

GAHC010266552019



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

Case No. : WP(C)/8184/2019

AJIRAN NESSA @ AJERAN NESSA
W/O- IDRISH ALI, R/O- VILL- GAMARIGURI,, P.S. BARPETA ROAD, DIST-
BARPETA, ASSAM, PIN- 781315

VERSUS

THE UNION OF INDIA AND 7 ORS.
REP. BY SECY. OF THE MINISTRY OF HOME AFFAIRS, UNION OF INDIA,
NEW DELHI

2:THE STATE OF ASSAM
REP. BY COMM. AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY-6

3:THE ELECTION COMMISSIONER
ASSAM STATE ELECTION COMMISSION
DISPUR
GHY-6

4:THE STATE CO-ORDINATOR
NRC
ASSAM

5:THE DIRECTOR GENERAL OF POLICE (ADMN.)
ASSAM
ULUBARI
GHY-7

6:THE DY. COMMISSIONER
BARPETA
DIST- BARPETA

ASSAM
PIN- 781301

7:THE SUPERINTENDENT OF POLICE (B)
BARPETA
P.O. AND DIST- BARPETA
ASSAM
PIN- 781301

8:THE MEMBER
FOREIGNER TRIBUNAL BARPETA NO-8TH
P.S. BARPETA
P.O. BARPETA
DIST- BARPETA
ASSAM
PIN- 78130

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 K.R. Patgiri, Adv.
Advocates for the respondents : Ms. A. Verma, SC, FT.
Shri P. Sarma, GA, Assam
Shri A.I. Ali, SC, ECI

Date of hearing : **15.02.2024**

Date of Judgment : **07.03.2024**

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 09.08.2019 passed by the learned Foreigners Tribunal No. 8 Barpeta, in F.T. Case No.

151/2018[Ref- IM(D)T Case no. 10652/98] 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), Barpeta District, against the petitioner giving rise to the aforesaid F.T. Case No. 151/2018.

(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 03.10.2018 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 her and accordingly, the opinion was rendered declaring the petitioner to be a foreign national post 25.03.1971.

3. We have heard, Shri K.R. Patgiri learned counsel for the petitioner. We have also heard Ms A. Verma, 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 P. Sarma, learned Additional Senior Government Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 29.09.2023.

4. Shri Patgiri, the learned counsel for the petitioner has submitted that the petitioner could prove her case with cogent evidence and therefore, 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 including that of the proceedee and also the following documentary evidence.

- i. Copy of voter list, 1966 where petitioner's father, mother and brother's name reflected (Exbt -A)
- ii. Copy of voter list, 1970 petitioner's father , mother and grandmother's name reflected (Exbt – B)
- iii. Copy of voter list, 1966 name of the petitioner's husband and herself reflected (Exbt – C)
- iv. Voter list of 1970 (Exbt.-D)
- iv. Voter list of 1985 (Exbt.-E)
- v. Voter list of 1997 (Exbt.-F)
- vi. Jamabandi copy (Exbt – G)
- vii. Gaonburah Certificate (Exbt – H)
- viii. Gaonburah Certificate (Exbt – I)

5. In support of his submission, the learned counsel for the petitioner has relied upon the case of ***Sirajul Hoque vs. State of Assam & Ors.*** reported in ***(2019) 5 SCC 534*** to bring home the contention that minor discrepancies in the names in some documents may be overlooked.

6. *Per contra*, Ms. Verma, the 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 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. This is mandated under section 9 of the aforesaid Act, 1946. However, in the instant case, the petitioner utterly failed to discharge the burden. 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.

7. She further submits that so far as the documents are concerned, a part of the same cannot be relied upon and the document, as a whole is to be read. In any case, she submits that there are gross discrepancies in the name of the projected father of the petitioner and there is not even a single document to show the link of the petitioner with her father.

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

(i) 2018 (3) GLT 652 (*Tuta Mia @ Tota Mia vs. Union of India*);

(ii) 2018 (4) GLT 392 (*Borhan Ali vs. Union of India*);

(iii) (2019) 5 GLR 768 (*Monoduti Nandi vs. Union of India*).

