

GAHC010273952024



DB

2025:GAU-AS:1995-

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6889/2024

MAZITAN NESSA @ MAZIDAN NESSA
W/O- MD. MAJIBAR, R/O- VILL- NIZ BAGHMARI P.S.- GINGIA, DIST.-
BISWANATH, ASSAM

VERSUS

THE UNION OF INDIA AND 5 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF INDIA, HOME AFFAIRS DEPARTMENT, NEW DELHI-01

2:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY
TO THE GOVT. OF ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI-06

3:THE ELECTION COMMISSION OF INDIA
NEW DELHI-01
INDIA

4:THE STATE CO-ORDINATOR
NRC
ASSAM

5:THE DEPUTY COMMISSIONER
BISWANATH
BISWANATH CHARIALI DIST.- BISHWANATH
ASSAM
PIN- 784176

6:THE SUPERINTENDENT OF POLICE
BISWANATH
BISWANATH CHARIALI DIST.- BISHWANATH
ASSAM
PIN- 78417

Advocate for the Petitioner : MR A ALI, MS K TAYE,MS. M KHATUN

Advocate for the Respondent : DY.S.G.I., GA, ASSAM,SC, ELECTION COMMISSION.,SC, F.T

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGMENT & ORDER (CAV)

Date : 25-02-2025

(M. Nandi, J)

Heard Mr. A. Ali, learned counsel for the writ petitioner. Also heard Ms. S.T. Khan for Ms. P. Barua, learned Standing Counsel, ECI; Mr. J. Payeng, learned Standing Counsel, FT and Mr. H.K. Hazarika, learned Government Advocate.

2. The petitioner has preferred this application under Article 226 of the Constitution of India against the impugned opinion dated 10.11.2020 in F.T. Case No. BNC/D/1222/2016 passed by the Foreigners' Tribunal, Tezpur 5th, Biswanath Chariali, wherein the petitioner was declared foreigner of post 1971.

3. The case of the petitioner is that the petitioner was born and brought up at village Balidubi under Behali P.S (Now Ginjia) in the district of Biswanath (the then Tezpur), Assam. After her marriage, she was enlisted in voter list with her husband namely, Majibar of Niz Baghmari village of Biswanath district.

4. According to the petitioner, her father's name was late Mukshed Ali whose name appeared in the voter list of 1959 onwards. And her father's name was also recorded in the Patta, Jamabandi and Revenue record. After the death of the petitioner's father, the name of her brother Soyed Badshah appeared in the voters' lists of 2016, 2017 and 2018 wherein the name of her father late Mukshed Ali has also reflected. Her brother Soyed Badshah was examined as DW-2, who deposed that the petitioner is his own sister, daughter of Mukshed Ali.

5. The further case of the petitioner is that though the petitioner filed her written statement along with relevant documents to prove her citizenship but the Tribunal did not believe such documents and the evidence of her witnesses i.e. DW-1, DW-2, DW-3 and DW-4 and opined that the petitioner entered India after 25.03.1971 without authority.

6. It was urged by the learned counsel for the petitioner that the petitioner is an Indian citizen by birth and village Balidubi is her birth place in the district of Biswanath. Her father was Mukshed Ali who casted his vote since 1959. Subsequently, he died and after the marriage of the petitioner, her name was enrolled with her husband in the voter list and they casted their votes in their own constituency.

7. It is further submitted that after the death of husband of the petitioner, he used to stay with his own brother i.e. DW-2 , whose name has appeared in the voters' list of 2016, 2017 and 2018 showing the name of his father as Mukshed Ali. Moreover, the *gaonburah* has issued certificate certifying the link of the petitioner with her father. Apart from that the father of the petitioner was having landed properties and the relevant document was duly exhibited before the Tribunal.

8. According to the learned counsel for the petitioner, in spite of such relevant documents as well as the evidence of the witnesses, the petitioner proved the fact that she is an Indian citizen by birth as such, the opinion of the Tribunal is considered to be perverse and liable to be set aside.

9. Per contra, learned Standing Counsel, FT has argued before this Court by stating that there are lots of contradictions in the evidence of the petitioner along with other witnesses for which their statements cannot be considered on the issue of citizenship of a person.

10. Mr. Payeng has pointed out several anomalies recorded by the Tribunal in the evidence of the witnesses, one of which is that according to the petitioner as DW-1, her father has six sons and three daughters i.e. nine in numbers which is not tallied with the evidence of DW-2, who claims to be the brother of the petitioner. According to him, his father has eight children. Mr. Payeng also pointed out that DW-1 stated that the name of her grandfather was Akbar but as per 1959 voter list, the father's name of Mukshed Ali (Petitioner's father) shows as Ajimuddin. Accordingly, the learned counsel has prayed for dismissal of the writ petition.

11. We have considered the submissions of learned counsel for the parties, perused the records as well as the documents available thereon including the judgment of the Tribunal. After going through the record, we have also noticed several contradictory statements given by the witnesses before the Tribunal.

12. Coming to the statement of DW-1, she stated that after 1959, her father shifted his residence from village – Balidubi to village – Niz Baghmari under (Ginjia) P.S and started to reside there. After 1960, her father died in the said village. But in her cross-examination, DW-1 replied that her father shifted from

Balidubi to Saupat and when she was 5 years old, her father died at Saupat. Her father casted vote at Balidubi and Saupat.

