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

Case No. : WP(C)/2113/2023

MUSSTT. AFIA BEGUM
W/O MD. MAINUL ISLAM, D/O NASER ALI, R/O SIALMARI VILLAGE UNDER QUTAIYANI REVENUE VILLAGE, P.S.-NAGAON SADAR, DIST-NAGAON (ASSAM), PIN-782001

VERSUS

THE UNION OF INDIA AND 5 ORS.
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA, DEPARTMENT OF HOME AFFAIRS, NEW DELHI

2:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY
HOME AND POLITICAL (B) DEPARTMENT
DISPUR-781006

3:THE FOREIGNERS TRIBUNAL 1ST NAGAON
NAGAON
ASSAM
PIN-782001

4:THE SUPERINTENDENT OF POLICE (B)
NAGAON
ASSAM
PIN-782001

5:THE DEPUTY COMMISSIONER
NAGAON
ASSAM
PIN-782001

6:THE OFFICER-IN-CHARGE
P.S.-NAGAON (SADAR)

DIST-NAGAON
ASSAM
PIN-78200

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the petitioner : Ms. M.D. Medhi

Advocates for the respondents : Shri A.K. Dutta, CGC;
Shri A.I. Ali, SC ECI
Shri N. Kalita, ECI.
Ms. A. Verma, SC, Home Deptt. & NRC
Shri P. Sarma, Addl. Sr. GA, Assam.

Date on which judgment is reserved : **14.09.2026**

Date of pronouncement of judgment : **18.09.2026**

Whether the pronouncement is of the operative part of the judgment? : NA
Whether the full judgment has been pronounced? : Yes

JUDGMENT & ORDER

(S.K. Medhi, J.)

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 25.10.2021 passed by the learned Foreigners Tribunal No.1, Nagaon in F.T. Case No. 3279/2011. By the impugned judgment, the petitioner, who was the proceedee before the learned Tribunal, has been declared to be a foreigner post

25.03.1971.

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

(i) A reference was made by the Superintendent of Police (B), Nagaon, against the petitioner giving rise to the aforesaid F.T. Case No. 3279/2011.

(ii) As per requirement u/s 9 of the Foreigner's Act, 1946 to prove that the proceedee is not a foreigner, the petitioner had filed the written statement on 03.08.2016 along with certain documents and adduced evidence through 3 nos. of DWs.

(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 petitioner, as opposite party, had failed to discharge the burden cast upon her and accordingly, the opinion was rendered declaring the petitioner to be a foreign national post 25.03.1971.

3. We have heard Ms. M.D. Medhi, learned counsel for the petitioner. We have also heard Shri A.K. Dutta, learned CGC, Shri A.I. Ali, learned Standing Counsel, ECI assisted by Shri N. Kalita, learned counsel, Ms. A. Verma, learned Standing Counsel, Home Deptt. & NRC and Shri P. Sarma, learned Addl. Senior Government Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 17.10.2023.

4. Ms. Medhi, the learned counsel for the petitioner has submitted that the petitioner could prove her 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 petitioner to be a citizen of India. In this

regard, she has referred to the evidence adduced by the DWs and also the following documentary evidence

(i) Ext-1 - certified copy of the voters list of 1965

(ii) Ext-2 -certified copy of the voters list of 1970.

(iii) Ext-3 - certified copy of the voters list of 1975.

(iv) Ext-4 - certified copy of the voters list of 1993.

5. She has submitted that in the written statement, all material disclosures were made. Reliance has been made on the Voters List of 1965 containing the names of her parents. In the Voters List of 1970, the name of the father has been reflected. Further, reliance has been made on the Voters List of 1975 containing the names of her parents. So far as the petitioner is concerned, her name reflects in the Voters List of 1993 with her husband. Further, reliance has been made on a Voters List of 2017 containing her name. She has also relied upon a *jamabandi* wherein her name is written as daughter of Naser Ali. She has submitted that evidence was given by her as DW1, DW2 (her mother) and DW3 who is the Gaonburah.

6. The learned counsel for the petitioner has criticized the opinion which did not accept the *jamabandi* as relevant evidence as the same was not proved by competent authority. She submits that *jamabandi* is a public document and certified copy is acceptable as evidence. By referring to Section 77 of the Indian Evidence Act, she has submitted that there is no requirement to prove certified copies. In this connection, she has relied upon the case of ***Mazibar Miah vs. Union of India*** reported in ***2020 (5) GLT 395*** and another judgment dated 05.02.2019 passed by this Court in WP(C)/2108/2018 (***Dilip Biswas vs. Union***

of India).

7. The learned counsel accordingly submits that in view of the availability of the aforesaid materials, the impugned opinion could not have been rendered against the petitioner and therefore, the same requires interference.

8. *Per contra,* Ms. Verma, the learned Standing Counsel, Home Department & NRC has categorically refuted the stand taken on behalf of the petitioner. 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 petitioner 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.

