

GAHC010288962023



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

Case No. : WP(C)/7467/2023

ANOWARA KHATOON @ ANOWARA KHATUN
WIFE OF ABDUL MAZID,
DAUGHTER OF ALIMUDDIN @ ALIMUDDIN SK.
PERMANENT RESIDENT OF VILLAGE- BHAKUAMARI,
P.S.- SALBARI
IN THE BAKSA DISTRICT OF ASSAM.

VERSUS

THE UNION OF INDIA AND 5 ORS
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA,
MINISTRY OF HOME AFFAIRS,
NEW DELHI. PIN -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
GOVERNMENT OF ASSAM

HOME DEPARTMENT
DISPUR
GUWAHATI- 781006.

4:THE DEPUTY COMMISSIONER
BAKSA
MUSHALPUR
781372.

5:THE SUPERINTENDENT OF POLICE (B)

BAKSA
MUSHALPUR
781372.

6:COORDINTOR
NATIONAL REGISTER OF CITIZENS
BHANGAGARH
GUWAHATI-4

Advocate for the Petitioner : MR A W AMAN

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

BEFORE

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of Order : 07.03.2024

ORDER

(M. R. Pathak, J)

Heard Mr. A. W. Aman, learned counsel for the petitioner and Mr. A. I. Ali, learned Standing Counsel, Election Commission of India for the respondent No.2. Also heard Ms. A. Verma, learned Standing Counsel, Home Department Assam for the respondent Nos. 3 & 5 as well as Mr. P. Sharma, learned Additional Senior Government Advocate, Assam for the respondent No.6.

2) The petitioner has filed this writ petition on 19.12.2023 challenging the ex-parte order dated 23.12.2019, passed by the learned Foreigners Tribunal, Baksa at Tamulpur, Assam in F.T. Case No. 42/BAKSA/2019 whereby, she was declared to be a foreigner under the Foreigners Act, 1946, who had illegally entered into the territory of India from the specified territory on or after 25.03.1971.

3) Earlier, on 20.12.2023, the records in original of said F.T. Case No. 42/BAKSA/2019 were called for from the said Tribunal that has been accordingly placed before the Court and we have perused the same.

4) Brief facts of the case is that the Superintendent of Police (Border), Baksa vide

communication No. BSA/B/27/10/755-769 dated 08.09.2010 in F.T. Case No. 571/2010 referred the matter under Order 2 (1) of the Foreigners' (Tribunals) Orders, 1964 to the Foreigners' Tribunal, Baksa seeking opinion as to whether the suspect/proceedee/opposite party, i.e., petitioner herein is a foreigner under the Foreigners Act, 1946 or not.

5) The said reference of the S.P. (Border), Baksa dated 08.09.2010 was accordingly registered before the Foreigners Tribunal, Baksa at Tamulpur, Assam as F.T. Case No. 42/BAKSA/2019 wherein as per the provisions of Order 3 (1) of the Foreigners (Tribunal) Order, 1964, the said Tribunal on 06.06.2019 issued notice to the petitioner enabling her to show cause, supported by valid documents as admissible as required under Section 9 of the Foreigners Act, 1946 so as to prove her nationality, i.e., she is not a foreigner/illegal migrant, fixing the matter on 29.06.2019, observing that on her failure to respond to the said notice (dated 06.06.2019), the Tribunal shall proceed to decide the reference ex-parte.

6) The petitioner on receipt of the said notice dated 06.06.2019 appeared before the Foreigners Tribunal, Baksa on 29.06.2019 through her engaged counsel in said F.T. Case No. 42/BAKSA/2019. Though she did not appear before the Tribunal on 29.06.2019 but her counsel on 29.06.2019 filed an application before the Tribunal seeking another date for filing her Written Statement in the matter stating that the opposite party (petitioner) could not appear on the said date due to unavoidable circumstances. The Tribunal considered such prayer on behalf of the opposite party/petitioner and granted time to her, fixing the matter on 22.07.2019 for her appearance and filing of Written Statement and documents in the matter.

7) From the records we have seen that on 22.07.2019, the petitioner did not appear before the Tribunal in the matter and her counsel filed a petition stating that though she was ready to appear but as she could not collect a proper bailor, she could not appear on that day and therefore prayed for some time for her appearance and filing of Written Statement. The Tribunal considering the same fixed 14.08.2019 for appearance of the petitioner and filing of her Written Statement in it.

