GAHC010028622017

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

Case No. : WP(C)/3850/2017

ATUL SARKAR @ ATUL MANDAL
S/O- LATE SUSHIL SARKAR@ LATE SUSHIL MANADAL, R/O- VILL- BAGHMARI, P.O- KUTHARI, P.S- JAKHALABANDHA, DIST- NAGAON, ASSAM

VERSUS

THE UNION OF INDIA and 4 ORS
REP. BY THE SECRETARY, HOME DEPTT.,

2:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT OF ASSAM
HOME DEPTT.
GUWAHATI- 781006

3:THE SUPERINTENDENT OF POLICEB
NAGAON
DIST- NAGAON
ASSAM

4:THE DEPUTY COMMISSIONERELECTION
NAGAON
DIST- NAGAON
ASSAM

5:THE DIRECTOR GENERAL OF POLICE
REHABARI
GUWAHATI- 781008
DIST- KAMRUPM
ASSA

B E F O R E

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the petitioner : Ms. P. Borah, Adv.

Advocates for the respondents : Ms. A. Verma, SC- Home Dept.
Shri P. Sarma, Add. Sr. GA.

Date of hearing : **17.02.2024**

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 13.02.2008 passed by the learned Foreigners Tribunal (2nd), Nagaon in F.T. Case No. 278/2006. 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. As per the projection made in the petition, the aforesaid order is an *ex-parte* one.

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), Nagaon District, against the petitioner giving rise to the aforesaid F.T. Case No. 278/2006.

(ii) As per requirement u/s 9 of the Foreigner's Act, 1946 to prove that the proceedee is not a foreigner, the petitioner was duty bound to file written statement to prove his citizenship. But in contrast the petitioner remained absent at least for 5 consecutive dates and as a result there was no written statement filled.

(iii) The learned Tribunal after noticing the aforesaid 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 Ms. P. Bora, learned counsel for the petitioner. We have also heard Ms. A. Verma, learned Standing Counsel, Home Department, Assam, and Shri P. Sarma, learned Additional Senior Government Advocate, Assam.

4. It is contended on behalf of the petitioner that earlier a proceeding was initiated against the petitioner under the I.M.D.T. Act in which the petitioner had filed his Written Statement. However, vide an order dated 01.08.2005, the earlier proceeding under the IMDT Act was kept pending in view of the fact that the Act was struck down by the Hon'ble Supreme Court followed by an order dated 12.07.2006 whereby the case of the petitioner was transferred to the present Tribunal wherein notice was issued on 21.07.2006. It is however admitted that in the preset proceeding, the petitioner had appeared before the learned Tribunal on 13.09.2006 and had taken time to file the written statement. It is submitted that the subsequent default in appearance was on account of the fault on the part of his counsel. It is submitted that the engaged lawyer neither appeared himself nor informed the petitioner about the dates.

5. Ms. Bora further submits that the documents which are available and annexed to the writ petition would *ex facie* demonstrate his citizenship. In this connection, the Voter Lists of 1965 and 1989 have been referred to containing the name of the projected uncle of the petitioner in the former and containing the name of the projected father and another uncle in the latter. Reference has also been made to copies of Transfer certificate, Gaon Burha certificate, certificate issued by Gaon Panchayat and Jamabandi by contending that the same contain either the name of the petitioner or name of any of the relatives from whom he claim linkage.

6. The learned counsel for the petitioner has accordingly submitted that the petitioner was deprived from an opportunity to contest the case which proceeded *ex parte* and therefore, the instant petition may be allowed and the matter be remanded back for a fresh adjudication on merits.

7. *Per contra,* Ms. A. Verma, learned Standing Counsel, Home Department has at the outset emphatically refuted the primary contention made on behalf of the petitioner that the order dated 13.02.2008 of the learned Tribunal is an *ex parte* order. It is submitted that notices were duly served whereafter, the petitioner had taken time file written statement. However, there was continuous default thereafter and only after giving adequate opportunity, the learned Tribunal had passed the order dated 13.02.2008.

8. The learned Standing Counsel further submits that even the attempt to convince this Court in support of his citizenship is absolutely perfunctory and without any basis. She further submits that even in an appropriate case, a part of a document cannot be relied upon and the document as a whole is to be appreciated. It is also submitted that under clause 3(8) of the Order of 1964, a prescription of time is given for filing of written statement and evidence on

affidavit and the same cannot be an endless exercise.

9. In support of her submissions, Ms. Verma has placed reliance upon the following case laws-

i. (2016) 4 GLR 182 [Kadbhanu Bhanu Begum vs. Union of India]

ii. Order dated 13.02.2024 in WP(C)/82/2024 [Baten Paramanik vs. UOI]

10. In the case of ***Kadbhanu*** (supra), this Court has laid down the requirement of approaching a writ court with clean hands so as to be entitled to the equitable relief.

