

GAHC010014662024



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

Case No. : WP(C)/775/2024

SUKJAN NESSA
D/O- LATE BANIZ SHEIKH @ BANIS SHEIKH, W/O- LATE ADIR ALI, VILL.
CHUNBARI, P.S. GOBARDHANA, DIST.- BAKSA (BTAD), ASSAM

VERSUS

THE UNION OF INDIA AND 6 ORS
REPRESENTED BY THE SECRETARY TO THE GOVT. OF INDIA, HOME
DEPARTMENT, NEW DELHI, INDIA

2:THE CHIEF ELECTION COMMISSIONER
ELECTION COMMISSION OF INDIA
ASHOKA ROAD
NEW DELHI- 110001

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

4:THE DIRECTOR GENERAL OF POLICE
ULUBARI
GUWAHATI
DIST. KAMRUP (M)
ASSAM
PIN- 781007

5:THE STATE COORDINATOR
OFFICE OF THE STATE COORDINATOR OF NATIONAL REGISTER OF

CITIZENS (NRC)
ASSAM
1ST FLOOR
ACHYUT PLAZA
G.S.ROAD
BHANGAGARH
GUWAHATI- 781005

6:THE DEPUTY COMMISSIONER
BARPETA
P.O.
P.S. AND DIST.- BARPETA
ASSAM
PIN- 781301

7:THE SUPERINTENDENT OF POLICE (B)
BARPETA
P.O.
P.S. AND DIST.- BARPETA
ASSAM
PIN- 78130

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 J. Islam, Adv.

Advocates for the respondents : Ms. A. Verma, SC- Home Dept.

Shri P. Sharma, Addl. Sr. GA – Assam

Shri H. Kuli appearing on behalf of Shri A.I. Ali, SC,
Election Commission of India

Dates of hearing : 17.02.2024

Date of Judgment : 17.02.2024

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 17.05.2023 passed by the learned Foreigners Tribunal no. 9, Barpeta in F.T. Case No. 637/2018 [Ref-SP Ref. IM(D)T Case No. 4684(A)]. 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), Barpeta District, against the petitioner giving rise to the aforesaid F.T. Case No. 637/2018.
- (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 22.05.2019 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 J. Islam, learned counsel for the petitioner. We have also heard Ms A. Verma, learned Standing Counsel, Home Department, Assam;

Shri H. Kuli, learned counsel appearing on behalf of Shri A.I. Ali, learned Standing Counsel, Election Commission of India and Shri P. Sharma, learned Government Advocate, Assam.

4. Shri Islam, the learned counsel for the petitioner has submitted that the petitioner could prove her 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 three numbers of witnesses and also the following documentary evidence.

- i. Certified copy of Chitha (Exbt -A)
- ii. Certified copy of Voter list of 1966 (Exbt – B)
- iii. Certified copy of Voter list of 1970 (Exbt – C)
- iv. Certified copy of Voter list of 1985 (Exbt – D)
- v. Certified copy of Voter list of 1989 of elder brother (Exbt – E)
- vi. Certified copy of Voter list of 1989 of petitioner with name Khodeja Nessa (Exbt – F)
- vii. Certified copy of Voter list of 1993 (Exbt- G)
- viii. Certified copy of Voter list of 2010 (Exbt – H)
- ix. Certified copy of Voter list of 2013 (Exbt – I)
- x. Certified copy of Voter list of 2017 (Exbt – J)

5. The learned Tribunal had also taken into consideration two further documents namely;

- (a) Gaonburah certificate (Exbt – K)

(b) Copy of an Elector Photo I.D. Card (Exbt – L)

6. He submits 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.

7. *Per contra*, Ms A. Verma, learned Standing Counsel, Home Department has categorically refuted the stand taken on behalf of the petitioner. She 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. She 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. She 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.

9. 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. She submits that there is no procedural impropriety or illegality in the decision

making process and therefore, the instant petition is liable to be dismissed.

10. In support of her submissions, Ms Verma, learned Standing Counsel has placed reliance upon the following case laws-

(i) 2018 (3) GLT 652 (*Tuta Mia @ Tota Mia vs. Union of India*)

(ii) 2018 (4) GLT 392 (*Borhan Ali vs. Union of India*)

(iii) (2019) 5 GLR 768 (*Monoduti Nandi vs. Union of India*)

11. The case of ***Tuta Mia @ Tota Mia*** (supra) has been cited to bring home the point that an extract of voter list is not admissible as an evidence as it is not a certified copy.

