

(2018) 06 GAU CK 0110
In the Gauhati High Court
Case No : Writ Petition (C) No. 3209 of 2016

Mrs. Rasna Khatun

APPELLANT

Vs

union of India And Ors

RESPONDENT

Date of Decision : 19-06-2018

Acts Referred:

Foreigners Act, 1946 — Section 9
Constitution of India, 1950 — Article 226

Citation : (2018) 06 GAU CK 0110

Hon'ble Judges : UJJAL BHUYAN, J;RUMI KUMARI PHUKAN, J

Bench : Division Bench

Advocate : H. Bhuyan, J. Payeng

Final Decision : Dismissed

Judgement

Rumi Kumari Phukan, J

(1) Heard Mr H Bhuyan, learned counsel for the petitioner and Mr J Payeng, learned Special Counsel, Foreigners Tribunal.

(2) By filing this petition under Article 226 of the Constitution of India petitioner seeks quashing of the order dated 7.4.2016 passed by the learned

Foreigners Tribunal IV, Kamrup(R) at Hajo in HFT Case No.229/2015 (State vs. Mrs. Rasna Khatun) declaring the petitioner to be a foreigner who

entered the territory of India(Assam) from Bangladesh after 25.3.1971.

(3) On a reference made by Superintendent of Police(Border), Kamrup under the provisions of the Foreigners Act, 1946 alleging that the petitioner is a

foreigner who illegally entered the territory of India(Bangladesh) after 25.3.1971, the said FT Case No. 803/2007 was registered against petitioner

Mrs. Rasna Khatun, daughter of Maksud Ali and wife of Md Siddik Ali and was later transferred to the Foreigners Tribunal, Hajo where the same

was registered HFT Case No.229/2015(new).

(4) Notice issued by the Tribunal was served on petitioner and she appeared before the Tribunal and also filed written statement contending that

neither she is an illegal migrant nor a foreigner but a genuine citizen of India by birth stating that she is the daughter of Makshed Ali and wife of Md

Siddik Ali and a resident of Majdia village in Barpeta district and hence a citizen of India.

(5) Petitioner filed along with the written statement her Electronic Photo Identity Card (in short EPIC) of Hajo Constituency, a certificate issued by

Gaonburah of Mazdia village, special family identity card of her father, EPIC of her father, 1997 voter list of her father and grandfather, 1965 voter list

of her grandfather, legacy data, and an affidavit of her father.Â

(6) Petitioner examined herself as DW1, her one paternal uncle Md Mazid Ali as DW2; Md Ramesh Ali, the Gaonburah of Mazdia village as DW 3;

and her father Maksed Ali as DW 4; and exhibited some documents. After examining the evidence on record, both oral and documentary, Tribunal

declined to accept the version of petitioner holding that the documentary evidence is not enough to prove identity of the petitioner as a citizen of India

saying that the evidence of witnesses so far adduced by the petitioner is inconsistent with each other which failed to inspire confidence of the

Tribunal. Resultantly it is held that the petitioner has failed to discharge her onus to prove her citizenship as provided under Section 9 of the Foreigners

Act, 1946 and answered the reference in favour of the State. Aggrieved by the findings of the Tribunal present petition is filed.

(7) This court issued notice and also requisitioned the case record from the Tribunal and directed that the petitioner shall not be deported from India

subject to her appearance before Superintendent of Police (Border), Kamrup (R) and allowed her to go bail of Rs 10,000.

(8) We have gone through LCR as well as the written statement of petitioner and the evidence adduced by her.

(9) According to learned counsel for the petitioner, Tribunal arrived at an erroneous finding about the nationality of petitioner despite having all relevant

documents in support of the case of the petitioner that she is an Indian national. It is contended that the Tribunal has failed to appreciate the evidence

on record in proper perspective.

(10) On the other hand, according to learned Special Counsel, there is no error in the appreciation of the evidence by the Tribunal and the petitioner

herself has failed to produce all relevant documents to prove her nationality to discharge her burden as envisaged under Section 9 of the Foreigners

Act, 1946.

