the notice engaged an advocate for filing written reply/written statement (WS in short). The learned counsel filed WS on 02.09.2008.

5. It is submitted that after submitting his WS and evidence, the petitioner was expecting that a favourable order would be passed, but unfortunately in the meanwhile, the engaged counsel for the petitioner became ill and after suffering for a prolonged period from cancer, the petitioner's advocate died in the year 2016. The petitioner was unable to contact his engaged counsel or find out the residence of his counsel. As the petitioner was unable to find the residence of his lawyer, in the month of July, 2019, the petitioner visited the Foreigners Tribunal (1st), Morigaon for the first time, to find out about the status of his case, and he was informed that he has already been declared a foreigner as per the judgment and order dated 30.04.2011 passed by the Tribunal.

6. After providing reasons of his failure to appear before the Tribunal, the petitioner has drawn the attention to the merits of his case through this petition stating that his father

Paresh Sarkar's name appeared in the Voters List of 1966 of 83 No. Bokany Assembly (SC) Constituency against Part No. 63 and Centre No. 42 of village Lecharibori, at Sl. No. 272, House No. 58, Police Station – Morigaon. It is further stated by the petitioner that his father Paresh Sarkar was a voter and his name appeared in the Voters List of 1970, 83 No. Bokany (SC) Assembly Constituency against Part No. 63, Centre No. 36 of village – Lecharibori at Sl. No. 272, House No. 58, Police Station – Morigaon under the Nagaon district.

7. It is averred that the petitioner is a citizen of India by birth and he has born in the year 1970. He has submitted NRC application before the NRC Seva Kedra for enrollment of his name along with his family members and the data code - 270 4018 6934 is the legacy code of his father Paresh Sarkar as well as his own legacy data code. His father Paresh Sarkar died on 04.09.2016 but his father's name has been entered in the NRC along with his brother's name as well as his wife's name. Thus, the petitioner cannot be a foreigner if this fact is taken into consideration. It is further contended that the parents of the petitioner are Indian citizens and the petitioner was born and brought up in India at village – Karchawabori (Santali) P.O. – Jargaon P.S. – Jagiroad in the district – Morigaon. Therefore, the order/opinion dated 30.04.2011 passed by the Tribunal is liable to be set aside and quashed.

8. It was observed by the learned Tribunal that Sri Diganta Kr. Medhi stated in support of the prosecution case that he was working as an Assistant Inspector of Excise at Jagiroad in the year 1997, and he verified the nationality of the petitioner/D-Voter in presence of local Gaonburah and others and demanded documents like NRC, Passport, Ration Card, Refugee Registration Certificate, Voters List, land documents, insurance paper etc., in support of his Indian nationality. The petitioner could not produce any documents although sufficient

opportunity was accorded to him. The Verification Officer, (P.W.1) had reasonable doubt that the petitioner illegally entered into Assam after 25.03.1971. The PW.1 has proved the report as Exhibit-1. This witness was not cross examined by the petitioner.

9. The original record reveals that after receipt of notice, the petitioner appeared with his engaged counsel on 16.01.2007 and on 05.03.2007 and prayed for time to file his WS but thereafter, he remained absent continuously. This case was thus fixed for ex-parte hearing on 28.11.2007 and on subsequent dates, but on 02.09.2008 the petitioner appeared with his engaged counsel and submitted WS and filed a petition with prayer to vacate the order for the ex-parte hearing. This prayer was allowed.

10. Through his WS, the petitioner denied the prosecution allegation and submitted that he was an Indian citizen and was a voter and his father's name appeared in the Voters List of 1966.

11. It is submitted through his WS that he is a permanent resident of village – Karchowabori, P.S. – Mayong, District – Morigaon. His father's name has appeared in the Voters List of 1966. The Voters' List of 1966 reflects his father's name as Paresh Sarkar of LAC 83 No. Bokany (SC), Part No. - 63, Centre No. – 42, village – Lecharibori, P.S. – Morigaon, district – Nagaon (Assam) at Sl. No. 272, House No. – 58. It is further submitted through his WS that the petitioner left his home and family members about 7/8 years ago (from 02.09.2008) for livelihood and since then the petitioner has been residing at Karchuwabori (Kushatoli) permanently. The petitioner has submitted a certificate issued by the local Gaonburah to substantiate this fact.

12. It was observed by the learned Tribunal that the evidence of the prosecution remained un-rebutted. PW.1. was not cross examined by the petitioner. The photocopy of the Voters' List of 1966 of 83 No. Bokany Constituency, and the certificate of the President of Burgaon Gaon Panchayat and another certificate issued by the Gaonburah of Lecharibori village could not establish the linkage of the petitioner with his projected father. The documents were not proved and marked as Exhibits as required under the Indian Evidence Act, 1872 (the Evidence Act for short). In the absence of un-rebutting evidence, reliance was placed on the evidence of the prosecution and the petitioner, who was a D-Voter was declared a foreign national under Section 2(a) of the Foreigners Act, 1946 (The Act of 1946 for short).

