GAHC010053992018

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THE GAUHATI HIGH COURT

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

W.P.(C) 1975 OF 2018

SONABHAN BEWA @ SONA KHATUN ... PETITIONER

VERSUS

THE UNION OF INDIA

& 6 ORS. ... RESPONDENTS

BEFORE

HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE KARDAK ETE

For the petitioner : Mr. I.H. Saikia, Advocate.
For the Union of India : Mr. G. Pegu, CGC.
For FT matters : Mr. J. Payeng, Standing Counsel.
For the State : Mr. H.K. Hazarika, Govt. Advocate.
Date of hearing : 12.11.2024, 09.04.2025.
Date of judgment : 09.04.2025.

JUDGMENT AND ORDER

(K.R. Surana, J)

Heard Mr. I.H. Saikia, learned counsel for the petitioner. Also heard Mr. G. Pegu, learned CGC for the Union of India, Mr. G. Sharma, learned standing counsel for the FT matters and Mr. H.K. Hazarika, learned Govt. Advocate for the State.

2. The matter was heard on 12.11.2024, but the judgment and order could not be delivered on time. Hence, the matter was re-heard again on 09.04.2025.

3. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has assailed the opinion dated 12.02.2018, passed by the learned Member, Foreigners Tribunal No.5th, Goalpara in FT Case No. FT/5/131/MA/2016, bearing FT Reference Case No. 582/08, by which the petitioner was declared to be a foreigner of post 1971 stream.

4. On receipt of notice of the proceedings, the petitioner has filed her written statement on 01.08.2016 and claimed that she was a *bona fide* citizen of India by birth and born and brought up at village Ramapara Pather, P.S. Baghbar, the then undivided Karup District in the year 1975 and her parents are Haran Sarkar and Gokuljan Nessa. She claims to be an illiterate woman. In her written statement, the petitioner has stated that her parents name was recorded in the voters list of 1966, 1970 and that on her marriage with one Abdul Hussain, she shifted to her matrimonial home at village- Sondarpur (Buduchar) under P.S. and District- Goalpara. She has also projected that after marriage, she was kept at rented house in Goalpara Town, Dudhnai Town, Dalgoma by her husband and therefore, her name was not enrolled in any voters list of any consistency in the district of Goalpara for many years and that along with her children, she has shifted to village- Bakaitari Part-III under P.S. Matia in the district of Goalpara about 18 years ago and was staying there till date and her name was recorded in the voters list of 2005 as Sonabhan Bewa, wife of Abul Hussain in village- No.172 Bakaitari Part-III under P.S. Matia under No.37 Goalpara East LAC. Thereafter, her name was recorded in the voters list of 2016. It was stated that the petitioner did not enter illegally into India after

1971 and the proceeding was falsely brought against her for harassment. Along with the written statement, the petitioner had separately filed copy of the voters list of 1966, 1970, 2005, 2016 as well as her link certificate dated 19.06.2025, issued by the Secretary, 89 No. Ramapara Gaon Panchayat, stating therein that "Sonaban Bewa" got married on 01.01.1990 to Abul Hussain, resident of Bakaitari Part-III.

5. Thereafter, on 30.09.2016, the petitioner had filed her evidence-on-affidavit and by reiterating what has already been stated in the written statement, exhibited the voters list of 1966 (Ext.A), voters list of 1970 (Ext.B), land holding certificate dated 26.07.2016 (Ext.C). The DW-1 was cross-examined by the AGP on 07.01.2017.

6. The petitioner had examined one Samed Ali, son of Late Abdul Hai, aged about 55 years, resident of village- Gunialguri, P.S. Kalgachia, district-Barpeta as DW-2, who had filed his evidence of affidavit on 20.02.2017. He has reiterated the evidence of the petitioner and he has re-exhibited Ext.A, B and C, which were already exhibited by the petitioner. The said witness claimed that the petitioner is his maternal aunt. The DW-2 was cross-examined by the learned AGP 28.03.2017.

