GAHC010023812020

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

Case No. : WP(C)/926/2020

MAZAM ALI
S/O- JATRA SHEIKH, R/O- VILL. ALENGAMARI, MOUZA- GOBARDHANA,
P.S. GOBARDHANA, DIST.- BAKSA (BTAD), ASSAM, PIN-

VERSUS

THE UNION OF INDIA AND 5 ORS.
REP. BY THE MINISTRY OF HOME AFFAIRS, GOVT. OF INDIA, NEW DELHI.

2:THE ELECTION COMMISSION OF INDIA
NEW DELHI.

3:THE STATE OF ASSAM
REP. BY THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY.-06.

4:THE ASSAM STATE COORDINATOR OF NRC
BHANGAGARH
GHY.-05.

5:THE DY. COMMISSIONER
BARPETA
DIST.- BARPETA
ASSAM
PIN- 781319.

6:THE SUPDT. OF POLICE (B)
BARPETA
DIST.- BARPETA
ASSAM

PIN- 781319

Advocate for the Petitioner : MR. S A AHMED

Advocate for the Respondent : ASSTT.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 S.A. Ahmed, Adv.

Advocates for the respondents : Shri A. Kalita, SC- Home Dept.
Shri P. Sarma, GA, Assam
Shri A.I. Ali, SC - ECI

Date of hearing : **20.02.2024**
Date of Judgment : **04.04.2024**

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 29.10.2019 passed by the learned Foreigners Tribunal No. 11th, Barpeta in F.T. Case No. 2307/2017 [(Ref-FT Case No. IM(D)T 112(A)/98)]. 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 (Border), Barpeta District, against the petitioner giving rise to the aforesaid F.T. Case No. 2307/2017

(ii) As per requirement u/S 9 of the Foreigners Act, 1946 to prove that the proceedee is not a foreigner, the petitioner had filed the written statement on 21.08.2019 along with certain documents before the Foreigners Tribunal, Barpeta 11th at Sarbhog, on receipt of notice under the 1946 Act, noted above, from the said Tribunal.

(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.A. Ahmed, learned counsel for the petitioner. We have also heard Shri. A. Kalita, 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 Government Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 01.06.2020.

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 three numbers of witnesses and also the following documentary

evidence.

i. Copy of N.R.C. of 1951 (Exbt.-1).

ii. Copies of Voter List of 1965 (Exbt.- 2).

iii. Copy of Voter List of 1970 (Exbt.- 3).

iv. Copy of Voter List of 1985 (Exbt.-4).

v. Copy of Voter List of 1989 (Exbt.-5).

vi. Copy of Voter List of 1994 (Exbt.-6).

vii. Copy of Voter List of 1997 (Exbt.-7).

viii. Copy of Voter List of 2005 (Exbt.-8).

ix. Gaonburah Certificate (Exbt.-9).

5. The learned counsel for the petitioner has submitted that the name of the father of the petitioner is Jatra Sheikh whose name had appeared in the voter list of 1951. Reliance has also been placed on the voter lists of 1965 and 1970 containing the name of the projected brother of the petitioner as Abdul Gafur. The voter lists of 1985, 1989 and 1994 have been referred wherein the name of the petitioner appears.

6. The learned counsel for the petitioner has submitted that apart from the petitioner, his nephew Abdul Jalil had also deposed as DW2 and the Gaonburah - Shah Alom as DW3. In this connection, reference has been made to the voter lists of 1997 and 2005 containing the name of Abdul Jalil and a certificate of the Gaonburah.

7. In support of his submission, the learned counsel for the petitioner has relied upon the following case:

i. ***2015 (2) GLT 617 [Abdul Matali Vs. UOI]***

ii. ***2020 (1) GLT 330 [Motior Rahman Vs. UOI]***

iii. ***2021 (3) GLT 85 [Haidar Ali Vs. UOI]***

8. The cases of ***Abdul Matali*** (supra) and ***Motior Rahman*** (supra) have been cited to bring home the contention that minor discrepancy in names are to be ignored. The observations made in the case of ***Motior Rahman*** (supra) is as follows:

> "*11. We also find from the record that the learned Tribunal has declared the petitioner as a foreigner based on some minor discrepancies in recording of age and also for non-mentioning of the date of second marriage of the father of the petitioner. However, such discrepancies, in our opinion, are minor in nature and hence, even if found correct, would not have any material bearing in the outcome of this writ petition. Moreover, in the decision of the Hon'ble Supreme Court rendered in the case of Sirajul Hoque Vs. The State of Assam & Ors. in connection with Criminal Appeal No. 267/2019 arising out of SLP (Crl) No. 4500/2018 it has been held that minor discrepancies in recording of names, age and address of the family members of the proceedee cannot be ground to doubt his case.*

The case of ***Haidar Ali*** (supra) have been cited on the aspect of onus of proof.

