GAHC010147252019

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

Case No. : WP(C)/4650/2019

RAHIMA KHATUN
W/O- MD. SAHAB UDDIN, R/O- VILL- UDMARI, P.O. SINGARI MADRASSA,
P.S. JURIA DIST- NAGAON, ASSAM

VERSUS

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

2:THE STATE OF ASSAM
REP. BY THE COMM. AND SECY TO THE GOVT. OF ASSAM
DEPTT. OF HOME
DISPUR
DIST- KAMRUP (M)
GHY-1

3:THE DY. COMMISSIONER
NAGAON
ASSAM

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

5:ELECTION COMMISSION OF INDIA
NIRBACHAN SADAN
ASHOKA ROAD
NEW DELHI- 110001

6:STATE COORDINATOR NATIONAL REGISTRAR OF CITIZENS
G.S.ROAD
BHANGAGARH
GHY-

Advocate for the Petitioner : MR S CHAKRABORTY, MR. R SARKAR

Advocate for the Respondent : ASSTT.S.G.I., SC, NRC,SC, ELECTION COMMISSION.,SC, F.T

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 S. Chakraborty, Advocate.
Advocates for the respondents	:	Shri P. S. Bhattacharyya, CGC. Ms. A. Verma, SC- Home Deptt & NRC, Shri P. Sarma, Addl. Senior GA, Assam; Shri A. I. Ali, SC, ECI.

Date on which judgment is reserved : **17.09.2026**

Date of pronouncement of judgment : **14.10.2026**

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 20.12.2018

passed by the learned Member, Foreigners Tribunal-4th, Nagaon, Juria in FT Case No. 76/2016 [Police Reference D/C No. 1310/98]. 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 District, against the petitioner giving rise to the aforesaid FT Case No. 76/2016 [Police Reference D/C No. 1310/98].

(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 01.10.2013 along with certain documents and adduced evidence through 3 (three) 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 S. Chakraborty, learned counsel for the petitioner. We have also heard Shri K. Kalita, learned Counsel representing Shri P. S. Bhattacharyya, learned CGC; Ms. A. Verma, learned Standing Counsel, Home Department & NRC; Shri A. I. Ali, learned Standing Counsel, ECI and Shri P. Sarma, learned Addl. Senior Govt. Advocate, Assam. We have also carefully examined the records which were requisitioned vide an order dated 30.08.2019.

4. Shri Chakraborty, 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, he has referred to the evidence adduced by the petitioner as DW1 and two other witnesses as DW2 and DW3 and also certain documentary evidence including Voter List of 1965 (Ext. 1), Voter List of 1970 (Ext. 2), Jamabandi Copy and Gaonburah Certificate.

5. The learned counsel for the petitioner has submitted that in the written statement, all material disclosures were made. Reliance has been placed on Voters Lists of the years 1965 and 1970 containing the names of her grandparents, father and uncle. In the Voters List of 1970, the name of the mother is also there. By referring to the averments made in paragraph 5 of the written statement, the learned counsel has submitted that after marriage, the name of the petitioner was enlisted in the Voters List of the year 1997 which however is with her husband. Reliance has also been placed on the Certificate dated 02.06.2016 issued by the Gaonburah, who had also deposed in the proceeding as DW3.

6. It is further submitted that though there were 3 (three) nos. of witnesses, the deposition of DW2 was not discussed at all. It is submitted that DW2 is the elder brother of the petitioner and his evidence was important and clinching and therefore, failure to take into account such deposition would vitiate the entire opinion.

7. The learned counsel for the petitioner has also relied upon a School Certificate dated 31.12.2013 to prove the citizenship.

8. 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.

9. *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.

10. 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 proceedee and the written statement in the instant case is absolutely vague. There are no names of the father, mother, siblings and the date or year of birth. It is not pleaded that the petitioner had attended any school. Under those circumstances, she contends that the evidence of the DW2 – the projected brother cannot be held to be relevant and further, the School Certificate dated 31.12.2013 cannot be taken to be a valid piece of evidence. 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***:

> "*26. 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.*"

11. She has submitted that that there is not a single document which could be produced and proved by the petitioner to establish her citizenship and though certain documents prior to the cut-off date have been proved by contending that those contain the names of her parents, no documents worth its name has been able to be produced establishing a link with the projected parents. She further submits that the first Voters List in which the name of the petitioner figures is of the year 1997 when she was 28 years of age and yet she could not produce any Voters List of previous years containing her name.

12. In support of her submission that the written statement is required to contain all the details, she has relied upon the case of ***Rashminara Begum Vs. UoI & Ors.*** reported in ***2017 (4) GLT 346*** and the following observations are pressed into service-

> "*25. Written statement is the basic statement of defence of a proceedee*

before the Foreigners Tribunal. Keeping in mind the mandate of Section 9 of the Foreigners Act,1946, it is incumbent upon the proceedee to disclose at the first instance itself i.e., in his written statement all relevant facts specially within his knowledge having a material bearing on his claim to citizenship of India. Material facts pleaded in the written statement are thereafter required to be proved by adducing cogent and reliable evidence. It is also trite that a party cannot traverse beyond the pleadings made in the written statement."

13. By contending that there cannot be any variance between pleadings and evidence, the learned Standing Counsel has relied upon the case of ***Momin Ali vs. Union of India & Ors.*** reported in ***2017 (2) GLT 1076*** and the following observations have been pressed into service:

"*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."

