



IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)
PRINCIPAL SEAT

W.P(C) No.717/2020

Jahanar Khatun,

D/o:- Lt. Jamal Uddin @Jamal,

W/o:- Amir Hussain,

Vill:- Khagrabari,

P.O:- Khagrabar,

P.S.:- Marnoi

Dist:- Goalpara, Assam

.....Petitioner

-Versus-

- 1. The Union of India** represented by the Secretary Ministry of Home Affairs, New Delhi- 01
- 2. The State of Assam** represented by the Secretary to the Government of Assam, Home Department, Dispur, Guwahati – 06
- 3. The Director General of Police,** Assam Ulubari, Guwahati – 07
- 4. The Superintendent of Police (B),** Barpeta, P.O, P.S. & Dist:- Barpeta, Assam
- 5. The Deputy Commissioner,** Barpeta P.O., P.S. & Dist- Barpeta, Assam.
- 6. The Election Commissioner of India,** through its Secretary, Nirbachan Bhawan, New Delhi- 1
- 7. The State Co-ordinator of National Register of Cistizens (NRC),** Assam, Bhangagarh, Ghy-5

.....Respondents

- B E F O R E -
HON'BLE MR. JUSTICE KALYAN RAI SURANA
HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Advocate for the petitioner : Mr. M.H. Ahmed, Advocate

Advocate for the respondents : Mr. H.K. Hazarika, Jr. Government Advocate, Assam
Mr. K. Deka for Ms. R. Devi, C.G.C.
Mr. G. Sharma, SC, FT
Mr. H. Kuli for Mr. A.I. Ali, SC, ECI

Date of Hearing : **28.08.2024**

Date of Judgment & Order: : **26.11.2024**

Judgment and Order (CAV)

[Soumitra Saikia, J]

This writ petition is directed against the final order dated 15.11.2019 passed by the learned Member Foreigners' Tribunal 5th, Barpeta in Case No. F.T.(5th) 391/2017 whereby the Tribunal answered the reference in affirmative and held that the proceedee namely the petitioner herein had failed to discharge her burden that she is not a foreigner of post 1971 stream or that she had entered Assam on or after 25.03.1971.

2. Learned counsel for the petitioner submits that pursuant to notice being served on the petitioner she had appeared before the Tribunal and filed her written statement as well as the evidence on affidavit. The petitioner's projected the case before the Tribunal was that she was born in 1965 in village No. Santoshpur, Post Office- Santoshpur, P.S. Uttar Salmar (Now Mererchar), District Bongaigaon, of the then undivided Goalpara. Her father's name is Jamaluddin @Jamal and mother's name was Jarina Khatton @Jalan Biwi. Petitioner's mother own land at village Santoshpur by right of inheritance. The petitioner is the eldest amongst her 8 sisters and 1 brother.

3. It is stated that the petitioner's father name was included in the NRC of 1951 and her father's name was also enlisted in the voter's list of 1966 and 1970 and other subsequent voter's list including voter's list of 1979 showing him to be a resident of village Satoshpur Part II under P.S. Uttar Salmara, under 42 No. of Abhayapuri SC LAC in the district of undivided Goalpara vide Serial No. 238, house No. 63, Part No.148 along with his family members. In 1986 the petitioner's father and family members shifted to the nearby village Ghoramara under Abhayapuri Police Station due to erosion of River Rai and Banash and had settled therein and have been residing there till date. They were also residing in the nearby village at Nagarvita. Subsequent to the shifting of the family to Ghoramara, the petitioner's father's name was enrolled in the voter's list of 1989 showing him to be a resident of village Ghoramar at Serial No. 763 along with the petitioner's brother Jakir Hussain. Subsequently, the names of the petitioner's father was enlisted in voter's list of 1997 along with the petitioner's mother, her brothers and sister-in-laws and they have been casting their votes accordingly.