(11) We have given due consideration of the rival submissions and gone through material on record and the LCR.

(12) The petitioner in her evidence reiterated the statement given in the written statement that she was married to Md Siddik Ali about 17 years back

and has been living at Ketekibari under Hajo mouza since. She had produced the following documents in support of her contention that she is not a

foreigner but a genuine citizen of India by birth:

(i) Exhibit 1, her EPIC dated 1.10.2013.

(ii) Exhibit 2, the certificate given by the government Gaonburah of Mazdia village stating that the petitioner was a resident of Mazdia village.Â Â Â

(iii) Exhibit 3, the EPIC of her father Moksed Ali dated 1.10.2013.

(iv) Exhibit 4, 1965 voter list showing her grandfather Mamud Ali.

(v) Exhibit 5, 1997 voter list showing her father's name Moksed Ali.

(vi) Exhibit 6, an affidavit sworn by her father.

(vii) Exhibit 7, 2010 voter list showing her name.

(viii) Exhibit 8, a certificate given by the government Gaonburah.

(13) Petitioner states that the actual name of her paternal grandfather was Mamud Ali but in some documents his name is shown Kala Shekh and Kala

Mamud.

(14) One Majed Ali as DW2 gave a three-line statement saying that petitioner is his nephew and daughter of Moksed Ali and the father of Moksed Ali

is Mamud Ali. His father and Mamud Ali are brothers and their forefathers are residing permanently in Mazdia village since 1965.

(15) Ramesh Ali, the government Gaonburah, gave evidence as DW3 saying that petitioner who is the daughter of Moksed Ali, son of Mamud Ali, and

married to Siddik Ali about 17 years back, is known to him. Peculiar enough, DW3 did not testify that he has issued the certificates in favour of

petitioner vide exhibits 2 and 8. These documents were produced and exhibited by the petitioner authored by the DW3 but DW3 is silent about

issuance of those certificates. When the contents of these documents are not proved by the author, same cannot be accepted in evidence.

(16) The evidence given by the DW2 relates only to factual aspect about the name of her father, which otherwise cannot support the contention of

petitioner that her father or forefathers were residents of the said address. His evidence is totally insufficient to assist the case of petitioner.

(17) Next, the evidence of the father of the petitioner, Moksed Ali (DW4), is more interesting, save and except the statement that the petitioner is his

daughter and was married to one Siddik Ali, he did not refer to any documents like NRC, EPIC, etc as referred by the petitioner. More so the affidavit

Ext.6 filed by the petitioner stated to be sworn by DW4 saying that name of his father is Mamud Ali whose name is wrongly written as Kala Shekh in

the 1951 NRC, 1997 voter list, EPIC (exhibit 1) and name of his father and grandfather's names are wrongly written Basi Member in the voter

lists of 1965 and 1997 of GareMari village. But his evidence is totally silent about the execution of said Ext.6 nor did disclose in his evidence that

Mamud Ali, Kala Shekh and Kala Mamud are the one and same person and hence the affidavit cannot be accepted as evidence as it is not proved by

the author himself. DW4 did not state anything about the family identity card (exhibit 3) which was produced by his daughter, the petitioner.

(18) The verbal testimony of DW1 is to the extent that she is the daughter of Moksed Ali is supported by her witnesses in a casual manner without

elaborating the date of her date of birth, date and year of marriage, place of schooling, place of her upbringing etc. etc. The petitioner has totally failed

to bring on record any valid document to show that her father and forefathers were inhabitants of Mazdia village. There is no explanation as to why

the name of her father was not enlisted in any of the voter lists prior to 1965, even subsequent thereto. Only 1997 voter list (exhibit 5), which is again

not even supported by the DW4 that he was a voter of 1997. On the other hand, 1965 voter list (exhibit 4) contains the name of one Mamud Ali, son of

Basi Member, which again cannot be connected with the father of petitioner, as stated by her, to prove conclusively that said Mamud Ali is her

grandfather.