“17. In so far Exhibit-2 is concerned, it is an extract of the voters list of 2014 whereby voter was Abdus Samad, son of Tota Mia. This document is not admissible in evidence because it is not a certified copy. Therefore, it is neither primary evidence nor secondary evidence. Even then, if we accept the document at its face value, it only shows Abdus Samad to be son of Tota Mia. But there is nothing on record to trace existence of Tota Mia on Indian soil prior to 25.03.1971, which is the cut off date for identification of foreigners in the State of Assam as per Section 6-A of the Citizenship Act, 1955, as amended.”

12. In the case ***Borhan Ali*** (supra), it has been laid that a voter list is to be read in its entirety and not in part.

“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.”

13. In the case of ***Monoduti Nandi*** (supra), the requirement of continuous

stay has been emphasized so as to meet the requirement of establishing citizenship. In this case, there is a long gap from 1970 to 1985 with regard to the voter list of the projected father.

“6. We have perused the provisions of Section 6A(3) which is as follows:

(3)Subject to the provisions of sub-sections (6) and (7), every person of Indian origin who—

(a) came to Assam on or after the 1st day of January, 1966 but before the 25th day of March,1971 from the specified territory; and

(b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and

(c) has been detected to be a foreigner, shall register himself in accordance with the rules made by the Central Government in this behalf under section 18 with such authority (thereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll for any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom. Explanation.—In the case of every person seeking registration under this sub-section, the opinion of the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 holding such person to be a foreigner, shall be deemed to be sufficient proof of the requirement under clause (c) of this sub-section and if any question arises as to whether such person complies with any other requirement under this sub-section, the registering authority shall,—

(i) if such opinion contains a finding with respect to such other requirement, decide the question in conformity with such finding;

(ii) if such opinion does not contain a finding with respect to such other requirement, refer the question to a Tribunal constituted under the said Order having jurisdiction in accordance with such rules as the Central Government may make in this behalf under section 18 and decide the question in conformity with the opinion received on such reference.

7. The requirement of registering with the Foreigners Registration Authority under Section 6A(3) of the Citizenship Act is subject to the following conditions

precedent:

(i) that the proceedee came to Assam after 01.01.1966 but before 25.03.1971;

(ii) and since the date of his entry into Assam, been ordinarily resident in Assam; and

(iii) has been detected to be a foreigner.

8. In the instant case, as per the order of the Tribunal dated 16.06.1993, it is taken note of that there is no finding of a fact that since the date of their entry into Assam, the petitioners had ordinarily been residing in Assam. The only finding arrived is that the petitioners have entered India between 01.01.1966 and 25.03.1971. As the requirement of the conditions precedent of Section 6 A(3) had not been fulfilled in the case of the petitioners as revealed from the order of the Tribunal, we are of the view that there is a requirement of law to arrive at a finding of fact that the petitioners have ordinarily been residing in Assam since the date of their entry."

14. The rival contentions have been duly considered and the materials placed before this Court have been carefully examined.

15. 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.”

16. 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.”

17. 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.

18. 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."

19. This Court has noticed that while the petitioner has declared her name to be "Sukjan Nessa", in the first voter list of the year 1989 wherein her name allegedly appeared, it is shown as "Khodeja Nessa". No explanation in this regard has been made by the petitioner. Further, in the voter list of 1993, the

name again appears as "Sukjan Nessa", however, with a changed address. The settled law in this field is that the burden of proof that a proceedee is an Indian citizen is always on the said proceedee and the said burden never shifts. The said procedure is clearly laid down in Section 9 of the Act of 1946 and there is *non-obstante* clause that the provisions of the Indian Evidence Act would not be applicable.

20. This Court has also noticed that though the name of the projected father has been shown as "Banis" in the voter list of 1966, it alters to "Banis Sheikh" in the voter list of 1970. The next voter list is after a long gap of 15 years which is of 1985 wherein the name appears as "Basin Ali". Further, the name of the projected mother Sohiten Nessa does not find place in the earlier voter list in spite of she being shown as 63 years old in the voter list of 1985. The voter list of 1993 which has been annexed in the writ petition allegedly containing the name of the petitioner is an uncertified copy. We are also of the opinion that the draft Chitha cannot be a conclusive evidence of the linkage of the petitioner.

