GAHC010010572024

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

Case No. : WP(C)/841/2024

SHIBU DEBNATH
S/O- LATE RAMESH CHANDRA DEBNATH, R/O- VILLAGE- SAKUNTALA COLONY, BONGAIGAON MUNICIPALITY P.S. AND DISTRICT- BONGAIGAON, ASSAM

VERSUS

THE UNION OF INDIA AND 5 ORS
REPRESENTED BY THE SECRETARY TO THE MINISTRY OF HOME AFFAIRS, GOVT. OF INDIA, SHASTRI BHAWAN, TILOK MARG, NEW DELHI-1

2:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE HOME DEPARTMENT
DISPUR
GUWAHATI-6

3:THE DEPUTY COMMISSIONER
BONGAIGAON
ASSAM
PIN- 783380

4:THE SUPERINTENDENT OF POLICE (B)
BONGAIGAON
ASSAM
PIN- 783101

5:THE ELECTION COMMISSIONER OF INDIA
NEW DELHI-1

6:THE STATE CO-ORDINATOR OF NRC

ASSAM
HOUSEFED COMPLEX
2ND FLOOR
BANPHOOL NAGAR
DISPUR
GUWAHATI-

Advocate for the Petitioner : MR. A R SIKDAR

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 A.R. Sikdar , Adv.

Advocates for the respondents : Shri A. Kalita, SC- Home Dept.
Shri R. Talukdar, GA – Assam
Shri A.I. Ali, SC,ECI

Date of hearing : 21.02.2024
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 opinion rendered vide impugned order dated 02.06.2023 passed by the learned Foreigners Tribunal No.1, Bongaigaon, Assam in F.T. Case No. BNGN/FT/1636/08. 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), Bongaigaon District, against the petitioner giving rise to the aforesaid F.T. Case No. BNGN/FT/1636/08.

(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 08.11.2021 along with certain documents before the Foreigners Tribunal No. 1, Bongaigaon on receipt of notice under the above noted 1946 Act from the said Tribunal.

(iii) The learned Tribunal, after considering the 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.R. Sikdar, learned counsel for the petitioner. We have also heard Shri A. Kalita, learned Standing Counsel, Home Department, Assam; Shri A.I. Ali, learned Standing Counsel, Election Commission of India and Shri R. Talukdar, learned Government Advocate, Assam.

4. Shri Sikdar, the learned counsel for the petitioner has submitted that the petitioner could prove his case with cogent evidence and in view of the fact that there was no rebuttal evidence, 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 two numbers of

witnesses including the petitioner and also the following documentary evidence.

i. Certificate of Registration issued by the Sub-Divisional Officer (Exbt -A)

ii. Voter Identity Card (Exbt – B)

iii. Permanent Account Number (Exbt – C)

iv. Aadhar Card (Exbt – D)

v. Special Family Identity Card (BPL) (Exbt – E)

vi. Certified copy of Voter list of 2014 (Exbt – F)

5. The learned counsel for the petitioner has referred to the registration card of the projected father of the petitioner Ramesh Chandra Debnath dated 01.08.1963. He has also referred to the voter list of 1966 containing the name of the projected father. A voter list of 2014 has also been referred to containing the name of the petitioner.

6. The learned counsel has also referred to a Special Family Identity Card (BPL) (Ext.E) containing the name of the petitioner. In this connection, reference has also been made to the deposition of the DW2, Shri Naba Kumar Borah, the Inspector, Food and Civil Supplies, Bongaigaon.

7. The learned counsel has also referred to a Gazette Notification dated 07.09.2015 which is titled "Foreigners' (Amendment) Order, 2015" wherein there is insertion of paragraph 3A in the Foreigners' Order of 1948 regarding exemption of certain class of Foreigners. In this connection, reference has also been made to an order dated 04.09.2021 of a Coordinate Bench of this Court in Review. Pet. No. 73/2021 ***(Mangla Das Vs. UOI).***

8. The learned counsel for the petitioner has also relied upon the provision of

the Citizenship Act, 1955 more specifically, Section 5(1)(e) read with Section 6, as amended. It is submitted that a person of full age and capacity whose parents were registered as citizens of India under Clause (a) or Section 6(1) may apply for registration. Reference has also been made to the Citizenship (Amendment) Act, 2019 in this regard.

