

GAHC010275142018



2024:GAU-AS:9459

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

WP(C) No. 8585/2018

Smt. Sati Baishya @ Sati Mitra@ Saraswati
Baishya,
D/O. Sailesh Mitra, W/O. Pratibesh Baishya,
Resident of Village-Tapovan Colony,
P.O., P.S. & District-Tawang, Arunachal Pradesh.

.....Petitioner

-Versus-

1. The Union of India,
Represented through the Ministry of Home Affairs,
Griha Mantralaya, New Delhi-110001.
2. The State of Assam,
Represented through the Secretary to the
Government of Assam, Home Department,
Dispur, Guwahati-781006.
3. The Election Commission of India,
Nirvachan Sadan Ashoka Road,

New Delhi- 110001.

4. The State Co-ordinator,
National Registration of Citizen, Assam,
Bhangagarh, Guwahati- 781005.
5. The Deputy Commissioner, Sonitpur,
P.O.- Tezpur, District- Sonitpur, Assam,
Pin- 784001.
6. The Superintendent of Police (Border),
Sonitpur,P.O.-Tezpur,
District-Sonitpur, Assam,
Pin Code-784001

.....Respondents

For Petitioner : Mr. S.C. Biswas, Advocate.

For Respondent(s) : Mr. J. Payeng, SC, Home Department.
Mr. H. Kuli, appearing on behalf of Mr. A. I. Ali, SC,
ECI.
Mr. P. Sharma, Sr., Govt. Advocate.

Date of Judgment & **20.09.2024**
Order

BEFORE

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

JUDGMENT AND ORDER(CAV)

(MRIDUL KUMAR KALITA, J)

- 1.** Heard Mr. S. C. Biswas, learned counsel for the petitioner. Also

heard Mr. J. Payeng, learned Standing Counsel for the Home Department, Assam for respondent Nos. 2 and 6. Also heard Mr. H. Kuli, learned counsel appearing on behalf of Mr. A.I. Ali, learned Standing Counsel, Election Commission of India for the respondent No. 3. Also heard Mr. P. Sharma, learned Additional Senior Government Advocate, Assam for respondent No. 5.

- 2.** This writ petition has been filed by the petitioner, namely, Smt. Sati Baishya @ Sati Mitra @ Saraswati Baishya, impugning the judgment and opinion dated 05.09.2018, passed by the learned Foreigners Tribunal (7th), Sonitpur, Balipara, in Case No. FTDC. 665/2016, whereby the petitioner was declared as a foreigner, who had illegally entered into India (Assam) on or after 25.03.1971.
- 3.** The facts relevant for consideration of the instant writ petition, in brief, are as follows:
 - i.** On the basis of a communication received from the Electoral Registration Officer, 74 Rangapara Legislative Assembly Constituency, by the Superintendent of Police, Sonitpur, Tezpur, to the effect that the above-named petitioner could not produce any document regarding her citizenship during verification before the Local Verification Officer, wherein a request was made to refer the matter to the learned Foreigners Tribunal, Sonitpur, for deciding the

question as to whether the proceedee, Smt. Saraswati Baishya, is a citizen of India or not, the Superintendent of Police, Tezpur, on 28.03.2007, made a reference to the learned Foreigners Tribunal, Sonitpur, for deciding the citizenship status of the petitioner, namely, Smt. Saraswati Baishya, under the Foreigners Act, 1946 and the rules made there under.

- ii.** It is pertinent to mention herein that the reference in the instant case was made in respect of one Saraswati Baishya, wife of Pratibal Baishya. The verification process was also conducted in respect of Smt. Saraswati Baishya, wife of Pratibal Baishya only, and there is no mention about the name of "Sati Mitra" or "Sati Baishya" during the verification process or at the time of making reference to the learned Tribunal.
- iii.** On receipt of the aforementioned reference from the Superintendent of Police, Sonitpur, Tezpur, the learned Foreigners Tribunal (7th), Sonitpur, Tezpur, registered the Case No. FTDC. 665/2016 and notice was issued to the proceedee.
- iv.** Accordingly, on 8th December 2017, the petitioner appeared before the learned Tribunal and filed her written statement,

along with the copies of documents on which she intended to rely.

