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DB

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

Case No. : WP(C)/429/2025

MAZEDA BEGUM @ MAZIDA KHATOON
D/O- MD. HAZRAT ALI,
W/O- AKBAR ALI,
VILL- HILAPAKURI, P.S.- HOWLY,
DIST.- BARPETA, ASSAM.

VERSUS

THE UNION OF INDIA AND 5 ORS
REPRESENTED BY SECRETARY,
MINISTRY OF HOME AFFAIRS,
GOVT. OF INDIA,
NEW DELHI-1.

2:THE STATE OF ASSAM
REPRESENTED BY THE PRINCIPAL SECRETARY TO THE GOVERNMENT
OF ASSAM

DEPARTMENT OF HOME
DISPUR
GUWAHATI-6.

3:THE ELECTION COMMISSION OF INDIA
REPRESENTED CHIEF ELECTION COMMISSIONER
NEW DELHI-1.

4:THE STATE CO-ORDINATOR OF NATIONAL REGISTER OF CITIZEN (NRC)
ASSAM
HOUSEFED COMPLEX
2ND FLOOR
BONFUL NAGAR

GUWAHATI-28.

5:THE DISTRICT COMMISSIONER
BAJALI
P.O. AND DIST.- BAJALI
ASSAM
PIN- 781302.

6:THE SUPERINTENDENT OF POLICE (B)
BAJALI
P.O. AND DIST.- BAJALI
ASSAM
PIN- 781302

Advocate for the Petitioner : MR M AHMED, S W HUSSAIN,A. K. KANU

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

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

JUDGMENT & ORDER (CAV)

Date : 06-05-2025

(M. Nandi, J)

Heard Mr. M. Ahmed, learned counsel for the petitioner. Also heard Ms. B. Sarma, learned CGC; Mr. M. Kalita appearing on behalf of Ms. P. Barua, learned Standing Counsel, ECI; Ms. A. Verma, learned Standing Counsel, FT matters and Mr. P. Sarma, learned Additional Senior Government Advocate.

2. The petitioner assails the order/opinion dated 30.05.2023, passed in FT Case No.1250/2017 [arising out of IM(D)T Case No.95/2002] by the learned Foreigners' Tribunal, Bajali praying for setting aside the *ex parte* order whereby the petitioner was declared to be a foreigner who had illegally entered into Assam after 25.03.1971.

3. The case of the petitioner is that she used to live with her two children at her matrimonial home in village – Hilapukhuri. Her husband is living with his second wife at Kharupetia town in Darrang district. Her financial position is very poor and somehow she is surviving with her children. On receipt of the notice from the learned Tribunal, she informed about the same to her husband who assured her to do the needful and engaged an advocate to conduct her case.

4. It is also the case of the petitioner that her husband took all the xerox copies of documents along with copy of the notice of the Tribunal from her. She was waiting for her husband but he neither came nor informed anything to her. She kept pursuing her husband to know the status about her case but after a lapse of long period, her husband informed her that he lost the notice of the Tribunal. She could not immediately know about the status of her case as she failed to recollect the number of the case. Then one advocate was engaged by her son to know about the status of the case and then she came to know that her case was decided *ex parte* on account of her default to appear before the Tribunal and declared her as a foreigner of post 25.03.1971 stream. Subsequently, she was arrested by police in pursuant to the impugned order dated 30.05.2023.

5. It was urged by learned counsel for the petitioner that the aforesaid proceeding has been initiated against her without proper investigation which is illegal. There cannot be fair trial in absence of fair investigation. By referring the judgment of ***Sarbananda Sonowal Vs. Union of India, reported in (2007) 1 SCC 174***, the learned counsel has pointed out that the Hon'ble Apex Court held that although the burden of proof is on the proceedee but the State has initial burden to collect materials of doubt.

6. Learned counsel for the petitioner also relied on another case law ***State of Assam Vs. Moslem Mandal***, reported in ***(2013) 1 GLT 809*** and also pointed out that wherein this Court held that there will be violation of fundamental rights guaranteed under Article 21 of the Constitution of India unless the reference is made, giving opportunity to the proceedee to demonstrate that if he/she is not a foreigner by producing relevant documents at the investigation stage. That opportunity not being given, the whole proceeding is illegal. As such, the same is violation of Article 21 of the Constitution.

