GAHC010046412023

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

Case No. : WP(C)/1399/2023

MD ESUB ALI @ EUSOB ALI @ RIACHAB ALI
S/O- LT. RAZTULLA SHEIKH, VILL- BORBARI, P.S. SIPAJHAR, DIST.- DARRANG, ASSAM

VERSUS

THE UNION OF INDIA AND 5 ORS
REP. BY THE MINISTRY OF HOME AFFAIRS, GOVT. OF INDIA, NEW DELHI-01

2:THE ELECTION COMMISSION OF INDIA
NEW DELHI
REP. BY CHIEF ELECTION COMMISSIONER

3:THE STATE COORDINATOR
NATIONAL REGISTRAR OF CITIZENS OF ASSAM
DISPUR
GHY-6

4:THE SUPT. OF POLICE (B)
DARRANG
DIST.- DARRANG
ASSAM
PIN- 783301

5:THE DY. COMMISSIONER
DARRANG
DIST.- DARRANG
MANGALDOI
PIN- 783301

6:THE OFFICER-IN-CHARGE
SIPAJHAR P.S.
DIST.- DARRANG
ASSAM
PIN- 78334

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 IA Talukdar, Adv.

Advocates for the respondents : Shri J. Payeng, SC-Home Dept.
Shri P. Sarma, Add. Sr. GA
Shri AI Ali, Adv.

Date of hearing : **08.02.2024**
Date of Judgment : **27.02.2024**

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 opinion rendered vide impugned order dated 16.12.2022 passed by the learned Foreigners Tribunal (1st), Mangaldai, Darrang in F.T. Case No. 4446/11. 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. After the aforesaid order dated 16.12.2022, he was taken into custody on 20.01.2023 and is detained at Tezpur Detention Camp for which the

petitioner filed the connected Interlocutory Application being I.A.(C) No. 3605/2023 praying for his release from such detention.

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), Mangaldai Darrang District, against the petitioner giving rise to the aforesaid F.T. Case No. 4446/2011.

(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 18.11.2022 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 I.A. Talukdar, learned counsel for the petitioner. We have also heard Shri J. Payeng, learned Standing Counsel, Home Department, Assam, Shri A.I. Ali, learned Standing Counsel, Election Commission of India and Shri P. Sarma, learned Additional Senior Government Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 18.09.2023.

4. Shri I.A. Talukdar, 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. Certified copy of the voter list of 1966 (Ext.- 1)

ii. Certified copy of Voter List of 1970 (Ext.-2).

iii. Computer generated certified copy of Voter List of 1975 (Ext.-3);

iv. Computer generated certified copy of Voter List of 1985 (Ext.-4).

v. Computer generated certified copy of Voter List of 1997 (Ext.-5).

vi. Computer generated certified copy of Voter List of 2005 (Ext.- 6)

vii. Computer generated certified copy of Voter List of 2015 (Ext-7).

viii. Computer generated certified copy of Voter List of 2022 (Ext-8).

ix. Elector photo identity card (Ext.-9)

x. Elector photo identity card (Ext.-10)

xi. Name correction affidavit (Ext.-11)

xii. Computer generated photo copy of legacy data (Ext.-12)

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

i. ***(2019) 5 SCC 534 [Sirajul Hoque vs. State of Assam & Ors.]***

ii. ***(2018) 1 SCC 579 [Rupajan Begum vs. Union of India & Ors.]***

iii. ***2013 (1) GLT 941 [Abdul Khalique]***

6. The case of ***Sirajul Hoque*** (supra) has been cited to bring home the contention that minor discrepancies in the names in some documents may be overlooked. In the case of ***Rupajan*** (supra), the Hon'ble Supreme Court has laid down the principles to be followed for accepting documents as evidence. In the case of ***Abdul Khalique*** (supra), the procedure as to how the burden of proof can be discharged has been explained. He accordingly submits that the impugned opinion be interfered with.

7. *Per contra,* Shri Payeng, 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. This is mandated under section 9 of the aforesaid Act, 1946. 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.

8. He 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 are gross discrepancies in the names of the petitioner, his father and also the ages in the different voter list sought to be relied upon by the petitioner. The issue of shifting from Baghbor in the district of Barpeta to Sipajhar in the district of Darrang has also not been properly explained and substantiated. He submits from the records that the petitioner

claims his name to be Eusob Ali, son of Late Raztullah Sheikh. The voter lists of 1966 and 1970 depict the name of the father of the petitioner as Raztullah Sheikh. However, in the voter list of 1985 which the petitioner claims to contain his name, it is shown as Esop Ali, son of Azitullah and the age of the petitioner has been shown to be 40 years. However, in the voters list of 1989, the name changes to Usaf Ali with age 32 years. Further, in the voter list of 1997, the name is Eddsub Ali, son of Aji with age 33 years. The voters list of 2005, 2015 and 2022 are of Sipajhar consistuency and the name of the father of the petitioner changes to Aachatullah Sheikh and Astulla Shek. He has also pointed out that a self sworn affidavit which was exhibited as Ext. 12 cannot be treated as legal evidence.