- v.** In her written statement, the petitioner had stated that she is the daughter of one Sailesh Mitra, who is the son of Shib Charan Mitra and who were the citizen of India by birth. It has also been stated in her written statement that late Sailesh Mitra, who has been projected as her father, permanently resided at Village 1 No. Batabari, Mouza-Chinakona under Kalaigaon Police Station in the district of Darrang, which now falls under BTAD. It was also stated in the written statement that said Sailesh Mitra, the projected father of the petitioner, was a citizen of India and his name figured in the voter lists of the year 1965 and 1970 at 70 No. Kalaigaon Legislative Assembly Constituency. She has also stated that the name of her elder brother, namely, Subodh Mitra, has also appeared in the voter list of 1989 at Kalaigaon Legislative Assembly Constituency in respect of Village 1 No. Batabari, Mouza-Chinakona under Kalaigaon Police Station. The name of her brother Subodh Mitra also appeared in the voter list of 1997 in the same constituency.
- vi.** She has also stated that in the instant case her name has been wrongly recorded as Saraswati Baishya and that her husband's name has also been wrongly recorded as Pratibal

Baishya instead of Pratibash Baishya. She further stated that her actual name is Sati Mitra, but after marriage she used to write surname of her husband after her name and was known as Sati Baishya instead of Sati Mitra. She stated that in her Admit Card issued by the Board of Secondary Education, Assam (SEBA) in the year 1992, her name was recorded as Sati Mitra, daughter of Sailesh Mitra. She has also stated that later on 17.09.2014, she was married to one Pratibash Baishya, under the Special Marriage Act, 1944 before the Marriage Officer Tawang, Arunachal Pradesh. It is further stated that she is casting her vote, along with her husband under 2 Tawang (ST) Legislative Assembly Constituency at Village- Tapovan Colony, Tawang in Arunachal Pradesh.

vii. In support of the averments made by the petitioner in her written statement, she filed her evidence on affidavit, wherein she has reiterated the facts stated by her in her written statement. She exhibited following documents in support of her contention.

a. Exhibit-A - Voter List of 1965 of 70 No. Kalaigaon LAC Village No. 1, Batabari, Mouza-Chinakona, under Kalaigaon

Police Station, in the district of Darang.

- b.** Exhibit-B - Voter List of 1970 of the projected father of the petitioner.
- c.** Exhibit-C - Voter List of 1989 of 65 No. Kalaigaon LAC of Village No.1 Botabari, Mouza-Chinakona, Police Station, Kalaigaon, in the district, of Darrang of the projected brother of the petitioner, namely Subodh Mitra.
- d.** Exhibit-D- Voter List of 1997 showing the name of the projected brother of the petitioner.
- e.** Exhibit-E – The Admit Card issued to the petitioner by the Board of Secondary Education, Assam.
- f.** Exhibit-F - Marriage Certificate of the petitioner with one Pratibash Baishya.
- g.** Exhibit-G, Voter ID Card of the petitioner.
- h.** Exhibit-H, Gaon Burhas Certificate from the Government Gaon Burha Sri Dilip Basumatary of Village No.1 Botabari, Mouza-Chinakona, Police

Station, Kalaigaon, in the district of Darrang showing the linkage of the petitioner with her father, Sailesh Mitra.

viii. In her evidence-on- affidavit, the petitioner has also stated that her correct name is Sati Mitra and after her marriage, she used to write the surname of her husband "Baishya", and since then known as Sati Baishya. She has also stated that Sati Mitra and Sati Baishya are one and the same person. She has also stated that in the present case, her name has been wrongly recorded as Saraswati Baishya and the name of her husband has been wrongly recorded as Pratibal Baishya.

4. The learned counsel for the petitioner has submitted that the name of the petitioner is not Saraswati Baishya, but Sati Baishya and her original name was Sati Mitra and after her marriage with Pratibash Baishya, she started using the title of her husband with her name and therefore, since her marriage she is known as Sati Baishya. It is also submitted by the learned counsel for the petitioner that nowhere during the verification process or during the proceeding of the reference case, the identity of the present petitioner was confirmed as Saraswati Baishya.