13. DW-1 further stated that she married at Saupat. After expiry of her husband, she started to stay along with her brother. Her husband expired about 20 years back. But DW-2 has stated different story. According to him, Majitan Nessa i.e. the present petitioner was married to Majibor Ali of Baghmari. After 1 year of their marriage, her husband left home and never returned back. Now, Majitan is staying with him.

14. DW-2 also stated that his father had landed property at Balidubi but he did not know the said land. His father had Touji Patta land at Baghmari and they used to reside in the said land. His father had also landed property at Japorijan. The said land is now in his possession. But DW-1 stated that her father had landed property at Balidubi and at present, the said land is in the name of his brother. Hence, the statement of DW-2 belies the statement of DW-1 as DW-2 has stated that his father had landed property at Balidubi but he did not know the said land.

15. Next to the evidence of DW-3 and DW-4. DW-3 deposed in his evidence that the petitioner is her cousin sister, daughter of her uncle Mukshed Ali. The name of his grandfather was Ajimuddin. Earlier Mukshed Ali resided at Japorijan village under Biswanath P.S. Due to river erosion, Mukshed Ali shifted his residence from Japorijan to Balidubi. Thereafter, due to further river erosion, Mukshed Ali left Balidubi and started to reside at Niz Baghmari since the year 1959-1960 and he died in the year 1974-1975 at Baghmari.

16. It is interesting to note that as per evidence of DW-4, Mukshed Ali had expired in the year 1962 at Baghmari. DW-1, who is the daughter of Mukshed

Ali also stated that after 1960, her father had died. Though DW-1 stated in her deposition that after 1959, her father shifted his residence from Balidubi to Niz Baghmari but there is no whisper in the statement of DW-1 that her father initially resided at Japorijan village and subsequently, he shifted from Japorijan to Balidubi.

17. From the evidence of the aforesaid witnesses, it is crystal clear that they are not telling the truth. Apparently, the petitioner has failed to prove the place of residence where she was born and subsequently resided along with her parents in a particular village and her present place of residence.

18. We have also noticed the anomalies regarding brothers and sisters of the petitioner. According to the petitioner, her father has six sons and three daughters and they used to reside now at Niz Baghmari village but subsequently during cross-examination, DW-1 replied that she has 4 (four) brothers and 2 (two) sisters. They are Ajimuddin, Sayab Ali, Syed Badsha (DW-2), Abdulla, Gul Kachari and she herself. All are residing now at Saupat. But DW-2 contradicted her statement by stating that his father has 8 (eight) children by adding Naushad Ali and Azad Ali. Admittedly, the petitioner does not avail her voting rights at any point of time.

19. In the case of ***Sarbananda Sonowal vs. Union of India*** reported in **(2005) 5 SCC 665**, the Apex Court while discussing the problem being faced by the State of Assam due to illegal migration and their continued presence in the State has been vividly discussed the alarming situation. While striking out the IM(D)T Act, 1983, the Apex Court also dealt with the modality of proving one's Indian citizenship. It has been emphasized that the burden of proof is always on the proceedee as per provisions of Section 9 of the Foreigners' Act, 1946. In *Sarbananda Sonowal (supra)*, the Apex Court dealing with the burden of proof,

made the following observation –

“ There is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one’s citizenship, normally he may be required to give evidence of his date of birth, place of birth, name of his parents, their place of birth and citizenship. Sometimes the place of birth of his grandparents may also be relevant like u/s 6 A (1)(d) of the Citizenship Act. All these facts would be necessarily within the personal knowledge of the person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act, which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

20. Moreover, merely by producing some documents like voter list of other person claimed to be his father or brother, one cannot establish his Indian Citizenship. As has been held by the Apex Court in ***LIC of India vs. Ram Pal Singh Bisen***, reported in **(2010) 4 SCC 491**, even admission of a document in evidence does not amount to its proof; in other words, mere marking of exhibit

of a document does not dispense with its proof, which is required to be done in accordance with law. The admission of documents may amount to admission of contents but not its truth. Therefore, contents of document cannot be proved by merely filing in a Court.

21. In the case in hand, the learned Tribunal has discussed all the above aspects of the matter in its impugned opinion. It has rightly been observed by the Tribunal that in **Ext. C**, the Electoral Roll of 2016, the age of the brother of the petitioner has been recorded as 42 years. If that be so, he was born in the year 1974 and got the right of voting in the year 1995. But the proceedee has not submitted any voter list of her brother prior to the year of 2016 and she has not explained in her evidence as to why she has not submitted any voter list of her projected brother in between the period of 1995-2016 i.e. all along 21 years. Similarly, DW-1 proceedee in her cross-examination stated that her father had Myadi Patta land at Balidubi but she has not submitted any land document of Balidubi.

22. Needless to say that the High Court exercising its power of judicial review under Article 226 of the Constitution of India cannot sit on appeal over the finding of facts recorded by the Court/ Tribunal. It is only when the Court/Tribunal exercises a jurisdiction without being empowered or in excess of it or fails to exercise the vested jurisdiction or acts illegally, the writ court exercising its jurisdiction can interfere with the same. The High Court can interfere with the opinion of the Tribunal exercising its writ jurisdiction only if it is proved that it is a case of no evidence at all or there is error apparent on the face of the record. The power of judicial review under Article 226 of the Constitution is limited only for correction of errors apparent on the face of the records and does not need long drawn out process of reasons on points whether

there may be conceivably two views.

23. In the result, the writ petition is dismissed. There shall be no order as to costs.

24. With the above observation, the writ petition is disposed of at the admission stage.

25. Transmit the records to the Tribunal.

JUDGE

JUDGE

Comparing Assistant