GAHC010025812016

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

Case No. : WP(C)/5760/2016

MS. JAHANARA BEGUM
W/O MD. ABDUL ZABBAR OF VILL- BHELLOUGURI, P.S. DOBOKA DIST. HOJAI, ASSAM.

VERSUS

THE UNION OF INDIA and 6 ORS
TO BE REP. BY THE SECRETARY TO THE GOVT. OF INDIA, HOME DEPARTMENT, NORTH BLOCK, NEW DELHI.

2:STATE OF ASSAM
TO BE REP. BY COMMISSIONER and SECRETARY TO THE GOVT OF ASSAM
HOME DEPARTMENT
DISPUR
GUWHATI -06.

3:ADDITIONAL DIRECTOR GENERAL OF POLICE

ASSAM BORDER
BHANGAGARH
GUWAHATI -05.

4:DEPUTY COMMISSIONER

HOJAI
SHANKARDEVNAGAR
ASSAM.

5:SUPERINTENDENT OF POLICE BORDER

NAGAON
ASSAM.

6:SUPERINTENDENT OF POLICE BORDER

HOJAI
ASSAM

Advocate for the Petitioner : MR.N ISLAM, MR.K MIRA,MR.N H MAZARBHUYAN,MS.L WAJEEDA

Advocate for the Respondent : GA, ASSAM, ASSTT.S.G.I.,,

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

ORDER

Date : 31.07.2024
(K.R. Surana, J)

Heard Ms. L. Wajeeda, learned counsel for the petitioner. Also heard J. Payeng, learned standing counsel for the Home Department of the State; and Mr. H.K. Hazarika, learned Govt. Advocate, Assam.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has assailed the opinion dated 30.04.2016, passed by the Foreigners' Tribunal 10th, Nagaon, Dabaka in FT(D) Case No. 12/2015 arising out of SP's F.T. Case No. 1058/2008.

3. Suspecting the petitioner herein to be a foreigner of post 25.03.1971 stream, the Superintendent of Police (Border), Nagaon directed the Officer-in-Charge of Dabaka P.S. to start an enquiry under Foreigners' Act, 1946. On submission of the report, a reference was made by the Superintendent of Police (B), Nagaon, giving rise to the proceedings of F.T.(D) Case No. 12/2015.

4. The Tribunal's record, as received by the Court upon requisition

being made, reveals that as per the requirement of Section 9 of the Foreigners' Act, 1946, the petitioner has filed her written statement on 29.09.2015, enclosing therewith the photocopy of the certified copy of voter's list of the year 1966, 1970, 2010 and 2014, a certificate dated 01.07.2015, issued by the Secretary, Bhelowguri Gaon Panchayat, District- Nagaon, and photocopy of the Elector Photo Identity Card. The petitioner has filed her evidence-in-chief on affidavit containing verification dated 21.11.2015 and has exhibited the certified copy of voter's list of 1966, 1970, 2010, 2014, Gaon Panchayat's Certificate and *Gaonbura's* Certificate as Ext.1 to Ext.6 respectively. She was cross-examined on 18.12.2015 and discharged. As per order dated 18.12.2015, the petitioner had no further witnesses or documentary evidence to be produced and as such, her evidence was closed. The case was fixed for argument and judgment on 18.01.2016, but the petitioner and her lawyer were not present on the date fixed and accordingly, the learned Member, Foreigners' Tribunal deemed that the argument was declined and the case was fixed for opinion on 19.02.2016. As the petitioner was again unrepresented, the delivery of opinion was adjourned to 30.04.2016 and on the said date, as the petitioner was present, opinion was delivered, holding that the petitioner has absolutely failed to discharge her mandatory burden to prove that she is an Indian citizen and not a foreigner as envisaged under Section 9 of the Foreigners' Act, 1946 and opinion was expressed that the petitioner is a foreigner of post 25.03.1971 under Section 2(1)(a) of the Foreigners' Act, 1946, who has illegally entered into the territory of India (Assam) after 25.03.1971 without any valid document.