5. The learned counsel for the petitioner has also submitted that the name of the father of the petitioner, is Sailash Mitra and his name appeared in the voter lists of 1965 as well as 1970.
6. The learned counsel for the petitioner has also submitted that the Admit Card exhibited by the petitioner before the Tribunal as Exhibit-E clearly shows that she is Sati Mitra and she is the daughter of Sailash Mitra. He also submits that the certificate issued by the *Gaon Burah*, which is exhibited as Exhibit-H also shows that Sati Mitra is the daughter of Sailash Mitra of Village No.1 Botabari, Mouza-Chinakona, Police Station, Kalaigaon, in the district of Udalguri, (BTAD), and she has been married to Sri Pratibash Baishya. Hence, he submits that the learned Tribunal wrongly ignored the documents produced by the petitioner before it during the enquiry and has arrived at a wrong finding that the petitioner is a Foreigner, who came to India (Assam) on or after 25.03.1971.
7. On the other hand, Mr. J. Payeng, learned Standing Counsel for the Home Department of the State has submitted that though the petitioner has claimed that she is Sati Baishya @ Sati Mitra and Saraswati Baishya and they are one and the same person, however, she did not adduce documentary evidence or any other evidence in support of her said contention. Therefore, he submits that the petitioner has failed to show that Sati Baishya

@ Sati Mitra and Saraswati Baishya are one and the same person.

8. The learned Standing Counsel Home Department, has submitted that though the petitioner has exhibited, Exhibit-H, i.e. the certificate issued by the Government Gaon Burah to show her linkage with her projected father Sailash Mitra, however, the said certificate has not been proved by the Government Gaon Burah by adducing his evidence, showing that he had issued the said certificate. Hence, the contents of Exhibit-D cannot be held to be duly proved and the said certificate may not be of any use to the petitioner.
9. The learned Standing Counsel, Home Department has also submitted that the Admit Card, which is exhibited as Exhibit-E, also shows the name of one Sati Mitra, who is the daughter of Sailesh Mitra. However, there is nothing on record to show that Sati Mitra and Saraswati Baishya are one and the same person. Hence, it is submitted that the petitioner has failed to adduce any evidence to show her linkage with her projected father, whom she has claimed to be a citizen of India, therefore, he submits that the writ petition filed by the present petitioner is liable to be dismissed.
10. Before considering the materials on record *vis-à-vis* the submissions made by learned counsel for both the sides, it is

pertinent to note herein that the ambit of exercise of jurisdiction under Article 226 of the Constitution of India by this Court, while considering a prayer for issuance of the Writ of Certiorari, is limited to the extent of interfering with an order which has been passed without jurisdiction or is palpably erroneous. This Court, while exercising the Writ jurisdiction, do not exercise the powers of the appellate Court and review or re-weigh the evidence on which the Tribunal has based its finding. In that perspective, we intend to examine the contention raised by both the parties.

- 11.** If we peruse the report of the Local Verification Officer dated 24.03.2005, which is the basis for making the reference in the instant case, it would appear that the verification was conducted in respect of one Smt. Saraswati Baishya of Sarupat Gaon, whose husband's name is shown to be Shri Pratibal Baishya.
- 12.** It also appears that the communication made by the Electoral Registration Officer of 74 Rangapara Legislative Assembly Constituency to the competent authority, Sonitpur, Tezpur was also in respect of Smt. Saraswati Baishya, wife of Pratibal Baishya and the reference made to the learned Foreigners Tribunal, Tezpur by the Superintendent of Police(B), Sonitpur, Tezpur, on 28.03.2007, was also in respect of Saraswati

Baishya wife of Pratibal Baishya. Moreover, the opinion rendered by the learned Foreigners Tribunal (7th), Sonitpur, in Case No. FTDC. 665/2016, on 05.09.2018, which has been impugned in the instant writ petition, is also in respect of Saraswati Baishya wife of Pratibal Baishya.

- 13.** The stand of the present petitioner before the Tribunal as well as before this Court that she is not Saraswati Baishya and her name has been wrongly shown as Saraswati Baishya has been consistent throughout. She has also stated throughout the proceeding that her name is Sati Mitra and after her marriage with Pratibash Baishya, she is known as Sati Baishya. She has exhibited her electoral photo identity card, which also contains her photograph, to show that her name is Sati Baishya and her husband's name is Pratibash Baishya.
- 14.** It also appears from the record that the notice to the petitioner by the learned Foreigners Tribunal (7th), Sonitpur, on 14.06.2017, was also issued to Smt. Saraswati Baishya, wife of Pratibal Baishya and said notice was delivered to one Smt. M. Baishya who was shown to be the mother of the petitioner in the report of the process server.
- 15.** It also appears that in all the documents, including the Vakalatnama, filed by the petitioner before the learned

Foreigners Tribunal in the FTDC Case No. 665/2016, the petitioner has signed her name as "Sati Baishya" and nowhere she has stated her name to be Saraswati Baishya. It has been constant stand of the petitioner that her name is not Saraswati Baishya wife of Pratibal Baishya.

