GAHC010304742019

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

Case No. : WP(C)/9197/2019

JAMIR HUSSAIN
S/O- ABDUL MANNAN @ ABDUL MANNAS, VILL. SILPUKHURI, P.S. MIKIRBHETA, DIST.- MORIGAON (ASSAM), PIN- 782123.

VERSUS

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

2:THE STATE OF ASSAM
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY.-06.

3:THE DY. COMMISSIONER
MORIGAON
DIST.- MORIGAON
ASSAM
PIN- 782127.

4:THE SUPDT. OF POLICE (B)
MORIGAON
ASSAM
PIN- 782127.

5:THE ELECTION COMMISSION OF INDIA
NEW DELHI
110001.

6:THE STATE COORDINATOR
NATIONAL REGISTER OF CITIZENS (NRC)

BANGAGARH
GHY- 781032

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 A. Sharma, Advocate.

Advocates for the respondents : Shri J. Payeng, SC- Home Deptt & NRC,
Ms. R. B. Bora, GA, Assam;
Shri A. I. Ali, SC, ECI.
Ms. J. Sarma, CGC.

Date on which judgment is reserved : **15.09.2026**

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 13.09.2019 passed by the learned Member, Foreigners Tribunal-3rd, Morigaon in Case No. FT 475/2016 arising out of Ref. FT Case No. 236/2008. 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), Morigaon District, against the petitioner giving rise to the aforesaid Case No. Case No. FT 475/2016 arising out of Ref. FT Case No. 236/2008.

(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 21.11.2016 along with certain documents and adduced evidence through 4 (four) 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 Shri A. Sharma, learned counsel for the petitioner. We have also heard Shri J. Payeng, learned Standing Counsel, Home Department & NRC; Ms. R. B. Bora, learned Govt. Advocate, Assam, Shri A. I. Ali, learned Standing Counsel, Election Commission of India and Ms. J. Sarma, learned CGC. We have also carefully examined the records which were requisitioned vide an order dated 14.05.2020.

4. Shri Sharma, 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, he has referred to the evidence adduced by the 4 DWs and also the following documentary evidence.

i. Ext.A 1965 voter list of Abdul Mannas(father of OP).

ii. Ext.B 1975 voter list of Mannas Ali(father of OP).

iii. Ext.C 1979 voter list of Mannas(father of OP).

iv. Ext.D 1989 voter list of Abdul Mannan(father of OP).

v. Ext.E 1997 voter list of Abdul Mannan(father of OP).

vi. Ext.F 2005 voter list of Jamir Hussain (OP1)

vii. Ext.G 2005 (father of OP)voter list of OP1/OP2.

viii. Ext.H 1968 Miyadi Patta of Abdul Mannaf(father of OP).

ix. Ext.I 1974-75 Jamabandi of Abdul Mannan(father of OP).

x. Ext.J 1966 voter list of Jamir Ali father of OP2.

xi. Ext.K 1979 voter list of Jamir Ali.

xii. Ext.L 2005 voter list of Jamir Ali.

xiii. Ext.M 2016 voter list of Jamir Ali.

xiv. Ext.N Birth Certificate of Dildar Hussain.

xv. Ext.O Jamabandi copy of Abdul Mannas.

5. The learned counsel for the petitioner has however clarified that since the proceeding was against two persons namely, the petitioner and his wife, DW2 and DW 4 had adduced evidence for his wife. The learned Tribunal upon consideration that the reference being against the petitioner alone, had

excluded his wife from the proceeding and therefore the evidence of DWs 2 & 4 were omitted. Consequently, two DWs remained for the instant case namely, the petitioner as DW 1 and his younger brother Jalaluddin as DW 2.

6. The learned counsel for the petitioner has submitted that in the written statement, all material disclosures were made. Reliance has been placed on a Sale Deed of 1968 and a Jamabandi in the name of his father. He has relied upon Voters Lists of the years 1965, 1975 and 1979 containing the name of his father as Mannas/Mannas Ali. He has also relied upon the Voters Lists of the years 1989 and 1997 containing the names of his father and his brothers. He has also relied upon the Voters List of the year 2005 where his name along with that of his brothers and sister-in-law appears. Another Voters List of the same year, i.e., 2005 has been relied upon containing certain names including the name of the wife of the petitioner and his brother.

