GAHC010024812024

IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

W.P(C) No.814/2024

Musstt. Jahanara Parbin @ Jahanara Begum, aged about 42 years, D/O- Late Hussain Ali, W/O- Abdul Khalek, Vill:- Chirakhundi, P.S.- Tamulpur, District-Baksa, Assam

.....Petitioner

-***Versus***-

1. The Union of India, represented by the Secretary to the Government of India, Ministry of Home Affairs, , New Delhi-110001.

2. The State of Assam, represented by the Commissioner & Secretary to the Government of Assam, Home Department, Dispur, Guwahati – 781006.

3. The Election Commission of India, New Delhi-110001

4. The State Co-ordinator, National Register of Citizens (NRC), Assam, Achyut Plaza, Bhangagarh, Guwahati-781005

5. The Deputy Commissioner, Baksa, Assam-7821354

6. The Superintendent of Police (Border), Baksa, Assam-781354

7. The O/C, Tamulpur Police Station, Baksa, PIN-781354

.....Respondents

– B E F O R E –
HON'BLE MR. JUSTICE MANSAH RANJAN PATHAK
HON'BLE MR. JUSTICE SOUMITRA SAIKIA

For the Petitioner : Mr. P. Rahma, Advocate.

For the Respondents : Mr. U.K. Goswami, CGC for R-1
Ms. A. Verma, SC, FT for R-2, 6 & 7
Mr. T. Pegu, SC, ECI for R-3
Mr. H.K. Hazarika, Government Advocate, Assam for R-5

Dates of hearing : **20.09.2024 & 24.09.2024**
Date of Judgment & Order : **20.12.2024**

JUDGMENT & ORDER (CAV)

[Soumitra Saikia, J.]

This writ petition has challenged the opinion/final order dated 30.08.2023 passed by the Foreigners' Tribunal, Baksa &Tamulpur (Assam) in FT Case No. 19/BAKSA/2023 answering the reference made by the State in affirmative and rendering an opinion that the petitioner who was the proceedee before the Tribunal is a foreigner/illegal migrant who entered India (Assam) on or after 25.03.1971. Being aggrieved, the petitioner is before this Court challenging the said opinion.

2. The petitioner after receipt of notice from the Tribunal contested the case by filing written statements and also adduced evidences by projecting two witnesses including the petitioner. The petitioner submitted 12

(twelve) exhibits in support of her contentions disputing the reference made by the State. She examined herself as D.W-1 and her mother as D.W.-2. The Tribunal upon consideration of the exhibits submitted as well as after considering the deposition of the petitioner and the other witness, rejected the claims of the petitioner and answered the reference in affirmative.

3. This Court by order dated 19.02.2024 before proceeding in the matter decided to examine the Tribunal records and accordingly the same were called for.

4. Since the Tribunal records being available, this matter is taken up for disposal at this stage and in the presence of counsel for both parties.

5. The learned counsel both the parties have been heard and the Tribunal records available before this Court have been carefully perused.

6. Before the Tribunal, the petitioner had filed written statements. The case projected by the petitioner is that the investigating officer made references without proper and fair investigation and that he never met the opposite party namely the petitioner herein nor enquire about her documents in support of her Citizenship. It is stated that the investigating officer out of hatred whimsically made the reference sitting in his office and

only to harass the petitioner, who is a genuine Indian Citizen.

7. The petitioner has projected one late Hussain Ali and one Saleha Khatun @ Bidhaba as her parents and Late Kasim @ Kasimuddin and Late Rupbhanu Nessa as her grandparents. Her great grandfather was late Bijur Ali (Haji). It is stated that the parents and the grandparents in their lifetime were residents of Village-Bangnaputa No. 2 under P.S. Nalbari in the District of Kamrup, Assam and Village-kalachar 1st Part under Mukalmua Police Station in the erstwhile district of Kamrup now within the district of Nalbari. The petitioner stated that her grandparents had deceased before the birth of the petitioner and she did not see her grand-parents. The projected father of the petitioner has five siblings namely Iman Hussain, Hussain Ali (who is her father of the petitioner), Lal Mamud, Naytan and Samiran. The father of the petitioner had two wives namely, Saleha Khatun (the mother of the petitioner) and Musstt. Japa Khatun. The petitioner was born on 30.10.1981 at Village-Kalachar 1st part under Mukalmua Police State in the present district of Nalbari and she was brought up in the said village. The petitioner has 11 (eleven) siblings including her namely, Nurjatan Begum, Nazma Heptulla, Laily Khatun, Hasna Akhtar, Rumiya Akhtar, Haidar Ali, Hasmat Ali, Kohinur, Runuja Parbin and Hafizur Rahman. The petitioner claims to have been married in the year 1997 with one Abdul Khalek son of late

