

GAHC010277372019



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

Case No. : WP(C)/8486/2019

MUCHA ALI @ MD. MUSA ALI
S/O- HEKIM ALI @ A. HEKIM @ A. HEKAN @ ABDUL HEKIM, R/O- VILL-
LELAIBORI, P.S. LAHORIGHAT, DIST- MORIGAON, ASSAM

VERSUS

THE UNION OF INDIA AND 6 ORS.
REP. BY THE SECY. TO THE GOVT. OF INDIA, MINISTRY OF HOME
AFFAIRS, NEW DELHI-1

2:THE ELECTION COMMISSION
INDIA
REP. BY THE CHIEF ELECTION COMMISSIONER
INDIA
NEW DELHI-01

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

4:THE STATE CO ORDINATOR
NRC
ASSAM
BHANGAGARH
GHY-5
PIN- 781005

5:THE DY. COMMISSIONER
MORIGAON
P.O. AND DIST- MARIGAON

ASSAM
PIN- 783380

6:THE SUPERINTENDENT OF POLICE (B)
MARIGAON
P.O. AND DIST- MORIGAON
ASSAM
PIN- 783380

7:THE OFFICER-IN-CHARGE
LAHARIGHAT P.S.
LAHARIGHAT
DIST- MORIGAON
PIN- 78338

Advocate for the Petitioner : MR. J AHMED, MRS R BEGUM,MS A HUSSAIN

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

BBEFORE
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI
HON'BLE MR. JUSTICE PRANJAL DAS

Advocate for the petitioner : Shri J. Ahmed, Advocate.

Advocates for the respondents : Ms. A. Verma, S.C., Home Deptt.,
Ms. A. Phookan, G.A., Assam,
Shri N. Kalita, Advocate (on behalf of A.I.
Ali, SC, E.C.I.),
Ms. P.R. Choudhury (on behalf of Shri H. Gupta, C.G.C.).

Date on which judgment is reserved : 18.05.2026.

Date of pronouncement of judgment : 29.05.2026.

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 10.10.2018 passed by the learned Member, Foreigners' Tribunal No. 2nd, Morigaon, Assam in F.T. Case No.07/2017. 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), Morigaon, against the petitioner giving rise to the aforesaid F.T. Case No. 07/2017.
- (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 along with certain documents and adduced evidence through two 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 J. Ahmed, learned counsel for the petitioner. We have also heard Ms. A. Verma, learned Standing Counsel, Home Department; Ms. A.

Phookan, learned GA, Assam, Shri N. Kalita, learned counsel appearing on instructions of A.I. Ali, learned Standing Counsel, Election Commission of India and Ms. P.R. Choudhury, learned counsel appearing on instructions of Shri H. Gupta, learned CGC. We have also carefully examined the records which were requisitioned vide an order dated 04.05.2020.

4. Shri Ahmed, 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 following documentary evidence.

- (i) Ext-1 is the translated copy of voter list of 1966,
- (ii) Ext-2 is the translated copy of voter list of 1970,
- (iii) Ext-3 is the translated copy of voter list of 2005,
- (iv) Ext-4 is the translated copy of voter list of 2018,
- (v) Ext-5 is the copy of *Jamabandi*,
- (vi) Ext-6 is the Gaonburah certificate.

5. The learned counsel for the petitioner has submitted that in the voters list of the year 1966, the name of his father appears followed by the voters list of 1970 where the name of his father along with the names of three uncles appears. Another voters list of 2005 has been relied upon containing the name of his father along with him. This voters list, however, was not produced or proved in the Tribunal. Reliance has been placed upon the voters list of 2018 containing the names of the parents, the petitioner and few others. A *Jamabandi* in the name of A. Hekim has also been relied upon followed by a

certificate by the Gaonburah. Reliance has also been placed on voters lists 1989, 1993, 1997, 2010 and 2015.

