

Farida Khatun Vs Union Of India And 5 Ors

Court: Gauhati High Court

Date of Decision: June 10, 2020

Acts Referred: State Emblem Of India (Prohibition Of Improper Use) Act, 2005 " Section 11
 Foreigners Act, 1946 " Section 9
 Evidence Act, 1872 " Section 3

Hon'ble Judges: Prasanta Kumar Deka, J; Parthivjyoti Saikia, J

Bench: Division Bench

Advocate: S Bhuyan

Final Decision: Allowed

Judgement

P.K.Deka. J

1. Heard Mr. S. Bhuyan, learned counsel for the petitioner. Also heard Mr. A. Kalita, the learned Standing Counsel for the State, Foreigners Tribunal,

Ms. B. Das, the learned counsel for the Election Commission of India and Ms. G. Hazarika, on behalf of the learned Asstt. S. G. I. and NRC.

2. F. T. Case No. 222/15 & F. T. Case No. 27/16, were decided by a common opinion dated 03.04.2019, by the learned Member, Foreigners Tribunal,

4th, Nagaon at Juria against two separate references by the SP(Border) Nagaon, which were against the petitioner. The said common

opinion is under challenge in this writ petition.

3. On receipt of the notice, the petitioner filed her written statement and adduced evidence including herself as DW/OPW No. 1, her elder brother

Gias Uddin as DW/OPW No. 2 and one Samsul Hoque, Headmaster as DW/OPW No. 3. In the written statement it is stated that the petitioner was

born and brought up in the village Dhupaguri, Mouza- Batadrava, P.S.-Dhing, Dist- Nagaon, Assam and when she attained the age of puberty she was

married to Md. Samsul Hoque resident of village Mahguri, Mouza and P.S.-Juria, District " Nagaon, Assam. After marriage, she was residing with

her husband. The name of the father was Late Alal Uddin and the name of the mother was Jamena Khatun. Both were Indian nationals and their

names were recorded in various voter lists of No. 86 Dhing LAC including the voter list of the year 1971. The parents died about 12 years ago. She is

the only daughter and have five brothers whose names are mentioned in the written statement. The petitioner filed her evidence-in-chief by way of

affidavit supporting the claim so made in the written statement and exhibited the following documents as recorded in the impugned opinion:-

“(5) Ext. 1 is the certified copy of voter list of 1970, 86 No. Dhing Assam Legislative Assembly wherein Sl. No. 489, House No. 113, Taleb

Husen, S/O Ismail, age 55, in Sl. No. 490, House No. 113, Jamila Khatoon, W/O Jamaluddin, age 24 are voters.

(6) Ext. 2 is the certified copy of voter list of 1971, 86 Dhing Assam Legislative Assembly wherein Sl. No. 639, House No. 113, Alal, S/O Tale

Husen, age 26 is sole voter.

(7) Ext. 3 is the certified copy of voter list of 1975, 84 No. Batadrava Assam Legislative Assembly wherein Sl. No. 704, House No. 113, Jalal

Uddin, S/O Taleb, age 28, in Sl. No. 705, House No.- 113, Halal S/O Taleb, age 26, in Sl. No. 706, House No. 113, Jamela Khatoon, W/O Halal, age

29 are voters.

(8) Ext. 4 is certificate issued by the Headmaster, Dhupaguri J.B.School dtd. 20/02/2015 countersigned by Block Ele. Edn. Officer,

Batadrava, Nagaon, Assam certified that “Mussa Farida Khatoon, D/O Alal Uddin, Vill-Dhupguri, P.S. Dhing was reading in Dhupaguri J.B.L.P.

School. She has completed her education on 31/12/1991. She has passed class I. according to admission register her date of birth is 02/05/1983.

(9) Ext. 5 is Jamabandi for surveyed villages of vill-Nagaon/Nagaon/Dhing/Batadrava/Lat. No.3/Dhupguri gaon where Forida Khatoon D/O

Lt. Alal Uddin is a pattadar.

