

GAHC010065082018



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

Case No. : WP(C)/2081/2018

SAFIA KHATOON
WIFE OF ABDUL KARIM, VILLAGE- BAJIA GAON, P.S. SAMAGURI, DIST.
NAGAON, ASSAM, PIN-781002

VERSUS

THE UNION OF INDIA AND 7 ORS.
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA,
DEPARTMENT OF HOME AFFAIRS, NEW DELHI.

2:ELECTION COMMISSION OF INDIA
NEW DELHI

3:COORDINATOR
N.R.C.
ASSAM
GUWAHATI

4:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY
HOME AND POLITICAL (B) DEPTT.
DISPUR-781006

5:THE FOREIGNERS TRIBUNAL
2ND
NAGAON DIST.
NAGAON

PIN-782003

6:THE SUPERINTENDENT OF POLICE (BORDER)
NAGAON
ASSAM-782001

7:THE DEPUTY COMMISSIONER
NAGAON
ASSAM
PIN-782426

8:THE OFFICER-IN-CHARGE
SAMAGURI POLICE STATION
NAGAON
ASSAM
PIN-78200

Advocate for the Petitioner : MR. B C DAS

Advocate for the Respondent : ASSTT.S.G.I.

BEFORE:::

HON'BLE MR. JUSTICE MANAS RANJAN PATHAK

HON'BLE MR. JUSTICE MITALI THAKURIA

Date of hearing : **17.11.2023**

Date of verdict : **07.03.2024**

JUDGMENT & ORDER (CAV)

(Mitali Thakuria, J)

Heard Mr. B. C. Das, learned counsel for the petitioner. Also heard Mr. K. Gogoi,

learned CGC representing respondent No. 1; Mr. A. I. Ali, learned Standing Counsel, Election Commission of India, for respondent No. 2; Mr. G. Sarma, learned Standing Counsel, Home and Political Department, Assam, representing respondent Nos. 4, 6 & 8; and Ms. A. Phukan, learned Government Advocate, Assam, representing respondent No. 7.

2. This is an application under Article 226 of the Constitution of India for issuance of writ in the nature of certiorari or mandamus and/or any other appropriate writ, order or direction of like nature.

3. The brief facts of the case is that in pursuant to a reference made by the Superintendent of Police (B), Nagaon, under the Foreigner's Act, 1946 vide reference D Case No. 327/2001, the learned Member, Foreigners' Tribunal, (2nd), Nagaon, Assam, registered a case, being F.T. Case No. 2067/2011. Thereafter, notice was issued to the petitioner/proceedee for appearance. Accordingly, the petitioner appeared before the learned Tribunal and contested the case by filing Written Statement and also adduced her evidence as DW-1 and evidences of 2 (two) other witnesses, namely, Hajrat Ali (uncle) as DW-2 and Md. Idrish Ali (Sarkari Gaonburah) as DW-3. In support of her Indian nationality, the petitioner also produced and exhibited several documents and she was duly cross-examined by the State.

4. It is the contention of the petitioner that she is an Indian citizen by birth and was born and brought up in village Bhogamur under Samaguri Police Station of Nagaon District. She was married to one Abdul Kadir, son of Isab Ali of village Bajiagaon. The name of her father and mother is Suruj Ali and Nilman Bibi, respectively, and her grandfather's name is Mishir. She accordingly exhibited the following documents in support of her case:

- (i) Certified copy of the voter list of 1965 under the Samaguri LAC of Assam (Exhibit-1).
- (ii) Certified copy of voter list of 1970 under the 91 Samaguri LAC of Assam (Exhibit-2).
- (iii) Certified copy of voter list of 1985 under the 88 Samaguri LAC of Assam (Exhibit-3).
- (iv) Certified copy of voter list of 1985 under the 88 Samaguri Lac of Assam (Exhibit-4).
- (v) Certified copy of voter list of 1993 under the 88 Samaguri LAC of Assam (Exhibit-5).

She further annexed the following documents:

- (vi) Certificate issued by Sarkari Gaonburah.
- (vii) Myadi Jamabandi copy of 1968/69 (not exhibited).
- (viii) Land Tax paying receipt (not exhibited).