7. Thereafter, the matter was fixed for argument. Thereafter, the impugned opinion was passed.

8. The learned counsel for the petitioner has submitted that the petitioner has been able to prove that her parents were already residents of Assam and their names appeared in the voters list of 1966 (Ext.A) and voters list of 1970 (Ext.B) and the petitioner has also shown that she had a land at Ramapathar village in her own name vide land holding certificate dated

26.07.2016 (Ext.C). Accordingly, it is submitted that the petitioner has been able to prove that she was an Indian citizen and therefore, the impugned opinion is liable to be set aside and quashed. It is also submitted that the petitioner had submitted her link certificate dated 19.06.2015, which was issued by the Secretary of 89 No. Ramapara Gaon Panchayat, which was duly countersigned by the Block Development Officer, Mandia Development Block and the correctness or authenticity thereof was never questioned by the State and therefore, merely because the author of the document was not examined, the link certificate, which was issued as per the directions of the Supreme Court of India could not have been discarded.

9. It is submitted that the citizenship of the petitioner was doubted on the basis of an alleged information received from one Md. Abul Kalam and Md. Khabir Ali, based on which the enquiry officer arrived at a conclusion that the petitioner was suspected to be a foreigner of post 1970 stream. However, the State did not examine any person to prove the allegations. It is also submitted that the evidence of the petitioner as DW-1 and that of one Samed Ali could not be dislodged during cross-examination and therefore, their evidence was arbitrarily discarded by the learned Tribunal. In order to support his submission that discrepancies of name of the projected parents of the petitioner cannot be a ground to discard the evidence of the petitioner, the learned counsel for the petitioner has cited the case of *Md. Anuwar Hussain @ Md. Anowar Hussain v. Union of India & Ors., 2014 Legal Eagle (Gau) 986*.

10. Per contra, opposing this writ petition, the learned standing counsel for the FT matters has submitted that a mere oral statement is not enough to establish the relationship of the petitioner with persons whose names are entered in any voters list. It is submitted that the petitioner did not

introduce her parental family in her written statement or in her evidence-on-affidavit. Therefore, the sudden appearance of the maternal nephew of the petitioner becomes doubtful. It is further submitted that although the petitioner had filed the purported link certificate as well as a copy of *jamabandi* before the learned Tribunal, those two documents were not exhibited by the petitioner or by DW-2. Moreover, the purported link certificate was not proved by examining its author. It is also submitted that the burden is on the petitioner to prove that she is not a foreigner, but a citizen of India and this burden never shifts. Accordingly, by relying on the judgment of this Court in the case of *Rupali Bibi v. Union of India & Ors., WP(C) 3917/2016*, *decided on 13.02.2018*; *Zelekha Khatun v. Union of India, (2023) 0 Supreme (Gau) 1069; and Sabir Ahmed v. Union of India & Ors., 2023 (1) GLT 155*, it is submitted that no case has been made out by the petitioner warranting interference of this Court.

11. On a careful examination of the materials available on record, it is seen that the petitioner as DW-1 has only exhibited three documents, being voters list of 1966 (Ext.A), voters list of 1970 (Ext.B), land holding certificate dated 26.07.2016 (Ext.C). No other documents have been exhibited. Apart from stating the names of her projected parents, the petitioner has stated that she has married with one Abul Hussain. Though she has stated that she along with her children had shifted to village- Bakaitari Part-III, she has not disclosed the number of children she has; names of her children; names of members of her paternal family; names of members of maternal family; names of members of her matrimonial family. Though the petitioner has stated in her written statement and evidence that she resided in rented place in Goalpara Town, Dudhnai Town, Dalgoma, etc., where her husband was doing business, the petitioner has withheld documents relating to the business of her husband and

she has not pleaded about the nature of business which her husband was doing. In her cross-examination, the petitioner has stated that her husband expired after birth of second son Saidul Islam and stated that Sahidul was her elder son. She had also stated that she has one brother and five sisters, namely, (1) Hurmuj Ali; (2) Sona Bhanu; (3) Chabila Khatun; (4) Ramisa Khatun; (5) Romela Khatun, first wife of her husband; (6) Jamiron Khatun. If the DW-2, the maternal nephew of the petitioner is 14 years old then the petitioner, the name of the mother of the petitioner should have appeared in some voter list. The petitioner has no explanation why the names of her brothers and sisters are not appearing in any voter list.

