

GAHC010286192023



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

Case No. : WP(C)/82/2024

BATEN PARAMANIK @ ABDUL BATER
S/O- JAINAL PARAMANIK @ JAINAL PORAMANI @ JOYNAL ABDIN,
VILL.- 3 NO. GALANDIKASH,
P.O.- GALANDI,
P.S.- KHARUPETIA,
DIST.- DARRANG, ASSAM.
PRESENTLY RESIDING AT-
VILL. AND P.O.- GHANSIMOLU,
P.S.- KHARUPETIA,
DIST.- DARRANG, ASSAM.

VERSUS

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

2:THE ELECTION COMMISSION OF INDIA
REPRESENTED BY THE CHIEF ELECTION COMMISSIONER

NEW DELHI-110001.

3:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM

HOME DEPARTMENT
DISPUR

GUWAHATI- 781006.

4:THE STATE COORDINATOR OF NATIONAL REGISTER OF CITIZENS
ASSAM
1ST FLOOR
ACHYUT PLAZA

GUWAHATI SHILLONG ROAD

BHANGAGARH
GUWAHATI

ASSAM
PIN- 781005.

5:THE DEPUTY COMMISSIONER OF DARRANG DISTRICT
DARRANG AT MANGALDAI

P.O. AND P.S.- MANGALDAI

DISTRICT- DARRANG
ASSAM

PIN- 784125.

6:THE SUPERINTENDENT OF POLICE
DARRANG DISTRICT
DARRANG AT MANGALDAI

P.O. AND P.S.- MANGALDAI

DISTRICT- DARRANG
ASSAM

PIN- 784125

Advocate for the Petitioner : MR. A T SARKAR

Advocate for the Respondent : DY.S.G.I.

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 AT Sarkar, Adv.

Advocates for the respondents : Ms. A. Verma, SC- Home Dept.

Shri P. Sarma, Add. Sr. GA

Shri H. Kuli, Adv.

Date of hearing : **06.02.2024**

Date of Judgment : **13.02.2024**

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 14.11.2023 passed by the learned Foreigners Tribunal (3rd), Darrang in F.T.(3) Case No. 6280/2022 (Ref-FT Case No. 309/2009). 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. As per the projection made in the petition, the aforesaid order is an *ex parte* one.

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), Darrang, Mangaldai District, against the petitioner giving rise to the aforesaid F.T. (3) Case No. 6280/2022.

(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 18.07.2023 along with certain documents. Thereafter,

though at least 5 dates were fixed for filing of evidence on affidavit, neither the petitioner nor his counsel had appeared and accordingly on 14.11.2023, the impugned order has been passed.

(iii) The learned Tribunal after noticing the aforesaid 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 him and accordingly, the opinion was rendered declaring the petitioner to be a foreign national post 25.03.1971.

3. We have heard Shri A.T. Sarkar, 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 10.01.2024.

4. It is contended on behalf of the petitioner that the default in appearance was on account of the fault on the part of his counsel. It is submitted that the engaged lawyer neither appeared himself nor informed the petitioner about the dates and rather assured the petitioner that the matter was being taken care of. Shri Sarkar has however submitted that the written statement was indeed filed on 18.07.2023 and on the subsequent date i.e. 11.08.2023, time was taken to file the evidence on affidavit.

5. By referring to Order 4(e) of the Foreigners (Tribunals) Order, 1964, Shri Sarkar, learned counsel submits that the aforesaid provision vests powers upon the Tribunal to issue warrant of arrest to secure the attendance of a party and

without exercising the said power, the decision to proceed *ex parte* is not proper.

6. Shri Sarkar further submits that the documents which are available and annexed to the writ petition would *ex facie* demonstrate his citizenship. In this connection, the Voter Lists of 1966 and 1977 have been referred to containing the name of the projected father of the petitioner. Reference has also been made to the Voter Lists of 1993, 1997, 2010 and 2023 by contending that the same contain the name of the petitioner.

7. The learned counsel for the petitioner has accordingly submitted that he was deprived from an opportunity to contest the case which proceeded *ex parte* and therefore, the instant petition may be allowed and the matter be remanded back for a fresh adjudication on merits.