4. The petitioner's mother expired in the year 2000 at village Ghoramara. Petitioner claims to have been married of at the young age of 12 years with Amir Hussain, S/o. Lt. Bilat Ali at village Isabpur, P.S. Baghbar now Barbhita, District Barpeta due to family partition the petitioner's husband shifted to village Tukura Part I, Post Office Tukura, P.S. Goalpara, District Goalpara along with petitioner and their children. Subsequently the family re-shifted to a nearby village Khagrabari in which village the petitioner and her family member residing at present. A certificate issued by the Secretary Rangapani Gao Panchayat with counter signature of Block Development Officer of Tapatar Development Block issued Linkage Certificate dated 17.06.2015 in her favour. The

petitioner has also produced the voter ID card in support of her contentions.

5. The Counsel for the petitioner submits that the petitioner projected her case in detail by filing a written statement in support of her contentions along with necessary documents. It is also submitted on behalf of the petitioner that she filed her evidence-in-chief by affidavit as DW1 before the Tribunal and she exhibited as many as 12 documents in support of her contentions. However, prior to cross-examination because of some difficulties in travelling long distances to come to the Goalpara Tribunal she could not contact her engaged counsel and accordingly filed applications praying for further time. The said application however was rejected and Tribunal without considering the materials placed before the Court has passed this impugned order holding that she is an illegal immigrant of the post 25.03.1971 stream.

6. The State represented by Mr. H.K. Hazarika, Jr. Government Advocate disputed the case of the petitioner and submitted that although evidence-in-affidavit was filed but none of the documents or the statements made were proved as she failed to present herself for cross-examination, accordingly there was no evidence before the Tribunal to support her contentions and consequently on her repeated failure to appear before the Court to be cross-examined, the Tribunal rejected her petition and passed the final order. Under such circumstances there is no infirmity in the opinion dated 15.11.2024 as there was no evidence led in support of the case projected by the proceedee. Consequently, Tribunal passed the order holding the reference in affirmative and declaring the petitioner to be a foreigner of the post 25.03.1971 stream. In the facts of the case there is no infirmity in the opinion passed by the Tribunal and the same is not required to be interfered with and the writ

petition be dismissed. It is also submitted that any evidence not placed before the Tribunal ought not to be considered by this Court in the present writ proceedings, accordingly the same should be dismissed.

7. The learned counsel for the parties have been heard, pleadings on record have been carefully perused. Pursuant to the orders passed by the Court, the tribunal records was called for and the same being available before this Court, has also been examined carefully. The order passed by the Tribunal is reproduced below:

BEFORE THE MEMBER, FOREIGNERS' TRIBUNAL- 5TH

BARPETA, ASSAM

Case No.- FT (5th) 391/2017

Reference IM(D)T Case No.-3608/A/98

State.....Petitioner

-Vs-

Jahanara Khatoon @Jahanara Khatun

Wife of:- Amir

Resident of village:- Manikpur

Police Station:- Kalgachia (previously Baghbar)

District:- Barpeta, Assam.....Opposite

Party/Proceedee.....

Advocate for the petitioner..... Banjit Kr. Das, Asstt. Govt. Pleader.

Advocate for the Opposite party/Proceedee....Haidar Ali, Zakir Hussain Sikdar

Present

Kalpana Baruah

Member,

Foreigners' Tribunal – (5th) Barpeta

1. Present case, in hand, has arisen out of the IMDT case No.-3608/A/98 referred by the Superintendent of Police, Border (in short S.P(B)), Barpeta under the Illegal Migrants (Determination by Tribunals) Act, 1983 (in short IMDT) Act suspecting the opposite party (O.P for short) Jahanara Khatoon @Jahanara Khatun, wife of- Amir, a resident of village:- Manikpur, Police Station (in short P.S):-Kalgachia (previously Baghbar) in the district of Barpeta, Assam to be an illegal migrant.

