

(2024) 03 GAU CK 0015

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 5239 Of 2020

Jahanara Khatun

APPELLANT

Vs

Union Of India And 5 Ors

RESPONDENT

Date of Decision : 07-03-2024

Acts Referred:

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

Citation : (2024) 03 GAU CK 0015

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

Bench : Division Bench

Advocate : A. Roshid, J. Payeng, R. Talukdar, A.I. 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 19.01.2017 passed by the learned Foreigners Tribunal no.11th , Barpeta in F.T. Case No. 151/2016 . 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 (B), Barpeta District, against the petitioner giving rise to the aforesaid F.T. Case No. 151/2016.

(ii) As per requirement u/s 9 of the Foreigner's Act, 1946 to prove that the proceedee is not a foreigner, the petitioner had filed the written statement on 13.10.2016 along with certain documents.

(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 her and accordingly, the opinion was rendered declaring the petitioner to be a foreign national post 25.03.1971.

3. We have heard Shri A. Roshid, learned counsel for the petitioner. We have also heard Shri J. Payeng, 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 R. Talukdar, learned Government Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 15.03.2021.

4. Shri Roshid, the learned counsel for the petitioner has submitted that the petitioner could prove her case with cogent evidence and in view of the fact that there was no rebuttal evidence, 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 two numbers of witnesses and also the following documentary evidence.

- i. Copy of Voter list of 1965 (Exbt. -A)
- ii. Linkage Certificate of Jalah Revenue Circle (Exbt. – B)
- iii. Gaonburah certificate (Exbt. – C)
- iv. Copy of Voter list of 1970 (Exbt. – D)
- v. Copy of Voter list of 1997 (Exbt. – E)

5. Shri Roshid, the learned counsel for the petitioner submits that in the written statement, all material disclosures were made. It is submitted that the name of the petitioner is Jahanara Khatun @ Bewa, wife of late Majibar Rahman and daughter of late Ain Uddin Sarkar. She was born in village Alengamari under Mouza Gobardhana and her marriage was on 01.02.1985. He submits that three documents were exhibited to show her linkage with her father and in proof of her claim to be a citizen. In the voter list of 1965, the name of one Ain Uddin Sarkar appears who is the projected father of the petitioner. The second document is a Certificate by the Gaonburah and the third document is stated to be a Certificate by the Circle Officer.

6. Along with the petitioner, another witness had deposed as DW2 who claimed himself to be the younger brother of the petitioner. Sri Roshid, the learned counsel for the petitioner has also pointed out that there is a land document which would show a linkage of the petitioner with her father. It is accordingly submitted that in view of the aforesaid materials, the impugned opinion dated 19.01.2017 is unsustainable and liable to be set aside.

7. Per contra, Shri J. 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. Therefore, the relevant facts are especially within the knowledge of the

proceedee and accordingly, the burden of proving citizenship rests absolutely upon the proceedee, notwithstanding anything contained in the Evidence Act, 1872 and this is mandated under Section 9 of the aforesaid Act, 1946. However, in the instant case, the petitioner utterly failed to discharge the burden. It is also submitted that rebuttal evidence is not mandatory in every case and would be given only if necessary. 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.

8. Shri Payeng, the learning Standing Counsel has further submitted that the written statement is the basic document which is supposed to lay down the foundation of the case of the proceeding. He submits that in the written statement, there is no reference regarding the date of birth of the petitioner, her siblings and other details. He submits that with regard to the only voter list of 1965, there is no explanation as to why there are no voter list of subsequent years pertaining to her parents which itself raises a serious doubt on the claim of the petitioner.

9. It is also submitted that there is no link document at all and the so-called link document which is issued by the Office of the Circle Officer is actually issued by the Lat Mandal which was not proved in accordance with law as the author of the Certificate was not produced as a witness. Similarly, the Certificate of the Gaonburah is also not a valid piece of evidence as the same was not proved.

10. With regard to the evidence of DW2, it is submitted that the same DW2 who claims himself to be the brother of the petitioner has not referred to any document to link himself either with the petitioner or with the projected parents. By referring to the materials on records, the learned Standing Counsel, submits that the petitioner as DW1 had deposed that her father did not have any brothers. However, in paragraph 3 of the written statement, it has been stated that the petitioner had three paternal uncles. By pointing out the NRC of 1951, the learned counsel has submitted that Ain Uddin had at least four children and the petitioner appears to have been born in 1970. However, the petitioner has not stated anything regarding her siblings either in the written statement or in her examination in chief. He has also specifically referred to the answers given in the cross-examination wherein the petitioner has admitted of not knowing about the contents of her chief examination.

11. The learned Standing Counsel further submits that so far as the documents relied upon by the petitioner are concerned, a part of the same cannot be relied upon and the document as a whole is to be read and considered.

12. The learned Standing Counsel further submits that this Court in exercise of its Certiorari jurisdiction does not act as an Appellate Court and it is only the decision making process which can be the subject matter of scrutiny. He submits that there is no procedural impropriety or illegality in the decision making process and therefore, the instant petition is liable to be dismissed.

