

GAHC010049292018



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

Case No. : WP(C)/1966/2018

MALEKA KHATUN
D/O- LT MOHAMMAD KHAN@MOHAMMAD ALI, W/O- MOGRAB ALI,
PERMANENT R/O- VILL- KUMULLIPARA, MOUZA- GHILAZARI, P.S.
HOWLY, DIST- BARPETA, ASSAM

VERSUS

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

2:THE ELECTION COMMISSION OF INDIA
REP. BY THE CHIEF ELECTION COMMISSIONER
NEW DELHI-110001

3:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY-6

4:THE DEPUTY COMMISSIONER
BARPETA
781301

5:THE SUPERINTENDENT OF POLICE (B)
BARPETA
781301
ASSAM

6:COORDINATOR
NATIONAL REGISTER OF CITIZENS

BHANGAGARH
GHY-

Advocate for the Petitioner : MR. S B RAHMAN, MR. S S S RAHMAN, MR. M R SODIAL, MR. A W AMAN

Advocate for the Respondent : ASSTT.S.G.I., SC, ELECTION COMMISSION.(R2), SC, F.T (R3TO5), SC, NRC (R6)

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE KARDAK ETE

JUDGMENT

Date : 13-12-2024

(Kardak Ete, J)

Heard Mr. A. W. Aman, learned counsel for the petitioner. Also heard Mr. G. Pegu, learned CGC for the respondent no. 1; Mr. P. Pegu, learned counsel appearing on behalf of Mr. A. I. Ali, learned Standing counsel for the Election Commission of India, respondent No. 2; Mr. J. Payeng, learned Standing counsel for the Home Department, respondent Nos. 3 & 5 and Mr. R. Talukdar, learned Government Advocate appearing for the respondent No. 4. None appears for respondent No. 6.

2. By filing this writ petition, the petitioner has assailed the order/opinion dated 04.01.2018 passed by the learned Foreigners Tribunal No. 10, Barpeta in F.T. Case No. 24/2016, by which, the petitioner/proceedee, Maleka Khatun has been declared foreigner of a post 1971 stream thereby, directed to be pushed back to the specified territory.

3. The case projected by the petitioner is that her parents are citizens of India by birth. The names of her father and mother are recorded in the 1966 voter-list. The name of her father Md. Mohammad Khan son of Nandu is

recorded at Serial No. 341, House No. 117, Part No. 15, village-Kumullipara, Mouza-Ghilazari, Police Station-Barpeta, under 50 number Barpeta LAC in the State of Assam. Her mother's name is recorded in the 1966 voter-list as Sopiya Khatun at Serial No. 342 and same house number as her father. In the 1970 voter-list, the name of her father appeared at Serial No. 445, House No. 117, in the same village and the Police Station in the LAC. Her mother's name appeared in 1970 voter-list as Sapiya Khatun wife of Mohammad at Serial No. 446 with the same house number. In the 1989 voter-list, the name of petitioner's father is recorded as Mohammad Ali Khan at Serial No. 85, House no. 276 with the same village and LAC. Her mother's name is recorded as Sokiya Khatun wife of Mohammad Ali Khan at Serial No. 86 and House No. 276. In the 1997 voter-list, petitioner is recorded as Maleka Khatun, daughter of Mohammad at Serial No. 103, House No. 32, village-Kumullipara, Mouza-Ghilazari, Police Station-Barpeta. Her mother's name is recorded as Sofiya Khatun wife of Mohammad at Serial No. 104 of the same voter-list. Since the father of the petitioner died before 1997, his name is not recorded in the 1997 and onwards voter-list.

4. The petitioner contended that she was born and brought up in the Kumullipara village and married at village Galia, where she has been casting her vote since 1989. After soil erosion in the village Galia by Beki River, she has shifted to her paternal home, where she has enrolled herself as a voter in the year 1997. However, she has been marked as "D" voter in the Galia village voter list of 1997. She claims that in the voter list of 2011, her name has been recorded as Maleka Khatun, daughter of Mohammad Ali at Serial No. 124, House No. 32, in the village Kumullipara under 43 Barpeta LAC. Her mother's name is recorded as Sofiya Khatun Bidhoba, wife of Mohammad Ali at Serial No. 123, House No. 32 in the same voter list of 2011. Her husband's name is recorded as

Magrab Ali, son of Toraf Ali at Serial No. 125. She contends that her mother's name has been recorded as Sofiya Khatun Bidhoba, as her mother was a widow and in Assamese Bidhoba means widow.

