

(2018) 09 GAU CK 0017
In the Gauhati High Court
Case No : Civil Writ Petition No.7868 Of 2017

Parul Bala Debnath

APPELLANT

Vs

Union Of India And 3 Ors.

RESPONDENT

Date of Decision : 07-09-2018

Acts Referred:

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

Citation : (2018) 09 GAU CK 0017

Hon'ble Judges : Manojit Bhuyan, J;Prasanta Kumar Deka, J

Bench : Division Bench

Advocate : A. Roshid, S.C. Keyal, J. Payeng

Final Decision : Dismissed

Judgement

(Manojit Bhuyan, J)

1. Heard Mr. A. Roshid, learned counsel for the petitioner as well as Mr. S.C. Keyal, learned Assistant SGI for respondent no.1 and Mr. J. Payeng,

learned counsel for respondent nos.2, 3 & 4.

2. After 7 (seven) long years the petitioner assails the judgment and order dated 1.12.2010 passed by the Foreignersâ?? Tribunal No.1, Goalpara in

F.T. Case No.290/G/2006, declaring the petitioner to be an illegal migrant entering India from Bangladesh after 1971.

3. Having heard the learned counsels for the parties and on perusal of the materials on record we, at the outset, are not inclined to interfere with the

aforesaid judgment and order dated 1.12.2010 for the reasons stated hereunder.

4. A reference was made by the Superintendent of Police (Border) Goalpara under the erstwhile Illegal Migrants (Determination by Tribunal) Act,

1983 holding the petitioner to be an illegal migrant of post 1971 stream. The said case was registered as Reference Case No. 23/2002. On the striking

down of the aforesaid Act, 1983 by the Supreme Court, the case was transferred and decided under the Foreigners Act, 1964 as F.T. Case No.

290/G/2006 before the Foreignersâ?? Tribunal No.1, Goalpara. Fresh notice was issued and served upon the petitioner. On 30.8.2008 and 18.9.2008

the engaged counsel of the petitioner appeared before the Tribunal with prayer for adjournment. On 17.11.2008 the petitioner filed written statement

claiming to be a citizen of India by birth.

Thereafter, the case was fixed for evidence of the petitioner but during the next 15 dates i.e. 12.12.2008, 19.1.2009, 25.2.2009, 19.3.2009, 11.5.2009,

20.6.2009, 3.8.2009, 3.10.2009, 7.12.2009, 8.2.2010, 17.3.2010, 28.4.2010, 18.6.2010, 3.9.2010 and 4.11.2010 the petitioner failed to adduce evidence

to prove her case and to discharge her burden as being a citizen of India. The engaged counsel only filed petitions until 11.5.2009 seeking adjournment

for giving evidence. On and after 11.5.2009 the engaged counsel also stopped taking steps in the matter. Under the circumstances, the petitioner

having failed to discharge her burden as required under Section 9 of the Foreigners Act, 1946 and/or for failing to adduce evidence to prove her claim,

the Tribunal declared the petitioner to be an illegal migrant of post 1971 stream from Bangladesh.

5. On record, the influx of foreign nationals over the years have received serious concern and attention of the people, as unabated influx threatens the

integrity and sovereignty of the country itself. Having said so, the procedure of identification and for declaring an individual to be a foreign national

cannot be a mechanical exercise as the citizenship of a person is a valuable right to be zealously guarded. Therefore, fair and reasonable opportunity

must be afforded to the person/proceedee to establish that he/she is a citizen of India. A caveat, however, must be flagged that a person/proceedee

who is not diligent and/or is unmindful in taking steps to safeguard his interest, he does so at his own risk and peril. Grant of fair and reasonable

opportunity can neither be an endless exercise nor be allowed to be reduced to a farcical exercise. Granting of time and opportunity endlessly cannot

be permitted as it would be used as a tool to defeat the very object of identification and deportation of foreigners plaguing this country, particularly the

State of Assam. As indicated above, as many as 15 (fifteen) opportunities were granted to the petitioner to adduce evidence and to establish that she is a citizen of India, which she utterly failed to do so.

6. In a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 the primary issue for determination is whether the proceedee is a foreigner or not. The relevant fact being especially within the knowledge of the proceedee, as such, the burden of proving citizenship absolutely rests upon the proceedee notwithstanding anything contained in the Indian Evidence Act, 1872. This is mandated under Section 9 of the aforesaid Act, 1946. Accordingly, burden is cast upon the proceedee to plead and prove evidence to establish that he is not a foreigner. The said position would not change in an ex-parte proceeding before the Tribunal as the burden never shifts but continues to be upon the proceedee.

In a situation where no evidence is adduced or the burden is not discharged, the only option left to the Tribunal would be to declare the proceedee to be a foreigner, based on the grounds of reference upon which appropriate proceeding was initiated and notice was issued and served upon the proceedee. In the instant case, the petitioner had duly received the notice and had also submitted written statement through engaged counsel. Because of non-participation of the petitioner in the subsequent stages of the proceeding, covering 15 (fifteen) dates during which the case was fixed for evidence, the Tribunal had no alternative but to proceed against the petitioner and declare her as a foreigner.

7. It is now to be seen as to what relief can be granted to the petitioner in the present proceeding under Article 226 of the Constitution of India.

Evidently, the scope of interference is limited. A writ in the nature of certiorari can only issue for correcting errors of jurisdiction or when decision is made by the Tribunal without giving opportunity of hearing or when judgment is rendered in violation of the principles of natural justice or where there appears to be an error apparent on the face of the record. None of the above grounds exists in the present writ petition. The writ court would definitely not interfere with the order of the Tribunal, when admittedly sufficient opportunities had been given to the proceedee to discharge the burden of proving that he is not a foreigner, as in the instant case. The certiorari jurisdiction is supervisory and not appellate jurisdiction. The documents which

the petitioner have enclosed in the present writ petition also cannot be looked into, those not having been proved before the Tribunal at the first instance despite opportunities afforded.

8. For all the reasons aforestated, we find no merit in the present petition. Accordingly, the writ petition stands dismissed and the judgment and order of the Tribunal affirmed.

9. Registry to inform the concerned Foreignersâ?? Tribunal, the Deputy Commissioner and the Superintendent of Police (Border) for taking immediate follow-up steps.