9. In support of his submissions, Shri Payeng, the learned Counsel has placed reliance upon the following case laws-

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

ii. Order dated 09.06.2023 in WP(C)/2370/2023 [Ajij Miah]

iii. 2017 (4) GLR 295 [Saru Sheikh]

10. 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."

11. The case of ***Saru Sheikh*** (supra) is on the issue of age discrepancies as well as the evidentiary value of ration card. The case of ***Ajij Mia*** (supra) has been cited to support the contention that mere production of a voters list would not be a conclusive evidence of citizenship of a person.

12. The rival contentions have been duly considered. The records of the

Tribunal placed before this Court have been carefully perused.

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 observation 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. 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. This Court has however noticed that there are major discrepancies in the name of the petitioner, his projected father, ages as well as address. On verification with the original records, this Court has found that the petitioner claims his name to be "Eusob Ali", son of "Late Raztullah Sheikh" and the voters lists of 1966 and 1970 depict the name of the father of the petitioner as "Raztullah Sheikh". However, in the voters list of 1985 which the petitioner claims to contain his name, it is shown as "Esop Ali", son of "Azitullah" and the age of the petitioner has been shown to be 40 years. However, in the voters list of 1989, the name changes to "Usaf Ali" and the age lowers to 32 years. Further, in the voter list of 1997, the name is "Eddsub Ali", son of "Aji" with age 33 years. The voters lists of 2005, 2015 and 2022 are of Sipajhar consistuency and the name of the father of the petitioner changes to "Aachatullah Sheikh" and "Astulla Shek". There is no plausible or any rational explanation for such major discrepancies.

19. The records would reveal that the Voters lists of 1966 and 1970 containing

the name of Raztulla Sheikh, son of Piyarmullya, projected father of the petitioner with his other family members relate to Baghbar LAC of village Chaysimana, House No. 9, Part No. - 49, Police Station - Baghbor, Mouza - Baghbor, Sub-Division - Barpeta, whereas Voters List of 1975 containing name of Raztullah Sheikh, son of Piyar of village - Chaysimana relates to House No. 9, Part No. - 65 (but not Part No. - 49, as reflected in the previous Voters Lists of 1966 and 1970), Mouza - Baghbar, Sub-Division - Barpeta of Baghbar LAC.

Similarly the Voters list of 1985 contains name of Esop Ali (petitioner), son of Azitullah, aged about 40 years of village - Chaysimana relates to House No. 22, Part No. - 26, Mouza - Baghbor, Sub-Division - Barpeta (Sadar) of Baghbor LAC whereas the Voters list of 1997 contains the name of one Eddsub Ali, son of Azi, aged about 33 years of village - Chaysimana that relates to House No. 248, Part - 27, Mouza - Baghbor, Sub-Division - Barpeta (Sadar) of Baghbor LAC.

Again from the Voters list of 2005 of Sipajhar LAC placed by the petitioner, it is seen that it contains the name of one Eusob Ali, son of Aachatulla Shekh, aged about 45 years of village - Kirakara (Part), House No. 50, Part - 126, Sub-Division - Mangaldai (Sadar) whereas, the Voters List of 2015 contains the name of Eusob Ali son of Astulla Shek, aged about 63 years of village - Kirakara (Part), House No. 50, Part - 160, Sub-Division - Mangaldai (Sadar).

It is also seen that for the first time, name of Esop Ali, son of Azitulla, aged about 40 years of village – Chaysimana, House No. 22, Part - 26, Mouza - Baghbor, Sub-Division - Barpeta (Sadar) of Baghbor LAC where the petitioner claims that said Esop Ali and he is the same and one person and considering said Esop Ali aged about 40 years in the year 1985, then petitioner's birth year would be approximately 1945 (1985-40=1945) and in that case his name should have figured in the Voters List of 1966 (1945+21=1966) considering voting age

of 21 years at the relevant time that too, with his projected father Raztulla Sheikh and thereafter, continuously as required under the provisions of the Citizenship Act, 1955, as amended.

In our opinion, the aforesaid discrepancies are major and glaring and therefore, we are of the opinion that the petitioner could not prove his nationality as required under Section 9 of the Foreigners Act, 1946. Consequently, there is no scope for interference with the impugned opinion of the learned Tribunal.

20. As regards the case laws cited on behalf of the petitioner, the facts 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" and 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, ages and the address.

21. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 16.12.2022 passed by the learned Foreigners Tribunal (1st), Mangaldai, Darrang in F.T. Case No. 4446/11 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. The records of the aforesaid impugned order dated 16.12.2022 passed by the learned Foreigners Tribunal (1st), Mangaldai, Darrang in F.T. Case No.

4446/11 be returned to the concerned Foreigners Tribunal forthwith along with a copy of this order.

JUDGE JUDGE

Comparing Assistant