9. The learned counsel for the petitioner accordingly submits that the impugned opinion dated 02.06.2023 of the learned Tribunal be interfered with.

10. *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 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 and this is mandated under Section 9 of the aforesaid Act, 1946. However, in the instant case, the petitioner utterly failed to discharge the burden. It is also submitted that rebuttal evidence is not mandatory in every case and would be given only if necessary. 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.

11. Shri Kalita, learned Standing Counsel submits that so far as the documents relied upon by the petitioner are concerned, a part of the same cannot be relied upon and the document as a whole is to be read. It is also submitted that there are major discrepancies in the voters list regarding the names, age and address.

12. The learned Standing Counsel further submits that this Court in exercise

of its Certiorari jurisdiction does not act as an Appellate Court and it is only the decision making process which can be the subject matter of scrutiny. He submits that there is no procedural impropriety or illegality in the decision making process and therefore, the instant petition is liable to be dismissed.

13. The rival contentions have been duly considered.

14. 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.*"

15. 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."*

16. 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.

17. 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.*
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> *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.*
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> *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."

18. With regard to the registration certificate dated 01.08.1963 of the father of the petitioner, the age of the father - Ramesh Ch. Debnath has been stated to be 55 years and he has been stated to be the son of one late Ananda Ch. Debnath. Further, in the voter list of 1966, the said Ramesh Chandra Debnath has been stated to be the son of Jogesh Chandra and his age is 36 years. So far as the voter list of 2014 is concerned, this Court has noticed that the age of the petitioner has been stated to be 48 years. This would indicate that the petitioner had become eligible to vote sometime in the year 1987. However, not a single voter list of any earlier years containing the name of the petitioner has been proved or even referred to in the proceedings.

19. In this connection, one may refer to the case of ***Borhan Ali Vs. Union of India*** reported in ***2018 (4) GLT 392*** wherein it has been laid that a voter list is to be read in its entirety and not in part. The relevant part of the same is extracted hereinbelow:

"***27.1.*** *Extending this principle, if a proceedee relies on a voters list, he*

has to rely on the same in its entirety and not in part. He cannot say that he will rely upon that part of the voters list which is favourable to the proceedee but would not rely upon that part of the voters list which goes against him, for example, vital discrepancies in name, residence and age. A document has to be appreciated as a whole; not in bits and pieces."

20. As regards the Family Identity Card (BPL), this Court has noticed that in the deposition, the DW2- Inspector, Food and Civil Supplies has stated that there was no record in connection with the concerned BPL card (Ext. E) and further that after implementation of the NFS Act, 2015, the Card has become redundant. This Court has also noticed that though there is a requirement in law to make full disclosure in the written statement which would constitute the defence of a proceedee, there is not even a single reference regarding the grandfather of the petitioner. Further, there is no reference in the written statement about the BPL card.

21. As regards the Gazette Notification dated 07.09.2015, we are of the opinion that before referring to the aforesaid notification, the petitioner has to make out a case that he meets the requirement to get the benefit of the said notification. This Court has noticed that there are major discrepancies in the name, identity and age of the projected father of the petitioner. The registration of the projected father was even otherwise under Section 5(1)(a)(d) of the Citizenship Act, 1955.

22. With regard to the submission made in connection with the Citizenship Act, 1955, this Court has noticed that the amended provision was to come into effect from an appointed date to be notified by the Central Government by publishing in the Official Gazette. At the time of consideration of the case by the learned Tribunal, no such date was appointed and therefore, the amendment

would not *per se* be held applicable. In any case, if the petitioner wishes to apply under the aforesaid provision of law, such application has to be dealt with strictly in accordance with law wherein there would be an obligation cast upon the petitioner to establish a linkage of him with his projected father.

23. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 02.06.2023 passed by the learned Foreigners Tribunal No.1, Bongaigaon, Assam in F.T. Case No. BNGN/FT/1636/08 does not call for any interference. Accordingly, this writ petition being devoid of merits is dismissed.

24. The actions consequent upon the opinion rendered by the learned Tribunal would follow, in accordance with law. Let a copy of this order be furnished to the learned Tribunal forthwith.

JUDGE **JUDGE**

Vinay

Comparing Assistant