

(2024) 04 GAU CK 0013

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 3638 Of 2020

Sayed Ali And Anr.

APPELLANT

Vs

Union Of India And 5 Ors.

RESPONDENT

Date of Decision : 04-04-2024

Acts Referred:

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

Citation : (2024) 04 GAU CK 0013

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

Bench : Division Bench

Advocate : A. R. Sikdar, A. Verma, R. Talukdar, H. Kuli

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 28.03.2019 passed by the learned Foreigners Tribunal No. 7th, Lanka, Hojai in F.T. Case Nos. 1078/2016 and 1227/2016. By the impugned judgment, the petitioners, who were the proceedees before the learned Tribunal, have been declared to be foreigners post 25.03.1971.

2. The facts of the case may be put in a nutshell as follows:

(i) The references were made by the Superintendent of Police (Border), Hojai District, against the petitioners giving rise to the aforesaid F.T. Case Nos. 1078/2016 and 1227/2016.

(ii) As per requirement under Section 9 of the Foreigner's Act, 1946 to prove that the proceedee is not a foreigner, both the petitioner no. 1 and petitioner no. 2 had filed the written statement on 06.08.2018 and 10.08.2018 respectively 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 petitioners, as opposite parties had failed to discharge the burden cast upon them and accordingly, the opinion was rendered declaring the petitioners to be foreign nationals post 25.03.1971.

3. We have heard Shri A.R. Sikdar, learned counsel for the petitioners. Also heard Ms. A. Verma, 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 28.09.2020.

4. Shri Sikdar, the learned counsel for the petitioners has submitted that the petitioners could prove their 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 petitioners 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. Computer generated statement of voter details (Exbt -1)
- ii. Certified copy of Voter list of 1965 (Exbt – 2)
- iii. Certified copy of Voter list of 1970 (Exbt – 3)
- iv. Certified copy of Voter list of 1975 (Exbt – 4)
- v. Certified copy of Voter list of 1993 (Exbt – 5)
- vi. Certified copy of Voter list of 2005 (Exbt – 6)
- vii. Certified copy of Voter list of 2011 (Exbt- 7)
- viii. Certified copy of Voter list of 2016 (Exbt – 8)
- ix. Two miscellaneous receipts of Hojai Municipal Board [Exbt – 9 and 9(i)]
- x. Driving License for Cycle Rickshaw (Exbt – 10)
- xi. Two compared Voter photo identity cards (Exbt – 11 and 14)
- xii. Certificate by Nilbagan Gaon Panchayat (Exbt – 12)
- xiii. Aadhar Card (Exbt – 13 and 15)

5. He submits that there was no effective cross examination by the prosecution side of the said witnesses who had deposed and therefore, such evidence ought to have been accepted.

6. It is submitted that the voter list of 1965 was proved containing the name of Jahur Ali, aged 66 years, the projected father of the petitioners and Hazara Bhanu, aged 30 years, the projected mother. It is contended that the father of

the petitioners had two wives- Aimana Nessa (first wife) and Hazara Bhanu (second wife) who is the projected mother of the petitioners.

7. It is contended by Shri Sikdar, the learned counsel that the name of the petitioner no.1 appears in the voter list of 1993, 2005, 2011 and 2016 which would establish his citizenship.

8. It is contended that the deposition of DW2 has not been considered in its proper perspective in the impugned judgment and therefore, the findings arrived at is not a correct finding.

9. Shri Sikdar, the learned counsel accordingly submits that the impugned opinion dated 28.03.2019 be interfered with. In support of his submissions, the learned counsel has relied upon the following case laws:

(i) (2004) 5 SCC 679 [Anil Sharma vs. State of Jharkhand].

(ii) (2021) 3 GLT 85 [Haidar Ali vs. Union of India].