5. A Reference No. 220 of 2015 under the then Illegal Migrants (Determination by Tribunals) Act, 1983, was made against the petitioner, namely, Maleka Khatun, wife of Magrab Ali, village Kumullipara, P.S. Howly, District-Barpeta, stating that the petitioner/proceedee could not furnish the relevant documents as to her citizenship when such an enquiry was conducted against her and therefore, suspected to be an illegal migrant. On such reference, FT Case No. 24/2016 was registered.

6. The petitioner filed a written statement on 29.04.2016, Examination-in-Chief on affidavit and depositions of the petitioner/proceedee as DW-1, deposition of Safia Khatun as DW 2 and deposition of Magrab Ali as DW 3.

7. The petitioner/proceedee has exhibited as many as 15 (fifteen) exhibits.

8. The petitioner has examined 3 DWs, she herself as DW 1, one Safia Khatun as DW 2 and Magrab Ali as DW 3, who have claimed the petitioner as daughter and wife during the course of examination before the learned Tribunal.

9. After consideration of the oral and documentary evidences, the learned Tribunal has held that the proceedee has failed to prove herself to be a daughter of genuine Indian parents by discharging her burden of proof as provided in Section 9 of the Foreigner's Act 1946 read with Section 106 of the Evidence Act 1872 and declared the petitioner/proceedee to be foreigner who entered in Assam on or after 25.03.1971 without valid documents. Thus, the reference is answered in affirmative.

10. Accordingly, the petitioner/proceedee Maleka Khatun, W/O-Magrab Ali,

Vill-Kumuliapara, P.S-Howly, Dist-Barpeta, Assam, has been declared as foreigner of post 1971 stream and directed to be pushed back to the specified territory. Hence, this present writ petition.

11. Mr. A. W. Aman, learned counsel for the petitioner submits that the petitioner has clearly stated in her written statement as well as Deposition before the learned tribunal that she was born and brought up in the village Kumullipara, Mouza-Ghilazari, P.S-Howly, District-Barpeta. She has also explained that the name of her father is Md. Mohammad Khan @ Mohammad Ali and Mohammad Ali Khan and the name of her mother is Sufia Khatun@SufiaKhatun Bidhaba@SokiaKhatun. She had also deposed that she was married to DW-3 about 34 years ago and at the time of marriage, she was 18 years old. Her father Mohammad Khan's name appears in the voter-list of 1966 and 1970 of village Kumullipara under No. 50 Barpeta LAC and exhibited the voter-list of 1966 and 1970 as Exhibit-A and B. He submits that the correct name of the petitioner's mother is Sofia Khatun although there are minor discrepancies in the letter as Sokia Khatun and Safia Khatun Bidhoba in the voter-list. However, the above names recorded in the voter-list are one and same person. He submits that the DW 2 has clearly stated that petitioner is her daughter who was born at village Kumuliapara, who was married to DW 3 who is the resident of village Galia in the District of Barpeta. Therefore, since DW-2 is an Indian Citizen, the petitioner is also an Indian Citizen by birth. DW 3 has also deposed that the petitioner is his wife and was born and brought up at village Kumuliapara and married to him at village Galia. DW 3 had further deposed that Mohammad Khan, whose name appears in the voter-list of 1966, 1970 and 1989, is the father of the petitioner and Sofia Khatun is the mother of petitioner and they reside in the same house.

12. Mr. A. W. Aman, learned counsel, submits that the learned Tribunal failed to appreciate the relevant documents, which has been produced and proved, which clearly shows that the petitioner is a citizen of India, thereby, came to a wrong conclusion and declared the petitioner to be a foreigner.