7. It is also submitted that in this writ petition, the petitioner has challenged the investigation/verification done by the State.

8. Learned counsel for petitioner also contended that the petitioner is not a foreigner as alleged in the reference. She is an Indian citizen born to her parents who are Indian national. Her parents are Hazrat Ali and Asatan Nessa. Her grandparents were Lokman and Halemon Nessa. The petitioner has 6 (six) siblings including her namely Shahidul Islam, Anowar Hussain, Mazeda Begum @ Mazida Khatoon (petitioner), Moynal Hoque, Sikkim Uddin and Sajeda. Her husband is Akbar Ali.

9. According to the learned counsel for the petitioner, the petitioner was born on 18.06.1979 at village - Barbala and was brought up in the said village. She studied up to class IV in Kamalpur L.P School and was promoted to class V in the year 1988.

10. It is further submitted that the names of the petitioner's grandparents along with her parental uncle Hamed Miya was enlisted as regular voters in the voter lists of 1966 and 1970. The names of petitioner's parents were enlisted in the voter lists of 1985, 1989, 1997, 2005, 2010 and 2018.

11. Further submission of learned counsel for the petitioner is that she got married to one Akbar Ali, s/o Jumuruddin of village Hilapukhuri. After her marriage, her name has appeared in the voter lists of 1993, 2005, 2010, 2014 and 2024 along with her husband and other family members.

12. It is further contended that *gaonburah* of her paternal village has issued a certificate certifying that the petitioner is the daughter of Hazrat Ali. Under such backdrop, learned counsel for the petitioner has prayed to remand the matter for fresh adjudication giving the petitioner an opportunity to prove her case that she is an Indian citizen by birth. And she be released on bail who is now detained in Matia Detention Camp, Goalpara.

13. Per contra, Ms. Verma, learned counsel for the FT matters has opposed in remand of the matter by stating that the notice was duly served to the petitioner, thereby she has knowledge about pending of the case before the Tribunal. The clarification given by the petitioner for her non-appearance before the Tribunal is not acceptable.

14. Ms. Verma has also pointed out that some anomalies appeared in the documents i.e. voter lists of the so called parents and grandparents of the petitioner that in 1966 and 1970 voter lists, the names of the grandparents of the petitioner have been shown as Lakshan Miya, s/o Jujur Uddin and Halemon Nessa, w/o Lakshan. In 1985 voter list, the names of projected parents of the petitioner have appeared as Hazrat Ali, s/o Lakshan and Asatan Nessa, w/o Hazrat. Subsequently, in 1989 voter list, the name of the father of Hazrat Ali has been shown as Lokman.

15. Learned counsel has also submitted that sufficient opportunity was given to the petitioner by the Tribunal, however the petitioner has failed to take such

opportunity. As such, the case was rightly decided by the Tribunal as *ex parte*.

16. By referring the case of ***Ijjat Ali Vs. Union of India vide WP(C) 8361/2009***, the learned counsel has submitted that a proceeding before the Foreigners' Tribunal cannot be an endless exercise. Accordingly, learned counsel has prayed for dismissal of the writ petition.

Ms. Verma has also relied on some other case laws in support of her submission –

a) WP(C) 291/2024 [Baharul Islam Vs. Union of India and Others]

b) WP(C) 1293/2020 [Sajiran Nessa Vs. Union of India and Others]

c) (2018) 5 GLT 492 [Jonali Das Vs. Union of India and Others]

d) (2023) SCC Online SC 996 [Central Council for Research in Ayurvedic Sciences and another Vs. Bikartan Das and Others]

17. Having heard the learned counsel for the parties and on perusal of the trial court record, it is not in dispute that the petitioner received the notice from the Tribunal, but she did not appear before the Tribunal to contest the case. As such, the Tribunal has no other option but to proceed with the case *ex parte.* From the judgment itself, it appears that a report was furnished by the process server on 12.05.2023 stating that notice was served upon the petitioner at the given address which was acknowledged by the petitioner by putting her signature thereon. It was mentioned on the report that the petitioner was asked to appear in person or by her engaged counsel vide notice dated 04.04.2023 before the Tribunal on 15.05.2023.