5. Considered the submissions of the learned counsel for the parties and examined the records requisitioned from the Foreigners' Tribunal vide order dated 05.10.2016.

6. The learned counsel for the petitioner has submitted that the petitioner could prove her case with cogent evidence and that as there was no rebuttal evidence, the learned Tribunal ought to have accepted the prove tendered by the petitioner and the reference ought to have been answered in the negative and in favour of the petitioner. To support her submissions, the learned counsel for the petitioner has referred to the exhibited documents referred hereinbefore. It was submitted that the petitioner is the daughter of Kala Miya, son of Irman @ Irman Ali of village- Bhelowguri Pathar under P.S. Jamunamukh, District- Nagaon, whose name is recorded in the voter's list of 1966, 1970, 2010, and 2014 respectively, which proves that she is a citizen of India. It has been submitted that on attaining the age of majority, the petitioner was married to one Abdul Zabbar, son of Abdul Khalek of village- Bhelowguri.

7. It has been submitted that along with the notice of the proceeding, the learned Foreigners' Tribunal had not provided the main grounds to proceed against her as a foreigner. Moreover, it has been submitted that in the proceeding before the learned Foreigners' Tribunal, the State had neither filed any document nor did it adduce any evidence against the petitioner. Nonetheless, the documentary evidence of the petitioner was discarded by the learned Tribunal. And she was held to be a foreigner, who had illegally entered into the State of Assam after 25.07.1971.

8. It may be stated that although the petitioner had pleaded in the writ petition that the Central Government has not appointed any authority as a "civil authority" within the meaning of paragraph 2(2) of the Foreigners (Tribunals) Order, 1964 to refer the question as to whether a person is a foreigner or not to a Tribunal or to make any enquiry.

9. Accordingly, the learned counsel for the petitioner has prayed

that the writ petition be allowed by setting aside the impugned opinion dated 30.04.2016.

10. Per contra, the learned standing counsel for the Home Department has submitted that the proceeding under Foreigners' Act, 1946 and the Foreigners' (Tribunal) Order, 1964 relates to determination as to whether the proceedee is a foreigner or not, which is within his special knowledge. Therefore, it is required that all essential facts has to be pleaded by the proceedee in the written statement and then prove the same with cogent and admissible evidence as per the mandate of section 9 of the Foreigners' Act, 1946, however, the petitioner has failed to demonstrate through any cogent and admissible evidence that she is a citizen of India. It was submitted that the petitioner has filed to link her to her projected parents and grand-parents.

11. In her written statement, the petitioner has stated that she is enlisted in the voter's list of 2010 and 2011 from No. 90 Jamunamukh L.A.C. as Jahanara Begum, wife of Abdul Zabbar. She has further stated that her father's name appears in the voter's list of 1966 from No. 92 Jamunamukh L.A.C. as Kala Miya, son of Irman and in the voter's list of 1970 from No. 91 Jamunamukh L.A.C. as Kala Miya, son of Irman. Accordingly, she had claimed that a case has been registered and filed against her falsely without any investigation and thus, it is liable to be dismissed.

12. The documents which have been filed by the petitioner before the learned Foreigners' Tribunal along with the written statement and evidence-on-affidavit are narrated in paragraph 4 above.

13. The contents of the *Gaon* Panchayat's certificate have neither been mentioned in the written statement, nor have been stated in the evidence-

on-affidavit filed by the petitioner. No statement regarding *Gaonbura's* certificate is made in the written statement. Moreover, the contents of the said *Gaonbura's* certificate are also not narrated in the evidence-on-affidavit. The said *Gaon* Panchayat's certificate (Ext.5) and *Gaonbura's* certificate (Ext.6) have not been proved in accordance with law by calling and examining their respective author's as witnesses. It is too well settled legal principle that the marking of a document as exhibit does not amount to proof of contents and/or entries made in the documents. Hence, the said exhibit nos. 5 and 6 cannot be held to be a cogent, admissible and reliable evidence to prove that the petitioner is a citizen of India.