5. Accordingly, it is the case of the petitioner that the name of her parents were recorded in the Voters Lists of 1965, 1970 and 1985 while her own name was recorded in the Voters Lists of 1985 and 1993. However, the learned Member, Foreigners' Tribunal, (2nd), Nagaon, Assam, without considering the

materials on record, vide its impugned order dated 17.02.2018, declared the petitioner as foreigner who had illegally entered into the territory of India after 25.03.1971 from the specified territory (Bangladesh). Hence, being aggrieved and dissatisfied with the said impugned order, the present petition has been filed by the petitioner.

6. Mr. B. C. Das, learned counsel for the petitioner, submitted that the petitioner produced all the relevant documents to prove herself to be an Indian citizen and she produced the Voters Lists of 1965 and 1970, wherein the names of her father and grandfather were recorded. More so, she also adduced the evidence of her uncle as well as the Sarkari Gaonburah to prove her link with her father and grandfather. But the learned Tribunal did not consider all these facts of the case and passed the order arbitrarily declaring the present petitioner as a foreigner of post 1971 stream.

7. Per contra, Mr. G. Sarma, learned Standing Counsel, Home Department, submitted that it is the duty of the petitioner/proceedee to prove the facts mentioned in the Written Statement by adducing cogent and reliable evidence. In this context, he placed reliance on a decision of this Court passed in **WP(C) No. 3071/2016 (Jainal Uddin Vs. Union of India & 4 Ors.)**, wherein it has been held that "*...it is the bounden duty of the proceedee to disclose all materials facts in his possession at the first instance itself; in this case, in the written statement. Failure to disclose material facts in the written statement by itself may lead to drawal of adverse presumption against the proceedee. However, mere pleading of material facts in the written statement is not enough. If material facts are disclosed, those would then have to be proved by*

adducing cogent, reliable and admissible evidence."

8. The learned Standing Counsel, Home Department further submitted that the petitioner id not state about the death of her brother and mother in her Written Statement and she stated about the same only at the time of her cross-evidence. Further, there are lots of contradictions in the evidences of D.Ws- 1, 2 & 3 which cannot be ignored as there are material contradictions in the evidences of those D.Ws. The D.W.-2 is stated to be the uncle of the proceedee, but from the cross-evidence of the D.W.-2, it reveals that he is not the own brother of the father of the proceedee and her projected father is the cousin brother of D.W.-2. More so, there is no document or Voter List to show that the D.W.-2 is the uncle of the present petitioner/proceedee. One Voter List is exhibited as Exhibit-9, i.e. the Voter Lists of 2017, wherein the name of the D.W.-2, Hazrat Ali of Village Bhogamur, has been recorded, but there is no other name in the said Voter List to consider that the said Hazrat Ali is the family member or brother of the projected father of the petitioner/proceedee. More so, he himself admitted in his cross-evidence that he is not the own brother of the projected father of the petitioner/proceedee. Accordingly, it is submitted by the learned Standing Counsel, Home Department that the petitioner/proceedee could not establish herself to be an Indian citizen through her exhibited documents as well as the evidence on record and thus, the learned Member, Foreigners' Tribunal, (2nd), Nagaon, Assam committed no irregularity or mistake while declaring the present petitioner/proceedee as a foreigner of post 1971 stream who had illegally entered into the territory of India after 25.03.1971.

9. We have considered the submissions made by the learned counsels for

both sides and also perused the record of F.T. Case No. 2067/2011.

10. As stated above, it is the case of the petitioner that she is the daughter of one Suruj Ali and Nilman Bibi and the names of her projected parents were recorded in the Voters List of 1965 as well as in 1970. It is also the claim of the petitioner that after the death of her mother- Nilman Bibi, her father married one Ayesha and her name is also reflected in the Voters List of 1985 from Village Bhogamur along with her father- Suruj Ali. It is seen that in the said Voter List of 1985, the name of one Usman Ali is recorded, who is the son of one Suruj. Further it is seen that said Usman Ali is the father of Hazrat Ali (D.W.-2), who deposed in favour of the present petitioner claiming himself to be the uncle of the present petitioner. It is a fact that he is not the own brother of the projected father of the petitioner, but it is seen that he is the cousin brother of the projected father of the petitioner as the name of said Usman Ali is also reflected in the Voter List of 1985 along with other family members from same village- Bhogamur.