The IM(D)T Act was declared unconstitutional by the Supreme Court in Sarbananda Sonowal Vs- Union of India reported in (2005) 5 SCC 665 with the further direction that references which were pending before the Tribunals constituted under the IMD)T Act should be transferred to the Tribunals constituted under the Foreigners' Act, 1946 read with the Foreigners' (Tribunals) order, 1964. Accordingly this case stand transferred under the Foreigners' Act, 1946 read with the Foreigners' (Tribunals) order, 1964. An enquiry was conducted beforehand in order to proceed ahead if reasonable grounds exist against the suspected foreigner Jahanara Khatoon @Jahana Khatun. The related reference was transferred from F.T 2^a, Barpeta to this Tribunal for adjudication.

2. *On receipt of notice, O.P Jahanara Khatoon @Jahanara Khatun, wife of- Amir @Amir Hussain has appeared and filed her written statement (W.S for short) along with some photostat copies of documents. The O.P has denied the allegation brought against her and claimed that she is a bonafide citizen of India by birth. Thereafter the O.P filed her evidence on Affidavit (here-in-after called the "Affidavit") along with the documents relied upon by her in support of her version. After that for two successive dates the engaged counsel has filed adjournment petitions and those petitions have been allowed by the Tribunal. On the next date again the engaged counsel has filed an adjournment petition where-in no valid ground is discernible. Hence the said petition has been dismissed and the instant case has been fixed for necessary order. On the next date O.P has been present along with engaged counsel. O.P has filed a petition praying for not passing any order and allow her to discharge her burden. For the ends of justice her prayer has been allowed. On the next date O.P has filed hajira but at the time of calling the case neither O.P nor the engaged counsel has been present. Still, the matter has been fixed on 13/05/2019 for cross-examination of O.P. On 13/05/2019 O.P was not present. Engaged counsel has filed an adjournment petition taking the plea that O.P could not collect relevant documents and as such could not appear before the Tribunal. It is apparent that all along O.P has been delaying the proceeding of the instant case. Record shows that this reference case was instituted in the year 1998 and the proceeding is going on since 2003. Hence, the petition no.-11,297 has been dismissed and the matter is fixed for necessary order. Accordingly, the matter is taken up for passing final order.*
3. *Now, the main point for determination is as to whether O.P namely Jahanara Khatoon @Jahanara Khatun, wife of- Amir @Amir Hussain is a citizen of India or a foreigner within the meaning of the expression "foreigner" as defined in the Foreigners' Act, 1946.*
4. *As per provision of Section 9 of the Foreigners' Act 1946, the onus of proving that the suspect (the O.P in the instant case) is a citizen of India and not a 'Foreigner' lies upon the suspect (O.P.) notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872). Now, let us find out as to how far the O.P could discharge her burden to prove that he is not a foreigner.*
5. *O.P has filed affidavit. An Affidavit is merely an Affidavit when it is filed in the Court. But when a witness appears for cross-examination, it is necessary for the*

witness either to confirm or differ the contents of the Affidavit, whatever recorded is the evidence and if the witness confirms to the Affidavit, the Affidavit would become part of the statement made by the deponent before the Court. Therefore what is finally taken as evidence by the court is not the Affidavit, but what is contained in the Affidavit, if confirmed by the deponent when he/she appears before the Court for cross-examination. But in the instant case O.P has abstained himself from doing that despite having ample opportunity.

O.P has submitted some photostat copies of documents along with his affidavit. Original copies of the said documents have not been exhibited by the O.P. Mere filing of some documents does not amount proof of its contents. As has been held by the Hon'ble Apex Court in LIC-vs-Ram Pal Singh Bisen reported in (2010) SCC 491, mere production of photo copy of documents does not lead to the discharge of burden of proof.

It is apparent that O.P has failed miserably to discharge her burden under Section-9 of the Foreigners' Act, 1946 to prove that she is not a foreigner as alleged in the reference.