13. In support of his submissions, Shri Payeng, learned Standing Counsel has placed reliance upon the following case laws:

- (i) 2018 (3) GLT 118 [Bijoy Das vs UOI];
- (ii) Order dated 18.02.2020 in WP(C)/ 1900/2019 [Nur Begum vs. Union Of India and others]
- (iii) Order dated 21.11.2019 in WP(C)/ 4020/2017 [Asia Khatoon vs. Union Of India]
- (iv) (2017) 3 GLJ 490 [Musstt. Ayesha Khatun @ Aisha Khatun vs. Union of India];
- (v) 2010 4 SCC 491 [LICI and Anr. Vs Ram Pal Singh Bisen];
- (vi) 2017 (4) GLT 346 [Rashminara Begum Vs. UOI].
- (vii) Order dated 09.06.2023 in WP(C)/2370/2023 [Ajij Miah @ Md. Aziz Mia vs. Union of India & Ors.]

14. In the cases of Bijoy Das (supra), Nur Begum (supra) and Asia Khatoon (supra), it has been laid down that in proceedings of this nature, oral evidence alone would not be enough and such evidence is required to be supported and corroborated by documentary evidence and contemporaneous records.

15. The case of Ayesha Khatun (supra) has been cited on the requirement of full disclosure in the written statement and such written statement is required to be adequate.

16. The case of LICI (supra) has been cited to bring home the contention that mere marking of a document as Exhibit will not dispense with the requirement of proof.

17. In the case of Rashminara Begum (supra), it has been laid down that the truthfulness of the contents of the documents are also required to be proved and mere exhibiting the document would not be enough.

18. In the case of Aziz Mia (supra), it has been laid down that if a claim is based on a Voter list, the same has to be proved by cogent evidence.

19. Shri Payeng, the learned Standing Counsel, accordingly submits that there is absolutely no materials to come to any conclusion that the petitioner could discharge her burden under Section 9 of the Citizenship Act and therefore, no interference is called for with regard to the opinion dated 19.01.2017.

20. Rival submissions made have been duly considered and the materials placed before this Court including the records of the Tribunal have been carefully perused.

21. 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."

22. In this connection, the observations 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 herein below-

"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."

23. 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.

24. 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."

25. This Court has noticed that in the written statement filed, the petitioner has not made the relevant disclosures. There is no mention about any siblings of the petitioner or that her father had any landed properties.

26. The petitioner had relied upon three documents, namely the voter list of 1965, Gaonburah Certificate, Certificate stated to be issued by the Circle Officer. However, on perusal of the same, we have noticed that the voters list of 1965 is wholly irrelevant as no link, whatsoever has been able to be established with late Ayanuddin Sarkar who is the projected father of the petitioner. The Certificates issued by the Gaonburah and the Circle Office are not proved in accordance with

law. Further, a wrong projection has been made that the Certificate has been issued by the Circle Officer. A perusal of the same would show that the same has been issued by one Lat Mandal who however was not produced as a witness and therefore, the contents as well as the veracity of the said Certificate becomes highly doubtful and rightly not accepted by the learned Tribunal.

27. We have also perused the depositions of the petitioner as DW1 and another person who has projected himself to be the younger brother of the petitioner as DW2. As rightly pointed out by Sri Payeng, we have noticed that DW2 has not referred to any document to link himself either with the petitioner or with the projected parents and therefore his deposition is of no use.

28. The deposition of DW1 is not acceptable at all as there are not only contradictions, in her cross-examination, she has categorically stated that she did not know anything about her chief examination. It may also be noted that the petitioner as DW1 had stated that her father had no brothers whereas in the written statement, she stated that she had three paternal uncles.

29. As regards the land document which has been referred to, we have noticed that the land document is dated 01.10.2020 whereas the Opinion under challenge is of a much earlier date i.e., 19.01.2017 and therefore, such an attempt to place reliance upon the land document is wholly inadmissible. Moreover, the petitioner / proceedee is totally silent not only in her written statement dated 13.10.2016, but also in her Evidence-in-Chief dated 08.12.2016 submitted before the Tribunal about landed property of her father. Further, it is a settled law that one cannot traverse beyond the pleadings.

30. This Court has also found relevance in the argument of the learned counsel of the Department who by relying upon the case laws have submitted that the oral evidence of the DW1 and DW2 which itself do not inspire any confidence also is not supported by any relevant documents and therefore the petitioner had failed to discharge her burden under Section 9 of the Foreigners Tribunal Act, 1946.

31. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 19.01.2017 passed by the learned Foreigners Tribunal no. 11th, Barpeta in F.T. Case No. 151/2016 does not call for any interference. Accordingly, this writ petition being devoid of merits being dismissed.

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

33. The records of the aforesaid impugned order dated 19.01.2017 passed by the learned Foreigners Tribunal No.11th, Barpeta in F.T. Case No. 151/2016 be returned to the concerned Foreigners Tribunal forthwith along with a copy of this order.