13. A close scrutiny of the order of the learned Tribunal and the submission of the petitioner reveals that the petitioner's statement is contradictory. He has duly contested the proceedings and therefore, he was declared a foreign national. The original record of F.T. (D) Case No. 229/2006 depicts that on 25.09.2006, the case was transferred to the Foreigners Tribunal, Morigaon from Nagaon for disposal. Notices were issued. The petitioner was absent with steps on 16.01.2007 and 05.03.2007. Thereafter, the petitioner was absent without steps. Several opportunities were accorded to the petitioner to present his case. The case was then fixed for ex-parte hearing on 06.03.2008. The petitioner appeared on 02.09.2008, and filed WS and prayed for vacation of the order of ex-parte hearing. WS was accepted and the order, fixed for ex-parte hearing was vacated. The case then proceeded for evidence. The Verification Officer was summoned. On 19.03.2010, the evidence of the Verification Officer was recorded but the petitioner did not cross-examine the Verification Officer although the petitioner was present. Thereafter, from 08.04.2011, the petitioner remained absent and the order was passed on 30.04.2011. Although arguments were not placed on behalf of the

petitioner, yet the petitioner was present when the Verification Officer adduced his evidence as PW.1., but he refrained from cross examining the Verification Officer and now at this stage the petitioner cannot take the plea that he was not given an opportunity to present his case. WS submitted by the petitioner was taken into consideration by the Tribunal.

14. It has also surfaced that the petitioner has produced only Xerox copies of the Voters Lists as evidence and the Tribunal correctly did not accept the Xerox copies as evidence. The petitioner has produced two certificates issued by the local Gaoburah of the village Burgaon Gaon and Lecharibori village, but both the Gaonburahs were not examined as witnesses to substantiate the contents of the certificates issued by them. Now, along with this petition, the petitioner has annexed the certificate of the Gaonburah as Annexure-1 of the petition, the Electoral-Roll of 1997 as Annexure-3 of the petition and the Voters List of 1970 reflecting the name of the petitioner's projected father as a resident of No. 83 Bokany (SC) Constituency under Nagaon district, Police Station – Morigaon, Part No. 63, Centre No. 36, Mouza – Pokoria, village - Lecharibori and Gaon Panchayat - Gagalmari.

15. Going by the merits of the case, it appears that the petitioner failed to establish his lineage through the limited documents he has relied upon i.e. the Voters' List of 1966, which he has relied upon while appearing before the Tribunal and at present the Voters' List of 1970, which he has furnished in this Court. This Court cannot take into consideration the Voters' List of 1970, which was not produced in the Tribunal, moreso, when the petitioner has failed to provide any linking document with the Voters' Lists of 1966 (copy) and 1970. The Electoral-Roll of 1997 which he has annexed along with this petition as Annexure-3 reflects that the petitioner's father is indeed Paresh and the age of the

petitioner is shown as 27 years. If the petitioner was born in the year 1970, indeed his age would be 27 years but the petitioner has stated that after his marriage, the petitioner had temporarily shifted to Karchowabori (Santali) P.O.- Jhargaon in the district Morigaon and so his name was enlisted in the Voters Lists showing him as D-Voter in the year 1997. With a remote Voters List of 1997, the petitioner has failed to establish his linkage with his father Paresh, whose name appears in the Voters List of 1966 as Paresh, son of Kala. It appears that the petitioner tried to fill up the lacunae by stating that he shifted to the village shown as Karchowabori under Mouza – Monoha, Sub-Division – Morigaon, District – Morigaon, Police Station - Jagiroad.

16. Apart from these documents, no documents except the Voters' Lists of 1966 has been submitted by the petitioner in the earlier case and the Voters' List of 1970 has been submitted in the present petition, to establish his linkage with his father Paresh. Even his father's name has appeared without a surname in the Voters' Lists of 1966 and 1970.

17. In the wake of the foregoing discussions, it is thus manifested that this petition is bereft of merits.

18. The Voters Lists of 1997, Annexure – 3 of this petition, cannot be stretched to the extent to be connected to the Voters' List of 1966 and 1970 to establish the linkage of the petitioner with his projected father. The case bearing registration No. 229/2006 was decided on 30.04.2011. The petitioner's statement that he could not find out the address of his engaged counsel is not found to be reliable. After 10 (Ten) years, the petitioner's engaged counsel passed away and after 13 (Thirteen) years, the petitioner went to the Tribunal to enquire about the status of his case and there, he learnt in the month of July, 2019 that he

has been declared a foreign national. The inertia of the petitioner is writ at large. The petitioner has not given sufficient grounds to show that there was no willful negligence on his part. Even if the delay is condoned, this case cannot be admitted to be decided on the merits as this petition is bereft of merits. A decision on merits also cannot be invited in this case.

19. In the wake of the foregoing discussions, we are of the opinion that the impugned order/opinion dated 30.04.2011 passed by the learned Foreigners Tribunal (1st), Morigaon in F.T. (D) Case No. 229/2006 does not call for any interference. Accordingly, this petition is hereby dismissed being devoid of merits.

20. Send back the Trial Court Record to the Foreigners Tribunal (1st), Morigaon forthwith along with a copy of this order. Registry shall also communicate this order to the Deputy Commissioner, Morigaon and the Superintendent of Police (Border), Morigaon for their needful.

JUDGE

JUDGE

Comparing Assistant