

(2019) 08 GAU CK 0029
In the Gauhati High Court
Case No : Writ Petition (C) No. 4161 Of 2019

Asthami Das

APPELLANT

Vs

Union Of India And 5 Ors

RESPONDENT

Date of Decision : 09-08-2019

Acts Referred:

Citizenship Act, 1955 — Section 6A
Evidence Act, 1872 — Section 1, 3, 76, 114
Foreigners Act, 1946 — Section 9

Citation : (2019) 08 GAU CK 0029

Hon'ble Judges : Manojit Bhuyan, J;Kalyan Rai Surana, J

Bench : Division Bench

Advocate : A Das

Final Decision : Dismissed

Judgement

1) Heard Mr. A. Das, learned counsel for the petitioner. Also heard Ms. G. Hazarika, learned CGC, Mr. A. Kalita, Standing Counsel for respondent No.2 to 6.

2) By this writ petition filed under Article 226 of the Constitution of India, the petitioner has assailed the opinion dated 15.03.2017 rendered by the learned Member, Foreigners Tribunal, Chirang, in Case No. BNGN/FT(CHR) 149/2002, declaring the petitioner to be an illegal migrant of post 1971 stream.

3) As the LCR, as called for, has been received, with the consent of counsel appearing for the appearing parties, the matter has been heard at the admission stage.

4) On receipt of reference, the above referred case was registered before the learned Foreigners Tribunal, Chirang. In her defence, the petitioner had submitted her written statement on 30.01.2016, wherein the petitioner had stated that the petitioner was born out of the wedlock of Jugol Kishor Das (father) and Gandeswari Das (mother) at Village & P.O. Balabhut, P.S. Tufanganj, District Coochbehar, West Bengal and that she was married to one Dam Das, son

of Jugesh Das, resident of Lechiagaon Gaon under Bijni P.S., District Chirang (BTAD), Assam. The petitioner had annexed copies of 6 (six) documents along with her written statement, viz., Panchayat Certificate issued by President/Secretary, Balabhut Gram Panchayat, Voters list of 1966, Magistrate's order and complaint, voters list of 1997, Special Family Identity Card, Bank Passbook, and Voters identity card.

5) The learned counsel for the petitioner has assailed the impugned opinion on the ground that the learned Tribunal had omitted to consider the evidence on record which according to him were sufficient to prove petitioner's citizenship.

6) On examination of materials available on record it is seen that the petitioner has not annexed the copy of her evidence- on- affidavit submitted before the learned Tribunal. However, on a perusal of the impugned opinion, it appears that the following documents were exhibited, viz., Kabla acceptance deed (i.e. sale deed) of 05.04.1959 in respect of land situated in Balabhut reflecting the name of Jugol Kishor Das as acceptor (Ext.1), extract of voters list of 1997, wherein the name of the petitioner and the name of her husband is recorded, Certificate dated 22.06.2015 issued by the Pradhan of Balabhut Gram Panchayat (Ext.2), wherein the petitioner is stated to be the daughter of Jugol Kishor Das and married to Sridam Das (Ext.3), affidavit dated 26.02.2016 by Jugol Kishor Das, declaring that the petitioner is his daughter (Ext.4).

7) It is further seen that in this writ petition, the petitioner has annexed as many as 17 annexures, but for the reasons best known to her, she has not annexed the copy of her own deposition as DW-1 or of DW-2 who was examined by her as supporting witness. From the impugned opinion, it appears that DW-2 was one Kshitish Chandra Das, who had claimed to be the brother of the petitioner. As per Declaration dated 26.02.2016 (Annexure-10), the projected father of the petitioner was 103 years old, as such, he would have born on or about the year 1913. Accordingly, he would have been 53 years of age in or about the year 1966, but as per the purported voters list of 1966 (Annexure-2), the purported father of the petitioner is shown as 40 years. Similarly in 1981, the purported father would have been 68 years, but as per voters list of 1988 (Annexure-6), his age is reflected as 60 years. Thus, though there appears to be some discrepancy in the age of the projected father of the petitioner, but for the time being the said discrepancy is ignored. Yet, the evidence of DW-2 is liable to be discarded because in her written statement, the petitioner has not disclosed about the existence of a brother named Kshitish Chandra Das, as such, his evidence is beyond pleadings. It would be relevant to mention herein that assuming but not admitting for the sake of discussions that the father of the petitioner had purchased land in 1966 in the State of West Bengal, it would not mean that such a person would be in the same footing as a person entering into Assam between the period prior to 01.01.1966 and those entering into Assam after 01.01.1996 but before 25.03.1971 in terms of the provisions of Section 6-A of the Citizenship Act, 1955. Thus, for the rest of the Country, except Assam, one can still be a

foreigner on 17.01.1967, the date when the projected father of the petitioner had purchased land in the State of West Bengal.

8) Moreover, it appears that the learned Tribunal had rightly mentioned in the opinion that the evidence of Kshitish Chandra Das is not supported by any documentary evidence. Hence, merely by an affidavit, no relationship can be established because the said document cannot be considered either as a piece of evidence or as a proof of existence of a relationship between the petitioner and her projected father in light of Section 1 and 3 of the Evidence Act, 1872 as it is a self serving declaration by a third party to the proceeding. For the same reasons, the affidavit dated 26.02.2016 (Ext.4), sworn by the projected father of the petitioner is also liable to be rejected.

