GAHC010081242023

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

Case No. : WP(C)/2533/2023

CHAINA KHATUN @ SAINA KHATUN
W/O- MD. ATABULLAH SHEIKH,
R/O- VILLAGE SRI SURYA, DASBHUJA,
P.S- MORNOI, DIST- GOALPARA, ASSAM

VERSUS

THE UNION OF INDIA AND 5 ORS
REP. BY THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY OF HOME AFFAIRS,
NEW DELHI- 110001.

2:THE ELECTION COMMISSION OF INDIA
REP. BY THE CHIEF ELECTION COMMISSIONER OF INDIA
NIRVACHAN BHAWAN
ASHOKA ROAD
NEW DELHI

3:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI-6

4:THE DIRECTOR GENERAL OF POLICE
ASSAM
ULUBARI
GUWAHATI-07

5:THE DEPUTY COMMISSIONER
GOALPARA

ASSAM

6:THE SUPERINTENDENT OF POLICE (B)
GOALPARA
ASSA

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the petitioner : Shri D. Baruah

Advocates for the respondents : Shri A.K. Dutta, CGC;
Shri A.I. Ali, SC, ECI.
Ms. A. Verma, SC, Home Deptt. & NRC.
Ms. R.B. Bora, GA, Assam

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

Date of pronouncement of judgment : **29.09.2026**

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 28.02.2023 passed by the learned Foreigners Tribunal no. 4, Goalpara in F.T. Case No. F.T.

(G-4) M/519/2018 arising out of Ref. F.T. Case No. 109/2009. 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), Goalpara District, against the petitioner giving rise to the aforesaid F.T. Case No. F.T. (G-4) M/519/2018 arising out of Ref. F.T. Case No. 109/2009.

(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 05.03.2020 along with certain documents and adduced evidence through 4 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 Shri D. Baruah, learned counsel for the petitioner. We have also heard Shri A.K. Dutta, learned CGC, Shri A.I. Ali, learned Standing Counsel, Election Commission of India, Ms. A. Verma, learned Standing Counsel, Home Deptt. & NRC and Ms. R.B. Bora, learned GA, Assam. We have also carefully examined the records which were requisitioned vide an order dated 17.10.2023.

4. Shri Baruah, 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 held the petitioner to be a citizen of India. In this regard, he has referred to the evidence adduced by 4 nos. of DWs and also the following documentary evidence.

(i) Ext-A Certified copy of the Voter List of 1966.

(ii) Ext-B Certified copy of the Voter List of 1970

(iii) Ext-C Certified copy of the Voter List of 1989.

(iv) Ext-D Certified copy of the Voter List of 1989.

(v) Ext-E Certified copy of the Voter List of 1997.

(vi) Ext-F Certified copy of the Voter List of 2005.

(vii) Ext-G Original copy of electoral photo ID Card.

(viii) Ext-H Original copy of certificate issued by Secretary, Sri Suryagiri G.P.

5. The learned counsel for the petitioner has submitted that in the written statement, all material disclosures were made. The petitioner has relied upon Voters Lists of 1966, 1970 and 1989 containing the name of her parents. It is clarified that so far as the Voters List of the year 1989 is concerned, the same is of a different village as in the meantime, the Barpeta District was bifurcated from the Kamrup District. It is also submitted that in the Voters List of 1989, along with the names of the parents, the name of the brother of the petitioner also figures. Voters Lists of the years, 1997, 2005 and 2018 have also been referred which are enclosed to the writ petition. Reference has also been made to a Voters List of 1996 claiming that, the name of the petitioner figures. Further reliance has been made on Voters List of 1997 containing the name of

the petitioner with her husband and another Voters List of 2005 containing the name of the petitioner with her husband. Reliance has also been placed on a certificate dated 06.11.1993 issued by the President of the Gaon Panchayat. Similar reliance has also been placed in a Gaonburah Certificate. It is contended that from 1996, the name of the petitioner has been reflected along with her husband which however was shown as Joyna Khatun.

6. 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.

7. *Per contra,* Ms. Verma, the learned Standing Counsel, Home Department 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.

8. 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.*"

9. She has submitted that no link could be established by any document by the petitioner with her projected father. It is submitted that even otherwise, there are inconsistencies in the Voters List containing the names of the projected parents of the petitioner. While the Voters Lists of 1966 and 1970 are

one village, that of the year, 1989 is of another village. She has also pointed out that the Gaon Panchayat Certificate dated 06.11.1993 enclosed to the writ petition was never produced before the learned Tribunal and the one which was produced as Ext. H is wholly different which in any case was not proved by the Issuing Authority by producing the contemporaneous records. She has relied upon the case of ***Rupajan Begum vs. Union of India*** reported in ***(2018) 1 SCC 579.***

10. In support of her submission that a certificate has to be proved from contemporaneous records, the learned Standing Counsel has relied upon the judgment passed in the case of ***Romila Khatun vs. Union of India*** reported in ***2018 (4) GLT 373*** and the following observations have been pressed into service.

> "***20.*** *It is trite that documentary evidence would have to be proved on the basis of the record and the contemporaneous record must substantiate and prove the contents of the document. Proof of document is one thing and proof of contents is another. Not only the document would have to be proved but its contents would also have to be proved. That apart, the truthfulness of the contents of the document would also have to be established from the record. A document or the contents of the document cannot be proved on the basis of personal knowledge. …"*

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

12. 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.