14. The endeavour of the petitioner ought to have been to establish a link with her father, which she has failed to show. The petitioner appears to have picked up the voter's list of the year 1966 and 1970, and she claims that she is the daughter of the projected father.

15. In her written statement, the petitioner has not disclosed her family tree and she is silent about the name and other particulars of her mother and siblings, if any. The petitioner has also not made any statement regarding other members of the family of her father like his brothers, aunt, etc. The voter's list of 1966 and 1970 contains a stand-alone entry of one "Kala Miya, son of Irman". In support of the statements made in the writ petition, the petitioner has sworn an affidavit on 20.09.2016, where she discloses her age as 44 years. Thus, she is born in or about the year 1972, yet the petitioner has not ventured to explain the conspicuous absence of the name of her mother in any of the voter's list prior to the birth of the petitioner.

16. It would be relevant to refer to paragraph nos. 21 to 24 of the case of *Jahanara Khatun v. Union of India & Ors., 2024 (3) GLT 249*, which are

extracted below:-

> "*21. 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-*
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> > "*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."*
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> *22. 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 herein below-*
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> > "*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 2024:GAU-AS:1998 onstitution Bench reversed the judgment of the High Court holding that onus of showing that he is not a foreigner was upon the respondent."*

23. 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.

24. 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."

17. In this case, no family member of the petitioner had appeared before the Foreigners' Tribunal to support the contention and projection of the petitioner.

18. The petitioner's self declaration in her written statement and evidence-on-affidavit that she is the daughter of "Kala Miya, son of Irman", in the absence of any other admissible supporting evidence, would not constitute proof of her being the daughter of "Kala Miya, son of Irman". If the voter's lists are to be believed, the father of the petitioner had resided in the Bhelowguri village from 1966 to 1970, but the petitioner has not disclosed whether her father had resided in his own landed property or whether her father resided in the said village as a tenant of somebody. The petitioner has neither pleaded about the date of her birth and the date of her marriage nor she has produced any documentary proof of her birth or of her marriage such as *kabinnama*. The petitioner has also not disclosed about her own children, if any, out of wedlock with her projected husband. She has also not disclosed the date of death of projected father, or whether her mother is dead or alive or whether or not she has or had any siblings. Thus, in her written statement, the petitioner has not divulged any details of her projected (i) father, (ii) father's family, (iii) grand-father, (iv) grand-father's family, (v) maternal-father and his family by which they can be identified. Thus, save and except what is disclosed in the voter's list, no other details of family is disclosed by the petitioner, leading to the only presumption that the petitioner has picked up a single and stand-alone entry from the voter's list of 1966 and 1970 of the Jamunamukh L.A.C. in respect of village- Bhelowguri and projected the said person to be her father.

19. Accordingly, the Court is constrained to hold that the oral evidence of the petitioner does not inspire any confidence about its truthfulness or reliability. Moreover, except for the stand-alone entry of the projected father of the petitioner in the voter's list of 1966 and 1970, no other cogent, admissible and reliable documentary evidence is produced by the petitioner to connect her to her projected father. Therefore, the petitioner has miserably failed to discharge her burden under section 9 of the Foreigners' Act, 1946.

20. In light of the discussions above, the Court is of the considered view that the opinion dated 30.04.2016, passed by the Foreigners' Tribunal 10th, Nagaon, Dabaka, in FT(D) Case No. 12/2015, arising out of SP's F.T. Case No. 1058/2008 does not warrant any interference. Accordingly, this writ petition is devoid of any merit and the same is dismissed.

21. The actions, consequent to rendition of opinion of the learned Foreigners' Tribunal, would follow in accordance with law.

22. The records of the Foreigners' Tribunal 10th, Nagaon, Dabaka in F.T.(D) Case No. 12/2015 arising out of S.P.'s F.T. Case No. 1058/2008 be returned along with a copy of this order to be made a part of the said record.

JUDGE **JUDGE**

Comparing Assistant