8. *Per contra*, Ms. A. Verma, learned Standing Counsel, Home Department has at the outset emphatically refuted the primary contention made on behalf of the petitioner that the order dated 14.11.2023 of the learned Tribunal is an *ex parte* order. It is submitted that notices were duly served whereafter, the petitioner had also filed his written statement on 18.07.2023 and thereafter, on 11.08.2023 had taken time to file the evidence on affidavit. However, there was continuous default thereafter and only after giving adequate opportunity, the learned Tribunal had passed the order dated 14.11.2023.

9. The learned Standing Counsel further submits that even the attempt to convince this Court in support of his citizenship is absolutely perfunctory and without any basis. It is submitted that in the written statement, the petitioner had mentioned that there were 8 siblings of the petitioner and in none of the Voter Lists, names of any of the siblings of the petitioner exists. Apart from the

discrepancies in the names, address and age, no Voter Lists from the period 1971 to 1993 have been referred. She further submits that even in appropriate case, a part of a document cannot be relied upon and the document as a whole is to be appreciated. It is also submitted that under clause 3(8) of the Order of 1964, a prescription of time is given for filing of written statement and evidence on affidavit and the same cannot be an endless exercise.

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

- i. Order dated 25.08.2017 of this Court (DB) in WP(C)/1002/2016 [Basiron Bibi Vs. UOI]**
- ii. Order dated 12.10.2020 of this Court (DB) in WP(C)/8361/2019 [Ijjat Ali Vs. Union of India]**
- iii. Order dated 05.01.2021 of this Court (DB) in WP(C)/1293/2020 [Sajiran Nessa Vs. UOI]**

11. The case of **Basiron Bibi** (supra) has been cited to support the contention of requiring the appreciation of a document as a whole, the relevant extract of which is reproduced below-

“Regarding discrepancies in the voters’ lists which the petitioner contended were not her creation being entered into by officials of Election Commission and therefore should not be used adversely against the petitioner, such contention is without any substance. The voters’ lists were adduced as evidence by the petitioner herself to prove her case that she was not a foreigner but a citizen of India. Petitioner cannot insist that only that portions of the voters’ lists which are in her favour should be accepted and those portions going against her should be over-looked.

This is not how a document put forward as a piece of evidence should be examined. The document has to be appreciated as a whole."

12. The case of **Ijjat Ali** (supra) has been cited in support of the contention that a proceeding before the Foreigners' Tribunal cannot be an endless exercise. The relevant part of the aforesaid judgment is extracted hereinbelow-

"Having regard to the undisputed facts, as above, we find that sufficient opportunities had been granted to the petitioner to establish his claim as not being foreigner or to refute the allegation that he had illegally entered into the territory of India after 25.03.1971. In this context, we may observe that although the procedure of identification and for declaring an individual to be a foreign national cannot be relegated to a mechanical exercise and that fair and reasonable opportunity must be afforded to a proceedee to establish claim that he/she is a citizen of India, however, such grant of opportunity cannot be enlarged to an endless exercise. A person who is not diligent and/or is unmindful to take steps to safeguard his interest, he does so at his own risk and peril."

13. In the case of **Sajiran Nessa** (supra), meaning of sufficient opportunities *qua* a proceedee before a Foreigners' Tribunal have been explained. For ready reference, the relevant part is extracted hereinbelow-

"Having regard to the facts, as above, we find that sufficient opportunities had been granted to the petitioner to establish her claim as not being a foreigner or to refute the allegation that she had illegally entered into the territory of India after 25.03.1971. In this context, we may observe that although the procedure of identification and for declaring an individual to be a foreign national cannot be relegated to a mechanical exercise and

that fair and reasonable opportunity must be afforded to a proceedee to establish claim that he/she is a citizen of India, however, such grant of opportunity cannot be enlarged to an endless exercise. A person who is not diligent and/or is unmindful to take steps to safeguard his/her interest, he/she does so at his own risk and peril. In the instant case several opportunities were granted to the petitioner to establish her claim, which she utterly failed to do so. In this context, we may observe that in a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964, the primary issue for determination is whether the proceedee is a foreigner or not. The relevant fact being especially within the knowledge of the proceedee, as such, the burden of proving citizenship absolutely rests upon the proceedee, notwithstanding anything contained in the Indian Evidence Act, 1872. This is mandated under section 9 of the aforesaid Act, 1946. The said position would not change even in an ex-parte proceeding before the Tribunal as the burden never shifts but continues to be upon the proceedee. In a situation where no evidence is adduced or the burden is not discharged, the only option left to the Tribunal would be to declare the proceedee to be a foreigner, based on the grounds of reference upon which appropriate proceeding was initiated, where notice was issued and duly served upon the proceedee. In the instant case, the petitioner utterly neglected to participate/contest in the proceedings."