12. The petitioner did not say anything about land in the name of her projected father. However, in his cross-examination DW-2 had stated that there was landed property of his maternal grandfather, Haron Sarkar. However, the petitioner did not exhibit the land revenue records relating to land held in her father's name. The petitioner has exhibited land holding certificate as Ext.C., but did not exhibit any corresponding land revenue records, nor she had examined the author of Ext.C to prove the said certificate. In the State of Assam, land records are maintained as per the Assam Land and Revenue Regulation, 1891 and the record of rights is known as *jamabandi*, which contains the names of persons in whose name a particular land is mutated. The land holding certificate (Ext.C) is not a document backed by any provision of the Assam Land and Revenue Regulation, 1891 or any other law for the time being in force. It is mentioned in the land holding certificate (Ext.C) that it has been prepared as per the report of the *Lot Mandal*. Thus, in this case, the land revenue record is the primary evidence, which was not proved; the report of the *Lot Mandal* is the secondary evidence; and the said land-holding certificate

(Ext.C), can at best be said to be secondary evidence of secondary evidence. The entry of the name of the petitioner was not proved from any official record. The name of the petitioner can be entered in the land revenue records on the strength of either purchase and possession or by dint of inheritance. In this case, the petitioner did not prove her inheritance over the land mentioned in Ext.C, and she had also not proved any sale deed to show purchase. The petitioner and the DW-2 did not exhibit any land record relating to the land of the projected father of the petitioner. Thus, there are two possibilities, either the petitioner does not have those documents, or she has those documents and did not exhibit it. Then the presumption would be against the petitioner that had the land records or sale deed been produced, the contents thereof would have gone against the petitioner and such presumption can be drawn from Section 114, Illustration (g) of the Evidence Act, 1872.

13. Hence, there is no exhibited document other than the voters list of 1966 and 1970 (Ext.A and Ext.B) to show the existence of the projected parents of the petitioner. The Ext.A contains three names, viz., (i) Haran Sarkar, (ii) Gokuljan Nessa; and (iii) Harmuj Ali. Ext.B contains four names, viz., (i) Haran Sarkar, (ii) Gokuljan Nessa; (iii) Harmuj Ali; and (iv) Pijara Khatun. In the English translated copy of Ext.B, the fourth name is not translated to English without any explanation. It is noticed that the petitioner as DW-1 and the DW-2 have consciously not shown what was the relationship of the petitioner with Harmuj Ali and Pijara Khatun.

14. Thus, when voter lists are in public domain and anyone can obtain certified copy of any voter list, it is difficult to accept that two names appearing in the voters list of 1966 (Ext.A) and 1970 (Ext.B) are the projected parents of the petitioner in the absence of any other document being proved or

with no other contemporaneous record proved showing the existence of some semblance of relationship between the petitioner and her projected parents.

15. The record received from the Tribunal reveals that the enquiry against the petitioner was initiated by the Superintendent of Police (Border), Goalpara on 15.09.2008, by directing a particular Sub-Inspector of Matia P.S. to make the enquiry. On the same date, the statement of the petitioner was recorded by the Enquiry Officer. The reference was sent to the learned Foreigners Tribunal on 03.10.2008. The proceeding was registered on 16.03.2016. Notice of the proceedings before the learned Foreigners Tribunal was served on the petitioner on 01.04.2016. Thereafter, the petitioner has obtained a land holding certificate dated 26.07.2016 (Ext.C), the contents of which was not proved through official records or certified copy of official records.

16. The sudden appearance of DW-2 without any pleading or evidence by the petitioner regarding existence of DW-2 has her sister's son makes it difficult for the Court to accept that there was any relationship between the petitioner and the DW-2. The DW-2 did not prove any document regarding his own identity and did not prove existence of any relationship between the petitioner and his own mother, or that his own mother was the daughter of Haran Sarkar and Gokuljan Nessa.

17. Although the petitioner has filed a purported link certificate, but she has neither exhibited it nor she had examined the author of the said document as witness to prove the documents and the author's signature. Moreover, there is nothing on record of the learned Tribunal that the petitioner had taken any steps for summoning the Gaon Panchayat Secretary to come and depose as witness but such prayer was refused by the learned Tribunal.