9. The learned Standing Counsel has further submitted that the written statement is the basic document which is supposed to lay down the foundation of the case of the proceeding and the written statement in the instant case lacks details and is totally vague. There is no date or year of the birth of the petitioner and there are no details of the family members. In this connection, she has relied upon the following observations made by the Hon'ble Supreme Court in the case of ***Sarbananda Sonowal vs. Union of India*** reported

in***(2005) 5 SCC 665***:

> "*17. 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 (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Sometimes the place of birth of his grandparents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be 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.*"

10. She has submitted that the evidence adduced by the petitioner as DW1 and her projected mother as DW2 are not at all consistent. While the petitioner as DW1 had deposed that her father had expired 25 years ago, DW2, her mother had deposed that her husband died 7 years ago. She has also highlighted that reliance of the petitioner on certain documents are not acceptable as the name of the petitioner itself appears to be inconsistent. She has also submitted that the evidence of DW3 has been rightly discarded by the learned Tribunal.

11. In support of her submission that consistent discrepancies would give rise to grave doubts, she has relied upon a judgment dated 28.02.2018 passed by

this Court in WP(C)/4512/2016 [***Md. Fakharuddin vs. Union of India***].

12. She has also drawn the attention of this Court to the case of ***Nur Begum vs. Union of India and Ors.*** reported in ***2020 (3) GLT 347*** wherein certain observations regarding exercise of Certiorari jurisdiction have been made which read as follows:

> "*9. On the available materials, we find that the Tribunal rendered opinion/order upon due appreciation of the entire facts, evidence and documents brought on record. We find no infirmity in the findings and opinion recorded by the Tribunal. We would observe that the certiorari jurisdiction of the writ court being supervisory and not appellate jurisdiction, this Court would refrain from reviewing the findings of facts reached by the Tribunal. No case is made out that the impugned opinion/order was rendered without affording opportunity of hearing or in violation of the principles of natural justice and/or that it suffers from illegality on any ground of having been passed by placing reliance on evidence which is legally impermissible in law and/or that the Tribunal refused to admit admissible evidence and/or that the findings finds no support by any evidence at all. In other words, the petitioner has not been able to make out any case demonstrating any errors apparent on the face of the record to warrant interference of the impugned opinion."*

13. She has also relied upon the case of the Hon'ble Supreme Court in ***Rupajan Begum vs. Union of India*** reported in ***(2018) 1 SCC 579,*** wherein it has been laid down that a document has to be proved on two aspects, firstly, the authenticity of the same and secondly, the authenticity of the contents.To buttress her argument that there cannot be any variance between pleadings and evidence, she has relied upon the case of ***Momin Ali vs. Union of India*** reported in ***2017 (2) GLT 1076***.

14. The learned Standing Counsel has accordingly submitted that the writ petition be dismissed and the interim order be vacated.

15. The learned counsel for the rest of the respondents have supported the submissions advanced on behalf of the Home Deptt. & NRC and have prayed for dismissal of the writ petition. They have submitted 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. It is submitted that there is no procedural impropriety or illegality in the decision making process and therefore, the instant petition is liable to be dismissed. They have further submitted that the procedure adopted for adjudication of a reference by a Foreigners Tribunal is summary in nature and there is also a time frame for completion. It is also submitted that there is a question of national security by the unabated influx of foreign nationals and before any action is taken, the proceedee is given an opportunity whereby he or she is required to prove the citizenship through cogent, credible and acceptable evidence.

16. The rival submissions made have been duly considered and the materials placed before this Court including the records of the Tribunal have been carefully perused.

17. 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 hereinbelow-

"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."

18. 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 hereinbelow-

"*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."

19. 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.

20. 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."

21. In the instant case, the written statement is absolutely vague and apparently has not met the requirements as laid down by the Hon'ble Supreme Court in the case of ***Sarbananda Sonowal*** (supra). There is a requirement to disclose the following:

(i) her date of birth;

(ii) place of birth;

(iii) name of her parents;

(iv) their place of birth and citizenship.

22. Further, there may be a requirement to give the details of the

grandparents. It has been stated that all these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State.

23. We have perused the written statement which has been enclosed with the writ petition. We have found that the same is absolutely vague and does not conform to the requirement laid down by the Hon'ble Supreme Court in the case of ***Sarbananda Sonowal*** (supra). There is no mention of the date or even year of birth of the petitioner, there is no mention about the name of the mother of the petitioner, no mention about her siblings. With the written statement, only the Voters List of 1965 was enclosed and there were no other documents. For ready reference, the relevant paragraph of the written statement is extracted herein below:

> "*5. That the true state of affairs is that this answering opposite party is an Indian citizen by birth, not only the opposite party, her father Naser All is also Indian by birth. The Opp. Party was born in Kanchanpur under Saidarla village under Rupahihut P.S. in Nagaon District. She was born in Saidaria and married to Md. Mainul Islam @ Mainul Haque of Sialmari village under Sadar P.S. After marriage she was permanently resided at Sialmari village. Her father's name is appeared in the voter list of 1965 from Rupahihut LAC.*
>
> *The certified copies of the above mentioned documents are enclosed herewith."*

24. We have found that only in the stage of evidence, the petitioner as DW1 had included the names of her grandparents, parents and siblings. The name of her mother had been stated to be Rabia Begum. Further, in the cross-examination, she had deposed that she had forgotten the name of her grandmother.