Sirajuddin Ahmed and thereafter resided with her husband in the village of Chirakhundi under the Tamulpur in the District of Baksa. The said village was earlier situated under Rangia Police Station in the District of Kamrup. The petitioner has three children namely, Jeherul Islam, Jahidul Islam, and Khalida Parbin. It is stated in the written statement that the petitioner as well as her paternal ancestors were Citizen of India and she has sufficient documents in support of her claim.

8. Before the Tribunal, the petitioner filed her evidence on affidavit exhibiting the following exhibits and the petitioner presented two witnesses namely the petitioner herself as D.W-1 and her mother as D.W-2.

1. *Ext.1 is the Certified copy of the voter list of 1966*
2. *Ext.2 is the Certified copy of the voter list of 1979*
3. *Ext.3 is the Certified copy of the voter list of 1985*
4. *Ext. 4 is the Certified copy of the voter list of 1993*
5. *Ext.5 is the Certified copy of the voter list of 1997*
6. *Ext.6 is the certified copy of the voter list of 2005*
7. *Ext.7 is the Admit Card*
8. *Ext.8 is the PAN card*
9. *Ext.9 is the Certified copy of the Voter list of 2005*
10. *Ext. 10 is the EPIC of 2015*
11. *Ext. 11 is the Certified copy of the voter list of 2016*

12. Ext. 12 is the Certified copy of the voter list of 2023.

9. Exhibit-1 which is the voter list of 1966 reflects the name of her father Hussain Ali son of Kasim under 54 Chenga LAC vide Sl. No. 116 and the House No. 32 of the Village No. 2, Bangnaputa P.S. Nalbari, District-Kamrup, Assam.

The petitioner has referred a reply under RTI received from the Election Officer, Nalbari which shown that due to non-availability of voter list of the year 1970 under 54 Chenga LAC Part No 24 of Village-Kalachar Part-1 in the Election Office of Nalbari, the details of voters Sl. Nos. 628 and 629 could not be provided.

It is stated in the written statements by the petitioner that between 1960 and 1970, the village-Bangnaputa was eroded by the river Brahmaputra and therefore the parents of the petitioner shifted their residents to Village-Kalachar 1st Part under the same Mouza and locality.

10. In the voter list of 1979 exhibited by the petitioner to show the name of her parents under 54 Chenga LAC vide Sl. No. 628 House No. 267 of the Village-Kalachar, P.S. Nalbari, District-Nalbari, Assam.

11. The voters lists of 1979, 1985, 1993 were exhibited showing the names of her projected parents from the

Village-Kalachar under Mukalmua Police Station in the District of Kamrup.

12. The Voters list of 1992 was exhibited to show the names of her mother along with her elder brother Haidar Ali. It is stated that the father of the petitioner expired about the age of 62 years in 1999 and therefore only the name of the mother and elder brother were enlisted in the voters list of 1997.

13. In the vote's list of 2005, the petitioner states that her mother's name along with two of her brothers' name are enlisted from the same village-Kalachar under Mukalmua Police Station, District- Nalbari, Assam.

14. The petitioner exhibited her Admit Card issued by the SEBA and she states that she passed the HSLC examination in the year 1997 bearing Roll N7-351 No. 0099. This exhibit was presented to in support of her contention that she is the daughter of Hussain Ali of Village-Kalachar whose name is clearly reflected in the said exhibit namely the Admit Card.

15. Exhibit-8 is the PAN Card obtained by the petitioner showing her date of birth and the name of her father namely Hussain Ali.

16. Exhibit-9 is the certified copy of the voters list of 2005 which enlists her name showing her to be the wife of Abdul Khalek.

17. It is stated that in the voters list of 2005, her name was enlised as Jahanara Begum instead of Jahanara Parbin. Even in the voter list of 2016 initially the name of the petitioner was enlisted as Jahanara Begum instead of Jahanara Parbin and after she applied to the Election Commission for correction, her name was rectified and shown as Jahanara Parbin under 56 Kamalpur LAC. Her name is also reflected in the voters list for the year 2023.