(10) Ext. 6 is Govt. Gaonburha certificate of Dhupaguri Gaon Dhakai Basti, Nagaon (Assam) certified that “Mussa Forida Khatoon D/O

Lt. Alal Uddin, vill-Dhupguri gaon, P.O-Dhupguri, P.S. Dhing, Mouza-Batadrava, Dist- Nagaon (Assam). The above mentioned person is known to

me well. She is an inhabitant of the said village. She got married with Md. Samsul Hoque of village Mahguri.

4. The Tribunal considered two documents out of the above six documents exhibited after identifying the documents only for establishing the lineage

between the petitioner and Alal Uddin, the projected father. The Tribunal discussed the said two documents as follows:-

“(14) The linkage documents marks ext. 4 is school certificate which is issued by Dhupaguri J.B.L.P.School. The proceedee also called for

school headmaster with school record. During the query of school document the school headmaster deposed that he donot bring the school certificate

issuing book and also deposed that the khata which he brings to the tribunal there is no mention from which year the admission record contains this

book and he also admitted that the certificate issued by him contain the state emblem of India at the top. This school certificate grave doubt about the

genuineness for one reason that as per the State Emblem of India (Regulation of use) Rules, 2007 framed by the Central Government in exercise of

the powers conferred by section 11 of the State Emblem of India (Prohibition of improper use) Act, 2005, more particularly Rule 5 thereof, use of the

official emblem is restricted to the authorities specified in schedule-I. Therefore it is evident that School Headmaster is not authorized to use the

national emblem so this certificate is not admissible in evidence.

Another reason is that the school headmaster admission register it is seen that proceedee's name is entered school Admission register in the year

1988 and the headmaster certified that the proceedee completed her education in the year 1991 after passing of class-I. If the proceedee takes

admission at school in the year 1988 then she may be completed class "I" in the year 1989. Therefore, this document grave doubt about genuineness.

(15) Another linkage document is ext. 6 is Govt. Gaonburha certificate of Dhupaguri gaon Dhakai Basti, Nagaon (Assam) certified that

"Mussa Forida Khatoon D/O Lt. Alal Uddin, vill-Dhupguri gaon, P.O- Dhupguri, P.S. Dhing, Mouza " Batadrava, Dist " Nagaon (Assam).

The above mentioned person is know to me well. She is an inhabitant of the said village. She got married with Md. Samsul Hoque of village

Mahguri. At the top of in this certificate embossed the state emblem of India. As per the Sate Emblem of India (Regulation of use) Rules, 2007

framed by the Central Government in exercise of the powers conferred by section 11 of the State Emblem of India (Prohibition of improper use) Act,

2005, more particularly Rule 5 thereof, use of the official emblem is restricted to the authorities specified in Schedule-I. Therefore it is evident that

Gaonburha is not authorized to use the national emblem so this certificate is not admissible in evidence.

In Rupjan Begum-Vs-Union of India(2008) 1 SCC 578, Supreme Court has categorically held that such a certificate by no stretch can be said to be

proof of citizenship. It is only link document which has to be supported by the other evidence.

(16) Therefore, if the above exhibited documents ext. 4 and ext. 6 are excluded, there is no linkage between the proceedee and Alal

Uddin whom she claims to her father.

5. After the said discussion, the learned Member of the Tribunal held that the petitioner failed to discharge her burden under section 9 of the

Foreigners Act, 1946 to prove that she is not a Foreigner but a citizen of India and passed the impugned opinion.

6. Mr. Bhuyan submits that the Tribunal instead of discussing the oral evidence of the witnesses which are on record, took into consideration the

school certificate and the one issued by the Government Gaonburah i.e. Ext. 4 and Ext. 6 and came to the conclusion that the petitioner failed to

establish her lineage with her projected father Alal Uddin. Referring to the various documents which were exhibited and annexed to this writ petition,

it is his contention that even if the findings on Ext. 4 and Ext.6 remains, the petitioner also exhibited the Jamabandi of a particular plot of land wherein

the petitioner being the daughter of deceased Alal Uddin is shown as one of the Pattadars. The said document which is exhibited as Ext. 5 ought to

have been considered along with the oral evidence on record. Having not done so, the impugned opinion is perverse and is liable to be interfered.