11. Further it is seen that to prove her linkage with her projected parents, the petitioner also adduced the evidence of Gaonburah- Md. Idrish Ali as D.W.-3, who issued the certificate in the name of the present petitioner/proceedee stating that she is the daughter of Suruj Ali from Bhogamur village and she got married with one Abdul Kadir. From the other exhibited Voters List also, it is seen that her name is reflected as wife of one Abdul Kadir and she had cast her vote from the same village where she got married with one Abdul Kadir. Accordingly, it is seen that the D.W.-3 (Gaonburah) issued the certificate from his personal knowledge and there is no evidence that he consulted any

documents and/or relied any record in that regard before issuing the certificate in the name of the present petitioner/proceedee. But, from his cross-evidence, it is seen that the petitioner was known to him since her childhood and he also saw the projected father of the petitioner since his childhood. Though he took charge as a village headman in the year 2003, but from his evidence it is seen that he has the personal knowledge about the family of the present petitioner and apart from that, he know the present petitioner/proceedee since her birth as well as her father since his childhood. In the year 2003, when he took the charge as a village Headman, he was around 52 years of age and the projected father of the petitioner was also alive at the time when he took the charge as a village Headman. Thus, the certificate may not be issued by him after consulting any documents etc. maintained in his office, but it cannot be denied that he personally knows the petitioner and her family as he is also the resident of same village Bhogamur from Nagaon District. It is a fact that the name of the petitioner/proceedee is not recorded in any of the Voters Lists along with her projected parents, but from the evidence of the D.W.-2 and D.W.-3 as well as from the Voter List of 1985, wherein the name of the father of the D.W.-2 was also recorded, it cannot out rightly be rejected the plea of the petitioner that D.W.-2 is her uncle and they belong to same family from Bhogamur village.

12. In the case of **Sarbananda Sonowal (II) Vs. Union of India**, reported in **(2007) 1 SCC 174**, the Hon'ble Apex Court has expressed the view that adequate care should be taken to see that no genuine citizen of India is thrown out of the country. In paragraph No. 55 of the said judgment, it has been held as under:

“55. There cannot, however, be any doubt whatsoever that adequate care should be taken to

see that no genuine citizen of India is thrown out of the country. A person who claims himself to be a citizen of India in terms of the Constitution of India or the Citizenship Act is entitled to all safeguards both substantive and procedural provided for therein to show that he is a citizen."

13. In view of above, we are of the view that the learned Member, Foreigners' Tribunal, (2nd), Nagaon, Assam did not verify all the relevant documents as well as the evidences in its true perspective and arrived at a wrong decision. Accordingly, the order dated 17.02.2018, passed by the learned Member, Foreigners' Tribunal, (2nd), Nagaon, Assam, in F.T. Case No. 2067/2011 is set aside and quashed. The matter is remanded to the Tribunal for a fresh opinion after considering/appreciating the Exhibits, more particularly Exhibit-3, i.e. the Voter List of 1985, as well as the evidences of the petitioner/proceedee as well as the D.Ws.-2 & 3 on merit and at the true perspective.

14. The petitioner is directed to appear before the Foreigners' Tribunal (2nd), Nagaon positively by 1st April, 2024 in F.T. Case No. 2067/2011 with a certified copy of this order and thereafter, the Tribunal shall deliver its fresh opinion within next 45 days.

15. We also direct that the Tribunal shall not admit any fresh evidence or documents. Further, the learned Member, Foreigners' Tribunal, (2nd), Nagaon, will pass its opinion/order without being influenced by the observation made by this Court.

16. The interim order passed earlier in this proceeding on 06.04.2018 stands merged with this order.

17. Registry shall return the record of F.T. Case No. 2067/2011 to the Foreigners' Tribunal (2nd), Nagaon forthwith along with a copy of this order.

18. The writ petition is, accordingly, disposed of.

JUDGE

JUDGE

Comparing Assistant