18. In her cross-examination, the petitioner stated that she was born in her parents' home in Village-Kalachar under Mukalmua Police Station, District- Nalbari, Assam and her father passed away in the year 1999 and her mother Saleha Khatun is still alive. She stated that her grandfather Kasimuddin passed away before her birth and her father's name was enlisted in the voter list of 1966 as Exhibit-1 and her parents name were enlisted in the voters list of 1979 as Exhibit-2. She has produced her Voter identity card issued on 2015 as Exhibit-10.

19. The mother of the petitioner as D.W.-2 in her evidence on affidavit deposed that she was 70 years old and wife of late Hussain Ali. She deposed that the opposite party/petitioner Jaharana Parbin is her daughter and that

she has appeared before the Tribunal to depose in support of her daughter. In her evidence on affidavit, she stated that she is a resident of Village-Bangnaputa No. 2 of Nalbari Police Station in the District of Kamrup, Assam. After erosion by the river Brahmaputra, they shifted their residence from Bangnaputa to Village-Kalachar Part-1 under the same locality. Subsequently again because of erosion, they shifted their residence from Kalachar to Village-Baithabhanga under Mukalmua Police Station in the District of Nalbari, Assam. She has produced the EPIC Card bearing EPCI No. FBF3339740 under 60-Barkhetri LAC from the Village-Baithabhanga, P.S.-Mukalmua. The EPIC card produced has been proved in original. In her evidence, she stated that her husband expired in the year 1999 at Village-Kalachar No. 1 under P.S.-Mukalmua. She deposed that her husband married another woman namely Japa Khatun and having 11 (eleven) children including the petitioner. Amongst the children, the petitioner is 4th in number. She deposed that her husband casted vote since 1966 till his death in 1999 and the D.W.-2 had casted her vote since 1971 till the present and that she along with forefathers of the petitioner were/are Citizens of India beyond reasonable doubt and the petitioner being their child is also an Indian by birth.

20. During the cross examination, the D.W-2 confirmed that her husband passed away in 1999 and that the opposite party/petitioner Jahanara Parbin is her daughter

and she was born at village-Kalachar under Mukalmua Police Station in the District of Nalbari and that she is residing with her husband Abdul Khalek of village-Chirakhundi, P.S.-Tamulpur, District-Baksa.

21. Upon careful consideration of the above factual matrix and upon careful perusal of the records, it is seen that there is no specific period mentioned when the petitioner's family shifted from Bangnaputa village to Kalachar Part-1 and thereafter to Baithabhanga. In the written statement filed, it is stated that during 1960 to 1970, the village Bangnaputa was eroded by the river Brahmaputra and the parents of the petitioner shifted their residents to Kalachar under the said Mouza. However, a close scrutiny of the written statement reflects that the shifting of the petitioner's parents and other family members were from the village Bangnaputa to Kalachar Part-1 but in the deposition of D.W.-2, a further shifting was mentioned which is not referred to in the written statement or even in the evidence adduced by the petitioner as D.W-1. It is not clear from the written statement read with the evidence of D.W-2 as to whether the further shifting from Kalachar Part-1 to Baithabhanga Village was prior to the birth of the petitioner or subsequent thereto. There is also no evidence adduced before the Tribunal in support of the statement which ordinarily in similar matters certificates are seen to be issued by the respective Gaon Burahs/Pradhans to show

that there was a shifting of the family from one village to another because of the erosion.

22. On the other hand, it is the consistent stand of the petitioner in the written statement as well as in her evidence on affidavit that the shifting took place between 1960 and 1970 from Bangnaputa to Kalachar Part-1. As such there is a clear discrepancy between the statements made by the petitioner in her written statements, the evidence adduced by her and the evidence adduced by the mother of the petitioner as D.W.-2 before the Tribunal.

23. The case projected in the written statements as well as the evidence adduced both by D.W-1 and D.W.-2 are not entirely supported by necessary documents. Therefore, any inconsistency between the statements and the evidences adduced by the D.W.-1 and the evidence of D.W-2 will have to be viewed with a great deal of suspicion and it cannot be accepted in support of the case projected by the petitioner.

