

GAHC010267002017



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

Case No. : WP(C)/5401/2017

JAFAR ALI
S/O. KHERULLAH SHEIKH, VILL. RABHAPARA, P.S. MATIA, DIST.
GOALPARA, ASSAM.

VERSUS

THE UNION OF INDIA and 3 ORS.
REP. BY THE MINISTRY OF HOME AFFAIRS, GOVT. OF INDIA, SASTRI
BHAWAN, NEW DELHI, PIN-110001.

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

3:THE SUPERINTENDENT OF POLICE B
GOALPARA

DIST. GOALPARA
PIN-783101.

4:THE DEPUTY COMMISSIONER
GOALPARA

P.O. GOALPARA
DIST. GOALPARA
ASSAM
PIN-783101

Advocate for the Petitioner : MR. M A SHEIKH, MR.K U AHMED,MR.M HUSSAIN,MS.F
INTAZ

Advocate for the Respondent : , ASSTT.S.G.I.,GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

ORDER

Date : 29.07.2024

(K.R. Surana, J)

Heard Mr. M.A. Sheikh, the learned counsel for the petitioner. Also heard Mr. R.K.D. Choudhury, learned DSGI, representing respondent No.1, Ms. A. Verma, learned Standing Counsel for Home Department, representing respondent nos. 2 and 4 and Mr. R. Talukdar, learned Govt. Advocate, representing respondent no.4.

2) By filing this writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged the impugned opinion dated 04.07.2017, passed by the learned Member, Foreigners Tribunal No.5th, Goalpara, Assam in F.T. Case No. F.T/5/228/MA/16, whereby the petitioner was declared a foreigner who had illegally entered into India subsequent to 25.03.1971.

3) The learned counsel for the petitioner has referred to the written statement filed by the petitioner and it is submitted that the petitioner was born and brought up in Village- Sarapara, P.S. & Dist. Goalpara, Assam. The petitioner has projected that his father is Kherullah Sheikh and his mother is Sairon Nessa @ Sairun Bewa and that Earu Sheikh (Earuddin in NRC 1966) and Khademjan Bibi were his grand-parents. It has also been projected that the name of his grand-parents and parents were entered in the National Register of

Citizens- 1951 ("NRC-1951" for short). It was also projected that the name of his father was recorded in the voter's list of 1966 and 1970 in village- Sarapara, PO & Dist. Goalpara.

4) It is projected that the petitioner along with his family had shifted to village- Tangabari, P.S. Dudhnoi, District- Goalpara. It is projected that the name of Sairon Nessa, mother of the petitioner and the name of Saher Ali, elder brother of the petitioner was entered in the voters list of 1979 in village- Tangabari, but in the said voter's list, the name of her father appeared differently as Nirulla instead of correct name Kherullah. It is projected that in the voter's list of the year 1990, the name of petitioner's mother and Samser Ali, elder brother of the petitioner is entered in village- Tangabari, District- Goalpara. The petitioner and his family had then shifted from village- Tangabari to village- Sidhabari Part-II, P.S. Matia, Dist. Goalpara. It is projected that the name of the petitioner, his mother and wife have been recorded in the voter's list of 1997, being Jafar Ali, Saherun Nessa and Achlatun Nessa respectively, in respect of village- Sidhabari Part-II, Dist. Goalpara.

5) It is projected that the petitioner and his family had shifted from village- Sidhabari Part-II to village- Rabhapara, Dist. Goalpara, where he is still residing. His name along with the name of his wife, Achalatun Nessa has been recorded in the voter's list of 2005, however, as 'D' voter.

6) The learned counsel for the petitioner has submitted that the learned Foreigner's Tribunal had failed to consider the oral and documentary evidence on record and had whimsically passed the impugned opinion by taking a hyper- technical view by taking into account the minor discrepancy in the names and age of persons recorded in the voters list and non-production of voter's list of 1975, 1977, 1985 and 1995. It is submitted that for no apparent

reason, the evidence tendered by the petitioner as DW-1 was disbelieved.

7) The learned counsel for the petitioner has referred to (i) the additional affidavit filed by the petitioner on 23.05.2023, and (ii) the additional affidavit filed by the petitioner on 12.06.2023. Referring to the additional affidavit filed on 23.05.2023, it has been submitted that the petitioner has brought on record the following, viz., (i) affidavit sworn on 12.05.2023 by one Ussaranga Basumatari, regarding shifting of the petitioner from village- Sarapara to village- Tangabari and then to village- Sidhabari Part-II; (ii) affidavit sworn on 12.05.2023 by one Jamal Uddin Sheikh regarding shifting of the petitioner from village- Sidhabari Part-II to village- Rabhapara; and (iii) affidavit sworn on 12.05.2023 by one Matior Rahman regarding shifting of petitioner along with his elder brother Shahjamal Sheikh @ Bajju from Sidhabari Part-II to village- Rabhapara. It has been submitted that the voter's list of the said three persons has been annexed to show that their own names appeared in the voter's list of the villages where they are respectively residing.