16. Keeping the aforesaid facts in mind, let us now examine as to how the Tribunal came to the finding that Saraswati Baishya is a foreigner who entered into India on or after 25.03.1971.
17. The petitioner exhibited the computer-generated copy of the voter list of 1965 as Exhibit-A and voter list of 1970 as Exhibit-B, where the name of her projected father Sailesh Mitra, son of Shib Charan Mitra appears at Sl. No. 115 and Sl. No. 111, respectively. However, the learned Tribunal, had discarded those voter lists on the ground that those are not admissible evidence as required under Section 65B of the Indian Evidence Act, that has not been complied with.
18. It is no longer *res integra* that the certified copies of voter list are admissible in evidence. However, this Court in the case of **"Borhan Ali Vs. Union of India and Ors."** reported in **"2018 (4)GLT 392"** has held that in spite of the presumptions of genuineness of the certified copies of the documents, it would be safe for the Tribunal to insist on prove of contents of such certified copies by comparing it with the primary evidence, i.e.

the electoral roll in original produced and testified before the Tribunal. It has observed as follows:

"21.7. Therefore, if a proceedee relies on a voters list, only a certified copy of such voters list or extract thereof would be admissible in evidence. Filing of an unsigned or unauthenticated or uncertified copy of voters list sought to be relied upon as proof of citizenship would not be admissible in evidence, Therefore, we would respectfully disagree with the view taken by the Orissa High Court.

21.8. There is one more aspect. Though under Section 79 of the Evidence Act, there is presumption as to the genuineness of certified copies provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf, it is in the public domain that citizenship is a contentious issue in so far the State of Assam is concerned. There are 100 Foreigners Tribunals functioning in the State of Assam which are mandated under the law to answer references made to them by the referral authority, i.e., concerned Superintendent of Police (Border) as to whether the proceedee is a foreigner or not. Simultaneously, process is on for finalizing or rather updating National Register of Citizens (NRC) in the State of Assam. In both the processes, proceedee or the claimant, as the case may be, primarily rely upon voters lists to prove their citizenship. It is also in public domain that a large number of voters lists have been detected which have been suspected to be not genuine. Therefore, notwithstanding the presumption of genuineness under Section 79, it would be safe for the Tribunals and the

Courts to insist on proof of contents of such certified copies by comparing with the primary evidence, i.e., electoral roll in original produced and testified before the Tribunal or the Court by the lawful custodian of such primary evidence i.e., by the concerned Electoral Registration Officer or by his authorized officer or personnel.”

- 19.** As the petitioner has not adduced the evidence of any lawful custodian of such voter list(s), this Court finds no error in the Tribunal in not relying on Exhibits-A and B. For the same reasons, the Tribunal did not rely on Exhibits-C and D, which are the voter lists containing the name of the projected brother of the petitioner.
- 20.** The learned Tribunal discarded Exhibit-E, which is the HSLC Admit Card in the name of Sati Mitra, on the ground that, on discarding of the voter lists, where the name of the projected father of the proceedee appears, the said Exhibit-E does not remain of any use for the proceedee to show that she is a citizen of India. Further, Exhibit-F, which is the Marriage Certificate of the petitioner, was also discarded on the ground that it is a document after 25.03.1971 that shows the linkage of the petitioner only with her husband, holding that it is not at all relevant. Similarly, Exhibit-G was also discarded by the learned Tribunal, on the ground that it only establishes link with her husband and accordingly, same is not relevant. Exhibit-H was

discarded by the Tribunal on the ground that it was not proved according to law, i.e., the person who issued the said certificate was not examined as a witness and therefore, it was not relied upon.