18. But on that day, neither the petitioner nor her counsel had appeared. However, another date was fixed for appearance of the petitioner i.e. 22.05.2023 but none was present on that day. Thereafter, the case was fixed for *ex parte* order fixing 30.05.2023. On that day also neither the petitioner nor her counsel had made any response to the notice received by the petitioner.

19. At the time of filing this writ petition, the petitioner submitted some documents stating that she had enough documents to prove her citizenship before the Tribunal. Accordingly, the learned counsel for the petitioner prayed to consider the case of the petitioner with a prayer to remand the case giving the petitioner an opportunity to exhibit the documents before the Tribunal.

20. Now the question comes whether this Court has such power in exercising writ jurisdiction to consider the documents submitted by the petitioner along with this writ petition which were not produced and exhibited before the Tribunal.

21. Having regard to the undisputed facts, as above, we find that sufficient opportunities were granted to the petitioner to establish her claim as not being a foreigner or to refute the allegation that she had illegally entered into the territory of India after 25.03.1971. In this context, we may observe that although the procedure of identification and for declaring an individual to be a foreign national cannot be relegated to mechanical exercise and that fair and reasonable opportunity must be afforded to a proceedee to establish a claim that he/she is a citizen of India, however, such grant of fair and reasonable opportunity cannot be enlarged to an endless exercise. A person who is not diligent and/or is unmindful in taking steps to safeguard his interest, he does so at his own risk and peril.

22. In the instant case, several opportunities were granted to the petitioner to establish her claim which she utterly failed to do so. In this context, we also observed that in a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunal) Order, 1964, the primary issue for determination is whether the petitioner is a foreigner or not. The relevant fact being especially within the knowledge of the petitioner, as such, the burden of proving citizenship absolutely rests upon the petitioner, notwithstanding anything contained in the Indian Evidence Act, 1872. This is mandated u/s 9 of the aforesaid Act, 1946. The said position would not change even in an *ex parte* proceeding before the Tribunal as such the burden never shifts but continues to be upon the petitioner. 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 petitioner to be a foreigner, based on the grounds of reference upon which the appropriate proceeding was initiated, where notice was issued and duly served upon the petitioner.

23. Having noticed as above, another aspect to be noted is that the scope of interference under Article 226 of the Constitution of India to a decision of the Tribunal is limited to correct errors of jurisdiction or when the 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 case.

24. To reiterate, sufficient opportunities have been given to the petitioner to discharge the burden of proving that she is not a foreigner which she utterly failed to discharge. On this ground alone, the writ court would refrain from interfering with the impugned order. We also hold that the documents enclosed

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

25. It is pertinent to mention here that though the petitioner took the plea that on receipt of notice from the Tribunal, she handed over all the relevant documents to her husband and as her husband lost the notice of the Tribunal, she failed to appear before the Tribunal, as a result of which, the proceeding was decided *ex parte*.

26. It appears from the instant writ petition that the affidavit on behalf of the petitioner was sworn by one Minhazur Rahman, aged about 25 years, son of the petitioner and he put his signature in English which transpires that he is not illiterate. Under such backdrop, it cannot be said that the petitioner was helpless at the relevant time to take steps in a proper way.

27. In the case of ***Bikartan Das (supra),*** the Hon'ble Supreme Court has formulated the guidelines to consider the writ of certiorari which reads as follows –

> "*51. 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.

52. 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 there under 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….."

28. In view of the above discussion as well as the law laid down by the Hon'ble Supreme Court, we find no merit in the present petition.

29. Accordingly, the writ petition is dismissed and the order/ opinion of the Tribunal is affirmed. There shall be no order as to costs.

30. Situated thus, the petitioner is not entitled for bail.

31. The writ petition is disposed of accordingly.

32. Transmit the records to the Tribunal.

JUDGE **JUDGE**

Comparing Assistant