8) By referring to the additional affidavit filed on 12.06.2023, it was submitted that the petitioner has produced the voter's list of 1997 containing the name of Jaher Ali, in village- Sarapara, and voter's list of 1997 containing his own name and the names of other family members in the voter's list of 1997.

9) Accordingly, the learned counsel for the petitioner had prayed for dismissing the impugned order as he had never entered India illegally and that the proceeding has been brought falsely against him.

10) Upon hearing the learned counsel for the appearing parties, the materials available in the records including the records called for from the learned Foreigner's Tribunal has been perused.

11) It is seen that in support of his defence, the petitioner has examined himself as DW-1, and 8 (eight) documents, viz., (i) attested copy of NRC-1951 of village- Singramari (Ext.A), containing the name of the projected grand-parents of the petitioner; (ii) the certified copy of the electoral roll of 1966 of Village- Sarapara (Ext.B); (iii) the certified copy of the electoral roll of 1970 of Village- Sarapara (Ext.C); (iv) the electoral roll of 1966 of Village- Nayapara reflecting the name of projected maternal grand-father of the petitioner (Ext.D); (v) the certified copy of the voter's list of 1970 of Village- Nayapara reflecting the name of projected maternal grand-father of the petitioner (Ext.E), (vi) photocopy of registered sale deed executed in the year 2004 (Ext.F); (vii) the certified copy of the electoral roll of 1977 of Village- Sidhabari Part-II (Ext.G) in the name of the petitioner and his mother; (viii) Land revenue paid certificate (Ext.H) in the name of the projected father of the petitioner in respect of the land situated at Singrabari.

12) The learned Tribunal has found the documents insufficient to hold the petitioner to be a citizen of India. Relevant para-6 of the impugned opinion dated 04.07.2017, is quoted below:-

“6. To come to a definite or just conclusion, let me first appreciate the evidence on record along with the aforementioned seven documents to determine the nationality of the O.P Zafor Ali S/O Kherullah Sk Ext-A N.R.C of 1951, exhibited a zerox copy of the same, where the name of the Kherullah Sk. S/O Lt. Earu Sk. aged about 26 yrs. seen recorded, but the same cannot be appreciated as the same is a photo copy of the original copy, it does not bears any evidentiary value Ext-B is the electoral roll of 1966, where the name of the Kherullya Sk. S/O Iyaruddin aged about 45 yrs. recorded more over the opp. party neither submitted the whole names of the family members in certified copy nor produced the extract copy of the electoral roll of 1966, Ext-C also the same, it presumed that if the opp. party submitted the extract copy of electoral roll of 1966 or 1970, then the tribunal can find out the irregularities of the names of others family members, for this the opp. party willfully avoid to submit the same. Ext-D & Ext E shows the name of the

Dhanu Paramanik and Achiman Nessa and Abuluddin Para: But there is no link who was those person only verbal evidence cannot be believed. Ext-F is the land sale deed vide No.7 executed on 09.01.2004 in favour of the Zafor Ali, S/O Kherullah Sk. of Sarapara. Ext-G is the electoral roll of 1997, of village Sidhabari Pt II, where the name of Sahjamal Sk., Zafar Sk. both are S/O Kherullah Sk. and Chaherun Bewa, Chamila Nessa and Achlatun Nessa's name recorded, Ext-H is the land revenue paid receipt, paid in the name Kherullah Sk. for the year 1975 to 1985 vide Khatian no 19 the opp. party also submitted the photo copy of the electoral roll of 1979, 1990 where the name of his mother recorded as Chayran Nessa, W/O Thirullah aged about 50 yrs., in 1990 her (alleged mother) name recorded as Chayran Nessa, W/O Kherulla 51 yrs. and in the year 1997 her (mother of the O.P) name recorded as Chayran Bewa, W/O Kherullah aged 70. I have seen the Opp. Party in his cross has stated that his father had expired in his early childhood, but when? As to why he unable to submit the electoral roll of 1975 or 1977, 1985, 1995 but no explanation or clarification in this respect, has been furnished as to why no such list has been furnished and proved in this case, therefore in absence of any reliable evidence on record, a reasonable doubt arises, which leads to the only presumption that afore mentioned Zafor Ali came to India without valid documents much after 1971. More over if his father's name is recorded in the NRC of 1951, then as to why he failed to submit the original copy of NRC 1951."

