
(2019) 02 GAU CK 0070
In the Gauhati High Court
Case No : Writ Petition (C) No. 4444 Of 2017

Sabjan Nessa @ Shabjan Nessa

APPELLANT

Vs

Union Of India And 4 Ors

RESPONDENT

Date of Decision : 21-02-2019

Acts Referred:

Citation : (2019) 02 GAU CK 0070

Hon'ble Judges : Achintya Malla Bujor Barua, J;Ajit Borthakur, J

Bench : Division Bench

Advocate : M Ali

Final Decision : Allowed

Judgement

AM Bujor Barua, J

1. Heard Mr. M.U. Mahmud, learned counsel for the petitioner, Mr. A Ali, learned counsel for the Election Commission of India, Mr. J. Payeng, learned standing counsel for the State of Assam appearing for the Foreigners Tribunal and Border Affairs, Ms. A. Verma, learned standing counsel for the authorities under the NRC as well as Ms. G Sarma, learned counsel for the authorities under the Union of India.

2. On being referred by the Superintendent of Police (Border), Barpeta, IM(D)T Case No.2435/A/1998 was registered against the petitioner. On the IM(D)T Act of 1983 being declared ultra-vires, the reference was transferred to Foreigners Tribunal No.9th, Barpeta and accordingly FT 9th Case No.128/2016 was registered against the petitioner.

3. In the written statement before the Tribunal, the petitioner took the stand that she was born and brought up at village Bhalukabari Pathar, Mouza- Betbari, PS- Barpeta and that the name of her father Bishu Miah along with other family members appeared in the voters list of 1965 of village Bhulukabari Pathar, Mouza- Betbari PS-Barpeta. A stand was also taken that the name of her father Bishu

Miah along with other family members also appeared in the voters list of 1970 of village Bhulukabari and that the mother of the petitioner is Asmani Nesa Bibi, whose name also appears in the voters list of 1970. The petitioner also took the stand that the father Bishu Miah had landed properties in village Bhulukabari Pathar covered by Patta No.45, Dag No.184, 183 and 193 of the year 1964. Before the Tribunal, the petitioner exhibited the voters list of 1965, which includes the name of Bishu Mia son of Jahuruddin, age 40 years at SI o.142, House No.45 of village Bhaluki Pathar. The petitioner also exhibited the voters list of 1970 of village Bhulukabari Pathar, which contains the name of Bisha Miah, son of Jahur, age 45 years at SI No.166 and Asmani Nessa Bibi, wife of Bisha Miah, age 30 years at SI No.167. The subsequent voters list of 1989 containing the name of Bishu Miah son of Jahur and the voters list of 1997 containing the name of Asmani Nesa wife of Bishu were also produced. Further, the Khajnar Krcha Patta of village Bhalukbari Pathar in respect of Dag No.184, 183 and 193 of Patta No.45 containing the name of Bishu Miah son of Jahuruddin as well as a list of revenue paying receipt by Bishu Miah dated 24.03.1970 were also exhibited.

4. From the aforesaid materials exhibited, it can be ascertained that Bishu Miah son of Jahuruddin of village Bhulukabari Pathar was an Indian citizen whose existence in the State can be established prior to 25.03.1971. In order to establish her link with Bishu Miah of village Bhulukabari Pathar, the petitioner relies upon a certificate issued by the Gaonbura of village Bhalukbari Pathar stating that the name of the father of the petitioner is Bishu Miah of village Bhalukbari Pathar. The Gaonbura certifying the aforesaid certificate was examined as DW-2, who had stated his name to be Omar Ali, age 62 years. In his deposition, DW-2 had stated that the name of the father of the petitioner is Bishu Miah and that she was born at village Bhalukbari Pathar and she was married to Nurul Hoque of village Barbala. It also stated that presently the family of Nurul Hoque had shifted to Bhaluki Gaon. But in the cross-examination, DW-2 had stated that he is the Gaonbura from the year 1989 and that his father Ibrahim was also the Gaonbura prior to him. But he stated that he knows the father of the petitioner Bishu Miah only after he became a Gaonbura and that he does not know when Bishu Miah came to the village.

5. The statement that he does not know when Bishu Miah came to the village would not have much relevance as corroborating documents pertaining to revenue records as well as voters lists have been exhibited indicating the existence of Bishu Miah in village Bhulukabari Pathar since prior to 25.03.1971. But DW-2 further stated that he does not know when and where the petitioner got married and that after asking the petitioner as to where and with whom she got married, the certificate was issued.

6. We are of the view that the statements made by the Gaonbura in his cross examination to some extent dilutes the deposition made in his evidence in chief and to that extent it will be in fairness to both the parties to subject the DW-2 to

a further examination and cross examination by both the parties to bring out the existence of the fact as to whether Bishu Miah of village Bhulukabari Pathar is the father of the petitioner. In the absence of any conclusive evidence from the Gaonbura as regards the question of fact raised that the father of the petitioner is Bishu Miah of village Bhulukabari Pathar, we are of the view that it will be unsafe to declare the petitioner to be a foreigner on the basis of the evidence presently on record.

7. Accordingly, the order dated 13.07.2017 of the Foreigners Tribunal No.9th, Barpeta in FT Case No.128/2016 is set aside. The matter is now remanded back to the Tribunal for a further examination and cross examination of the DW-2 Gaonbura as indicated above.

8. The petitioner shall appear before the Tribunal on 18.03.2019 along with the DW-2 for his further examination and cross examination. As the declaration of the petitioner to be a foreigner is interfered with, it is ordered that the petitioner be released from the detention forthwith. But, however, in order to ensure further presence of the petitioner, the petitioner shall submit two separate surety bonds from two prominent persons of her village or a security from an appropriate Government official to the satisfaction of the Superintendent of Police (Border), Barpeta to ensure continuous presence of the petitioner as and when required by the authorities

9. Send back the LCR immediately.

Writ petition stands allowed to the extent indicated above.