7. So far as the depositions are concerned, the petitioner had deposed as DW1 and his brother as DW2. It is contended that the aforesaid depositions clearly established the citizenship of the petitioner.

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,* Shri Payeng, 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.

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 totally vague. There is no mention of the name of the mother, siblings or the date of 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.*"

11. He has submitted that even the evidence adduced by the petitioner as

DW1 is vague and DW2 the projected brother was not even mentioned in the written statement. He has submitted that no document was proved by the petitioner and the purpose of adducing evidence through DW2 was only to introduce the documents which are also grossly inconsistent. He has submitted that though minor discrepancies in the Voters List and documents can be overlooked, the other aspects including names have to be consistent. He has categorically submitted that the Voters List of 1997 and 2005 are absolutely inconsistent and different and there is no explanation. He has also highlighted the aspect that though the mother of the petitioner has been stated to be alive, her name does not figure in the Voters List.

12. In support of his submission that all necessary averments are to be pleaded in the written statement, the learned Standing Counsel has relied upon the case of ***Momin Ali vs. Union of India*** 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.*
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> ***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."*

13. He has also relied upon the case of ***Aziz Miya Vs Union of India***

reported in ***2023 (4) GLT 246*** and 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."*

14. He 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 reads 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."*

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

16. 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.

17. The rival submissions advanced in the Bar have been duly considered and the materials placed before this Court including the records of the Tribunal have been carefully perused.

18. 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.*"

19. 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."*

20. 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.

21. 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.*"

22. 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.

23. So far as the Sale Deed of 1968 and Jamabandi are concerned which are projected to be in the name of the father of the petitioner, those would be relevant only when a link is able to be established with the petitioner as he appears to have been born after the cut-off date. The name of the projected father in the aforesaid two documents is however Md. Abdul Mannan, son of Haji Rosan Ali. The name of the projected father in the Voters List of 1965 is however Mannas, son of Ruson Ali. In the Voters Lists of 1975, the name is Mannas Ali, Son of Juson Ali and in 1979 it is Mannas, Son of Romon Ali. In the subsequent Voters Lists of the years 1989 and 1997, the name of the projected father is A. Mannan, son of Ruson Ali in which, the petitioner claims that the names of his brothers also figure. Further, it is seen that in the Voters List of 1997, the name of the projected father is A. Mannan along with three projected brothers. The name of the projected mother however is missing and there is no explanation. So far as the Voters List of the year 2005 is concerned in which the name of the petitioner appears, the other names which have been projected to be his brothers are not consistent at all with the names of the projected brothers of the petitioner appearing in the Voters List of 1997. It may be mentioned that the names of the projected brothers in the Voters List of 1997 are Joynal Abedin, Alal Uddin and Jalal Uddin. On the other hand, the names of

the projected brothers in the Voters List of 2005 are Amir Hussain and Ali Hussain. Further, though two other names appear in the Voters List of 2005, namely, Nazira Sultana and Mostara Begum, those names also do not find place in the earlier Voters List. So far as the other Voters List of 2005 is concerned, though one name appearing thereon is projected to be the brother of the petitioner, there is no mention of the said incumbent in the earlier Voters List. Further, there is no explanation as to how there are names of unrelated persons in the said Voters List.

24. So far as the depositions are concerned, the petitioner who had deposed as DW1, in his cross-examination recorded in December, 2016 had deposed that his father had expired 9 years back. However, after 1997, there is not a single Voters List containing the name of the father, not to talk about any common Voters List containing the names of both the petitioner and his projected father. So far as DW2, the projected brother is concerned, there is not a single document to link him and the petitioner. On the contrary, though the name of DW2 appears in the Voters List of 1997 with the projected father, in the later Voters List of 2005, there is no mention of his name in which the name of the petitioner figures. It is also to be noted that in the written statement filed by the petitioner on 21.11.2016, there was no mention about any siblings, not to talk about the DW2.

25. 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 his burden to prove his citizenship.

26. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 13.09.2019 passed by the learned Member, Foreigners Tribunal-3rd, Morigaon in Case No. FT 475/2016 arising out of Ref. FT Case No. 236/2008 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 of the learned Tribunal be returned forthwith, along with a copy of this order.

JUDGE **JUDGE**

Comparing Assistant