8) The petitioner on various pretext did not appear before the said Tribunal in the matter on the dates fixed i.e., on 14.08.2019; 04.09.2019; 25.09.2019 and 21.10.2019 though those were the dates fixed by the Tribunal for her appearance and filing of her Written Statement. However, the counsel for the petitioner on those dates filed petitions seeking adjournment of the matter for

appearance of the petitioner and for filing her Written Statement stating the ground of her non-appearance due to unavoidable circumstances. The Tribunal considered those petitions of the learned counsel for the petitioner and extended the time for her appearance and for filing her written statement in the said matter.

9) On 21.10.2019, the Tribunal while granting adjournment to the petitioner fixed the matter on 18.11.2019 for her appearance, filing of Written Statement and documents, observing that on her failure, the reference shall be answered.

10) Even on 18.11.2019, the petitioner did not appear before the Tribunal and her counsel on 18.11.2019 filed application stating that her bail bond with written statement had already been submitted but as her bailor sustained injury in a motor accident and was hospitalized that was informed to him over telephone, hence, he filed the said application on behalf of the petitioner stating that she could not appear on that date and sought for another date for her appearance and filing written statement.

11) From the records, we have seen that even on 18.11.2019, the learned Tribunal adjourned the matter considering the said application filed by her counsel fixing 23.12.2019 for her appearance, written statement and filing of documents observing that failing the same the reference shall be answered accordingly.

12) On 23.12.2019, the petitioner remained absent before the Tribunal and after hearing the Assistant Government pleader and considering the fact that the notice in the case was served on her way back on 21.06.2019 and she through her counsel appeared on 29.06.2019 but in spite of granting several adjournments and sufficient opportunities the Tribunal found that the petitioner/proceedee did not take any effective steps in the matter.

13) The Tribunal observed that as per Section 9 of the Foreigners Act, 1946, burden of proving whether a proceedee is a foreigner or not, notwithstanding anything contained in the Evidence Act, 1872, lies upon the opposite party.

14) From the records, we have seen that the Tribunal considered the police enquiry report which reflected that the petitioner/proceedee suspected to have entered into the territory of India illegally or as illegal migrant from Village-Sarpara, Police Station-Paugsa, District-Rajbari of

Bangladesh, the specified territory after 25.03.1971. The Tribunal also found that the proceedee did not volunteer to appear before the Tribunal and also did not prove her citizenship in India from the relevant period though she was granted sufficient opportunity and time to prove her nationality as provided under the law.

15) Since the petitioner failed to prove and/or establish her presence in India prior to 25.03.1971 as required under the provisions of Section 6 (A) of the Citizenship Act, 1955 as amended and also failed to prove her nationality as required under Section 9 of the Foreigners Act, 1946, in that background, the learned Foreigners Tribunal, Baksa on 23.12.2019 passed the impugned order in said F.T. Case No. 42/BAKSA/2019, holding her to be a foreigner who had entered into India illegally from the specified territory after 25.03.1971, disposing of the reference answering the question in negative holding that she is a foreigner.

16) Though the petitioner in this petition have annexed certain documents stating that name of her grandfather Javed Ali, son of Abed Ali figured in the voters list of 1966 from Village-Minua of Sorbhog Police Station under No. 47 Sorbhog Legislative Assembly Constituency in the then District-Kamrup, thereafter, her said family shifted their residence to Bilasipara under No. 40 Sorbhog Legislative Assembly Constituency and that name of her parents, i.e., father, Alimuddin, son of Sabed and mother, Kad Bhanu Nessa, wife of Alimuddin figured in the voters lists of 1973, 1985, 1989 and 1997 from Village-Matanga under No. 40 Sorbhog LAC.

17) Petitioner also stated that her name figured in the voters lists of 1997, 2005, 2010 and 2019 along with her husband Abdul Mazid from Village-Bhakuamari under No. 40 Sorbhog LAC, Identity Card issued by the concerned Village Headman on 09.08.2019, Elector Photo Identity Card issued in her name on 01.10.2013, Permanent Account Number Card issued by the Income Tax Department showing her to be the daughter of Alimuddin and land document in her name and her brothers and sisters as well as her mother pursuant to the order dated 29.11.2018 inherited from her father, Alimuddin. Petitioner stated that as those documents are sufficient to prove her nationality, she should be given a chance to appear before the Tribunal to prove her citizenship.

18) It is also stated that on 31.10.2023 she was taken into custody pursuant to the said order dated 23.12.2019 passed by the learned Foreigners Tribunal, Baksa, Tamulpur in F.T. Case No. 42/BAKSA/2019 and presently kept in the Detention Camp at Matia, Goalpara.

