

GAHC010015242024



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

Case No. : WP(C)/776/2024

SITU BISWAS

S/O- LT. KALI KUMAR BISWAS, R/O- VILL- SERELIA MIKIR GAON, P.O.
CHERELIA, P.S. BEHALI, DIST.- SONITPUR (NOW BISWANATH), ASSAM,
PIN- 784167

VERSUS

THE UNION OF INDIA AND 8 ORS
REPRESENTED BY THE MINISTRY OF HOME AFFAIRS, GOVT. OF INDIA,
NEW DELHI-01

2:THE STATE OF ASSAM
REPRESENTED BY CHIEF SECRETARY TO THE GOVT. OF ASSAM
DISPUR
GHY-06

3:THE COMMISSIONER AND SECRETARY
TO THE GOVT. OF ASSAM HOME DEPARTMENT
DISPUR
GHY-06

4:THE STATE COORDINATOR
NRC
ASSAM
BHANGAGARH
GHY-05

5:THE DIRECTOR GENERAL OF POLICE
ASSAM
ULUBARI
GUWAHATI-05

6:THE SUPERINTENDENT OF POLICE (B)
SONITPUR (NOW BISWANATH CHARALI)
DIST.- SONITPUR (NOW BISWANATH CHARALI)
ASSAM
PIN- 784176

7:THE DEPUTY COMMISSIONER
SONITPUR (NOW BISWANATH CHARALI)
ASSAM
PIN- 784176

8:THE OFFICER-IN-CHARGE
BEHALI POLICE STATION
DIST.- SONITPUR (NOW BISWANATH CHARALI)
ASSAM
PIN- 784166

9:THE ELECTORAL REGISTRATION OFFICER
NO.77 BEHALI LAC
DIST.- SONITPUR (NOW BISWANATH CHARALI)
ASSAM
PIN- 78416

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 M. Mondal , Adv.
Advocates for the respondents : Shri A. Kalita, SC- Home Dept.
Shri P. Sharma, Addl. Sr. GA – Assam
Shri A.I. Ali, SC,
Election Commission of India

Dates of hearing : 21.02.2024.

Date of Judgment : 07.03.2024.

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 17.10.2022 passed by the learned Foreigners Tribunal Biswanath 1st, Biswanath Chariali, Biswanath in F.T. Case No. BNC/614/2016. 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), Sonitpur, Tezpur District, against the petitioner giving rise to the aforesaid F.T. Case No. BNC/614/2016.
- (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 06.03.2017 along with certain documents.
- (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 M.U. Mondal, learned counsel for the petitioner. We have also heard Shr A. Kalita, learned Standing Counsel, Home Department,

Assam; Shri A.I. Ali, learned Standing Counsel, Election Commission of India and Shri P. Sharma, learned Government Advocate, Assam.

4. Shri Mondal, 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 five numbers of witnesses and also the following documentary evidence.

- i. Copy of land sale deed (Exbt -A)
- ii. Registered land sale deed (Exbt – B)
- iii. Certified copy of Electoral Roll of 2005 (Exbt – C)
- iv. Certified copy of Electoral Roll of 2016 (Exbt – D)
- v. Elector photo identity card and Copy of voter list of 1966 (Exbt.-E)

5. It is submitted that there was no effective cross-examination by the prosecution side of the said witnesses who had deposed and therefore, such evidence ought to have been accepted without any difficulty.

6. *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.

7. He further 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.

8. 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.

9. In support of her submissions, Shri Kalita, learned Standing Counsel has placed reliance upon the following case laws-

i) Order dated 18.02.2020 in WP(C)/ 1900/2019 [**Nur Begum vs Union Of India and others**)

ii) Order dated 21.11.2019 in WP(C)/ 4020/2017 [**Asia Khatoon Vs Union Of India**]

10. In both the abovementioned cases it is laid down that oral testimony without the support of documentary evidence is of no value to prove citizenship.

11. The rival contentions have been duly considered.

12. 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.”

13. 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."*

14. 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.

15. 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."

16. This court has noticed that the age declared in the affidavit annexed to the writ petition is 55 years as on 2024. However, the voter lists which were placed before the Learned Tribunal is of the years 2005 and 2016. In this regard, a specific query made by this Court. Responding to the same, Sri Mandal, the learned counsel for the petitioner has submitted that it is a prerogative of a voter not to register himself in the electoral rolls. Such stand taken by the learned lawyer of the petitioner is absolutely an unreasonable one and not tenable in law. This court has noticed that in the Representatives of People's Act 1950, there is a provision in the form of Section 32 which lays down the penal provision for breach of official duties in connection with preparation of the electoral rolls. The Representation of People's Act 1951 also contains a provision in Section 62 regarding the right to vote. Under the Rules of 1960 framed thereunder, Rule 10 deals with publication of electoral rolls in draft and Rule 12 is with regard to the period of lodging claims. It is a different matter if a citizen is not inclined to cast his/her vote in favour of any candidate while exercising the right to franchise and in fact taking this into consideration, the concept of NOTA has been developed by the Hon'ble Supreme Court.

17. This court has also noticed that though one Munindra Biswas has deposed as DW2 as the projected brother of the petitioner, in the written statement filed by the petitioner, there was not even a mention of such brother. On the other hand, the petitioner took pains to mention the name of his uncle and therefore it is wholly unacceptable as to why the name of his brother was left out, more so, when the said person had deposed as the DW2 by projecting himself as the brother of the petitioner.

18. The petitioner has also relied upon a so-called *lease deed* in the name of one Munindra Chandra Das claiming him to be his brother who had deposed as DW2. However, the said lease deed has not even been mentioned in the written statement and therefore it is highly questionable as to how the said lease deed could be produced as a piece of evidence. In any case, this Court has noticed that in the said lease deed, a signature was given by one Munindra Chandra Das whereas in the deposition, the LTI of Munindra Biswas has been given. There is no explanation at all regarding the change of name, even if it is assumed that Munindra Biswas and Munindra Chandra Das is one and the same person. This Court has also noticed that the aforesaid lease deed which was produced before the Tribunal has no connection with the petitioner and the Tribunal had rightly rejected the said lease deed as a valid piece of evidence.

19. Reliance has also been placed on a certificate of the Gaon Pradhan and the electoral voter identity card. It is a settled law that unless such certificate is proved by the maker of the certificate along with the contemporaneous records pertaining to the same, such certificate would be of no evidentiary value. As regards EPIC, there is a rider that such EPIC cannot be treated as a conclusive evidence of the citizenship of a person.

20. This Court finds force in the argument of Sri Kalita, the learned Standing

Counsel, Home Department that none of the documents which were placed on record before the tribunal would serve as a cogent, reliable and acceptable evidence and it is only the oral evidence which lies for consideration. The law is well settled that in matters of the present nature, oral evidence is to be substantiated by reliable cogent and acceptable documentary evidence which is relatable to the contemporaneous records.

21. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 17.10.2022 passed by the learned Foreigners Tribunal Biswanath 1st, Biswanath Chariali, Biswanath in F.T. Case No. BNC/614/2016 does not call for any interference. Accordingly, this writ petition being devoid of merits being dismissed.

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

23. Let a copy of this order be transmitted to the learned Foreigners Tribunal Biswanath 1st, Biswanath Chariali and all concerned so as to take appropriate action pursuant to the aforesaid opinion.

JUDGE

JUDGE

Comparing Assistant