(19) On comparison of the documents produced and relied by the petitioner it reflects that the father of Moksed Ali (DW 4) is shown Kala Mamud

in the 1997 voter list, whereas one Mamud Ali is shown as voter of Garemari village in the 1965 voter list and name of one Kala Seikh is reflected in

1951 NRC. There is nothing to prove that said Mamud Ali, Kala Mamud and Kala Shekh are the one and same person, who is claimed to be the

father of DW4. There is no any convincing evidence/document to prove that the petitioner is residing in the given address from the days of her father

and forefather as claimed by the petitioner. Apart from the voter list of 2010 of petitioner there is no any linkage document to establish that said Kala

Seikh was the grandfather of the petitioner whose name is reflected in 1951 NRC and the father of petitioner has no any voter list or any sort of

document to reveal that he entered into Assam prior to 1966. All these disparities in the evidence indicate that petitioner has failed to prove her burden

as per Section 9 of the Foreigners Act, 1946.

(20) Tribunal held that the evidence adduced by the petitioner is not credible to prove the citizenship of the petitioner and held as follows:

“As the evidence on record discloses, Exhibit-3 is the Family Identity Card(Ration Card) stands in the name of Makshed Ali, the father of the

proceedee. Although the Exhibit-3 reveals that his family consists of total six members, but it does not specifically show the name of the proceedee in

it. In that view of the matter, the Exhibit-3 cannot be of any help in the matter of determining the Citizenship of the proceedee Rasna Khatun.

10. Another prominent factor to be considered is that as stated by Ramesh Ali(DW-3), the Govt., Lotgaonburha of village Majdia, during cross

examination that he is holding the post of gaonburha for the last 25 years and thus it is crystal clear from this piece of evidence that he was holding the

said post of gaonburah[2016(the year of deposition)-25=1991], since 1991. Under such circumstance, his claim in his evidence in Chief that Lt Mamud

Ali, the grandfather of the proceedee had cast his vote as per voter list of 1965 of 55 No. Sarukhetri L.A.C. cannot inspire confidence to rely upon.

11. Further, as it transpires from the evidence on record that Ramesh Ali(DW-3) the Govt.gaonburha had issued two certificates “ (1) Certificate

dt. 25.7.2015 in favour of the proceedee Rasna Khatun(exhibit-2) and (2) Certificate dt 7.3.2016 in favour of Makshed Ali, the father of the

proceedee(exhibit8).

On a careful perusal of these two certificates, it transpires that as per Exhibit-2,

the name of Lt Mamud Ali the grandfather of the proceedee

appeared as Kala Sheikh in the NRC 1951 under(Legacy Data Code:1200044-3755) and that in the voter list of 2015, the name of Mamud Ali appears

as Kala Mamud, although, Mamud Ali, Kala Sheikh and Kala Mamud is one and same person, being the son of Basir Member.

Neither the NRC 1951 nor the voter list of 2015 is submitted in support of such claim as made in Exhibit-2. But more significantly the Exhibit-8 does

not reveal such fact to the effect that Mamud Ali, the grandfather of the proceedee was also known as Kala Sheikh @ Kala Mamud. In other words

the claim as made in Exhibit-2, to the effect that Mamud Ali Sheikh, Kala Mamud is one and same person; such claim is visibly absent in Exhibit-8.

12. It is also claimed by Makshed Ali(DW-4) the father of the proceedee, in his cross-examination that he used to cast his vote since his attaining the

age of 25 years. From the evidence in chief of DW-4, it is clear that his age was about 66 years, as on 8.3.2016(date of verification of his Affidavit-in-

Chief), thus he appears to have born more or less in the year 1950 and thus he used to regularly cast his vote since [1950 years of birth+25

years=1975 years] 1975. But curiously enough that he has submitted only the voter list of 1997. Why either he or the proceedee has not submitted

such voter list of other years cannot be reasonably understood, in the absence of any cogent and reliable explanation; thereby seriously affected the

reliability of their testimonies.