14. She has also submitted that the oral evidence of the projected brother as DW2, in absence of any documentary link would be of no help and in this connection, she has relied upon the following observations of the judgment dated 21.11.2019 passed by a Coordinate Bench in a case of ***Asia Khatoon vs. Union of India*** [WP(C)/4020/2017] which are as follows:

> "*The statement of DW-2 i.e. Amir Uddin, who claimed to be the father of the petitioner, cannot be relied upon in the absence of any documents showing his relationship to the petitioner. In this we would observe 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. The evidence of DW-2, thus, falls short of being considered as cogent, reliable and admissible evidence, so much so, to establish linkage of the petitioner to him*"

15. By contending that the certificate of the Gaonburah has been rightly rejected by the learned Tribunal, she has relied upon the case of ***Romila Khatun vs. Union of India*** reported in ***2018 (4) GLT 373***

16. The learned Standing Counsel has accordingly submitted that no grounds for interference with the impugned opinion been made out, the writ petition be dismissed and the interim order be vacated.

17. The learned counsel for the other 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.

18. 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.

19. 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."*

20. 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 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."

21. 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.

22. 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."

23. 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) date of birth;

(ii) place of birth;

(iii) name of the 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. The petitioner has not named her parents, siblings and there is no date of birth mentioned.

24. So far as the documentary evidence in the form of the Voters Lists of 1965 and 1970 are concerned, though the same contain the names of the projected grandparents and parents of the petitioner, unless a link is able to be established with them by the petitioner, those documents would be irrelevant as the same did not contain the name of the petitioner. It is contended that the name of the petitioner appeared for the first time in the Voters List of the year 1997 along with her husband. However, from the age disclosed in the affidavit accompanying the writ petition, in 1997, the age of the petitioner appears to be 28 years. Therefore, it would be imperative on the part of the petitioner to explain as to why her name was not figuring in the Voters List prior to 1997 as the age of exercising franchise at that time was 21 years.

25. So far as the Certificate dated 02.06.2016 issued by the Gaonburah and the deposition made by him as DW3 are concerned, the learned Tribunal had discarded the same for use of the State Emblem. We are of the view that though the use of the State Emblem on the certificate is not authorized by law, that by itself may not *per se* make the contents of the document wholly inadmissible. Such contents are to be examined by applying the principles governing the field. The Gaonburah as DW3 though had proved the Certificate, there was no contemporaneous documents or records which were produced and proved on the basis of which, the certificate was issued. Therefore, the contention advanced on behalf of the petitioner would not have any legs to stand. We find force in the contention advanced by the respondents who have relied upon the case ***Romila Khatun*** (supra) on the aspect of the proof of a document, namely Gaonburah Certificate. We endorse the observations made in the said case which are as follows:

"*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. In so far Ext-F document vis-a-vis the petitioner is concerned, Nimai Miah was a resident of Kukarpar village. Petitioner after her marriage with Saijuddin had left the said village and started residing at village Hirajani under Hajo Police Station. When the petitioner got married and since when she had been residing at village - Hirajani has not come on evidence. When the petitioner was not a resident of village - Kukarpar on the date when the Gaonburah had issued the certificate, Gaonburah could have issued the certificate only on the basis of the record maintained in his office. We also do not know what happened to Nimai Miah after his name appeared in one of the documents i.e., voters list of 1965 (Ext-C). Nimai Miah was 30 years of age in 1965 and in the ordinary course, he would have been around much beyond 25.03.1971. From the voters list of 1997 (Ext-A), we find that Ramila Bibi was 20 years of age. This is the first time the age of the petitioner has come on record. If Ramila Bibi was 20 years of age in 1997, she would have born in the year 1977, which means that her father ought to have been alive atleast till 1976. Therefore, on the basis of the testimony of Md. Ramesh Ali, as discussed above, it cannot be said that Ext-F was proved. Besides, there is unauthorised use of the State Emblem of India by the Gaoburah which has rendered Ext-F inadmissible in evidence. Under the State Emblem of India (Regulation of Use) Rules, 2007, Gaonburah is not authorized to use the State Emblem of India in any manner. If Ext-F is excluded from consideration, there is nothing on record to establish that Ramila Bibi or Ramila Khatun was the daughter of Nimai Miah of Ext-C (1965).*"

26. Though it is submitted that the deposition of DW2 has not been discussed in the impugned opinion, a bare perusal of the same would show that the learned Tribunal had duly considered the aforesaid deposition in the impugned opinion and has rejected the same. While endorsing the finding of the learned Tribunal on the deposition of DW2, we would like to add that mere oral evidence of DW2 would not be sustainable in absence of any documentary evidence linking the said DW2 with the petitioner (proceedee). In the instant case, there

is not a single document wherein the name of DW2 appears along with the petitioner.

27. So far as the School Certificate dated 31.12.2013 is concerned, though the same has not been enclosed to the writ petition, the same could be found in page 41 of the TCR. The Certificate states that the petitioner had left school in the year 1979. Apart from the aspect of the inordinate and unexplained delay of more than 3 decades in obtaining such a certificate, the same was not proved by the school authorities. In that view of the matter, the certificate cannot be treated as a relevant piece of evidence.

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

30. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 20.12.2018 passed by the learned Member, Foreigners Tribunal, 4th, Nagaon, Juria in FT Case No. 76/2016 [Police Reference D/C No. 1310/98] does not call for any interference.

31. 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.

32. The records of the learned Tribunal be returned forthwith, along with a copy of this order.

JUDGE **JUDGE**

Comparing Assistant