10. In the case of Anil Sharma (supra), it has been laid down that evidentiary value of oral testimony is required to be taken into due consideration. The case of Haidar Ali (supra) has been cited in support of the contention that non-appearance of the names of the relatives of the proceedee in certain voters list would not be a conclusive evidence to discard the claim.

11. Per contra, Ms A. Verma, learned Standing Counsel, Home Department has categorically refuted the stand taken on behalf of the petitioners. She 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 petitioners 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. She 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.

12. She further submits that so far as the documents relied upon by the petitioners are concerned, a part of the same cannot be relied upon and the document as a whole is to be read. It is also submitted that there are major discrepancies in the voters list regarding the names, age and address.

13. It is submitted by Ms. Verma, learned Standing Counsel that there is no linkage of the petitioners whatsoever with her projected father and the discrepancies in the documents are consistent. It is pointed out that in the voter list of 1970 containing the name of the projected parents of the petitioners, there are change in the names compared to the voter list of 1965. The aspect of there

being no voters list of the petitioners prior to the year 1993 has also been highlighted.

14. 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. She submits that there is no procedural impropriety or illegality in the decision making process and therefore, the instant petition is liable to be dismissed.

15. In support of her submissions, Ms Verma, learned Standing Counsel has placed reliance upon the following case laws-

(i) Order dated 07.05.2018 in WP(C)/1073/2016 [Md. Abdul Kuddus Vs. UOI]

(ii) 2018 (1) GLT 372 [Basiron Bibi Vs. UOI]

(iii) 2018 (4) GLT 392 [Borhan Ali vs. Union of India]

(iv) Order dated 18.04.2018 in WP(C) 562/2016 [Bijoy Das Vs Uoi And Ors.]

(v) Order dated 28.02.2018 in WP(C)/4512/2016 [Md. Fakharuddin vs. Union of India & Ors.]

16. The case of Abdul Kuddus (supra) has been cited in support of the contention that the documentary evidence has to be proved by corroborating the same with contemporaneous records.

17. The case of Basiron Bibi (supra) has been cited to support the contention of requiring the appreciation of a document as a whole, the relevant extract of which is reproduced below-

i. "Regarding discrepancies in the voters' lists which the petitioner contended were not her creation being entered into by officials of Election Commission and therefore should not be used adversely against the petitioner, such contention is without any substance. The voters' lists were adduced as evidence by the petitioner herself to prove her case that she was not a foreigner but a citizen of India. Petitioner cannot insist that only that portions of the voters' lists which are in her favour should be accepted and those portions going against her should be over-looked. This is not how a document put forward as a piece of evidence should be examined. The document has to be appreciated as a whole."

18. In the case Borhan Ali (supra), it has been laid that a voter list is to be read in its entirety and not in part.

"27.1. Extending this principle, if a proceedee relies on a voters list, he has to rely on the same in its entirety and not in part. He cannot say that he will rely upon that part of the voters list which is favourable to the proceedee but would not rely upon that part of the voters list which goes against him, for example, vital discrepancies in name, residence and age. A document has to be appreciated as a whole; not in bits and pieces."

19. In the case of Bijoy Das (supra) it is held that mere filing of written statement and oral testimony in a proceeding under the Foreigners Act, 1946 would not be enough. The fact-in-issue would have to be proved by the proceedee by adducing documentary evidence which are admissible and relevant.

20. In the case of Md. Fakharuddin (supra) it has been held that in case of consistent discrepancies, evidence adduced cannot be accepted.

21. In his rejoinder, Shri Sikdar, the learned counsel has referred to two miscellaneous receipts of Hojai Municipal Board [Exbt.– 9 and 9(i)], Driving License for Cycle Rickshaw (Exbt. – 10), two compared Voter photo identity cards (Exbt. – 11 and 14), Certificate by Nilbagan Gaon Panchayat (Exbt. – 12), Aadhar Card (Exbt. – 13 and 15).

22. The rival contentions have been duly considered. The LCRs placed before this Court have been carefully perused.

23. 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 herein below-

"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."