18. As regards the submissions that the State had not examined any witness to prove the allegation against the petitioner, we may refer to the judgment of the Supreme Court of India in the case of *Sarbananda Sonowal v. State of Assam & Ors., (2005) 5 SCC 665.* Relevant paragraph-41 and 42 thereof is quoted below:

"*41. Another important enactment, whose provisions have been superseded by Section 4 of the IMDT Act, is The Passport (Entry into India) Act, 1920. Sub-section (1) of Section 3 of this Act conferred power upon the Central Government to make rules requiring that persons entering India shall be in possession of passports and for all matters ancillary or incidental to that purpose. Sub-section (2) of this Section says that without prejudice to the generality of the powers conferred by sub-section (1), the rules may prohibit the entry into India or any part thereof of any person who has not in his possession a passport issued to him and also prescribe the authorities by whom passports must have been issued or renewed and the conditions which they must comply for the purposes of the Act. Sub-section (3) lays down that the rules made under this Section may provide that any contravention thereof or of any order issued under the authority of any such rule shall be punishable with imprisonment for a term which may extend to three months or with fine or with both. Section 4 says that any officer of police not below the rank of Sub-Inspector and any officer of the customs department empowered by a general or special order of the Central Government in this behalf may arrest without warrant any person who has contravened or against whom a reasonable suspicion exists that he has contravened any rule or order made u/s 3. Section 5 provides that the Central Government may, by general or special order, direct the removal of any person from India who, in contravention of any rule made u/s 3 prohibiting entry into India without passport, has entered therein, and thereupon any officer of the Government shall have all reasonable powers necessary to enforce such direction. By virtue of the power conferred by this Act, all such nationals of Bangladesh, who have entered India without a passport, could be arrested without a warrant by a police officer not below the rank of Sub-Inspector. The Central Government also had the power to direct removal of any such person who had entered India in contravention of a rule made u/s 3 prohibiting entry into India without a passport. However, Section 4 of the IMDT Act has stripped the Central Government of its power of removal of such person from India and also the power of arrest of such person without warrant possessed by a police officer of the rank of Sub-Inspector or above.*

42. The above discussion leads to irresistible conclusion that the provisions of the IMDT Act and the Rules made thereunder clearly negate the constitutional mandate contained in Article 355 of the Constitution, where a duty has been cast upon the Union of India to protect every State against external aggression and internal disturbance. The IMDT Act which contravenes Article 355 of the Constitution is, therefore, wholly unconstitutional and must be struck down."

19. Moreover, in the case of *Kulsum Khatun @ Kursun Khatoon @ Umme Kulsum Nessa v. The Union of India & Ors., (2024) 0 Supreme(Gau) 346:*

2024 (3) GLT 352, it was held by this Court that burden of proof under Section 9 of the Foreigners Act, 1946 is on the proceedee. The relevant paragraph nos. 9 and 10 are quoted below:-

"*9. 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."*

10. In this connection, the observation 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."*

20. Thus, the petitioner has failed to prove any link document to prove that two persons, namely, Haran Sarkar and Gokuljan Nessa, whose name appear in the voter list of 1966 (Ext.A) and voter list of 1970 (Ext.B) were her projected parents. Similarly, the DW-2 has also not been able to establish his link with those two persons.

21. In the case of *Bijoy Das v. Union of India, 2018 (3) GLT 118*, this Court has held that oral evidence is not enough in a proceeding under Foreigners Act, 1946.

22. While exercising certiorari jurisdiction under Article 226 of the Constitution of India, the Court is not sitting in appeal over the opinion expressed by the learned Foreigners Tribunal. The learned counsel for the petitioner has not been able to show any error in the impugned opinion, which is manifest or patent on the face of record. The learned Tribunal is not shown to have misread or misconstrued any pleadings of evidence, or that it had failed to consider any judicial precedent, binding on it or that it had failed to consider any evidence available before it. If one requires any decision on the point the judgment of the Supreme Court of India in the case of *Central Council for Research in Ayurvedic Sciences v. Bikartan Das, (2023) 0 Supreme(SC) 763*, may be referred to.

23. In light of the discussion above, and in light of the pleadings of the petitioner and evidence tendered by the petitioner and DW-2 before the learned Tribunal in this case, the Court is of the considered opinion that no case has been made out by the petitioner for any interference whatsoever in respect of the opinion dated 12.02.2018, passed by the learned Member, Foreigners Tribunal No.5th, Goalpara in FT Case No. FT/5/131/MA/2016, bearing FT

Reference Case No. 582/08, by which the petitioner was declared to be a foreigner of post 1971 stream. Accordingly, this writ petition fails and the same is dismissed.

24. The interim order and bail granted by order dated 04.04.2018, stands vacated and revoked.

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

JUDGE **JUDGE**

Comparing Assistant