7. Mr. Kalita on the other hand, vehemently objected to the submission made by the learned counsel for the petitioner. It is his contention that once it

is established that the petitioner failed to establish her lineage with her projected father, there is no point in further taking into consideration the rest of

the documents nor the oral evidence. The evidence which the Tribunal considered are documentary one which has its probative value much higher

than the one of oral evidence. It is his further contention that though as per the procedure, all the exhibits are to be discussed by the Tribunal but, if the

Member came to a definite conclusion that leaving aside the two exhibits, there are no other documents in order to establish the lineage of the

petitioner with the projected father then it would not cause prejudice to the proceedee for non-consideration of rest of evidence on record.

8. We have given due consideration to the submissions made by the learned counsel. Section 9 of the Foreigners Act, 1946 stipulates that if any

question arises where any person is or is not a foreigner, the onus of proving that such person is not a foreigner, shall notwithstanding anything

contained in the Indian Evidence Act, 1872 lie upon such person. The aforesaid stipulation under Section 9 of the Act, 1946 makes the proceeding

before the Tribunal, a special one unlike a civil proceeding or a criminal proceeding where the principal burden lies on the plaintiff or the prosecution

side to get the relief. But it is the "proceedee" who is mandated to discharge the burden against whom the proceeding is initiated by the State

under the Citizenship Act, 1955.

9. The reference to the Tribunal by the SP (Border) is in respect of the status of the citizenship of the petitioner as to whether she is an illegal migrant

entering India (Assam) after 25.03.1971. Accordingly, the "facts in issue" before the tribunal is whether the petitioner is an Indian citizen and

whether she had been able to establish her citizenship prior to 25.03.1971. The term "facts in issue" is interpreted under Section 3 of the Indian

Evidence Act, 1872 which is reproduced herein below:-

"Facts in issue" - The expression "facts in issue" means and includes- any fact from which, either by itself or in connection with other facts,

the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.- Whenever, under the provisions of the law for the time being in force relating to Civil Procedure¹⁴, any Court records an issue of act,

the fact to be asserted or denied in the answer to such issue is a fact in issue.

10. The aforesaid interpretation itself gives the petitioner/proceedee a wider choice of evidence in order to prove her citizenship by any fact from

which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or

denied in the proceeding, necessarily follows. Accordingly, the petitioner has a right to rely various facts which must be relevant keeping in view the

“facts in issue”. Once the petitioner placed the evidence, the Tribunal is bound to consider each and every such evidence in order to decide its

relevancy and admissibility of the evidence. The search for relevancy and proof of contents thereof in the case of documentary evidence is not the

same. Relevancy relates to the “facts in issue” before the Tribunal which are undoubtedly the facts pleaded by the proceedee and the degree of

veracity that can be attached to it. So the said exercise requires discussions and reasoning and if there is no such discussion, then it would amount to

non consideration of a particular fact pleaded resulting violation of principle of natural justice affecting the proceedee. Once a document is held to be

relevant then comes the issue of proving the document and the contents thereof. While searching for the relevancy the Tribunal is bound to consider

the oral evidence also alongwith the documentary one as all facts cannot be proved only by documentary evidence.

11. On perusal of the impugned opinion, it is apparent that the petitioner relied six documents but the learned Member of the Tribunal failed to discuss

four of the documents after picking up only two exhibits as referred hereinabove. The Member of the Tribunal even failed to take note of the oral

evidence which are very much on record and the certified copies of which are annexed in this writ petition.

12. In view of the discussions made, we are of the considered opinion that there is an error apparent on the face of the impugned opinion as the

learned Member, failed to discuss the evidence on record and as such, we are inclined to allow this writ petition by setting aside the common

impugned opinion dated 03.04.2019 passed in F.T. Case No. 222/15 and F. T. Case No. 27/16 by the learned Member, Foreigners Tribunal, 4th

Nagaon at Juria which we accordingly do and remand the same with a direction to consider the evidence on record and pass an opinion as per the

law. It is clarified that we have not entered into the merit of the claim of the petitioner on the basis of the documents exhibited. The petitioner shall

appear along with the certified copy of this order before the Tribunal on 29.06.2020 whereafter, the Tribunal shall hear the petitioner after fixing a

date and pass appropriate opinion within a period of 30 (thirty) days from the date of appearance. It is specifically directed that no further evidence

shall be allowed to be adduced by the petitioner.

13. Accordingly, this writ petition stands allowed.