19) Hence, this writ petition by the petitioner praying amongst others to set aside and quash the impugned ex-parte order dated 23.12.2019 passed by the learned Foreigners Tribunal, Baksa, Tamulpur in F.T. Case No. 42/BAKSA/2019 and to treat her as a citizen of India and further in the interim prayed for stay of the said ex-parte order dated 23.12.2019 passed by the learned Foreigners Tribunal, Baksa, Tamulpur in F.T. Case No. 42/BAKSA/2019, thereby directing the respondents to release her from Transit Camp allowing her to remain on bail.

20) Order 3 of the Foreigners (Tribunals) Order, 1964 provides for the procedure for disposal of questions by a Foreigners Tribunal while giving its opinion pertaining to the question referred by the concerned/empowered authority as to whether a person is or is not a foreigner within the meaning of the Foreigners Act, 1946. The Foreigners (Tribunals) Order, 1964 has been framed under Section 3 of the Foreigners Act, 1946 and therefore, the provisions of said 1964 Order having a statutory force are mandatory and binding in nature.

21) Order 3 (7) of said 1964 Order stipulates that — *In case where notice is duly served, the proceedee shall appear before the Foreigners Tribunal in person or by a counsel engaged by him or her as the case may be on every hearing before the Foreigners Tribunal.*

22) Order 3 (8) of said 1964 Order provides that — *The Foreigners Tribunal shall give the proceedee ten days time to give reply to the show-cause notice and further ten days time to produce evidence in support of his or her case.*

23) Further, Order 3 - (11), (12), (13), (14), (15) and (16) of said 1964 Order stipulate as follows:-

- (11) *The Foreigners Tribunal shall hear such persons as, in its opinion, are required to be heard.*
- (12) *The Foreigners Tribunal may grant adjournment of the case on any plea sparingly and for reasons to be recorded in writing.*
- (13) *Where the proceedee fails to produce any proof in support of his or her claim that he or she is not a foreigner and also not able to arrange for bail in respect of his or her claim, the proceedee shall be detained and kept in internment or detention centre.*
- (14) *The Foreigners Tribunal shall dispose of the case within a period of sixty days of the receipt of the reference from the competent authority.*
- (15) *After the case has been heard, the Foreigners Tribunal shall submit its opinion as*

soon thereafter as may be practicable, to the officer or the authority specified in this behalf in the order of reference.

- (16) *The final order of the Foreigners Tribunal shall contain its opinion on the questions referred to which shall be a concise statement of facts and the conclusion.*

24) Order 3 (5) (a) to (j) of the Foreigners (Tribunals) Order, 1964 provides for the procedure regarding service of notice on the proceedee in the reference to be answered by the Foreigners Tribunal, where the proceedee is or is not a foreigner within the meaning of the Foreigners Act, 1946.

25) A Full Bench of this Court in the case of *State of Assam & Others -Vs- Moslem Mondal & Others*, reported in *2013 (1) GLT 809* at Paragraphs 101 and 102 dealt with the just, proper and reasonable procedure for the purpose of service of notice on the person who is suspected to be a foreigner considering the fact that the proper service of notice assumes importance as the Tribunal has to render its opinion also in an ex-parte proceeding, on the question referred to it even in the absence of any evidence on record and solely on the basis of materials initially submitted by the Referral Authority before the Tribunal and at the time of making the reference, since the Referral Authority is not required to adduce any evidence to substantiate that the proceedee is not a foreigner where the burden, in view of Section 9 of the Foreigners Act, 1946 lies on the proceedee.

26) In the said case of *Moslem Mondal* (Supra), the Hon'ble Full Court at Para 102 laid down the procedure required to be adopted in the matter of service of notice by the Tribunals on the proceedee, making such procedure applicable to all the proceedings pending before the Tribunals where the notices were yet to be issued or issued but not served.

27) A Constitution Bench in the case of *Radheshyam Khare -Vs- State of M.P.* reported in *AIR 1959 SC 107* have held that — *It is quite different from the well-ordered procedure involving notice and opportunity of hearing necessary to be followed before a quasi-judicial action, open to correction by a superior court by means of a writ of certiorari, can be taken. The difference lies in the manner and mode of the two procedures. For the breach of the rules of fair play in taking administrative action a writ of certiorari will not lie.*

28) It is settled that a Writ Court in exercise of its jurisdiction of Writ of Certiorari under Article 226 of the Constitution of India is required to confine its powers to examine the decision making process only and the finding of facts are not liable to be interfered with and that while exercising its power of jurisdiction of Writ of Certiorari, the High Court shall not exercise the powers of the Appellate Authority.

29) After discussing its earlier decisions relating to the Writ of Certiorari, the Hon'ble Supreme Court in the case of *Central Council for Research in Ayurvedic Sciences and Another -Vs- Bikartan Das and Others*, decided on 16-8-2023, amongst others have held that –

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.

