GAHC010037702019

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

## WP(C)/1343/2019

ABDUL HOQUE
S/O. LT. RIAZ UDDIN
R/O. DUMAIHAGI
P.S. KAMPUR
DIST. NAGAON
ASSAM-782426.

VERSUS

THE UNION OF INDIA AND 7 ORS.
TO BE REP. BY THE MINISTRY OF HOME AFFAIRS
NEW DELHI-01.

2:THE ELECTION COMMISSIONER OF INDIA
REP. BY THE CHIEF ELECTORAL OFFICER
ASSAM
DISPUR
GUWAHATI-06.
3:THE REGISTRAR GENERAL OF INDIA
REP. BY THE STATE COORDINATOR
NRC (NATIONAL REGISTER OF CITIZENS)
ASSAM
ULUBARI
GUWAHATI-05.
4:THE STATE OF ASSAM

TO BE REP. BY THE COMM. AND SECY. OF HOME DEPTT.
DISPUR
GUWAHATI-06.
5:THE DY. COMMISSIONER

NAGAON

DIST. NAGAON
ASSAM-782001.
6:THE FOREIGNERS REGISTRATION OFFICER

NAGAON
DIST. NAGAON
ASSAM-782001.
7:THE SUPDT. OF POLICE (B) M NAGAON

DIST. NAGAON
ASSAM-782001.
8:THE OFFICER IN CHARGE

KAMPUR POLICE STATION
NAGAON
ASSAM.
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**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 S. Ahmed, Adv.

Advocates for the respondents : Ms. A. Verma, SC- Home Dept.
Shri R. Talukdar, GA – Assam
Shri H. Kuli, Adv.

Dates of hearing : **06.02.2024**
Date of Judgment : **22.02.2024**

**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 judgment an order dated 18.06.2018 passed by the learned Foreigners' Tribunal No. 9, Nagaon in F.T. Case No. 746/2016. 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), Nagaon District, against the petitioner giving rise to the aforesaid F.T. Case No. 746/2016.

(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 25.08.2017 along with certain documents.

(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 S. Ahmed, 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 R. Talukdar, learned Government Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 31.07.2019.

**4.** Shri Ahmed, the learned counsel for the petitioner has submitted that the petitioner could prove his 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 four numbers of witnesses and also the following documentary evidence.

i. Identification Certificate issued by Government Gaonbura as Ext. 1.

ii. Certified copies of Voter List of 1993 of 82 Raha LAC as Exts. 2, 3 and 4.

iii. Certified copy of Voter List of 2016 of 82 Raha Lac as Ext. 5.

iv. Certified copy of sale deed executed in the year 1950 in favour of Araj Ali, grandfather of the proceedee as Ext. 6.

v. Certified copies of the Voter List of 1966 of 92 Jamunamukh LAC as Ext. 7.

**5.** In support of his submission, the learned counsel for the petitioner has relied upon the case of ***Samad Ali Vs. UOI*** reported in ***2012 (5) GLT 162*** and has submitted another opportunity may be granted.

**6.** *Per contra,* Ms. A. Verma, 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 the name of the grand-father, father along with the villages are different in different Voter Lists. The name of the grand father is changed from Aabar to Araaz Ali; the name of the father in one Voter List is Md. Reyaz Uddin whereas it is Rejat Ali in another. The village also differed in different Voter Lists as Chankhola and Kachua. It is not explained as to why the name of the father of the petitioner was not there in the Voter List of 1966. She has also pointed out that a self shown affidavit which was exhibited as Ext. 12 cannot be treated as legal evidence.