24. Similarly, although the Admit Card of SEBA was produced, the contents of which was not proved by examining the competent authorities who had issued the Admit Card. As such Exhibit-7, the Admit Card although produced and its contents having not being proved as required under law, the same also does not come to the

aid of the petitioner to establish her link between her and her late father. The D.W.-2 who is the projected mother of the petitioner although had appeared before the Tribunal and deposed that she is her mother, such deposition without any supporting documents also cannot be accepted to come to a conclusion that the D.W.-2 is the mother of the opposite party/petitioner. The D.W.-2 had produced her identity card which is again an EPIC issued by the authorities . The photocopy of the said Voter ID which is compared with the original is available in the records, upon examination reveals that the address is shown as Baithabhanga and her husband's name is shown as Huchein Ali.

25. Coming to the opinion rendered by the Tribunal, it is seen that the Tribunal disbelieved the petitioner that Hussain Ali and Saleha Khatun are the projected parents by comparing the voter list of 1966 and the voter list of 1979. The Tribunal concluded that the voter list of 1966, the projected father of the petitioner Hussain Ali was shown as son of 'Kasim' whereas the Hussain Ali reflected in the voter list of 1979 is shown to be the son of 'Kasimuddin' and the projected mother of the petitioner Saleha Khatun was shown to be related to one "Husen". The Tribunal rejected these exhibits on the ground that the opposite party/petitioner failed to show any evidence that Hussain Ali son of 'Kasim' enlisted in voter list of 1966 and Hussain

Ali son of 'Kasimuddin' enlisted in voters list of 1979 are one and the same person and the father of the petitioner.

26. The Tribunal also held that there was no explanation as to why petitioner's grandfather was 'Kasim' and not 'Kasimuddin' and therefore there was a serious doubt as to whether Hussain Ali son of 'Kasim' and Hussain Ali son of 'Kasimuddin' were one and the same person. The Tribunal also held that the petitioner failed to submit any voter list where her parents name was enlisted post 1966 (Ext-1) and prior to 1979 which is exhibit-2. Therefore, the Tribunal concluded that these two exhibits were not sufficient to prove the link between the petitioner and her projected parents.

27. In so far as the Exibits-1 to 6, 9, 11 and 12 are concerned, the Tribunal concluded that these have not been proved by comparing with the primary evidence of the lawful custodian and as such, the extract translated/digital copies of the said voter list were not proved and cannot be relied upon as trustworthy documents.

28. The learned counsel for the petitioner has placed reliance on an order of Co-ordinate Bench of this Court rendered in *Anjuma Khatun @ Anjuma Begum Vs. The Union of India and Ors* [W.P.(C) No. 4215/2023] vide order dated 31.07.2023. The learned counsel for the petitioner

submits that this Court in Anjuma Khatun (Supra) held that there is a requirement to examine the school records produced before the Tribunal in original for the Tribunal to arrive at a satisfaction that the records are authentic and as the same had not been done, the said matter was therefore remanded back to the Foreigners Tribunal.

29. In the facts of the present case, from the records available, there is no material to suggest that any application or prayer made on behalf of the petitioner calling for original records and examination thereof before the Tribunal was made. Under such circumstances, since the burden under Section 9 is on the petitioner to prove not only the documents but also the contents thereof, there is no burden cast on the Tribunal to call for the competent officers as a matter of course unless such prayers have been made before the Tribunal.

30. The respondents on the contrary have referred to and relied on the Judgments in *Narbad Devi Gupta Vs. Birendra Kumar Jaiswal and Ors*, reported in (*2003) 8 SCC 745* and *Rashminara Begum Vs. Union of India,* reported in *(2017) 4 GLT 346*. Relying on both the Judgments, the learned counsel for the respondents submits that mere production and marking of documents exhibits are not sufficient to arrive at the conclusion. The execution has to be proved by admissible evidence. It is only when these

documents which are produced are admitted by the signatories thereto that they are marked as exhibits, no further burden is there to lead the additional evidence.

31. The learned counsel for the respondents also relies upon the Judgment of *State of Assam and Others vs. Moslem Mondal and Others* reported in *2013 (3) GLR 402*, where a Full Bench of this Court deal with the scope of interference with a Tribunal's order in a writ proceedings. Referring to the said Judgment, the learned counsel submits that certiorari jurisdiction of a writ Court being supervisory, the Court cannot review the findings of facts reached by the inferior Court or Tribunal with the exception that the decision of the Tribunal on a finding of fact has been arrived at by the Tribunal acting on evidence which is legally inadmissible or has refused to admit admissible evidence or if the finding is not supported by any evidence at all because in such error would amount to an error of law apparent on the fact of the record.

