GAHC010267402019

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

Case No. : WP(C)/9070/2019

JIARUL SHEIKH
S/O- SAMEJ UDDIN, R/O- VILL. DAYARCHAR, P.S. SOUTH SALMARA, DIST. SOUTH SALMARA, ASSAM, PIN- 783135.

VERSUS

THE UNION OF INDIA AND 6 ORS.
REP. BY THE SECY., MINISTRY OF HOME AFFAIRS, GOVT. OF INDIA, SHASTRI BHAWAN, NEW DELHI. PIN- 110001.

2:THE STATE OF ASSAM
THROUGH THE ADDL. CHIEF SECY.
HOME AND POLITICAL DEPTT.
GOVT. OF ASSAM
ASSAM SECRETARIAT
GHY.
ASSAM. PIN- 781006.

3:THE DY. COMMISSIONER OF POLICE (BORDER)
GUWAHATI
ASSAM.

4:THE OFFICER-IN-CHARGE
AZARA POLICE STATION
AZARA
GHY.
ASSAM
PIN- 781017.

5:THE LEARNED MEMBER
FOREIGNERS TRIBUNAL NO. 4
KAMRUP(M)
HEDAYATPUR
GHY.

ASSAM
PIN- 781003.

6:THE STATE COORDINATOR
O/O THE STATE COORDINATOR
NRC
ASSAM
1ST FLOOR
ACHYUT PLAZA
GS ROAD
BHANGAGARH
GHY.
ASSAM
PIN- 781005.

7:THE ELECTION COMMISSIONER
ELECTION COMMISSION OF INDIA
NIRVACHAN SADAN
ASHOKA RD
PANDIT PANT MARG AREA
SANSAD MARG AREA
NEW DELHI
DELHI. PIN- 110001

Advocate for the Petitioner : MS. D GHOSH, MR SAURADEEP DEY,MS N DEKA

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

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. D. Ghosh, Advocate

Advocates for the respondents : Ms. L. Devi, CGC;
Shri A.I. Ali, SC, ECI,
Shri N. Kalita, ECI
Shri G. Sarma, SC, Home Deptt. & NRC.
Ms. R.B. Bora, GA, Assam.

Date on which judgment is reserved : **16.09.2026**

Date of pronouncement of judgment : **22.09.2026**

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 30.04.2019 passed by the learned Foreigners Tribunal no.4th, Kamrup (M) in F.T. Case No. 1078/2017. 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), Kamrup (M) District, against the petitioner giving rise to the aforesaid F.T. Case No. 1078/2017.

(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 03.08.2018 along with certain documents and adduced evidence through 2 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 him and accordingly, the opinion was rendered declaring the petitioner to be a foreign national post 25.03.1971.

3. We have heard Ms. D. Ghosh, learned counsel for the petitioner. We have also heard Ms. L. Devi, learned CGC, Shri A.I. Ali, learned Standing Counsel, ECI assisted by Shri N. Kalita, learned counsel, Shri G. Sarma, 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 04.06.2020.

4. Ms. Ghosh, the learned counsel for the petitioner has submitted that the petitioner could prove his 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 his evidence adduced as DW1 and his father as DW2 and also the following documentary evidence.

(i) Ext-1 - Certified copy of the Voter List of 1966

(ii) Ext-2 - Certified copy of the Voter List of 1970.

(iii) Ext-3 - Final Khatian dated 18.01.1962

(iv) Ext-4 - Final Khatian dated 25.02.1973

(v) Ext-5–certified copy of Voters List of 1989

(vi) Ext-6 - certified copy of Voters List of 2005.

(vii) Ext-7 - certified copy of Voters List of 2010

(viii) Ext-8 - certified copy of Voters List of 2015

(ix) Ext-9 - EPIC.

5. The learned counsel has submitted that in the written statement, all material disclosures were made. Reliance has been placed on a Voters Lists of 1966 and 1970 containing the names of his grandparents. The petitioner has also relied upon two khatians, one in the name of his great grandfather, Kismatullah and the other in the name of his grandfather, Bholey Mandal. He has also relied upon Voters List of the year 1989 containing the names of his parents. The subsequent Voters Lists of 2005 and 2010 have been relied upon containing the name of the petitioner along with his father. He has referred to the deposition of the petitioner as DW1 and by his father as DW2. She has also referred to Voters Lists of 1970, 1975, 1979, 1985, 1989, 2005 and 2011 which have been enclosed to the writ petition.