6. The learned counsel for the petitioner has also submitted that the evidence of the witnesses was not rebutted and therefore, the same have to be considered. In this connection, reliance has been placed upon the case of ***Sujab Ali (Md.) Vs. Union of India & Ors.***, reported in **2021 (4) GLT 664** wherein, it has been laid down that a definite finding is to be given upon evidence rendered by family members. The learned counsel has also relied upon certain other case laws which are as follows:

- i) **AIR 2024 SC 3551, *Md. Rahim Ali @ Md. Abdul Rahim Vs. The State of Assam & Ors.***;
- ii) **2008 (4) SCC 75, *Bant Singh & Anr. Vs. Niranjana Singh (D) by Lrs. & Ors.***;
- iii) **AIR 1959 SC 914, *Dolgobinda Paricha Vs. Nimai Charan Misra & Ors.***;
- iv) **2021 (3) GLT 85, *Haidar Ali Vs. Union of India & Ors.***;
- v) **2019 (5) SCC 534, *Sirajul Hoque Vs. State of Assam & Ors.***

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

8. *Per contra*, Ms. Verma, the learned Standing Counsel, Home Department has categorically refuted the stand taken on behalf of the petitioner. She submits that a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 relates to determination as to whether the proceedee is a foreigner or not. Therefore, the relevant facts are especially within the knowledge of the proceedee and accordingly, the burden of proving citizenship rests absolutely upon the proceedee, notwithstanding anything contained in the Evidence Act, 1872 and this is mandated under Section 9 of the aforesaid Act,

1946. However, in the instant case, the petitioner utterly failed to discharge the burden. It is also submitted that rebuttal evidence is not mandatory in every case and would be given only if necessary. She further submits that the evidence of a proceedee has to be cogent, relevant, which inspire confidence and acceptable and only thereafter, the question of adducing rebuttal evidence may come in.

9. The learned Standing Counsel, Home 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 is vague and the relevant facts have not been stated. There is no date or year of the birth of the petitioner and there are inconsistencies with the members of the family. 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 grand parents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act which says that when any fact is especially within the knowledge

of any person, the burden of proving that fact is upon him.”

10. She has submitted that there is a long and inordinate gap of 35 years from the voters list of 1970 to the next voters list of 2005. Further, the pleadings are not at all adequate in the written statement and three names have been attributed as the projected father whereas, as per the Reference, the name of the father of the petitioner is Hakim Ali. Further, in the written statement, there is no mention of any step- mother whereas the uncle as DW-2 has deposed that the petitioner is the son of the second wife.

11. She has further submitted that no link could be established with the projected father and the certificate issued by the Gaonburah, by no means, could be deemed as a proof of citizenship, more so when the Gaonburah did not come to prove the said certificate. She has also criticized the use of the National Emblem on the said certificate. In this regard, she has relied upon the case of ***Khudeja Khatoon Vs. Union of India & Ors.***, reported **2018 (3) GLT 347** and the following observations have been pressed into service:

“13. Ext. B is a certificate dated 13.2.2016 issued by the Gaonburah certifying that Khudeja Khatoon was the wife of A. Matalib. This certificate also has got the State Emblem of India embossed on it and that too not as per the statutory format. For the reasons mentioned above, this certificate is also liable to be discarded. However, notwithstanding the same, even if we accept this certificate at its face value, it only certifies that Khudeja Khatoon was the wife of A. Matalib; thus no linkage is established with Jonab Ali; whom the petitioner claimed to be her father.

14. Ext. C is a certificate dated 13.2.2015 of the Gaonburah of Durabandhi village certifying that Khudeja Khatoon was the daughter of Lt. Jonab Ali. For

the reasons mentioned above, this certificate was also not proved. Mere filing of a document or marking of a document as exhibit is not enough. The certificate as well as the contents thereof would have to be proved, so also the truthfulness thereof, in accordance with law.”

12. 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...”

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

“9. On the available materials, we find that the Tribunal rendered opinion/order upon due appreciation of the entire facts, evidence and documents brought on record. We find no infirmity in the findings and opinion recorded by the Tribunal. We would observe that the certiorari jurisdiction of the writ court being supervisory and not appellate

jurisdiction, this Court would refrain from reviewing the findings of facts reached by the Tribunal. No case is made out that the impugned opinion/order was rendered without affording opportunity of hearing or in violation of the principles of natural justice and/or that it suffers from illegality on any ground of having been passed by placing reliance on evidence which is legally impermissible in law and/or that the Tribunal refused to admit admissible evidence and/or that the findings finds no support by any evidence at all. In other words, the petitioner has not been able to make out any case demonstrating any errors apparent on the face of the record to warrant interference of the impugned opinion.”

14. She has also relied upon the case of the Hon’ble Supreme Court in ***Rupajan Begum vs. Union of India***, reported in **(2018) 1 SCC 579** wherein it has been laid down that a certificate has to be proved on two aspects, firstly, the authenticity of the same and secondly, the authenticity of the contents.

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 made 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. They have 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 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 made 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 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.”

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 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.”

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.

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.”