13. Mr. A. W. Aman, learned counsel, submits that the petitioner in her written statement as well as deposition before the Tribunal has clearly explained that the name of the petitioner's mother in 1966 voter-list is recorded as Sopiya khatun, wife of Md. Mohammad and in 1970 as Sapiya Khatun wife of Mohammad, in 1989 voter-list as Sukia Khatun wife of Mohammad Ali Khan, in 1997 voter-list as Sofiya Khatun wife of Mohammad and finally, in 2011 voter-list as Sofia Khatun Bidhoba wife of Mohammad Ali and all the voter-list are of the same village Kumullipara, under same Sub-Division and Mouza. Therefore, he submits that it is apparent on the face of record that Sapia Khatun, Sufia Khatun Bidhoba, wife of Mohammad @ Mohammad Ali, are name of the mother of the petitioner and as such the learned Tribunal as erred in coming to the conclusion that same are unbelievable and variable age difference, by creating between two persons which led to believe that they are different persons.

14. Mr. A. W. Aman, learned counsel, submits that Exhibit-E, Exhibit-K and Exhibit-L are not only the documents exhibited to prove the linkage with the petitioner to her parents, Exhibit-C which relates to voter list of 2011, clearly shows the name of the petitioner as Maleka Khatun, daughter of Mohammad Ali. The DW-2, the mother of the petitioner had deposed that the petitioner is her daughter and she was born and brought up at village Kumullipara and married to DW 3.

15. Mr. A. W. Aman, learned counsel further submits that as per Section 3 of the Foreigners (Tribunal) Order, 1964, it is incumbent upon the learned Tribunal

to serve on the petitioner, a copy of the main grounds on which the petitioner is alleged to be foreigner. However, in the present case, the petitioner was served with a notice to appear without there being any copy of the main grounds, on which she has been alleged to be a foreigner. Therefore, in the absence of any main ground, the petitioner has been deprived of her right to defend herself, which has caused prejudice to her.

16. Mr. A. W. Aman, learned counsel submits that the learned Tribunal has failed to appreciate the exhibited documents and oral evidences and wrongly came to a conclusion that the petitioner has failed to prove her citizenship. Therefore, the impugned order/opinion dated 04.01.2018, may be set aside and quashed and declare the petitioner as citizen of India.

17. Mr. A. W. Aman, learned counsel for the petitioner, in support of his submission, has placed reliance on the following judgments:

- (i). **Sarbananda Sonowal vs. Union of India and Anr.**, reported in **(2005) 5 SCC 665**.
- (ii). **Bhanwaroo Khan and Ors. vs. Union of India and Ors.**, reported in **(2002)4 SCC 346**.
- (iii). **Basiron Bibi vs. Union of India & Ors.**, reported in **2018 (1) GLT 372**.
- (iv). **Hazara Khatoon vs. Union of India & Ors.**, reported in **2019 (5) GLR 471**.
- (v). **Central Council for Research in Ayurvedic Sciences & Anr. vs. Bikartan Das & Ors.** reported in **(2023) 0 Supreme (SC) 763**.
- (vi). **Md. Rahim Ali @ Abdur Rahim vs. The State of Assam & Ors.**, reported in **2024 SCC Online SC 1695** (decided on 11.07.2024).
- (vii). **Sirajul Hoque vs. The State of Assam & Ors.**, reported in **(2019) 5 SCC 534**.

18. Mr. J. Payeng, learned Standing counsel for the Home Department, Government of Assam, while supporting the impugned order/opinion of the learned Tribunal and relying upon the case of **Sarbananda Sonowal** (Supra), submits that section 9 of the Foreigners Act, 1946 stipulates that the burden of proof lies on the person against whom the allegation is made that he/she is a foreigner. The interpretation of section 9 has been elaborately dealt with by the Hon'ble Supreme Court in the case of **Sarbananda Sonowal** (Supra).

19. He submits that the petitioner has miserably failed to establish a linkage with her projected parents as not only the names of her projected parents are different but there are certain age variations of the persons who have been projected as her parents. Therefore, the discrepancies are in fact a major one. He further submits that in all the voter-lists, the petitioner could not establish the linkage as the name of the petitioner is nowhere recorded along with her projected parents. It is only the bald contentions of the petitioner, DW 2 and DW 3, that petitioner was born and brought up in village Kumullipara and she is the daughter and the wife of DW-2 and DW-3. Therefore, no interference is called for to the opinion of the learned tribunal. As such, the writ petition deserves to be dismissed.