30) A co-ordinate Bench of this Court in the case of *Ijjat Ali -Vs- Union of India and Others* [WP(C) No. 8361/2019], decided on 12.10.2020 have held that — “*while affording and/or granting a fair and reasonable opportunity to a proceedee in a proceeding before the Foreigners Tribunal to establish his/her claim that he/she is a citizen of India, however, such grant of opportunity cannot be enlarged to an endless exercise and if a person is not diligent and/or is unmindful to take steps to sage guard his/her interest , he/she does so at his/her own risk and peril.*”

31) Expressing similar views as that of *Ijjat Ali* (supra), a co-ordinate Bench of this Court in the case of *Sajiraon Nessa -Vs- Union of India and Others* [WP(C) No. 1293/2020], decided on 05.01.2021 went ahead and further observed that — *In a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964, the burden of proving citizenship absolutely rests upon the proceedee notwithstanding anything contained in the Indian Evidence Act, 1946, as mandated under Section 9 of the said 1946 Act, since the relevant fact being especially within the knowledge of the proceedee alone. 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.*

32) In the case in hand, the record of the case clearly reveals that notice of said F.T. Case No. 42/BAKSA/2019, issued by the learned Foreigners Tribunal, Baksa, Tamulpur on 06.06.2019 was duly served upon the petitioner on 21.06.2019 pursuant to which she appeared before the said Tribunal through her engaged counsel on 29.06.2019. But she preferred to remain absent in that matter without filing her written statement and also did not adduce cogent, reliable and acceptable documents and evidence in accordance with law thereby failed to prove her nationality, as required under Section 9 of the Foreigners Act, 1946, in spite of granting sufficient

opportunity to her by the said Tribunal. We have seen that the petitioner neither appeared before the Tribunal and filed her reply to the show cause notice / written statement nor adduced evidence in the said F.T. Case, as required under the law and she entirely neglected to participate in the proceeding and to contest the same.

33) We have seen that the petitioner was fully aware of the proceeding of said F.T. Case pending against her pertaining to her citizenship before the Foreigners Tribunal at Baksa, Tamulpur where though she appeared engaging her counsel by filing *vakalatnama*/power on 29.06.2019 but did not even bother to know about the status of the said case for almost four years. It was only when pursuant to the said order dated 23.12.2019 passed by the learned Foreigners Tribunal, Baksa, Tamulpur in F.T. Case No. 42/BAKSA/2019 whereby she was declared to be a foreigner under the Foreigners Act, 1946; the police personnel on 31.10.2023 took her into the custody and detained her in the detention camp at Matia, District-Goalpara, then only she woke up from deep slumber and then filed this writ petition on 19.12.2023.

34) It is settled that — Law courts never tolerate an indolent litigant, as the law assists those who are vigilant and not those who are indolent, who sleep over their rights as per the fundamental Latin Maxim – “*vigilantibus et non dormientibus jura subveniunt*”. As a matter of fact, lapse of time is a species for forfeiture of right. [*Hameed Joharan v. Abdul Salam, (2001) 7 SCC 573*].

35) In spite of granting sufficient opportunity to her, the petitioner did not participate in the proceeding and no rights of her has been violated by the Tribunal. At this stage, if any concession or grant is to be given to the petitioner, it will be a mockery of the judicial process, where the provisions of the Foreigners (Tribunals) Order, 1964 have statutory force, as noted above.

36) Considering the entire aspect of the matter, we are of the view that the impugned order dated 23.12.2019, passed by the learned Foreigners Tribunal, Baksa at Tamulpur in F.T. Case No. 42/BAKSA/2019 being in conformity with law, the same does not call for any interference.

37) For the reasons above, we are also of the opinion that the consequential action on the basis of said opinion/order dated 23.12.2019, passed by the learned Foreigners Tribunal, Baksa at Tamulpur in F.T. Case No. 42/BAKSA/2019, is also in accordance with law.

38) Accordingly, this writ petition, being devoid of merit, stands dismissed.

39) The records of F.T. Case No. 42/BAKSA/2019 be returned to Ms. A Verma, Standing counsel, Home Department, Assam, obtaining necessary acknowledgment from her in that regard, who in turn shall forward it to the Foreigners' Tribunal, Baksa at Tamulpur forthwith.

40) Registry shall communicate this order to the Foreigners' Tribunal, Baksa, Tamulpur as well as the Superintendent of Police (Border), Baksa, Tamulpur, forthwith.

JUDGE

JUDGE

Comparing Assistant