14. As already discussed, although in his affidavit dtd 24.7.2015(Exhibit-6) Makshed Ali the father of the proceedee has claimed that his

father's name was erroneously recorded as Kala Sheikh in place of Mamud Ali in the voter list of 1997 and also in electoral photo identity card of

village Majdia under Sathebari L.A.C. and that Mamud Ali, Kala Sheikh and Kala Mamud is one and the same person; no such claim is made either in

his evidence in chief or in his cross examination; no such claim, as made in exhibit-6, to the effect that Mamud Ali, Kala Sheikh, Kala Mamud visibly

appears in the written statement as well as either evidence of Majed Ali(DW-2), who is none but paternal uncle of the proceedee, or in the evidence

of Ramesh Ali(DW-3) the Govt. lot gaonburha of village Majdia.

DW-2,3 and 4 have never claimed in their evidence that the grandfather of the

proceedee was also known as Kala Sheikh or Kala Mamud or that Mamud Ali, Kala Sheikh or Kala Mamud is one and same person.

Moreover, the NRC 1951 is also not submitted in support of such claim.

14. In the premises the evidence of DWs not being consistent to each other, rather there appearing no such claim either in the written statement or

in the evidence of DWs 2, 3 and 4 to the effect that Mamud Ali, the father of the proceedee was known as Kala Sheikh or Kala Mamud, evidence of

DWs cannot inspire confidence as reliability and trustworthiness.

(21) It is discernible that the Tribunal considered the evidence adduced with due diligence and arrived at the finding that the petitioner is a foreigner

having illegally entered the territory of India (Assam) after 25.3.1971. This finding based on relevant material on record cannot be said to be perverse

finding.

(22) In *Damodar Lal vs. Sohan Devi*, (2016) 3 SCC 78, Supreme Court held that the question of perversity is to be dealt with on the perspective of a

reasonable man's interference on the facts and if the conclusion of facts arrived at by the court is only the plausible conclusion then there is no

perversity.

(23) In the given case the decision arrived at by the Tribunal is only the plausible conclusion hence there is no perversity in the decision arrived at by

the Tribunal.

(24) In *State of Assam vs. Moslem Mondal*, (2013) 1 GLT 809 it is held that the High Court has the power under Article 226 of the Constitution to

issue a writ of certiorari in quashing the decision of the Tribunal in an appropriate case. The scope of such interference, however, is limited. The

relevant part of the judgment is quoted hereunder:

“Certiorari jurisdiction of the writ court being supervisory and not appellate jurisdiction, writ Court would not review the findings of fact

reached by the Tribunal. Only exception to this proposition, as noticed above, would be in a case where the Tribunal had acted on evidence which was

legally inadmissible or had refused to admit admissible evidence or if the finding is not supported by any evidence at all, because in such cases, it

would amount to an error of law apparent on the face of the record. The other errors of fact, howsoever grave those may be, cannot be corrected by

a writ Courtâ??.

(25)In the envil of legal proposition and the discussion made above, we are of opinion thatthe learned Tribunal has rightly rendered his opinion that the petitioner has failed to discharge the burden under as envisaged Section 9 of the Foreigners Act, 1946. There appears no reason to interfere the findings of the learned Tribunal.

(26) We, therefore, find no merit in the writ petition which is accordingly dismissed. Inconsequence, the interim order passed earlier stands vacated.

(27) Registry to send down the LCR and communicate the Foreigners Tribunal,Kamrup(Rural) Hajo, Deputy Commissioner, Kamrup(Rural) and Superintendent of Police(Border), Kamrup(Rural) for doing the needful.

(28) Copy of this order may also be furnished to learned Standing Counsel, Election Commission ofIndia and State Coordinator, NRC.