13) On a perusal of the documents exhibited by the petitioner, it is seen that learned Tribunal had discarded Ext.A, as because the original document of NRC-1951 was not produced and proved. The certified copy of the electoral roll of 1966 (Ext.B) and 1970 (Ext.C) contains only a single entry of Kherullah Sheikh, the projected father of the petitioner and it does not contain the names of any other family members. The electoral roll of 1966 of Village- Nayapara reflecting the name of projected maternal grand-father of the petitioner (Ext.D) is only a photocopy and the original document was not exhibited. The certified copy of the voter's list of 1970 of Village- Nayapara reflecting the name of projected maternal grand-father of the petitioner (Ext.E) does not help the petitioner as there is no other document to link the petitioner to his projected maternal grand-father. The petitioner has exhibited the

photocopy of the registered sale deed executed in the year 2004 (Ext.F), which is not admissible in evidence, being a photocopy and not proved by producing the original document. In the evidence-on-affidavit, the petitioner has referred to "the certified copy of the electoral roll of 1977 of Village- Sidhabari Part-II (Ext.G) in the name of the petitioner and his mother", but no such document is available in the Tribunal's record. However, a photocopy of electoral roll of the year 1997 is available in the Tribunal's record of the said village, which is not marked as an exhibit. The land revenue paid certificate (Ext.H) in the name of the projected father of the petitioner in respect of the land situated at Singrabari is also a photocopy and the original document is not exhibited.

14) The petitioner has examined one Ennus Ali Sheikh as DW-2, who had signed as Ennus Ali on the affidavit, and one Nurul Islam as DW-3. The DW-2 claims to be a cousin of the petitioner, but he has not exhibited any document to show the said relationship. However, in his cross-examination, DW-2 claims that the petitioner is his younger brother. However, as per the statement made in the evidence-on-affidavit, the father of DW-2 is Late Sabed Ali Pandit, but in para-16 of his evidence-on- affidavit, DW-2 claims that in the voter's list of 1997, the name of the petitioner appears with mother of DW-2 and wife of the petitioner, which is not believable for two reasons, firstly, the name of mother is mentioned as Saherun Bewa, which is claimed by the petitioner to be his mother. Secondly, the DW-2 has not produced any document to show the names of members of his own family and parents. Thus, oral evidence of DW-2 was rightly rejected by the learned Foreigner's Tribunal to be sufficient to prove that the petitioner is a citizen of India.

15) Similar stand is taken by DW-3, who claims to be the son of Late Jalaluddin Ahmed, but has stated in para-16 of his evidence-on-affidavit that in

the voter's list of 1997, the name of the petitioner appears with mother of DW-2 and wife of the petitioner, which is not believable for two reasons, firstly, the name of mother is mentioned as Saherun Bewa, which is claimed by the petitioner to be his mother. Secondly, the DW-2 has not produced any document to show the names of members of his own family and parents. Thus, oral evidence of DW-2 was rightly rejected by the learned Foreigner's Tribunal to be sufficient to prove that the petitioner is a citizen of India.

16) In his additional affidavit filed by the petitioner on 23.05.2023, the petitioner has annexed (i) affidavit sworn on 12.05.2023 by one Ussaranga Basumatari, regarding shifting of the petitioner from village- Sarapara to village- Tangabari and then to village- Sidhabari Part-II; (ii) affidavit sworn on 12.05.2023 by one Jamal Uddin Sheikh regarding shifting of the petitioner from village- Sidhabari Part-II to village- Rabhapara; and (iii) affidavit sworn on 12.05.2023 by one Matior Rahman regarding shifting of petitioner along with his elder brother Shahjamal Sheikh from Sidhabari Part-II to village- Rabhapara. Moreover, along with the additional affidavit filed by the petitioner on 12.06.2023, the petitioner has annexed photocopy of the purported voter's list of 1997 containing the names of projected brother of the petitioner and the voter's list of 1997 of village- Tangabari showing the names of projected brothers and sisters of the petitioner. Those affidavits and voter's lists were not exhibited and/or proved by the petitioner. The petitioner, in his written statement, has not disclosed the names of all his projected brothers and sisters, but only in respect of voter's list of 1990, he has mentioned the name of one Samser Ali as his elder brother, who was not examined as a witness by the petitioner. Moreover, the three persons who had sworn the affidavits were also not examined as witnesses during the course of proceedings before the

Foreigner's Tribunal. Hence, those un-exhibited documents cannot be looked into at this stage.

17) Accordingly, the Court is of the considered view that the voters list of 1966 and 1970 (Ext.A and Ext.B) remained as stand-alone documents. The petitioner has not been able to prove his linkage to his projected parents and grand-parents, whose name is claimed to appear in the said Ext.A and Ext.B.