9) The most important document upon which the petitioner has placed reliance is the Panchayat Certificate dated 22.06.2015 (Ext.3/ Annexure-12) issued by President/ Secretary, Balabhut Gram Panchayat, and countersigned by the Block Development Officer, Tufanganj Development Block. As per contents thereof, the petitioner is stated to be daughter of Das Jugal Kishor (her projected father) of Village & P.O. Balabhut and married to Sri Dam Das, son of Jugesh Das of village-Lechia under Bijni Sub Division in the district of Chirang. However, in another certificate issued by Balabhut Gram Panchayat on 09.02.2017 (Annexure-13), it was mentioned that the petitioner is the daughter of her projected father of village-Nayar Char, PO Balabhut, and that she is married to Sridam Das, son of Late Jogesh Das of village- Bigni, PO Manikpur, PS Bigni, Dist. Chirang. The petitioner has never claimed that her name was Astomi Das @ Ashtami Kishor Das. Thus, it appears that the two Panchayat Certificates contain two different villages as the matrimonial as well as paternal residence of the petitioner. The signatories of the said certificate (Ext.3) i.e. the Gram Pradhan the Block Development Officer have not been examined. The learned counsel for the petitioner has not been able to show any Act, Rules, notifications or any Executive Instructions which require the Gram Panchayat to maintain a register of girls under their Gram Panchayat who are married outside their jurisdictional area containing the name and residence particulars of the respective husbands of such married girls. Therefore, no presumption can be drawn in respect of correctness of the entries contained in the Gram Panchayat Certificate (Ext.3), not being the extract of any official register, maintained by such Gram Panchayat in usual course of business of the Gram Panchayat. It is seen that in terms of the provisions of Section 114 Illustration (e) Court can take presumption that official acts have been regularly performed. But for that, it was the burden of the petitioner to prove that the contents of the said Gram Panchayat Certificate (Ext.3) were in accordance with the contents of any register maintained by the Balabhut Gram Panchayat in its regular course of ordinary business. As the signatories of such certificate were not examined, the learned Tribunal is found to have rightly rejected the said piece of evidence.

10) The voters list of 1997 (Ext.2) is not a conclusive proof to link the petitioner

with her projected father, because her father's name is not found contained therein.

11) The learned counsel for the petitioner had laid much emphasis on the copy of voters list of 1966 of 8 No. Tufanganj (SC) LAC (Annexure-2), and it is submitted that one chance may be given to the petitioner to prove the said document. In this connection, it is seen that the said voters list contains a rubber stamp of the Assistant Director, Directorate of State Archives, Higher Education Department, Govt. of West Bengal, and it is mentioned therein that - "Certified to be True Copy authorised under Section 76 of the Indian Evidence Act". In the said connection, the provision of Section 76 of the Evidence Act is quoted below:-

"76. Certified copies of public documents. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is true copy of such document or part thereof, as the case may be and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of seal; and such copies so certified shall be called certified copies.

Explanation. Any officer who, by the ordinary course of official duty, is authorized to deliver such copies shall be deemed to have the custody of such documents within the meaning of this section."

It is seen that under Section 9 of the Foreigners Act, 1946 the burden of proof is on the proceedee, as such, in the present case in hand, it was the duty of the petitioner to show that the Assistant Director, Directorate of State Archives, Higher Education Department, Govt. of West Bengal was the custodian of the Electoral Roll of the said particular Assembly Constituency and that the copy has been procured by paying the requisite legal fees. It is seen that the petitioner has annexed certified copy of the voters list of the year 1997, which was issued in folio paper by the Electoral Registration Officer concerned. Moreover, as indicated herein before, the said document is not a conclusive proof to the effect that the person whose name is contained therein was the father of the petitioner or that he was a lawful citizen of the Country.

9. Thus, from the discussions above, it appears that there is no document on record to establish the link of the petitioner with her projected father. The primary issue in 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, as the relevant facts are within the knowledge of the proceedee, notwithstanding anything contained in the Evidence Act, 1872, the burden of proving citizenship absolutely rests upon the proceedee as per the provisions of Section 9 of the Foreigners Act, 1946. In the present case in hand, the petitioner has failed to discharge the burden and to prove that she is an offspring of parents of Indian origin.

10. In light of discussions above, this Court does not find that the impugned opinion rendered by the learned tribunal is vitiated by any jurisdictional error or that there was any failure of giving opportunity of hearing to the petitioner. Therefore, as the Court is exercising supervisory jurisdiction and not appellate jurisdiction, no case is made out for substituting the opinion rendered by the learned tribunal with the view of the Court. This is not a case where the learned tribunal had refused to admit admissible evidence or that its finding is dehors the evidence on record.

11. Hence, this writ petition fails and the same is dismissed, leaving the parties to bear their own cost.

12. A copy of this order may be made a part of the records of the learned Tribunal for future reference.