11. In the case of ***Baten Paramanik*** (supra), the aspect of the provisions of Order 4(e) of the Foreigners (Tribunals) Order of 1964 has been dealt with wherein it has been held that the aforesaid provision of issuing warrant cannot be connected to secure filing of written statement and to contest a case and if such interpretation is accepted, no proceeding can be ordered to be *ex-parte*. This Court has also taken note of Order 3 A of the said order of 1964 which lays down the procedure to apply for vacation of *ex-parte* orders.

12. The rival contentions have been duly considered. The concerned records of the Foreigners Tribunal placed before this Court have been carefully perused.

13. 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.

14. 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."

15. The principal ground of challenge is by citing the default of the lawyer. However, it is seen that the explanations / pleadings made in this regard in paragraphs 9 and 12 are wholly insufficient and vague. On a specific query raised by the Court, the learned counsel for the petitioner responded that no complaint in the Bar Council against the concerned lawyer was lodged. This Court had noticed that even the name of the lawyer has not been stated.

16. Be that as it may, in the interest of justice, this Court had looked into the written statement filed in the proceeding under the IMDT Act from the records and has found that there was no disclosure at all regarding any facts which could substantiate the claim of the petitioner regarding his citizenship. Though

certain documents have been annexed to the writ petition, the said documents cannot be looked into by this Court as that would amount to dispensing the requirement of proof of documents. In a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 for determination as to whether the proceedee is a foreigner or not, the relevant facts being especially within the knowledge of the proceedee and therefore, the burden of proving citizenship absolutely rests upon the proceedee, notwithstanding anything contained in the Evidence Act, 1872. This is mandated under Section 9 of the aforesaid Act, 1946.

17. This Court has however noticed that even the documents annexed to this writ petition do not inspire confidence and none of the documents make out a prima facie case in favour of the petitioner.

18. In the case of ***Ijjat Ali Vs. Union of India*** [***Order dated 12.10.2020 in WP(C)/8361/2019]*** this Court has laid down that a proceeding before the Foreigners Tribunal cannot be an endless exercise. The relevant part of the aforesaid judgment is extracted herein below-

> "*Having regard to the undisputed facts, as above, we find that sufficient opportunities had been granted to the petitioner to establish his claim as not being foreigner or to refute the allegation that he had illegally entered into the territory of India after 25.03.1971. In this context, we may observe that although the procedure of identification and for declaring an individual to be a foreign national cannot be relegated to a mechanical exercise and that fair and reasonable opportunity must be afforded to a proceedee to establish claim that he/she is a citizen of India,*

however, such grant of opportunity cannot be enlarged to an endless exercise. A person who is not diligent and/or is unmindful to take steps to safeguard his interest, he does so at his own risk and peril."

19. In the case of ***Sajiran Nessa Vs. UOI [Order dated 05.01.2021 in WP(C)/1293/2020]***, this Court has explained the meaning of sufficient opportunities *qua* a proceedee before a Foreigners Tribunal. For ready reference, the relevant part is extracted herein below-

"*Having regard to the facts, as above, we find that sufficient opportunities had been granted to the petitioner to establish her claim as not being a foreigner or to refute the allegation that she had illegally entered into the territory of India after 25.03.1971. In this context, we may observe that although the procedure of identification and for declaring an individual to be a foreign national cannot be relegated to a mechanical exercise and that fair and reasonable opportunity must be afforded to a proceedee to establish claim that he/she is a citizen of India, however, such grant of opportunity cannot be enlarged to an endless exercise. A person who is not diligent and/or is unmindful to take steps to safeguard his/her interest, he/she does so at his own risk and peril. In the instant case several opportunities were granted to the petitioner to establish her claim, which she utterly failed to do so. In this context, we may observe that in a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964, the primary issue for determination is whether the proceedee is a foreigner or not. The relevant fact being especially within the knowledge of the proceedee, as such, the burden of proving citizenship absolutely*

rests upon the proceedee, notwithstanding anything contained in the Indian Evidence Act, 1872. This is mandated under section 9 of the aforesaid Act, 1946. The said position would not change even in an ex-parte proceeding before the Tribunal as the burden never shifts but continues to be upon the proceedee. In a situation where no evidence is adduced or the burden is not discharged, the only option left to the Tribunal would be to declare the proceedee to be a foreigner, based on the grounds of reference upon which appropriate proceeding was initiated, where notice was issued and duly served upon the proceedee. In the instant case, the petitioner utterly neglected to participate/contest in the proceedings."

20. In view of the aforesaid facts and circumstances, we are of the opinion that the final order dated 13.02.2008 passed by the learned Foreigners Tribunal (2nd), Nagaon in F.T. Case No. 278/2006 does not call for any interference. Accordingly, this writ petition being devoid of merits stands dismissed.

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

22. Let a copy of this order be transmitted forthwith to the learned Foreigners Tribunal.

JUDGE **JUDGE**

Comparing Assistant