- 21.** Be that as it may, it appears that after discarding the voter lists exhibited by the petitioner namely, Exhibit-A, B, C and D, other documents which were exhibited by the petitioner were also discarded only because, after discarding the voter lists, nothing remains to show that the father of the proceedee was an Indian citizen.
- 22.** However, it appears to us that ultimately the Tribunal declared the proceedee as an illegal migrant, who came to Assam on or after 25.03.1971 and in the said case before the Tribunal, the name of the proceedee was Saraswati Baishya only and there is no finding by the Tribunal that Saraswati Baishya and Sati Baishya are one and the same person.
- 23.** We are of the considered view that unless there is a finding by the Tribunal that the above-named petitioner, namely "Sati Baishya" @ Sati Mitra and Saraswati Baishya are one and the same person, the Tribunal could not have proceeded against the above-named petitioner in Case No. FTDC. 665/2016 as the reference to the Tribunal was made in respect of one Saraswati Baishya, wife of Pratibal Baishya only.

- 24.** Moreover, as on her appearance before the learned Tribunal by filing her written statement, the abovenamed petitioner has categorically stated that her name is not Saraswati Baishya, but Sati Mitra @ Sati Baishya, the Tribunal ought to have ascertained the identity of the above-named petitioner before proceeding with the reference case against her. The learned counsel for the petitioner has also submitted that the notice issued by the Tribunal was served on the mother-in-law of the present petitioner and merely because notice was received by her mother-in-law, the petitioner ought not to have been compelled to face the proceeding before the Foreigners Tribunal unless the reference was made in her name, i.e., Sati Mitra @ Sati Baishya or unless there is a finding that Smt. Saraswati Baishya, wife of Pratibal Baishya and Sati Mitra @ Sati Baishya, wife of Pratibash Baishya are one and the same person. As no such finding is there by the learned Tribunal, the impugned opinion rendered by the Foreigners Tribunal, in Case No. FTDC. 665/2016, in our opinion shall not be applicable to the above-named petitioner.
- 25.** In view of above discussion, we are of the view that it is a fit case of remand. Accordingly, the Case No. FTDC. 665/2016 is hereby remanded back to the Foreigners' Tribunal (7th), Sonitpur, Chariduar at Balipara for ascertaining as to whether

Sati Baishya @ Sati Mitra and Saraswati Baishya, wife of Pratibal Baishya are the names of one and the same person or not. The Tribunal may allow the State to adduce evidence to show as to whether Saraswati Baishya, wife of Pratibal Baishya and Sati Mitra@ Sati Baishya wife of Pratibash Baishya are one and the same person. In the event the State adduces any evidence in this regard, the petitioner may also be allowed to counter the said evidence by cross-examining the witnesses and by adducing her own evidence to show that the petitioner is not Saraswati Baishya, wife of Pratibal Baishya. After ascertaining the aforesaid fact, the learned Foreigner's Tribunal (7th), Sonitpur, Balipara, shall render a fresh opinion in this regard, to the reference made to it by the Superintendent of Police (Border), Sonitpur.

- 26.** Consequently, the impugned Order/Opinion dated 05.09.2018 passed by learned Member, Foreigners Tribunal (7th) Tezpur, Chariduar at Balipara, District-Sonitpur in Case No. FTDC. 665/2016 arising out of Reference TZP(B)/1047/07 dated 28.03.2007, is hereby set aside and quashed.
- 27.** As this Judgment has been passed in presence of the counsels for both the parties, no fresh notice need be issued to the parties for their appearance by the Foreigner's Tribunal (7th) Tezpur, Chariduar at Balipara, Sonitpur District. The petitioner

as well as the State respondent shall appear before the said Tribunal in Case No. FTDC. 665/2016 on 28.10.2024 at 10:30 AM. Petitioner shall submit a certified copy of this order before the said Tribunal.

- 28.** With above directions, this writ petition is disposed of.
- 29.** Send back the record of Case No. FTDC. 665/2016 to the learned Foreigner's Tribunal (7th), Sonitpur, Chariduar at Balipara, along with a copy of this judgment forthwith to comply with the directions made therein.
- 30.** Copy of this judgment be also forwarded to the Deputy Commissioner, Sonitpur District, Tezpur as well as Superintendent of Police (Border), Sonitpur District, Tezpur forthwith for their necessary use.

JUDGE

JUDGE

Comparing Assistant