32. The learned counsel for the respondents has also referred to the Judgment of the Apex Court in *Central Council for Research in Ayurvedic Sciences and Anr. Vs. Bikartan Das and ors,* reported in *(2023) SCCOnline SC 996*, wherein the Apex Court has expounded the principles on which a writ Court can exercise the writ of certiorari.

33. Having examined the case records and also after careful consideration of the Judgments cited at the bar, it is seen that the petitioner has produced as many as 12 (twelve) exhibits. Except for Exhibit Nos. 7, 8, 10, all the other exhibits are certified copies of the voters list. In addition thereto a reply received by the petitioner from the Election Officer dated 01.08.2023 which is found in the records does not bear any endorsement that the same was presented as an exhibit as per procedure by the Tribunal. As such, this document, cannot be referred to or relied upon unless the same is properly exhibited before the Tribunal as per procedure or necessary order was obtained from the Tribunal to bring it as an additional exhibit or a document.

34. A careful perusal of the Tribunal records do not reflect that any such application was filed or any such order even on an oral prayer is seen to be recorded in the order sheet, found available in the Tribunal records. As such the explanation sought to be projected by the petitioner that there are no records in the Election Office, Nalbari for the year 1970 under 54 Chenga LAC and consequently the voter list of 1970 could not be produced by the petitioner in support of her contentions was not before the Tribunal. The order-sheet in the Tribunal records reflects that written evidence-in-chief as D.W.-1 was filed on 19.07.2023. D.W.-1 was also cross examined on that date. The next date fixed was 09.08.2023. The

D.W.-2 along with the proceedee namely the petitioner was present as per the order recorded in the order-sheet and the evidence-on affidavit of D.W.-2 as well as the cross examination of D.W.-2 was undertaken on 09.08.2023 and the evidence was closed. The hearing was also concluded on the same date fixing 30.08.2023 for final order and accordingly on 30.08.2023 final orders were passed. As such in the absence of any order being available in the order sheet or any application found to have been filed by the petitioner to bring additional evidence, the reply under RTI dated 01.08.2023 cannot be accepted by this Court at this stage. While the certified copy of voter list of 1966 and 1970 show that Hussain Ali son of Kasim and Kasimuddin are shown to be the projected father, that by itself does not establish the link between the petitioner and her parents that she is the daughter of Hussain Ali and Saleha Khatun @ Bidhaba. The Admit Card although produced was not proved in accordance with the principles of law of evidence.

35. Under such circumstances, it has to be held that the petitioner could not establish the link between her projected parents and herself and consequently failed to discharge the burden under Section 9 of the Foreigners' Act, 1946.

36. As discussed above, even in respect of the statement made in the written statement as well as evidence on

affidavit by the petitioner as D.W.-1 as well as the evidence on affidavit adduced by her projected mother as D.W.-2, discrepancies have been noticed in respect of shifting of their residents. The deposition of D.W.-2 clearly reflects that they had shifted from Bangnaputa to Kalachar Part-1 and subsequently to Baithabhanga, which fact is not clearly disclosed in the written statement as well as in evidence on affidavit. Such discrepancies are in respect of vital particulars of the petitioner is expected to be aware of if D.W.-2 as projected is her mother.

37. It is proper to refer to the Judgments of *Sarbananda Sonowal Vs. Union of India*, reported in *(2005) 5 SCC 665* as well as *State of Assam and Others vs. Moslem Mondal and ors.* reported in *2013 (3) GLR 402*, where the Apex Court and this Court respectively has consistently held that the burden of proof in the first instance is on the proceedee namely the petitioner and this burden has to be discharged by the proceedee diligently in support of her claim that she is not an illegal migrant but an Indian Citizen.

38. In *State of Assam and Ors. Vs. Moslem Mondal and ors*, reported in *2013 (3) GLR 402,* a Full Bench of this Court while examining the various issues with regard to the Citizenship rights of a person by a Foreigners Tribunal, held that the 'burden of proof' means a party's duty to prove a disputed assertion or charge. The 'burden of proof includes

both 'burden of persuasion' and the 'burden of production'. The 'burden of persuasion' means the duty imposed on a person to convince the fact finder to view the facts in a way that favours that person. The 'burden of production' is the duty imposed on the person to introduce enough evidence on a issue to have the issue decided by the fact finder, in that person's favour. The party having the 'burden of proof' must introduce some evidence if he wishes to get a certain issue decided in his favour. The 'burden of proof', therefore, denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law (*Black's Law Dictionary*, 7th edn.).