24. 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.”

25. 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.

26. 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."

27. So far as the voter list of 1965 is concerned whereas the name of the projected father has been found to be "Jahur Ali", the name of the projected mother is "Hazara Bhanu", who however is the wife of one "Jafar Uddin". The difference is not a minor one regarding the surname but a major difference.

28. As regards, the contention that the father of the petitioners had two wives, the voters list of 1965, however, does not contain the name of the first wife- Aimana Nessa. Further, though it has been contended that Hazara Bhanu, the projected mother had died in 1962, her name is found in the voters lists of 1965 as well as 1970 and in both the said voters lists, she is stated to be the wife of "Jafar Uddin".

29. With regard to the voters list, wherein, the name of the petitioner no. 1 has been claimed to exist, we have noticed that in the voter list of 1993, the name of the petitioner no. 1 has been stated to be "Sahad Ali", aged 42 years with House No. 293. There is no voter list referred or even exhibited from 1993 to 2005. In the voter list of 2005, the name is written as "Sayad Ali", aged 47 years with House No. 29. In the voter list of 2016, the name is stated as "Sayad Ali", aged 57 years, House No. 136. There is no explanation regarding the discrepancy in the age and change in the House numbers.

30. So far as the evidence of DW2 is concerned, he has claimed himself to be a neighbour of the petitioners. However, in the cross examination, the said DW2 has stated that he was born at village – Sonatup under Rupahihat. Though he claims to know the petitioner no. 1 since his birth, he has stated that the petitioner no. 1 was born in another village namely, Kawaimari. He further states that he does not know about the death of Jahur Ali, the projected father of the petitioner no. 1. He has stated the name of the mother of the petitioner no. 1 as "Hazera Khatun" whereas the petitioner no. 1 claims the name of his mother to be "Hazera Bhanu". The said DW2 does not know about the death of the said Hazera Khatun or about the death of Kasem Ali, said to be the elder brother of the petitioner no.1. The DW1 does not even know the name of the wife of the petitioner no. 1 in spite of claiming to know him from his birth.

31. None of the documents referred to in the rejoinder can be treated as a valid piece of evidence to establish citizenship of the petitioners. Further, the documents are found to be full of discrepancies. In the driving license for Cycle Rikshaw, (Exbt. 10), it is found that it is in the name of Sahed Ali, son of one Johu Ali with address as Bhuyapatty. On the other hand, the petitioner no. 1

claims his name to be Md. Sayed Ali, son of Johur Ali and resident of village Nilbagan.

32. As regards the case of Anil Sharma (supra) is concerned, the said case was a criminal trial wherein such observation was made. However, the present proceeding is under the Foreigners Act, wherein there is an overriding provision in the form of Section 9 which cast the entire burden of proof upon a proceedee. Further, law is well settled that in proceedings of this nature, oral evidence is to be corroborated by documentary evidence of contemporaneous records.

33. As regards the case of Haidar Ali, this Court has noticed that the observation regarding non-appearance of the name of the parents of the proceedee in that case for a particular period may not be of much relevance as in the previous and subsequent voters list, such names were there. In our view, the facts of Haidar Ali are distinguishable.

34. This Court finds force in the contention of the learned Standing Counsel who had cited the case laws with regard to the procedure to be followed for proving a voter list as well as of the aspect of requiring to prove relevant documents.

35. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 28.03.2019 passed by the learned Tribunal No. 7th, Lanka, Hojai in F.T. Case Nos. 1078/2016 and 1227/2016 does not call for any interference. Accordingly, this writ petition being devoid of merits is dismissed.

36. The interim protection and bail granted to the petitioner vide order dated 28.09.2020 passed earlier in this proceeding stands vacated / is hereby recalled.

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

38. The records of the aforesaid F.T. Case Nos. 1078/2016 and 1227/2016 be returned to the Foreigners Tribunal forthwith along with a copy of this order.