9. *Per contra,* Shri. A. Kalita, learned Standing Counsel, Home Department has categorically refuted the stand taken on behalf of the petitioner. He submits that a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 relate 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 1946 Act. However, in the instant case, the petitioner utterly failed to discharge the burden. He 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.

10. Shri Kalita, 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, he submits that there is not even a single document to establish the link of the petitioner with Abdul Gafur, the projected brother. He has also highlighted while Abdul Gafur has been stated to be the son of Fatra in the voter lists of 1965 and 1970, in the voter list of 1985 where it is claimed that the name of the petitioner appears, he has been shown to be the son Jatra Sheikh. There is not even a single voter list of the petitioner along with his projected brother.

11. In support of his submissions, Shri A. Kalita has placed reliance upon the case of ***Bhanbhasa Sheikh Vs. Union of India*** reported in ***ALR 1970 Assam & Nagaland 206*** wherein it has been laid down that entry in NRC is not an admissible in evidence with regard to the issue of citizenship.

12. Contentions of both the sides have been duly considered.

13. 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."*

14. 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."

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. In the case in hand, the principal ground of challenge 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.

18. To appreciate the aforesaid contention, let us have a look at the case laws holding the field. In the case of ***Rashminara Begum Vs. UOI*** reported in ***2017 (4) GLT 346,*** it has been held that a proceedee is required to disclose in the 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."*

19. The cases of ***Ayesha Khatun Vs. UOI*** reported in **(*2017) 3 GLR 820***

and ***Aktara Khatun Vs. State of Assam*** reported in ***2017 (2) GLT 974*** reiterate the aforesaid view of ***Rashminara*** (supra). The observations made in the case of ***Aktara Khatun*** (supra) may be noted which reads 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."*

20. In the case of ***Sarbananda Sonowal*** reported in ***(2005) 5 SCC 665***, 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."

21. In the instant case, it is seen that so far as the voter list of 1951 is concerned, where the name of the projected father of the petitioner appears, the same is an uncertified copy. So far as the voter lists of 1965 and 1970 are concerned, the name of the father of the projected brother of the petitioner is however written as "Fatra". As regards the voter lists of 1985, 1989 and 1994 it is seen that the name has been stated as Md. Mazam, son of Jatra Sheikh.

There is no mention of Abdul Gafur the projected brother of the petitioner in any of those voter lists. Since the age of the petitioner has been shown to be 30 in the voter list of 1989, even assuming that Md. Mazam is the petitioner, there is also no explanation as to why his name did not appear in the earlier voter lists. Further, no voter lists regarding the projected father / projected brother of the petitioner have been referred from 1970 to 1985.

22. So far as the deposition of DW2 is concerned who has been projected as the nephew of the petitioner, it is seen that in his deposition he has stated that his father Abdul Gafur had passed away only in the year 2005. However, there is not a single voter list of the petitioner along with his said projected brother. Further, while the voter list of 1997 relates to village "Bhaluki", the one of 2005 is of village "Dhupguri". The DW3 in his cross-examination has admitted that he does not have any personal knowledge and further, no records have been produced to support the said certificate. This Court has however noticed that the learned Tribunal has come to a wrong finding that the certificate was not proved by the Gaonburah who had actually adduced evidence as DW3. However, the contents of the said certificate have not been proved due to the reasons cited above.

23. So far as the cases of ***Abdul Matali*** (supra) and ***Motior Rahman*** (supra) relied upon by the petitioner are concerned, the same are based on the decision of the Hon'ble Supreme Court in the case of ***Sirajul Hoque vs. State of Assam & Ors.*** reported in ***(2019) 5 SCC 534***. However, the facts of the said case laws are distinguishable and would not come to the aid of the petitioner. Further, in the case of ***Sirajul Hoque*** (supra), the Hon'ble Supreme Court had noticed that there was only a minor spelling mistake in the name of the grandfather wherein instead of the alphabet F in "Kefatullah", the alphabet

M was written making it "Kematullah" where all other evidence were consistent. The facts are wholly different in the instant case wherein discrepancies are galore in the names of the petitioner, his projected father, projected brother and long, inordinate and unexplained gap in the voters lists.

24. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 29.10.2019 passed by the, learned Foreigners Tribunal No. 11th, Barpeta in F.T. Case No. 2307/2017 does not call for any interference. Accordingly, this writ petition being devoid of merits being dismissed.

25. The interim protection granted to the petitioner vide order dated 01.06.2020 passed earlier in this proceeding is hereby recalled / stands vacated.

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

27. The records of the F.T. Case No. 2307/2017 be returned to the concerned Foreigners Tribunal forthwith along with a copy of this order.

JUDGE **JUDGE**

Vinay

Comparing Assistant