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

***i. 2017 (4) GLT 346 [Rashminara Begum Vs. UOI]***

***ii. (2017) 3 GLR 820 [Ayesha Khatun Vs. UOI]***

***iii. 2017 (2) GLT 974 [Aktara Khatun Vs. State of Assam]***

***iv. 2018 (1) GLT 372 [Basiron Bibi Vs. UOI]***

***v. (2005) 5 SCC 665 [Sarbanand Sonowal Vs. Union of India ]***

***vi. Order dated 07.05.2018 in WP(C)/1073/2016 [Md. Abdul Kuddus Vs. UOI]***

**9.** The case of ***Rashminara*** (supra) has been cited to bring home the contention that a proceedee is required to disclose in his /her reply to the Show Cause Notice / Written Statement all relevant facts having a material bearing on

his / her claim to citizenship of India which is the basic statement of defence. For ready reference, the relevant part is extracted herein below:

> "***25.*** *Written statement is the basic statement of defence of a proceedee before the Foreigners Tribunal. Keeping in mind the mandate of Section 9 of the Foreigners Act,1946, it is incumbent upon the proceedee to disclose at the first instance itself i.e., in his written statement all relevant facts specially within his knowledge having a material bearing on his claim to citizenship of India. Material facts pleaded in the written statement are thereafter required to be proved by adducing cogent and reliable evidence. It is also trite that a party cannot traverse beyond the pleadings made in the written statement."*

**10.** The cases of ***Ayesha Khatun*** (supra) and ***Aktara Khatun*** (supra) reiterate the aforesaid view of Rashminara (supra). The observations made in the case of Aktara Khatun (supra) may be noted which is as follows:

> "***12.*** *From this written statement, it is evident that petitioner did not disclose basic material facts, which were within her specific knowledge. Petitioner did not say when she was born. Consequently, there was no mention about her age. She remained completely silent as regards her mother as well as about her brothers and sisters. Though she mentioned Md Harmuz Ali as her husband, she did not mention when she got married and whether post-marriage she had any children. When one's citizenship is being questioned, that too, by the State, one has to disclose all material facts, which are within his special knowledge to prima facie establish his citizenship of India, which are thereafter required to be proved by adducing cogent and reliable evidence. Failure to disclose such material facts at the first instance itself, i.e., in the written statement, which is the basic defence statement of the proceedee, may lead to drawing of adverse inference against the proceedee. Moreover, it is a well settled proposition that a party cannot traverse beyond the pleadings. What is pleaded can only be proved and not something which is not pleaded."*

**11.** In the case of ***Sarbananda Sonowal*** (supra), the Hon'ble Supreme Court has laid down as follows-

"*26. Rule 4 requires an inquiry officer to elicit information and particulars from the alleged illegal migrant on the points mentioned in Form I. Item No. 5, 10, 11, 12 of this Form are as under:-*

*5. Address in the country of origin (village, police station, district and country).*

*10. Does the person hold any passport issued by any foreign country ? If so furnish particulars.*

*11. What are the reasons for leaving the person's country of origin ?*

*12. If the person has entered into India without a passport, how the person entered India ?*

*(Name of village, District from which the person entered). Date of entry.*

*It is elementary that a person who has illegally come from Bangladesh to India and is residing here for his better economic prospects or employment etc. would never disclose that he has come from Bangladesh but would assert that he is an Indian national and resides in India. There is no question of his telling his date of entry or giving any information on the aforesaid points. According to Rules 7 and 8 of the Rules, the inquiry officer has to submit a report in Form II and Item No. 5, 10, 11 and 12 are exactly identical to that in Form I. Rules 10, 10-A and 10-B lay down that an application to the Tribunal u/s 8(2) shall be made in Form III, an application to the Central Government u/s 8-A(2) shall be made in Form V and a declaration u/s 8-A(2) shall be made in Forms V and VI. Curiously enough Column No. 6 of Form III requires the applicant to furnish the following information regarding the alleged*

*illegal migrant: -*

*(a) whether he entered India on or after 25th March, 1971;*

*(b) date of his entry into India;*

*(c) whether he is a foreigner; and*

*(d) whether he entered India without being in possession of a valid passport or travel document or lawful authority in that behalf.*