9. The case of ***Tuta Mia @ Tota Mia*** (supra) has been cited to bring home the point that an extract of voter list is not admissible as an evidence as it is not a certified copy.

“17. In so far Exhibit-2 is concerned, it is an extract of the voters list of 2014 whereby voter was Abdus Samad, son of Tota Mia. This document is not admissible in evidence because it is not a certified copy. Therefore, it is neither primary evidence nor secondary evidence. Even then, if we accept the document at its face value, it only shows Abdus Samad to be son of Tota Mia. But there is nothing on record to trace existence of Tota Mia on Indian soil prior to 25.03.1971, which is the cut off date for identification of foreigners in the State of Assam as per Section 6-A of the Citizenship

Act, 1955, as amended."

10. In the case ***Borhan Ali*** (supra), it has been laid that a voter list is to be read in its entirety and not in part.

"27.1. Extending this principle, if a proceedee relies on a voters list, he has to rely on the same in its entirety and not in part. He cannot say that he will rely upon that part of the voters list which is favourable to the proceedee but would not rely upon that part of the voters list which goes against him, for example, vital discrepancies in name, residence and age. A document has to be appreciated as a whole; not in bits and pieces."

11. In the case of ***Monoduti Nandi*** (supra), the requirement of continuous stay has been emphasized so as to meet the requirement of establishing citizenship. In the said case, by taking into consideration the provisions of Section 6A (3) (b) of the Citizenship Act, 1955, the following have been laid down:

"6. We have perused the provisions of Section 6A(3) which is as follows:

(3)Subject to the provisions of sub-sections (6) and (7), every person of Indian origin who—

(a) came to Assam on or after the 1st day of January, 1966 but before the 25th day of March, 1971 from the specified territory; and

(b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and

(c) has been detected to be a foreigner, shall register himself in accordance with the rules made by the Central Government in this behalf under section 18 with such authority (thereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll for any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom. Explanation.—In the case of every person seeking registration under this sub-section, the opinion of the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 holding such person to be a foreigner, shall be deemed to be sufficient proof of the requirement under clause (c) of this sub-section and if any question arises as to whether such person complies with any other requirement under this sub-section, the registering

authority shall,—

(i) if such opinion contains a finding with respect to such other requirement, decide the

question in conformity with such finding;

(ii) if such opinion does not contain a finding with respect to such other requirement, refer the question to a Tribunal constituted under the said Order having jurisdiction in accordance with such rules as the Central Government may make in this behalf under section 18 and decide the question in conformity with the opinion received on such reference.

7. The requirement of registering with the Foreigners Registration Authority under Section 6A(3) of the Citizenship Act is subject to the following conditions precedent:

(i) that the proceedee came to Assam after 01.01.1966 but before 25.03.1971;

(ii) and since the date of his entry into Assam, been ordinarily resident in Assam; and

(iii) has been detected to be a foreigner.

8. In the instant case, as per the order of the Tribunal dated 16.06.1993, it is taken note of that there is no finding of a fact that since the date of their entry into Assam, the petitioners had ordinarily been residing in Assam. The only finding arrived is that the petitioners have entered India between 01.01.1966 and 25.03.1971. As the requirement of the conditions precedent of Section 6 A(3) had not been fulfilled in the case of the petitioners as revealed from the order of the Tribunal, we are of the view that there is a requirement of law to arrive at a finding of fact that the petitioners have ordinarily been residing in Assam since the date of their entry."

In the present case, there is a long gap from 1970 to 1985 with regard to the

voter lists which have been brought to records.

12. In the case of ***Rashminara Begum vs. Union of India*** reported in ***2017 (4) GLT 346***, it has been laid down that it is the duty of a proceedee to make all disclosures in the written statement.

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

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 observation 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. The principal ground of challenge is that the documents have not been properly appreciated and that there were sufficient materials to hold the petitioner to be a citizen of India.