39. Relying on Phipson Law of Evidence, this Court held the 'burden of proof', has three meanings, namely, (i) the persuasive burden, the burden of proof as a matter of law and pleading the burden of establishing a case, whether by preponderance of evidence or beyond a reasonable doubt; (ii) the evidential burden, the burden of proof in the sense of adducing evidence; and (iii) the burden of establishing the admissibility of evidence.

40. This Court held that while persuasive burden i.e. onus probandi never shifts and is always stable;, the evidential burden may shift constantly, according as one scale of evidence or other preponderates. Onus probandi

rests upon the party, who would fail if no evidence at all is adduced. The general principle of burden of proof that he who invokes the aid of law should be the first to prove his case may be affected by statutory provision, e.g. in a case where the matters within the knowledge of the person against whom a proceeding is initiated, like the proceeding under the provisions of the 1946 Act, as it will not only be difficult but also impossible for the State, at whose instance reference is made to the Tribunal, to first lead evidence on the question as to whether a person against whom such proceeding is initiated is a foreigner or not. The provisions of section 9 of the 1946 Act is, therefore, in accordance with the underlying policy of section 106 of the Evidence Act, which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In a proceeding before the Tribunal under the provisions of the 1946 Act, the provisions of section 101 of the 1946 Act is not at all applicable, an exception having been curved out by section 9 of the said Act. Even in a proceeding where the provisions of sections 101 and 106 of the Evidence Act are applicable, the burden of proving any fact which is especially within the knowledge of any person, is upon such person, by virtue of section 106 of the Evidence Act, which is an exception to section 101, i.e., the general rule of the burden of proof in such proceeding.

41. It was held that in a proceeding under Foreigners Act 1946 read with 1964, the issue is whether the proceedee is a foreigner. It being a fact especially within the knowledge of the proceedee, the burden of proving that he is a citizen is, therefore, upon him, because of section 9 of the 1946 Act and it is, therefore, his obligation to provide enough evidence to establish that he is not a foreigner.

42. The Full Bench of this Court referring to Union of India & Ors, Vs. *Ghaus Mohammad*, reported in AIR 1961 SC 1526, *Fateh Mohd. Son of Nathu Vs. Delhi Administration, reported in AIR 1963 SC 1035* and *Masud Khan Vs. State of Uttar Pradesh, reported in (1974) 3 SCC 469* held that whenever a question arises whether a person is or is not a foreigner, the onus of proving that he is not a foreigner lies upon him and hence the burden is on the proceedee to establish that he is a citizen of India in the manner claimed by him.

43. In *Sarbananda Sonowal (I)* where the question relating to the constitutional validity of the 1983 Act was under consideration, the Apex Court while dealing with various enactments made for dealing with the foreigners including the different provisions of 1946 Act has held that section 9 of the said Act 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, on such

person and therefore, when an order made under the 1946 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. The Apex Court while laying down the law relating to the burden of proof has also noticed the general rule in the leading democracies of the world that where a person claims to be a citizen of a particular country, the burden is upon him to prove that he is a citizen of that country. In paragraph 26 of the said Judgment, the Apex Court has observed as under:

> *"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 6A(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."*

44. The writ petitioner is before the Court praying for writ of Certiorari for setting aside and quashing the order dated 29.12.2023 passed by the Tribunal. The principles for exercising the Certiorari jurisdiction by a writ Court have been also expounded by this Court in the Full Bench Judgment of Moslem Mondal (Supra). The Full Bench of this

Court in Moslem Mondal (Supra) also examined the scope of interference of a Tribunal's order under Article 226. It was held by the Full Bench that Article 226 of the Constitution confers on the High Court power to issue appropriate writ to any person or authority within its territorial jurisdiction. The Tribunal constituted under the 1946 Act read with the 1964 Order, as noticed above, is required to discharge the quasi-judicial function. The High Court, therefore, has the power under article 226 of the Constitution to issue writ of certiorari quashing the decision of the Tribunal in an appropriate case. The scope of interference with the Tribunal's order, in exercise of the jurisdiction under article 226, however, is limited. The writ of certiorari can be issued for correcting errors of jurisdiction, as and when the inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it or if such court or Tribunal acts illegally in exercise of its undoubted jurisdiction, or when it decides without giving an opportunity to the parties to be heard or violates the principles of natural justice. The certiorari jurisdiction of the writ court being supervisory and not appellate jurisdiction, the court cannot review the findings of facts reached by the inferior Court or Tribunal. There is, however, an exception to the said general proposition, inasmuch as, the writ of certiorari can be issued and the decision of a Tribunal on a finding of fact can be interfered with, if in recording such a finding the Tribunal has acted on evidence which is legally inadmissible or has refused to

