GAHC010006102024

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

Case No. : WP(C)/291/2024

BAHARUL ISLAM
S/O- LT. HATEM ALI, R/O- VILL.- LAHAPARA, P.S. TAMULPUR, DIST- BAKSA, ASSAM, PIN- 781354

VERSUS

THE UNION OF INDIA AND 6 ORS
REPRESENTED BY THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY OF HOME AFFAIRS, NEW DELHI-1

2:THE ELECTION COMMISSION OF INDIA
NEW DELHI-1

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

4:THE STATE CO-ORDINATOR OF NRC
BHANGAGARH
ASSAM
GUWAHATI-5

5:THE DISTRICT COMMISSIONER
BAKSA
PIN- 781372

6:THE SUPERINTENDENT OF POLICE (B)
BAKSA AND TAMULPUR

ASSAM
PIN- 781372

7:THE OFFICER-IN-CHARGE
TAMULPUR POLICE STATION
DISTRICT- BAKSA
ASSAM
PIN- 78136

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.U. Mahmud, Adv.

Advocates for the respondents : Ms. A. Verma, SC- Home Dept.
Shri P. Sarma, Add. Sr. GA,
Shri H. Kuli, appearing on behalf of Shri A.I. Ali, SC, ECI.

Date of hearing : 15.02.2024
Date of Judgment : 23.02.2024

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 22.11.2023 passed by the learned Foreigners Tribunal, Baksa in F.T. Case No. 21/BAKSA/2023 [Ref-I.M.(D).T. Case No. 111/99]. 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), Baksa, Mushalpur District, against the petitioner giving rise to the aforesaid F.T. Case No. 21/BAKSA/2023.

(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. Though at least 7 dates were fixed for filing of written statement and evidence on affidavit, the petitioner had utterly failed to do the same.

(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 on 22.11.2023, declaring the petitioner to be a foreign national post 25.03.1971.

3. We have heard Shri M.U. Mahmud, 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. Sarma, learned Additional Senior Government Advocate, Assam. We have also carefully examined the records of the Tribunal which were requisitioned vide an order dated 22.01.2024.

4. It is contended on behalf of the petitioner that the default in appearance was on account of the fault on the part of his counsel. It is submitted that the petitioner was unwell and undergoing treatment and therefore he could not

appear before the learned Tribunal.

5. By referring to Order 4(e) of the Foreigners (Tribunals) Order, 1964, the learned counsel submits that the aforesaid provision vests powers upon the Tribunal to issue warrant of arrest to secure the attendance of a party and without exercising the said power, the decision to proceed *ex parte* is not proper.

6. Shri Mahmud further submits that the documents which are available and annexed to the writ petition would demonstrate his citizenship. In this connection, certain Voter Lists, Electoral Voter ID Cards, Aadhar Card, PAN Card and copy of Jamabandi have been referred to.

7. In support of his contention, the learned counsel for the petitioner has relied upon the following case laws:

(i) 2022 (1) GLT 756 [***Rajendra Das vs. Union of India***]

(ii) Order dated 09.09.2021 in WP(C)/ 6544/2019 [***Asor Uddin vs. Union of India***]

8. In both the aforesaid cases, *ex-parte* opinion rendered by Foreigners Tribunal were interfered with and the matters were remanded for adjudication on merits.

9. Shri Mahmud, has also relied upon the case of ***State of Orissa vs. Dhaniram Luhar*** reported in ***(2004) 5 SCC 568*** wherein the Hon'ble Supreme Court has laid down that maintenance of judicial discipline is an integral part of the judicial system. Reliance is also placed upon in the case of ***State of Bihar vs. Kalika Kuer*** reported in ***(2003) 5 SCC 448*** whereby it has been laid down that a later Coordinate Bench is required to follow an earlier view rendered and in case of disagreement, the matter may be referred to a

larger Bench.

10. It is 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.

11. *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 22.11.2023 of the learned Tribunal is an *ex parte* order. It is submitted that notices were duly served whereafter, the petitioner had also appeared and thereafter, kept on seeking adjournments and there was continuous default. Only thereafter and after giving adequate opportunity, the learned Tribunal had passed the order dated 22.11.2023.

12. 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. 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.

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

i. Order dated 12.10.2020 of this Court in WP(C)/8361/2019 [Ijjat Ali Vs. Union of India]

ii. Order dated 05.01.2021 of this Court in WP(C)/1293/2020 [Sajiran Nessa Vs. UOI]

iii. (2016) 1 GLR 375 [Ayub Ali vs. Union of India]

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

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

14. The case of ***Ijjat Ali*** (supra) has been cited in support of the contention that a proceeding before the Foreigners' Tribunal cannot be an endless exercise. The relevant part of the aforesaid judgment is extracted hereinbelow-

> "*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."*

15. In the case of ***Sajiran Nessa*** (supra), meaning of sufficient opportunities *qua* a proceedee before a Foreigners' Tribunal have been explained. For ready reference, the relevant part is extracted hereinbelow-

> "*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."