*The contents of the application (form III) have to be affirmed by the applicant that what is stated in the application is true to the best of his information and belief. The application to the Central Government has to be made in Form V which contains a similar Column 6 with two further additions, namely;*

*(i) the approximate distance between the place of residence of the applicant and the alleged illegal migrant;*

*(ii) since when the alleged illegal migrant is staying at the said place.*

*In Column 7 the applicant has to give details of (a) documentary; and (b) oral evidence in his possession. The application has to be affirmed that the facts stated are true to the best of his information and belief and that he has not made more than 10 such applications. It contains a further clause to the following effect :*

*"I am aware that in the event of this application being found as false or made with a view to cause vexation to the person named in this application or any member of his family, I am liable to be proceeded against in accordance with law for giving false evidence."*

*Form VI which is a declaration to be made u/s 8-A(2) by another person in corroboration of the application contains a similar*

*affirmation clause and also the clause quoted above regarding prosecution in the event the facts mentioned are found to be false."*

**12.** 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."*

**13.** The case of ***Abdul Kuddus*** (supra) has been cited in support of the contention that the documentary evidence has to be proved by corroborating the same with contemporaneous records.

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

**15.** 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."

**16.** In this connection, the observations 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 hereinbelow-

> "*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."*

**17.** 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.

**18.** 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."*

**19.** The principal ground of challenge in the case in hand is that the documents have not been properly appreciated and without there being any rebuttal evidence, the depositions made on behalf of the petitioner should have been deemed to be accepted.

**20.** This Court has however noticed that there are major discrepancies in the name of the grand-father, father in the different Voter Lists. Even the villages are found to be different. This Court also finds force in the argument of the learned Standing Counsel that there is no explanation as to why the Voter List of 1966, the name of the father was not there, in spite of the fact that he was eligible to exercise the right to franchise.

**21.** We found that the petitioner by placing any such cogent, reliable and collateral evidence failed to establish before the Tribunal that his projected father Md. Reyaj Uddin, son of Md. Araj Ali, whose name figured in the Voters List of 1971 [Exhibit-4 (Exhibit-8)] in 92 Jamunamukh LAC, Part-39, Mouza-Garubat, Police Station- Jamunamukh, Village- Chankhula, Serial No.503, House No.103, aged about 45 years of district Nagaon was the same person, i.e., Rejot Ali, son of Araj aged about 50 years, whose name figured in the Voters List of 1993 in 82 Raha LAC (Exhibit-6), Part No.111, Mouza-Garubat, Police Station-Kachuwa, Village-No.2, Kachuwa, Srl. No. 851, House No.297 of district Nagaon.

**22.** We have also seen that after the said Voters List of 1971 of his projected father Mr. Reyaj Uddin, aged about 45 years relating to No.92 Yamunamukh LAC, the petitioner produced Voters List of 1993 relating to No.82 Raha LAC, containing a name of Rejat Ali, aged about 50 years, to be his father, whereas, Md. Reyaj Uddin of 1971 Voters List and Rejat Ali of 1993 Voters List are from two different LACs, two different villages and with age discrepancies, i.e., 45 years in the year 1971 and 50 years in the years 1993 after 22 years. Further, the petitioner could not place anything before the Tribunal to show continuity of Md. Reyaj Uddin, son of Araj ordinarily residing in Assam since 1971, who according to the petitioner was the Rejat Ali in the Voters List of 1993 as required under Section 6A (2) and (3) of the Citizenship Act, 1955, as amended.

**23.** In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 18.06.2018 passed by the learned Foreigners' Tribunal No. 9, Nagaon in F.T. Case No. 746/2016 does not call for any interference. Accordingly, this writ petition being devoid of merits being dismissed.

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

**25.** The records of the F.T. Case No. 746/2016 be returned to the learned Foreigners' Tribunal No. 9, Nagaon forthwith along with a copy of this order.

**JUDGE** **JUDGE**

**Comparing Assistant**