13. 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.

14. 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."

15. 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 are 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."*

16. 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.

17. 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.*
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> *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.*
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> *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."

18. 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.

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.

19. So far as the Voters Lists are concerned, those of the years 1966, 1970 and 1989 contain the names of the projected parents and in the list of the year 1989, there is also the name of the projected brother, Sahjahan Ali. Those Voters Lists would not be of any relevance unless the petitioner is able to

establish a link with her projected father. This is necessary as the year of birth of the petitioner appears to be 1972 which is later than the cut-off date of March, 1971. It may be mentioned that the petitioner has not stated her date of birth in the written statement filed on 05.03.2020 and the year has only been deduced. Though a Voters List of 1997 is referred containing the names of the projected parents and brother of the petitioner, the same is not a certified copy and therefore, would not be admissible. Even, if the technical aspect is overlooked for a moment, the same would not be relevant as no link has been able to be established with the petitioner. We have also noted that while the Voters Lists of 1966 and 1970 pertaining to the projected parents are of one village, that of the year, 1989 is of another village. This Court is unable to accept the submission that the same was due to bifurcation of the Barpeta District. Though a district may be bifurcated, the village will not change.

20. The petitioner claims to be have been married in 1986 and it is contended that from 1996, her name has been reflected along with her husband in the Voters List. Firstly, the Voters List of 1996 is an uncertified copy and was not proved and therefore, would not be admissible. Nevertheless, a perusal of the same would show the name as Joyna Khatun, wife of Atabullah Sheikh. On the other hand, the name of the petitioner is Chaina Khatun @ Saina Khatun. Though the Voters List of 1997 was proved, strangely, the names reflected are Atubullah and Joyna Khatun. Suddenly, in the Voters List of the year 2005, the name appears as Chaina Khatun along with Atabullah Sheikh. The inconsistency in the name of the petitioner is not minor which can be overlooked but is entirely different and there is no explanation.

21. So far as the certificate dated 06.11.1993 issued by the President of the Gaon Panchayat is concerned (page 46-47 of the writ petition), the same was

not even produced before the learned Tribunal and therefore, would be wholly inadmissible which could be relied upon. This Court, however on perusal of the original records has found another Gaon Panchayat Certificate dated 28.05.2015 (Ext. H). The said certificate was however not proved by the Issuing Authority which would further require corroboration by production of the contemporaneous records. In any case, the evidentiary value of a Gaon Panchayat certificate is even otherwise inconsequential as laid down by the Hon'ble Supreme Court in the case of ***Rupajan Begum vs. Union of India*** reported in ***(2018) 1 SCC 571.*** Further, the learned Tribunal has made due discussion about the said certificate and has rightly come to the conclusion that the primary purpose is for the NRC. The relevant observations of the learned Tribunal are extracted herein below:

> "*From the close analysis of the evidence of the issuing authority of 'Exhibit H' i.e. Secretary of the said Gaon Panchayat, it appears that the certificate was not issued in a proper manner. At the time of cross examination of the said witness has clearly uttered that the 'Exhibit H' certificate was issued for the purpose of updating NRC. The certificate was issued on the basis of the application of Saina Khatun and the documents attached with the application vide voter Identity Card (in the name of Saina Khatun), voter list of 2015 in the name of Bahejuddin Sarkar, voter list of 2015 in the name of Atabulla Sk., Legacy Data of 1966 in the name of Bahejuddin Sarkar. No document of her marriage was submitted along with the application. The application was filed on dated 28/05/2015 and the certificate was issued on dated 28/05/2015. There is no seal and signature of receiving the application at their office available in the application. It clearly manifests the fact that the 'Exhibit H' is absolutely unsafe to be accepted as a private document without any reasonable and credible enquiry and investigation being carried out while issuing the same. That, the 'Exhibit H' which is produced by the proceedee cannot be relied upon and raises serious doubt about the genuineness of the proceedee as far as her Indian citizenship is concern."*

22. As regards the oral evidence is concerned, the petitioner as DW1 could not produce a single document which is cogent and trustworthy which inspires confidence to establish a link with her father. The other witnesses are the projected mother, one neighbour and one uncle. The projected mother did not have a single document to connect her with the petitioner (proceedee). The oral evidence of the neighbour and the projected uncle could not by itself be sufficient as in matters of the present nature, oral evidence in absence of relevant and trustworthy documents would not be significant. The said position is explained by this Court in the decision of ***Nur Begum vs. Union of India and Ors.*** reported in ***2020 (3) GLT 347*** and the relevant observations are as follows:

> ***6.*** **"***… Oral testimony of DW-2 alone, sans any documentary support, cannot be treated as sufficient to prove linkage or help the cause of the petitioner. Surprisingly, the petitioner failed to produce a single voter list in her name even until the age of 50 years. We would reiterate that in a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 the evidentiary value of oral testimony, without support of documentary evidence, is wholly insignificant. Oral testimony alone is no proof of citizenship. …"*

23. 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.We are of the view that the petitioner as proceedee had failed to discharge her burden to prove her citizenship.

24. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 28.02.2023 passed by the learned Foreigners

Tribunal no. 4, Goalpara in F.T. Case No. F.T. (G-4) M/519/2018 arising out of Ref. F.T. Case No. 109/2009 does not call for any interference.

25. 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.

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

JUDGE **JUDGE**

Comparing Assistant