22. In the instant case, the written statement is 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

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 voters lists are concerned, the first voters list relied upon is

of the year 1966 wherein the name of the projected father of the petitioner has been written as A. Hekim, aged 35 years. In the next voters list of 1970, the name of the projected father has been stated as A. Hekan. There is an inexplicable gap of 35 years in the next voters list which is of the year 2005 and the name of the projected father becomes Hekim Ali. It may also be noted that there is a change of the address. Another voters list of 2005 has been referred and as observed above, the said voters list was not produced and therefore, would not be relevant.

24. As regards the voters list of 2018 which is projected to be one containing the name of the petitioner along with his parents, it is seen that in the said voters list, the age of the petitioner is stated to be 33 years. The question therefore arises as to why the name of the petitioner was not enlisted in any previous voters list. This Court takes judicial notice of the fact that by the sixty-first amendment of the [Constitution of India](#), the voting age was reduced from 21 years to 18 years and therefore, at least from the year 2003, his name should have been enlisted.

25. In the *Jamabandi*, the name of Md. A. Hekim will not by itself serve as a link with the petitioner as the same is a standalone document. The voters lists of 1989, 1993, 1997, 2010 and 2015 are not of much relevance as those are post 1971. In any case, in the voters list of 1989, the name of the projected mother is Hazera Khatun whereas in the previous voters lists relied upon, the name of the mother of the petitioner appears to be Rabia Khatun. In the voters lists of 1993 and 1997, the name of the projected father of the petitioner only appears, that too, with inconsistency, namely, A. Hekim and Hekim Ali. In the voters list of 2010, though it is contended that the name of the petitioner

appears with the projected father, there is no explanation as to why the names of the other family members go missing. In the voters list of the year 2015, the name of the petitioner appears with a number of other persons who are projected to be his siblings. It may, however, be noted that in the written statement, there is no mention of the siblings.

26. The reliance upon the case of **Md. Sujab Ali** (*supra*) is misplaced. In the instant case, there is not documentary evidence to connect the DW-2 with the proceedee.

27. The case of **Md. Rahim Ali @ Md. Abdul Rahim** (*supra*) has been cited with regard to the aspect of the initial investigation. It, however, clearly appears that certain binding observations of a larger Bench in the case of **Sarbananda Sonowal** (*supra*) were not brought to the notice of the Court and therefore, reliance upon the case of **Md. Rahim Ali @ Md. Abdul Rahim** (*supra*) would be of no avail.

28. The cases of **Bant Singh & Anr.** (*supra*) and **Dolgobinda Paricha** (*supra*) are on the aspect of Section 50 of the Indian Evidence Act relating to evidence adduced by family members. However, the present subject matter is governed by Section 9 of the Foreigners' Act which, as discussed above, excludes the provisions of the Indian Evidence Act with a specific *non obstante* clause.

29. The case of **Haidar Ali** (*supra*) has been distinguished by later decisions of this Court and we are also of the opinion that the judgment in the case of **Haidar Ali** are to be confined to the fact of that case.

30. In the case of **Sirajul Hoque** (*supra*), while the Hon'ble Supreme Court had

laid down that minor discrepancy in the voters list may be ignored, the same is with a rider that all other things are to remain consistent. In the said case, except a minor change in the name of the grandfather of the proceedee from *Kematullah* to *Kefatullah*, all other things were consistent. For ready reference, the relevant observations are extracted hereinbelow:

“3. There is no doubt that the great grandfather’s name Amtullah appears as Amtullah throughout the document. Equally, there is no doubt about the father’s name which appears as Hakim Ali throughout. The only discrepancy found is that in some of the documents Kefatullah later becomes Kematullah. However, what is important to note is that his father’s name Amtullah continues as Amtullah and the other family members associated continued as such. Also produced are NRC Registration details of the year 1971 of the grandfather who is noted to be Kefatullah in this document. Other voters lists are then produced where the letter F becomes the letter M with other family names remaining the same. In fact, the appellant has himself produced a document of 1981 from the Income Tax Department giving his Permanent Account Number. Apart from these documents, certain other later documents have also been produced including photo identity cards issued by the Election Commission of India and identity cards issued to his brother including voters lists in which the appellant’s name appears.”

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

32. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned order dated 10.10.2018 passed by the learned Member,

Foreigners' Tribunal No. 2nd, Morigaon, Assam in F.T. Case No. 07/2017 does not call for any interference.

33. 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.

34. The records of the aforesaid F.T. Case No. 07/2017 be returned to the concerned Foreigners Tribunal forthwith, along with a copy of this order.

JUDGE

JUDGE

Comparing Assistant