

(2024) 04 GAU CK 0056
In the Gauhati High Court
Case No : Writ Petition (C) No. 6128 Of 2018

Aitullah Paramanik

APPELLANT

Vs

Union Of India And 6 Ors

RESPONDENT

Date of Decision : 10-04-2024

Acts Referred:

Constitution Of India, 1950 — Article 226
Foreigners Act, 1946 — Section 3(2)(c), 9
Evidence Act, 1872 — Section 79
Citizenship Act, 1955 — Section 9(2)

Citation : (2024) 04 GAU CK 0056

Hon'ble Judges : Manash Ranjan Pathak, J; Sanjay Kumar Medhi, J

Bench : Division Bench

Advocate : A Mobaraque, J. Payeng, R. Talukdar, Ai Ali

Final Decision : Dismissed

Judgement

1. 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 21.06.2018 passed by the learned Foreigners Tribunal (2nd), Nalbari, in F.T.(NAL) Case No. 21/2017. 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 (Border), Nalbari District, against the petitioner giving rise to the aforesaid F.T.(NAL) Case No. 21/2017.

(ii) As per requirement under Section 9 of the Foreigners Act, 1946 to prove that the proceedee is not a foreigner, the petitioner had filed the written statement on 21.02.2017 along with certain documents in said FT(NAL) Case No. 21/2017 before the learned Foreigners Tribunal (2nd), Nalbari.

(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 A. Mobaraque, learned counsel for the petitioner. We have also heard Shri J. Payeng, learned Standing Counsel, Home Department, Assam; Shri A.I. Ali, learned Standing Counsel, Election Commission of India and Shri R. Talukdar, learned Government Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 02.02.2024.

4. Shri A. Mobaraque, the learned counsel for the petitioner has submitted that the petitioner could prove his case with cogent evidence and therefore, 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 five numbers of witnesses and also the following documentary evidence.

- i. Revenue Payment Receipt (Ext.- 1 &2)
- ii. copy of NRC of 1951 (Ext.-3).
- iii. Electoral roll of 1955 (Ext.-4);
- iv. Photocopy of Voter List of 1961 (Ext.-5).
- v. Photocopy of Voter List of 1971 (Ext.-6).
- vi. Photocopy of Voter List of 1985 (Ext.- 7)
- vii. Photocopy of Voter List of 1989 (Ext-8).
- viii. Photocopy of Voter List of 1997 (Ext-9).
- ix. Certified copy of registered sale deed (Ext.-10)
- x. Certified copy of Voter List of 2005 (Ext.-11)
- xi. Elector Photo Identity card (Ext.-12)
- xii. Certified copy of Voter List of 2016 (Ext.-13)
- xiii. Certified copy of Voter List of 2017 (Ext.-14)
- xiv. Certificate issued by Village Headman (Ext.- 15 & 16)
- xv. Affidavit (Ext.-17)

5. The learned counsel for the petitioner has submitted that the village headman had deposed as OPW No. 4 and has proved the certificate issued by him. As regards the Voters List of 1989, it is contended that vide a communication dated 13.06.2017, the Electoral Registration Officer, 47 No. Chenga Legislative

Assembly Constituency had verified the same. He accordingly submits that the impugned opinion dated 21.06.2018 of the learned Tribunal is liable to be interfered with as the relevant factors were not considered.

6. Per contra, Shri Payeng, learned Standing Counsel, Home Department has categorically refuted the stand taken on behalf of the petitioner. He 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. As such, the relevant facts are especially within the knowledge of the proceedee and therefore, the burden of proving citizenship rests absolutely upon the proceedee, notwithstanding anything contained in the Evidence Act, 1872. This is mandated under Section 9 of the aforesaid Act, 1946. However, in the instant case, the petitioner utterly failed to discharge the burden. He 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.

7. He further submits that so far as the documents are concerned, a part of the same cannot be relied upon and the document, as a whole is to be read. In any case, he submits that there are gross discrepancies in the names of the petitioner, his father and also the ages in the different documents sought to be relied upon by the petitioner. He specifically submits that out of the 15 nos. of documents which were marked as exhibits, exhibit nos. 4, 5, 6, 7, 8 and 9 which are Voter Lists of 1955, 1961, 1971, 1985, 1989 and 1997 being only photocopies therefore, not admissible in evidence. As regards the exhibit nos. 1 and 2 which are revenue payment receipts, it is submitted that there is no mention in the written statement of any land by the petitioner. Exhibit 3 is a copy of the NRC which does not have any evidentially value so far as the issue of citizenship is concerned and in any case, the same was not properly proved. So far as the Exhibit 15 is concerned, though the village headman had deposed as OPW No. 4, the contents of the said exhibit were not proved.