16. In the case of ***Ayub Ali*** (supra), it has been laid down that the principles of natural justice cannot be put in a strait jacket formula and in view of the

unabated influx, the situation is required to be balanced. It has further been laid down that if a proceedee chooses not to contest a proceeding, he does so at his own peril. 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.

17. 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.

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

19. 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.

20. 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."

21. The grounds of challenge is default of the lawyer as well as medical reasons of the petitioner. However, it is seen that the explanations / pleadings made in this regard are wholly insufficient and vague. This Court has noticed that there was no complaint in the Bar Council against the concerned lawyer and even the name of the lawyer has not been stated. As regards the medical ground, the documents annexed are absolutely inadequate. There are no diagnostic reports and only certain prescriptions have been annexed. One prescription pertains to cough and another of diarrhoea. However, the default was continuous and at least 7 dates were given within a span from 23.06.2023 to 22.11.2023 and only thereafter the opinion was rendered.

22. Now let us deal with the argument made on behalf of the petitioner by taking support of Order 4(e) of the Order of 1964 that a proceeding cannot be made *ex parte* without exhausting the aforesaid provision. The aforesaid provision reads as follows:

"***4. Powers of Foreigners Tribunals****- The Foreigners Tribunals shall have the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), and the powers of a Judicial Magistrate First Class under the Code of Criminal Procedure, 1973 (2 of 1974) in respect of the following matters, namely, -*

(a)...
(b)...

(c)...

(d)...

(e) issuing a warrant of arrest against the proceedee if he or she fails to appear before it."

23. The aforesaid provision has been inserted by a notification dated 10.12.2013. The objective behind such insertion is to secure the attendance of a proceedee in case such attendance is deemed necessary by the learned Tribunal and for doing so, the learned Tribunal can exercise the powers of a JMFC under the CrPC, 1973. However, the said provision cannot be interpreted to mean that even for filing a written statement for defending the case, such powers are to be exercised. In the opinion of this Court, the aforesaid argument is apparently flawed and if such interpretation is accepted, no case under the Foreigners Tribunal can be proceeded *ex parte* which would be a wholly unreasonable proposition. The aforesaid view of this Court is fortified by the other provisions in the Order of 1964 which, in fact contemplates *ex parte* proceedings. In this connection, Order 3A of the said Order of 1964 may be referred to which lays down the procedure for setting aside *ex parte* order and the said provision of 3A was also inserted vide the same notification dated 10.12.2013.

24. As regards the reliance upon the new documents made on behalf of the petitioner, this Court is of the view that such documents cannot be looked into by a writ Court for the first time when it was not filed and proved before the learned Tribunal. Though, in an exceptional case wherein a party can conclusively establish that he was not at all aware of a case which was proceeding *ex-parte* and certain documents are annexed to the writ petition,

this Court can come to an *ex-facie* satisfaction on the issue of citizenship of the said party. However, the general proposition would be that when documents were not proved by the petitioner before the learned Tribunal in accordance with law, 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 which reads as follows:

> "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."

25. As regards the case of ***Asor Uddin*** (supra) and ***Rajendra Das*** (supra) cited on behalf of the petitioner, this Court had noticed that the *ex-parte* orders were set aside in those cases which were based on the facts and circumstances. In the case of ***Asor Uddin*** (supra), there is a specific finding in paragraph 9 that there were sufficient reasons for the petitioner in that case for not being able to appear before the Tribunal. As regard, the cases of ***Dhaniram Luhar***

and ***Kalika Kuer***, the Hon'ble Supreme Court laid down the requirement of judicial discipline in respect of precedents. There is absolutely no dispute to the aforesaid proposition and this Court is in humble agreement with such proposition. However, as observed above, the remand orders in the two cases cited were on the facts and circumstances of those cases and cannot act as a precedent. The Hon'ble Supreme Court in the case of ***Padma Sundara Rao vs State of T.N.*** *reported in* ***(2002) 3 SCC 533*** has laid down that a ratio of the case has to be understood with the facts of that case. For ready reference, the relevant part is extracted herein below:

> "*9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537]. Circumstantial flexibility, one additional or different fact may make a word of difference between conclusions in two cases."*

26. The aspect of the precedential value has also been explained by the Hon'ble Supreme Court in the case of ***Ambica Quarry Works v. State of Gujarat reported in (1987) 1 SCC 213*** in the following manner:

> "***18.*** *….. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. [See Lord Halsbury in Quinn v. Leathem (1901) AC 495]….."*

27. In view of the aforesaid facts and circumstances, we are of the opinion that the final order dated 22.11.2023 passed by the learned Foreigners Tribunal, Baksa in F.T. Case No. 21/BAKSA/2023 [Ref-I.M.(D).T. Case No. 111/99] does

not call for any interference. Accordingly, this writ petition being devoid of merits stands dismissed.

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

29. The records of the said order dated 22.11.2023 passed by the learned Foreigners Tribunal, Baksa in F.T. Case No. 21/BAKSA/2023 [Ref-I.M.(D).T. Case No. 111/99] be returned forthwith along with a copy of this order.

JUDGE **JUDGE**

Comparing Assistant