21. On examination of the written statement and the evidence in chief of the petitioner, we have noticed that the petitioner had stated that her parents and other family members shifted from village-Bhakhuradia, Mouza-Nagarbera, P.S.-Boko, District-Kamrup to village-Kholabanda Nonke, Mouza-Baguribari, P.S.-Tarabari, District-Barpeta. However, she have not mentioned when such shifting took place. In the written statement, the name of her elder brother has been stated to be Abdul Sheikh, son of Banish Sheikh appeared in the Voters List of 1989 village-Bhakhuradia, Mouza-Nagarbera, P.S.-Boko, District-Kamrup. However, in the Evidence-in-Affidavit of DW-2, Abdur Sheikh is silent regarding such shifting from village-Bhakhuradia. Further, the name of the DW2 figured in the Voters List of in the year 1985 from village-Bhakhuradia as Abdul Ali, age-

34, son of Banis; in the year 1989 as Abdul Sheikh, son of Banis Sheikh, age-37; in the year 2010, after 21 years as Abdul Sheikh, son of Banis Sheikh, age-65 and in the year 2013 as Abdul Sheikh, son of Banis Sheikh, age-67. Further, in his Evidence-in-Chief sworn on November, 2019 and his in cross he stated to be son of Banis Sheikh, from village-Bhakhuradia, aged about 75 years. We have also noticed that the DW-3, Ajmat Ali from village Chumbari in his Evidence-in-Affidavit stated that parents of the petitioner were permanently resided at village- Bhakhuradiya.

22. We have also noticed that in the written statement, the petitioner had stated that they were seven siblings – five brother and two sisters. The brothers were (1) Kafur Ali, (2) Jaher Ali, (3) Badsha Mia, (4) Akbar Ali & (5) Shadid Ali and the two sisters were (6) Joyful Nessa & (7) Sukjan Nessa (herself). The father has been stated to be late Sadar Ali @ Sabder Ali of village-Kholabanda Nonke, Mouza-Baguribari, P.S.-Tarabari, District-Barpeta. In one part petitioner projected her father as Baniz Sheikh son of Bahar who hails from village-Bhakhuradia, Mouza-Nagarbera, P.S.-Boko, District-Kamrup and on the other hand she stated that she is the daughter of late Sadar Ali @ Sabder Ali of village-Kholabanda Nonke, Mouza-Baguribari, P.S.-Tarabari, District-Barpeta.

23. The petitioner in her cross examination stated that there are altogether 4 brothers and sisters, and named them as Abdul Sheikh, elder brother; late Sarmala Khatun, 2nd person; Sukjan Nessa (herself), the 3rd one and late Haider Ali, the 4th one. But the DW-2, Abdul Sheikh, projected elder brother of the petitioner in his cross examination named his brothers and sisters as follows – Abdul Sheikh (himself), Sukjan Nessa (O.P.) and late Haider Ali Sheikh. He also failed to name his brother-in-law, i.e., the husband of the petitioner, stating

that he forgot his name but stated that she was married to Chumbari village.

24. We have also noticed that in her cross examination, the petitioner stated that her father had three brothers, who were late Banis Sheikh, Natu Sheikh and Rakhman Sheikh, whereas DW-2, projected brother of the petitioner in his cross examination named the brothers of his father as Natu Sheikh and Katu Sheikh. Further, the petitioner clearly stated that she is not aware of Basin Ali (name of Basin Ali, S/O Bahar, aged about 75 figured in the Voters List of 1985 from village Bhakhuradiya). She also stated that she did not see the brothers of her father and named them only from Voters Lists. She also stated that she is not aware about her grandparents from her father's side.

25. As regards, the DW-3, Ajmat Ali from village Chumbari, in his Evidence-in-Affidavit, he stated that he knew very well that the petitioner's parents and other relatives had cast their votes in the years 1966, 1970, 1985 and 1989 from village Bhakhuradiya under Boko LAC. However, in the cross examination it is clearly stated that regarding the marriage of the petitioner or about the house of her father he does not have any materials in his hand. It clearly transpires that the evidence adduced by DW-3 is hearsay and is of no value.

26. This Court finds force in the contention of the learned Standing Counsel who has cited the case laws of ***Tuta Mia*** (supra), ***Borhan Ali*** (supra) and ***Monoduti Nandi*** (supra) with regard to the procedure to be followed for proving a voter list as well as of the aspect of requirement of continuous stay.

27. In view of the aforesaid facts and circumstances, we are of the opinion

that the impugned order dated 17.05.2023 passed by the learned Foreigners Tribunal no. 9, Barpeta in F.T. Case No. 637/2018 [Ref-SP Ref. IM(D)T Case No. 4684(A) does not call for any interference. Accordingly, this writ petition being devoid of merits being dismissed.

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

JUDGE

JUDGE

Comparing Assistant