8. As regards the so called verification letter dated 13.06.2017 of the Electoral Registration Officer, Shri Payeng, the learned Standing Counsel submits that apart from the fact that the said letter has not been proved, even on its face value, it states that the voter list of 1985 which was relied upon by the petitioner has been deleted. It is further submitted that in the voter list of 1989 and 1997, there is major change in the name as well as age of the projected mother of the petitioner. While in 1989 the name has been shown to be Dublai Nessa aged about 45 years, in the voter list of 1997, the name has been shown to be Dubulai Begum aged about 45 years. There is no document of the father of the petitioner to show that he was in India prior to 1971. He points that the reference was made against the petitioner as son of Muntaz though, an explanation has been sought to be given that Muntaz is the father-in-law of the petitioner, there is no evidence adduced in this regard. It is also submitted that the evidence of the two Gaonburahs are wholly inadequate and there is no explanation regarding the

discrepancies and self sworn affidavit of the petitioner / proceedee cannot be treated as valid evidence. He accordingly submits that the writ petition is liable to be dismissed and the opinion of the learned Tribunal be upheld.

9. In support of his submissions, Shri Payeng, the learned Counsel has placed reliance upon the following case laws-

- i. 2018 (4) GLT 392 (Borhan Ali vs. Union of India)
- ii. (2002) 4 SCC 346 [Bhanwaroo Khan & Ors. Vs. Union of India]

10. In the case of Borhan Ali (supra), the following has been laid down:

"21.7. Therefore, if a proceedee relies on a voters list, only a certified copy of such voters list or extract thereof would be admissible in evidence. Filing of an unsigned or unauthenticated or uncertified copy of voters list sought to be relied upon as proof of citizenship would not be admissible in evidence. Therefore, we would respectfully disagree with the view taken by the Orissa High Court.

21.8. There is one more aspect. Though under Section 79 of the Evidence Act, there is presumption as to the genuineness of certified copies provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf, it is in the public domain that citizenship is a contentious issue in so far the State of Assam is concerned. There are 100 Foreigners Tribunals functioning in the State of Assam which are mandated under the law to answer references made to them by the referral authority, i.e., concerned Superintendent of Police (Border) as to whether the proceedee is a foreigner or not. Simultaneously, process is on for finalizing or rather updating National Register of Citizens (NRC) in the State of Assam. In both the processes, proceedee or the claimant, as the case may be, primarily rely upon voters lists to prove their citizenship. It is also in public domain that a large number of voters lists have been detected which have been suspected to be not genuine. Therefore, notwithstanding the presumption of genuineness under Section 79, it would be safe for the Tribunals and the Courts to insist on proof of contents of such certified copies by comparing with the primary evidence, i.e., electoral roll in original produced and testified before the Tribunal or the Court by the lawful custodian of such primary evidence i.e., by the concerned Electoral Registration Officer or by his authorized officer or personnel."

11. In the case of Bhanwaroo Khan (supra), the Hon'ble Supreme Court has laid down as follows:

"15. We agree with the High Court that a case for interference with the order of deportation is not made out. Long stay in the country and enrolment in the voters' list would not confer any right on an alien to continue to stay in the country. We do not find any infirmity either with the reasoning adopted or the conclusion arrived at by the High Court or even by the Government of India in its order dated 21-7-1995 passed under Section 9(2) of the Citizenship Act, 1955."

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

13. 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."

14. In this connection, the observation 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."

15. In the case of Sarbanand Sonowal Vs. Union of India reported in (2005) 5 SCC 665, the Hon'ble Supreme Court has laid down as follows-

"26. Rule 4 requires an inquiry officer to elicit information and particulars from the alleged illegal migrant on the points mentioned in Form I. Item No. 5, 10, 11,

12 of this Form are as under:-

5. Address in the country of origin (village, police station, district and country).

10. Does the person hold any passport issued by any foreign country ? If so furnish particulars.

11. What are the reasons for leaving the person's country of origin ?

12. If the person has entered into India without a passport, how the person entered India ?

(Name of village, District from which the person entered). Date of entry. It is elementary that a person who has illegally come from Bangladesh to India and is residing here for his better economic prospects or employment etc. would never disclose that he has come from Bangladesh but would assert that he is an Indian national and resides in India. There is no question of his telling his date of entry or giving any information on the aforesaid points. According to Rules 7 and 8 of the Rules, the inquiry officer has to submit a report in Form II and Item No. 5, 10, 11 and 12 are exactly identical to that in Form I. Rules 10, 10-A and 10-B lay down that an application to the Tribunal u/s 8(2) shall be made in Form III, an application to the Central Government u/s 8-A(2) shall be made in Form V and a declaration u/s 8-A(2) shall be made in Forms V and VI. Curiously enough Column No. 6 of Form III requires the applicant to furnish the following information regarding the alleged illegal migrant: -

(a) whether he entered India on or after 25th March, 1971;

(b) date of his entry into India;

(c) whether he is a foreigner; and

(d) whether he entered India without being in possession of a valid passport or travel document or lawful authority in that behalf.