6. Considering the fact that after getting ample opportunity O.P has failed to prove her case, I am of the considered opinion that O.P namely Jahanara Khatoon @Jahanara Khatun, wife of- Amir @Amir Hussain has miserably failed to discharge her burden to prove that She is an Indian citizen by birth. To sum-up O.P has miserably failed to discharge her burden to prove that she is not a foreigner.
7. From the discussion above, it is apparent that the oral and documentary evidence submitted by the O.P in support of her version are not adequate enough to establish that she is a citizen of India by birth through genuine Indian parents.

Rather it appears that the O.P entered Assam without authority subsequent to 25.03.1971 and hence she is termed to be a foreigner of post 1971 stream and she had entered Assam on or after 25.03.1971.

8. Considering the entire material on record and the discussion above, I am of the considered opinion that O.P namely Jahanara Khatoon @Jahanara Khatun, wife of- Amir @Amir Hussain, a resident of village:- Manikpur, P.S- Kalgachia (previously Baghbar) in the district of Barpeta, Assam is a foreigner of post 1971 stream. Hence, the reference case is answered in the affirmative and in favour of the state.

In exercise of power under Section-3 (13), Foreigners' (Tribunal) Order, 1964 the O.P/Proceedee Jahanara Khatoon @Jahanara Khatun, wife of- Amir @Amir Hussain, a resident of village:-Manikpur, P.S- Kalgachia (previously Baghbar) in the district of Barpeta, Assam be taken into custody and be kept as internee (Section-4 of Foreigners' Act, 1946.) in appropriate place till she is pushed back.

The reference is answered in affirmative accordingly.

10. Inform S.P.(B), Barpeta, District Magistrate & Election Officer, Barpeta for information and necessary action.

(Kalpana Baruah)
Member,
Foreigners' Tribunal-5th
Barpeta

8. The Tribunal has recorded that the written statement and the evidence on affidavit by the proceedee as DW1 has been filed and was available before the Tribunal. It is seen from the record as well as from the pleadings as many as 12 documents have been filed before the Tribunal. It is also seen from the Tribunal records that applications were filed seeking further time by the petitioner and which came to be rejected by the Tribunal and the matter was fixed for cross-examination.

9. As per the order sheet available from the Tribunal record it is seen that the written statement along with photocopies of the documents was filed on 12.10.2017. The evidence-in-chief of the petitioner as DW1 was filed on 03.01.2018 and the date for cross-examination of the proceedee as DW1 was fixed on 27.03.2018. On 27.05.2018 and five(5) dates thereafter the matter stood adjourned either because of the absence of the opposite party or her engaged counsel. On 27.09.2019 the Tribunal rejected the petition No. 13383 filed by the petitioner praying for not passing any adverse order and allowing her to take part in the proceedings. On 27.09.2019 the next date for order was fixed on 15.11.2019. On 15.11.2019 the final order was passed.

10. Perusal of the final order impugned in the present proceedings namely order dated 15.11.2019 it is seen that the Tribunal rejected the contentions of the petitioner on the ground that the evidence-in-chief,

before the Court was never confirmed by way of cross-examination and therefore the evidences of the proceedee as DW1 cannot be accepted by the Court. The proceedee did not appear for cross-examination in spite of several opportunities being granted. Perusal of the records shows that pursuant to filing of evidence-in-chief of the petitioner as DW1 on 03.01.2018 next date fixed for cross-examination was 27.03.2018.