19. In the written statement filed before the learned Tribunal, the petitioner has stated that she was born in village Shargaon and the name of her father is Mayan Akand, son of Gamir; the name of her mother has been stated to be Jomela Khatun and the name of her husband as Idresh Ali, son of Riaz. It is also stated that the petitioner had 6 siblings and she got married in the year 1963 and has 7 children. The voter lists of 1966 and 1970 have been annexed which contains the names of her father, mother and brother. Another set of voter list of the same years of 1966 and 1970 have been annexed with the name of the petitioner and her husband. In the voters list of 1985, along with the petitioner, there are two new names but her husband's name is not there. The voters list of 1997 is an uncertified copy which however contains the name of her husband

along with her and three other persons. A land document of 1966-67 has also been referred which allegedly contains the names of the father, brother, sister of the petitioner along with her.

20. To support the case of the petitioner, one Jier Ali projected to be her brother had deposed as DW2 in which his year of birth would appear as 1972. On the other hand, the father of the petitioner has been stated to have passed away in the year 1963 and therefore, the entire projection of the DW2 as the brother of the petitioner appears to be a farce. Further, the existence of the name of the father of the petitioner in the voters list of 1965 and 1970 also raises serious doubts on the projected case of the petitioner as according to the petitioner, her father had passed away in 1963.

21. As regards the land document allegedly containing the name of the father along with the petitioner, there are materials in record to show that the land was actually purchased by the father in law and therefore the veracity of such documents becomes highly doubtful. We have also noticed that there is a clear stand on behalf of the petitioner of shifting from Shargaon village in the year 1970 as the whole village of Shargaon was washed away in flood. Therefore, land document of the year 2007 of the same village clearly appears to be clouded.

22. In the case of ***Momin Ali vs. Union of India*** reported in ***2017 (2) GLT 1076***, it has been clearly laid down that there cannot be any variance between pleadings and proof submitted by a proceedee as the requirement is to prove the facts pleaded by material and cogent evidence. For ready reference, the relevant portions are extracted herein below:

“12. This written statement of the petitioner was wholly inadequate and did not disclose any material facts. As noticed above, it was the allegation of the State

that petitioner was a foreigner. Therefore, as per mandate of Section 9 of the Foreigners Act, 1946, it was the bounden duty of the petitioner to have disclosed all material facts which were specifically within his knowledge in the written statement but he did not do so. Petitioner neither mentioned his date of birth nor his age. He was silent regarding the name of his mother and identity of his grandparents - both paternal and maternal. He did not mention anything about his brothers and sisters or about his marital status. On the basis of such a written statement, it cannot be said that petitioner had stated anything substantial to show that he was not a foreigner but a citizen of India.

13. *It is a settled proposition of law that where a party fails to set up a case in his pleadings, he would be debarred from adducing evidence in his support at the stage of trial. As a matter of principle, variance between pleading and proof is not permissible."*

23. As regards the case laws cited on behalf of the petitioner, the facts are distinguishable and would not come to the aid of the petitioner. Further, in the case of **Sirajul Hoque** (supra), the Hon'ble Supreme Court had noticed that there was only a minor spelling mistake in the name of the grandfather wherein instead of the alphabet F in "Kefatullah", the alphabet M was written making it "Kematullah" and all other evidence were consistent. The facts are wholly different in the instant case wherein discrepancies are galore in the names of the petitioner, his projected father, ages and the address.

24. In view of the aforesaid facts and circumstances, we are of the opinion that the final order dated 09.08.2019 passed by the concerned Foreigners Tribunal in F.T. Case No. 151/2018 [Ref- IM(D)T Case no. 10652/98] does not call for any interference. Accordingly, this writ petition being devoid of merits stands dismissed.

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

26. Interim bail granted to the petitioner by this Court on 29.09.2023 earlier in

this matter is recalled / stands vacated.

27. The records of the F.T. Case No. 151/2018 [Ref- IM(D)T Case no. 10652/98] be returned forthwith, along with a copy of this order to the Foreigners Tribunal No. 8th , Barpeta. Copy of this order also be forwarded to the Superintendent of Police (Border) Barpeta for necessary information.

JUDGE

JUDGE

Comparing Assistant