admit admissible evidence or if the finding is not supported by any evidence at all, because in such cases such error would amount to an error of law apparent on the face of the record. The other errors of fact, however grave it may be, cannot be corrected by a writ court. As noticed above, the judicial review of the order passed by the inferior Court or the Tribunal, in exercise of the jurisdiction under article 226 of the Constitution, is limited to correction of errors apparent on the face of the record, which also takes within its fold a case where a statutory authority exercising its discretionary jurisdiction did not take into consideration a relevant fact or renders its decision on wholly irrelevant factors. Hence, the failure of taking into account the relevant facts or consideration of irrelevant factors, which has a bearing on the decision of the inferior court or the Tribunal, can be a ground for interference of the court or Tribunal's decision in exercise of the writ jurisdiction by the High Court.

In *Sant Lal Gupta* v. *Modern Coop. Group Housing Society Ltd.*, (2010) 13 SCC 336, the Apex Court reiterating the grounds on which a writ of certiorari can be issued, held that such a writ can be issued only when there is a failure of justice and cannot be issued merely because it may be legally permissible to do so. It is obligatory on the part of the petitioners to show that a jurisdictional error has been committed by the statutory authority. There must be an error apparent on the face of the record, as the High Court acts merely in a supervisory capacity and not as the

appellate authority. An error apparent on the face of the records means an error which strikes one on mere looking and does not need long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matters to show its incorrectness. Such error may include giving reasons that are bad in law or inconsistent, unintelligible or inadequate. It may also include the application of a wrong legal test to the facts found, taking irrelevant consideration into account and failing to take relevant consideration into account, and wrongful admission or exclusion of evidence as well as arriving at a conclusion without any supporting evidence. Such a writ can also be issued when there is an error in jurisdiction or authority whose order is to be reviewed has acted without jurisdiction or in excess of its jurisdiction or has failed to exercise the jurisdiction vested in him by law.

45. In this context, a very recent Judgment of the Apex Court on the scope and extent of issuance of Certiorari under 226 is relevant in the context of the present proceedings. In *Central Council for Research in Ayurvedic Sciences and Anr. Vs. Bikartan Das and ors,* reported in *(2023) SCCOnline SC 996*, the Apex Court has expounded the principles on which a writ Court can exercise the writ of certiorari. The Apex Court in this Judgment after examining the precedents in this regard held that there are 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.

The first cardinal principle is that when it comes to the issue of a writ of certiorari 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. It is not be issued on mere asking.

The second cardinal principle of exercise of extraordinary jurisdiction under Article 226 of the Constitution is that 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 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. The Apex Court held that so far as the errors of law are concerned, a writ of certiorari could be issued if an error of law is apparent on the face of the record. A mere error of law is not sufficient to attract the writ of certiorari. It must be one which is manifest or patent on the face of the record.

Mere formal or technical errors, even of law, are not sufficient, so as to attract a writ of certiorari.

46. Since this Court is examining the correctness of the Tribunal's order dated 30.08.2023 in its extraordinary power under the writ jurisdiction, as have been elaborated by the Apex Court laid down the parameters under which such exercise is to be undertaken, on the facts discussed and the records examined, this Court is disinclined to accept the contentions of the petitioner and therefore, finds no merit in the present writ petition. This Court is not persuaded to interfere with the opinion dated 30.08.2023 passed by the Foreigners Tribunal, Baksa & Tamulpur (Assam) which is impugned in the present writ petition. The writ petition is therefore is devoid of merit and the same is dismissed. No order as to cost.

47. Remit the records to the Foreigners' Tribunal, Baksa & Tamulpur (Assam) immediately along with a copy of this order.

48. Registry shall also forward a copy of this order to the Superintendent of Police (Border), Baksa, Assam, respondent No. 6 for its needful.

JUDGE **JUDGE**

Comparing Assistant