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

15. 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.

16. 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."

17. The principal ground of challenge is by citing the default of the lawyer. However, it is seen that the explanations / pleadings made in this regard in paragraph 5 are wholly insufficient and vague. This Court has noticed and had also solicited the response of the learned counsel to come to a finding that not to talk about any complaint in the Bar Council against the concerned lawyer, even the name of the lawyer has not been stated.

18. Now let us deal with the argument made on behalf of the petitioner by taking support of Order 4(e) of the Order of 1964 that a proceeding cannot be made *ex parte* without exhausting the aforesaid provision. The aforesaid

provision reads as follows:

“4. Powers of Foreigners Tribunals- *The Foreigners Tribunals shall have the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), and the powers of a Judicial Magistrate First Class under the Code of Criminal Procedure, 1973 (2 of 1974) in respect of the following matters, namely, -*

(a)...

(b)...

(c)...

(d)...

(e) issuing a warrant of arrest against the proceedee if he or she fails to appear before it.”

19. The aforesaid provision has been inserted by a notification dated 10.12.2013. The objective behind such insertion is to secure the attendance of a proceedee in case such attendance is deemed necessary by the learned Tribunal and for doing so, the learned Tribunal can exercise the powers of a JMFC under the CrPC, 1973. However, the said provision cannot be interpreted to mean that even for filing a written statement for defending the case, such powers are to be exercised. In the opinion of this Court, the aforesaid argument is apparently flawed and if such interpretation is accepted, no case under the Foreigners Tribunal can be proceeded *ex parte* which would be a wholly unreasonable proposition. The aforesaid view of this Court is fortified by the other provisions in the Order of 1964 which, in fact contemplates *ex parte* proceedings. In this connection, Order 3A of the said Order of 1964 may be referred to which lays down the procedure for setting aside *ex parte* order and the said provision of 3A was also inserted vide the same notification dated 10.12.2013.

20. As regards the reliance upon the documents made on behalf of the petitioner, this Court is of the view that when documents submitted by him in his written statement were not proved by the petitioner before the learned Tribunal in accordance with law, the said documents cannot be looked into by this Court as that would amount to dispensing the requirement of proof of documents. In a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 for determination as to whether the proceedee is a foreigner or not, the relevant facts being especially within the knowledge of the proceedee and therefore, the burden of proving citizenship absolutely rests upon the proceedee, notwithstanding anything contained in the Evidence Act, 1872. This is mandated under Section 9 of the aforesaid Act, 1946.

21. Be that as it may, even the documents annexed to this writ petition do not inspire confidence. This Court finds force in the argument made on behalf of the respondents in the Home Department that in the written statement, the petitioner had mentioned that there were 8(eight) siblings of the petitioner and in none of the Voter Lists, names of any of the siblings of the petitioner are seen to be existing. Further, apart from the discrepancies in the names, address and age, no Voter Lists from the period 1971 to 1993 have been referred and there is no explanation in this regard.

22. In view of the aforesaid facts and circumstances, we are of the opinion that the final order dated 14.11.2023 passed by the learned Foreigners Tribunal (3rd), Darrang in F.T.(3) Case No. 6280/2022 (Ref-FT Case No. 309/2009) does not call for any interference. Accordingly, this writ petition being devoid of merits stands dismissed.

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

24. The records of the said F.T.(3) Case No. 6280/2022 (Ref-FT Case No. 309/2009) be returned to the learned Foreigners Tribunal (3rd), Darrang, Mangaldai forthwith along with a copy of this order.

JUDGE

JUDGE

Comparing Assistant