25. So far as the evidence of the projected mother DW2 is concerned, she has

stated her name to be Rejia Khatoon whereas the petitioner had stated her name to be Rabia Begum. Further, the *jamabandi* was proved only by DW2 and not by the petitioner. It may be mentioned that the *jamabandi* was obtained on 29.06.2017 and was not even in existence when the written statement was filed or when the petitioner had deposed as DW1 on 22.03.2017. DW2 in her cross-examination has also admitted that the petitioner's name in the Voters List is of Village -Sialmari. We also find the approach of the learned Tribunal in discarding the evidence of DW3- the Gaonburah to be in accordance with law inasmuch as he did not come to the Tribunal when he was directed to produce his appointment which appears to have been made when he was only 12 years of age.

26. So far as the Voters Lists are concerned, while the Voters List of 1965 contains the names of the projected parents, in the list of 1970, the name of the mother is not there along with the projected father. In the Voters List of 1975, the mother has been shown to be the wife of one Alim Uddin and the village also differs. We have noticed that there is no mention of any shifting. After 1975, there is not a single Voters List of her projected parents, not to talk about any common Voters List with the petitioner. The Voters List in which the name of the petitioner figures is of the year 1993 with her husband and her name is written as Asia Khatun of Village - Kotayoni. The next Voters List in which the petitioner claims her name to be there is after a long and inordinate gap of more than two decades which is of the year 2017 and the name is Afia Begum of Village – Sialmari.

27. So far as the *jamabandi* is concerned, there is neither any mention in the written statement nor in the evidence of the petitioner as DW1 and the same

has been introduced by DW2. While the learned counsel may be correct in contending that the *jamabandi* is a public document, a minute perusal of the same would show that the mother of the petitioner Rejia has been shown to be the daughter of Naser. Therefore, the only so-called documentary evidence in the form of *jamabandi* is also wholly unreliable. We also find force in the submission advanced by the learned Standing Counsel that the evidence adduced by DW1 and DW2 are grossly inconsistent. While the petitioner as DW1 in her cross-examination had deposed that the father had expired 25 years ago, DW2, her mother had deposed that her husband had expired 7 years ago.

28. In the case of ***Bijoy Das Vs.UOI*** reported in ***2018 (3) GLT 118,*** this Court has laid down that in proceedings of this nature, oral evidence alone would not be enough and such evidence is required to be supported and corroborated by documentary evidence and contemporaneous records. However, in this case, the same has not been able to be done by the petitioner.

29. In the case of ***Momin Ali*** (supra), it has been laid down that variance between pleadings and evidence is not permissible. For ready reference, the relevant observations are extracted herein below:

> "***12.*** *This written statement of the petitioner was wholly inadequate and did not disclose any material facts. As noticed above, it was the allegation of the State that petitioner was a foreigner. Therefore, as per mandate of Section 9 of the Foreigners Act, 1946, it was the bounden duty of the petitioner to have disclosed all material facts which were specifically within his knowledge in the written statement but he did not do so. Petitioner neither mentioned his date of birth nor his age. He was silent regarding the name of his mother and identity of his grandparents - both paternal and maternal. He did not mention anything about his brothers and sisters or about his marital status. On the basis of such a written statement, it cannot be said that petitioner had stated anything substantial to show that he was not a foreigner but a citizen of India.*
>
> ***13.*** *It is a settled proposition of law that where a party fails to set up a case in his pleadings, he would be debarred from adducing evidence in his support at*

the stage of trial. As a matter of principle, variance between pleading and proof is not permissible."

30. Though the learned counsel for the petitioner had contended that ***Momin Ali*** judgment being delivered after the date of the impugned opinion and would not be binding, we are of the view that such contention cannot be countenanced. It is trite that all judgments pronounced by a Constitutional Court on a point of law would have retrospective effect unless specifically mentioned to be otherwise. We are of the opinion that the petitioner, as proceedee had failed to discharge her burden to prove her citizenship.

31. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 25.10.2021 passed by the learned Foreigners Tribunal no.1, Nagaon in F.T. Case No. 3279/2011 does not call for any interference.

32. The writ petition accordingly stands dismissed. Interim order passed earlier stands vacated. The actions consequent upon the opinion rendered by the learned Tribunal would follow in accordance with law.

33. The records be returned to the concerned Foreigners Tribunal forthwith, along with a copy of this order.

JUDGE **JUDGE**

Comparing Assistant