11. Although strict rules of evidence and civil procedure are not applicable in proceedings before the Tribunal, however, the fundamental principles governance the procedure for adducing evidence before the Courts are applicable to the Tribunal as the question before the Tribunal is the citizenship right of the proceedee. In the order dated 15.11.2019 there is no discussion in the various documents and the evidence filed before the Tribunal in support of the case of the petitioner. While it is true that mere production documents is not enough the same has to be proved as per law, however, what is not clear from the impugned order of the Tribunal is whether the Tribunal rejected all the evidences in the absence of any cross-examination or the evidences having been perused by the Tribunal was not seen to be sufficient in support of the case projected by the petitioner before the Tribunal. This Court is of the view that closure of the cross-examination due to non-appearance of the petitioner and specific order thereto as to how the Tribunal considers the evidence submitted by the petitioner in the absence of the petitioner being cross-examined, ought to have been rendered either separately or in the final order itself. Such specific finding is not discernible from the impugned order dated 15.11.2019.

12. In "*Chaturbhuj Pandey and Ors. reported in 1968 SCC online SC 72*" the Apex Court at the time of examining the value of the testimony adduced therein held that it is true that there is of no assistance to the appellants. As mentioned earlier, the High Court has refused to rely on the oral testimony adduced in support of the appellants' claim as regards the value of the orchard. It is true that the witnesses examined on behalf the appellants have not been effectively cross-examined. It is also true that the Collector had not adduced any evidence in rebuttal; but that does not mean that the court is bound to accept their evidence. The Judges are not computers. In assessing the value to be attached to oral evidence, they are bound to call into aid their experience of life. As Judges of fact, it was open to the appellate Judges to test the evidence placed before them on the basis of probabilities.

13. In "*P. Ram Reddy Vs. Hyderabad Urban Development Department reported in 1995 2 SCC*" held that Certified copy of a document registered under the Registration Act, 1908 but for the above provision could have been only secondary evidence which could have been accepted by the court when primary evidence relating to the original documents were shown to be unavailable. Section 51-A of the LA Act, as seen therefrom, is enacted to enable the parties in land acquisition cases, to produce certified copies of documents to get over the difficulty of parties, in that, persons in possession of the original documents would not be ready to put them in courts, for when once they are put in court they cannot be sure when they could take their return from court. However, the mere fact that a certified copy of the document is accepted as evidence of the transaction recorded in such document does not dispense with the need for a party relying upon the

certified copies of such documents produced in court in examining witnesses connected with documents to establish their genuineness and the truth of their contents. Therefore, the certified copies of registered documents, though accepted as evidence of transactions recorded in such documents, the court is not bound to act upon the contents of those documents unless persons connected with such documents give evidence in court as regards them and such evidence is accepted by the court as true. But when the LAO or the Collector has made his award based on the contents of documents, as found in the registers kept under the Registration Act and produces registration copies of such documents in support of his award in court, they could be regarded acceptable as evidence by court given in support of the award unless it is shown by contra-evidence on behalf of the claimants that such documents could not have been relied upon by the Collector or LAO in making the award. It would be so for the reason that when the LAO produces in court registration (certified) copies of those documents which he had made the basis for determining the market value, that would be only to support his award and not to establish something independent of the award. If that be so, when such documents are produced on behalf of the LAO in court, they cannot be rejected on the ground that the witnesses associated with those documents cannot be examined by the LAO, inasmuch as even without producing such documents he can rely upon the award made by him to show that he had looked into those documents and he had determined the market value on their basis. Hence, the mere fact that witnesses associated with such certified copies of documents produced as evidence in court were not examined on behalf of the LAO will not in any way affect the award of the LAO if he has determined the market value of the acquired land having perused those documents as found in the registers kept under

the Registration Act or their certified copies before determining the market value of those lands on the basis of such documents.”

14. Applying the principles of law of evidence as discussed above this Court is of the view that since it is a question of the citizenship right of the petitioner the matter should be remanded back to the Tribunal to pass appropriate orders in such a situation. The impugned order passed by the Tribunal is therefore set aside on by this ground and the matter is remanded back to the Tribunal for fresh decision of the said matter.

15. The petitioner will appear before the Tribunal within 15 days from date of this order and continue to appear before the Tribunal till the matter finally decided again.

16. The matter is accordingly remanded back. Send down the records of the Tribunal.

JUDGE

JUDGE