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,* Shri Sarma, the learned Standing Counsel, Home Department has categorically refuted the stand taken on behalf of the petitioner. He 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. He 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 adequate details. There is no date of the birth of the petitioner. In this connection, he 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.*"

9. So far as the Voters List are concerned, he has highlighted that there is a

huge gap of about 2 (two) decades from 1970 to 1989 and again another gap in the Voters Lists from 1989 to 2005 which are not explained. He has submitted that the Gaon Panchayat certificate has not been proved and therefore, would not be relevant and further, the EPIC would not have any evidentiary value to prove citizenship as has been held by this Court. He has submitted that the petitioner has failed to establish any link between the projected parents and the projected grandparents. He submits that such link is essential inasmuch as, the first Voters List containing the name of the projected father is of 1989, i.e., post 1971 and therefore, the question of citizenship of the father may arise.

10. By submitting that mere presence of name in the Voters List would not establish citizenship, the learned Standing Counsel has relied upon the case of ***Aziz Miah vs. Union of India*** reported in ***2023 (4) GLT 246***. He has also submitted that oral evidence by itself would not be sufficient to establish citizenship in absence of any documentary support and in this regard he has placed reliance upon the case of ***Nur Begum vs. Union of India*** reported in ***2020(3) GLT 347*** as well as ***Asia Khatoon vs. Union of India*** [WP(C)/4020/2017].

11. The case of ***Nur Begum*** (supra) has also been relied upon to buttress the submission that in exercise of Certiorari jurisdiction, the nature is only supervisory and not appellate. The following observations have been pressed into service:

> "*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."

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

13. 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.

14. 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.

15. 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."

16. 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."

17. 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.

18. 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."

19. 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) his date of birth;
(ii) place of birth;
(iii) name of his parents;
(iv) their place of birth and citizenship.

20. 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.

21. So far as the Voters Lists of 1966 and 1970 are concerned containing the names of the projected grandparents, the same would at best establish the presence of the grandparents on Indian soil during the said period and would not serve as a link document. There is however an inordinate and unexplained gap of almost two decades with the next Voters List which has been relied upon which is of the year 1989. The said Voters List is projected to have contained the names of the parents of the petitioner. The same would not serve as a link to establish that the predecessors of the petitioner were on Indian soil prior to the cut-off date. There is no link established between the projected father and the projected grandfather. It also appears that in 1989, the age of the projected father has been shown to be 28 years. There is no explanation as to why his name was not enlisted in previous Voters List. Though the Voters Lists of 2005 and 2010 have been relied upon containing the name of the petitioner with his

projected father, those will not prove the citizenship of the petitioner.

22. This Court finds force in the contention advanced by the learned Standing Counsel who by citing the case of ***Aziz Miah*** (supra) that mere enrolment of name in the Voters List would not prove citizenship. The following observations have been referred:

> "*15. We are constrained to observe that a mere claim by a suspected person by referring to a voters' list claiming a person therein to be his father is not a conclusive proof and that by doing so, the person has discharged the burden that he is not a foreigner. This is because there is also a further requirement to prove that the person who is reflected in the voters' list relied upon is actually the father of the person who makes the claim the claim will have to be substantiated with further material/materials acceptable in law.*"

23. So far as reference to the Voters Lists of 1970, 1975, 1979, 1985, 1989, 2005 and 2011 which have been enclosed to the writ petition is concerned, upon a bare perusal of the same, those have been found to be uncertified photocopies of certain extracts which cannot be taken cognizance of. Apart from the aspect that under the certiorari jurisdiction exercised by this Court, such a recourse is not available, even a lenient view cannot be taken to give any cognizance to such documents as the petitioner has not made even an endeavor to obtain certified copies of the said Voters List in this long period. It may be mentioned that the writ petition instituted in the year, 2019 is itself pending for the last about 7 (seven) years and so such endeavour has been made in this long period.

24. We have also noted that the petitioner in his cross examination as DW1 had deposed that his grandfather Bholey Mandal had died in the year 1995 and strangely, after 1970, there is not a single Voters List till 1995 which could have served as a link with the father of the petitioner. He had also deposed that his

father was about 57 years. He has also admitted that the exhibits were not proved by the Issuing Authorities.

25. So far as DW2, the projected father is concerned, he had stated that the mother of the petitioner had expired 14 years back and yet after the Voters List of 1989, her name does not figure in the later Voters List. It may be mentioned that such deposition was recorded on 11.12.2018.

26. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 30.04.2019 passed by the learned Foreigners Tribunal no.4th, Kamrup (M) in F.T. Case No. 1078/2017 does not call for any interference.

27. 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.

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

JUDGE JUDGE

Comparing Assistant