The contents of the application (form III) have to be affirmed by the applicant that what is stated in the application is true to the best of his information and belief. The application to the Central Government has to be made in Form V which contains a similar Column 6 with two further additions, namely;

(i) the approximate distance between the place of residence of the applicant and the alleged illegal migrant;

(ii) since when the alleged illegal migrant is staying at the said place.

In Column 7 the applicant has to give details of (a) documentary; and (b) oral evidence in his possession. The application has to be affirmed that the facts stated are true to the best of his information and belief and that he has not made more than 10 such applications. It contains a further clause to the following effect :

"I am aware that in the event of this application being found as false or made with a view to cause vexation to the person named in this application or any member of his family, I am liable to be proceeded against in accordance with law for giving false evidence."

Form VI which is a declaration to be made u/s 8-A(2) by another person in corroboration of the application contains a similar affirmation clause and also the clause quoted above regarding prosecution in the event the facts mentioned are found to be false."

16. 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.

17. 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."

18. The principal ground of challenge is that the documents have not been properly appreciated and without there being any rebuttal evidence, the depositions made on behalf of the petitioner should have been deemed to be accepted.

19. This Court has however noticed that there are major discrepancies in the name of the petitioner, his projected father, projected mother, their ages etc. On verification with the original records, this Court has found that the reference is against one Ayatula, son of Muntaz. Though an explanation has been sought to be given that the said Muntaz is the father-in-law of the petitioner, there is no evidence adduced in this regard and the said Muntaz was also not produced as a witness.

20. In the voter list of 1971, the name of the father has been stated as Bakkar Ali son of illegible, however the said voter list is not a certified copy and it is not admissible in evidence. The petitioner claims that the names of his parents appear in the voter list of 1985 as Abu Bakka and Dublai Nessa. The later communication of Electoral Officer dated 13.06.2017 however clarifies that the names have been deleted. It therefore, appears that the existence of the petitioner in India appears for the first time in the year 1989.

21. This Court finds force in the argument made on behalf of the respondents that out of the 15 nos. of documents which were marked as exhibits, exhibit nos. 4, 5, 6, 7, 8 and 9 are only photocopies and therefore, not admissible in evidence. Further, as regards the exhibit nos. 1 and 2 which are revenue payment receipts, there is no mention of any land in the written statement by the petitioner. Exhibit 3 is a copy of the NRC which does not have any evidentially value so far as the issue of citizenship is concerned and in any case, the same was not properly proved. In this connection, one may refer to the case of Bhanbhasa Sheikh Vs. Union of India reported in ALR 1970 Assam & Nagaland 206 wherein it has been laid down that entry in NRC is not an admissible in evidence with regard to the issue of citizenship.

22. So far as the Exhibit 15 is concerned, though the village headman had deposed as OPW No. 4, the contents were not proved in accordance with law. It is trite law that mere marking of a document as exhibit cannot dispense with the requirement of proving the contents of such documents. As regards the verification letter dated 13.06.2017 of the Electoral Registration Officer, it states that the voter list of 1985 which was relied upon by the petitioner has been

deleted. It is further seen that in the voter lists of 1989 and 1997, there are major change in the name as well as age of the projected mother of the petitioner. While in 1989 the name of the projected mother has been shown to be Dublai Nessa aged about 45 years, in the voter list of 1997, the name has been shown to be Dubulai Begum aged about 45 years. There is no document of the father of the petitioner to show that he was in India prior to 1971. As regards the evidence of the two Gaonburahs are concerned, the same are wholly inadequate and there is no explanation regarding the discrepancies. The self sworn affidavit cannot be treated as valid evidence.

23. In our opinion, the petitioner had failed to discharge his burden to prove his citizenship by reliable, cogent and acceptable evidence. We have further seen that the discrepancies in the documents are major and glaring and therefore, we are of the opinion that the petitioner could not prove his nationality as required under Section 9 of the Foreigners Act, 1946. Consequently, there is no scope for interference with the impugned opinion of the learned Tribunal.

24. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 21.06.2018 passed by the learned Foreigners Tribunal (2nd), Nalbari, in F.T.(NAL) Case No. 21/2017 does not call for any interference. Accordingly, this writ petition being devoid of merits is dismissed.

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

26. The interim protection granted to the petitioner earlier in this proceeding on 07.09.2018 stands vacated / hereby recalled.

27. The records of the F.T.(NAL) Case No. 21/2017 be returned to the Foreigners Tribunal (2nd), Nalbari forthwith along with a copy of this order.