18) In the absence of any documentary evidence to establish relationship, oral statement by DW-2 and DW-3 is not sufficient to prove that the petitioner was the son of Kherullah Sheikh and his mother is Sairun Bewa and that Earu Sheikh (Earuddin in NRC 1966) and Khademjan Bibi were his grand-parents. Thus, there are no grounds on which the opinion impugned herein is liable to be interfered with.

19) The primary issue in 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, as the relevant facts are within the knowledge of the proceedee, notwithstanding anything contained in the Evidence Act, 1872, the burden of proving citizenship absolutely rests upon the proceedee as per the provisions of Section 9 of the Foreigners Act, 1946. In the present case in hand, the petitioner has failed to discharge the burden and to prove that he is a citizen of India or that he is the offspring of parents of Indian origin.

20) In the case of *Sarbananda Sonowal v. Union of India*, AIR 2005 SC 2920: 2005 STPL 11372 (SC), the Supreme Court of India had observed and held as follows:-

17. *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 (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Sometimes the place of birth of his grand parents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by 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 which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

18. *Though in a criminal case the general rule is that the burden of proof is on the prosecution but if any fact is especially within the knowledge of the accused, he has to lead evidence to prove the said fact. In Shambhu Nath Mehra v. The State of Ajmer, AIR 1956 SC 404 it was held as follows:*

"Section 106 is an exception to S. 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and S. 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

In Collector of Customs, Madras v. D. Bhoormull, AIR 1974 SC 859, proceedings were initiated under Section 167(8)(c) of the Customs Act for confiscation of contraband or smuggled goods and it was observed:

"... Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the accused, it is not obliged to prove them as part of its primary burden." (Paragraph 31)

"... On the principle underlying S. 106 Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department

would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. In *State of West Bengal v. Meer Mohd. Umar*, (2000) 8 SCC 382, it was held that the legislature engrafted special rule in Section 106 of the Evidence Act to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. This principle was reiterated in *Sanjai @ Kaka v. State (NCT of Delhi)*, (2001) 3 SCC 190 and *Ezhil v. State of Tamil Nadu*, AIR 2002 SC 2017.

In *R. v. Oliver*, 1943 All ER 800, the accused was charged with having sold sugar as a whole-sale seller without the necessary licence. It was held that whether the accused had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him. It was further held that in the circumstances of the case the prosecution was under no necessity to give prima facie evidence of non-existence of a licence. In this case reference is made to some earlier decisions and it will be useful to notice the same. In *R. v. Turner*, (1916) 5 M & S 206: 14 Digest 430, the learned Judge observed as follows: "I have always understood it to be a general rule, that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative."

In *Williams v. Russel*, (1993) 149 LT 190, the learned Judge held as under: "On the principle laid down in *R. v. Turner* and numerous other cases where it is an offence to do an act without lawful authority, the person who sets up the lawful authority must prove it and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute."

19. Section 9 of the Foreigners Act regarding burden of proof is basically on the same lines as the corresponding provision is in U.K. and some other Western nations and is based upon sound legal principle that the facts which are peculiarly within the knowledge of a person should prove it and not the party who avers the negative.

(extracted from STPL)

21) The scope for interference with the finding of fact by the Foreigner's Tribunal in a writ proceeding is in a very narrow campus. Unless the petitioner is able to demonstrate that the opinion of the learned Tribunal is perverse, or vitiated by jurisdictional error, or otherwise grossly incorrect, the

writ Court would be slow in re-appreciation of the evidence as if it is exercising appellate jurisdiction. In this regard, the decision of the Supreme Court of India in the case of *Central Council for Research in Ayurvedic Sciences & Anr. v. Bikartan Das, (2023) 0 Supreme (SC) 763 ; AIR 2023 SC 4011* has been consistently being followed by this Court in a catena of cases. If one needs an authority on the point, the decision of this Court in the case of *Jahanara Khatun v. Union of India & Ors., 2024 (3) GLT 249* may be referred to.

22) In light of discussions above, this Court does not find that the impugned opinion rendered by the learned Tribunal is vitiated by any jurisdictional error or that there was any failure of giving opportunity of hearing to the petitioner. Therefore, as the Court is not exercising appellate jurisdiction, no case is made out for substituting the opinion rendered by the learned Foreigner's Tribunal with the view of the Court. This is not a case where the learned Tribunal had refused to admit admissible evidence or that its finding is *dehors* the evidence on record.

23) Hence, this writ petition fails and the same is dismissed, leaving the parties to bear their own cost.

24) Let the case records be returned together with a copy of this order for future reference.

JUDGE

JUDGE

Comparing Assistant