20. We have considered the rival submissions advanced by the learned counsel for the parties and perused the materials on record.

21. In order to appreciate the claims of the petitioner, we deem it appropriate to refer to the evidences/depositions of the DWs.

22. The petitioner as DW-1 had deposed that she was born and brought up at village Kumullipara in the district of Barpeta and married to Mograb Ali, son of Tarap Ali of village Galia about 34 years ago. At the time of the marriage she

was 18 years old. Her father Mohammad Khan's name appears in the voter list of 1966, 1970 at Serial Nos. 341 and 445, H.No-117, Part No- 15, 16, village Kumullipara under No-50 Barpeta LAC. Exhibit A and B are the voter list of 1966 and 1970. Her parents's name also appear in the voter list of 1989 and 1997. After death of her father about 26 years ago they shifted from Galia to Kumullipara due to erosion of river Beki. She has six sisters and they do not have any brother and hence after the death of her father she resided along with her mother. She is the 2nd amongst all the sisters. She has casted her vote in the year 1989 at village Galia. After shifting from Galia to Kumullipara she was marked as 'D' Voter at Galia. She voted at village Kumullipara along with her mother Sofia Khatun and husband Mograb Ali in 2011 after shifting from Galia to Kumullipara and she has been casting her vote since 2011. She resides along with her family in the same compound of her mother. She had stated that the Secretary of No. 102 Kumullipara GP Barniapara and Gaon Baruah of village Kumullipara issued the linkage certificates certifying that she is the daughter of Muhammad Khan and Sofia Khatun of village Kumuliapara and married to Magrab Ali of village Kumuliapara. The GB of village Galia also issued a certificate that she is the wife of Magrab Ali of village Galia and a permanent resident of the said village and her name appears in the voter list of 1989. She had stated that she has sworn an affidavit correcting the name of her mother Sofia Khatun, father-in-law Torap Ali and her own name. She had deposed that her mother's actual and correct name is Sofia Khatun but in the voter list of 1989 her name appeared as Sokia Khatun and in the voter list of 2011 as Safia Khatun Bidhawa. Therefore, Sakia Khatun, Safia Khatun Bidhawa and Sapia Khatun are one and same person. Her actual and correct name is Maleka Khatun and in the voter list of 1989 her name appeared as Maleka Bhanu,

however, Maleka Bhanu and Maleka Khatun is one and same person.

23. DW 2, claims to be mother of the petitioner had deposed that Maleka Khatun is her daughter and she was born at village Kumallipara at home and married to Magrab Ali, S/o Tarab Ali of Galia village in the district of Barpeta. Presently she is residing with her at village Kumallipara as her house broke due to erosion and she do not have any son. Since last 18 years her name appeared in the voter list of 1966 along with her husband in 1970 and 1989. Her husband expired before 1997 and hence in voter list of 1997, 2011 only her name appears. She has submitted voter list of 1997 her Voter ID Card issued by ECI. She stated that she knew that petitioner is marked 'D' Voter but she do not know since when she is an Indian by Birth. She has seven daughters and no son. Petitioner is 2nd amongst all. Maleka Khatun has cast her vote at village Kumallipara of 1997. She also had cast her vote at village Galia in 1989 along with her husband. She has her Voter ID Card. Maleka Khatun is an Indian citizen as she is an Indian citizen by birth.

24. One Mr. Magrab Ali, DW-3 claims to be the husband of the petitioner had deposed that Maleka Khatun is his wife. She was born and brought up at village Kumuliapara and was married at village Galia. After 1997 they shifted to the house of his in-law along with his family. Name of the father of Maleka Khatun is Mohammad Khan and his name appear in the voter list of 1966, 1970, 1989. Her mother's name is Sofia Khatun and they resides in the same house. His father's name appear in the voter list of 1966 and 1970 and his name also appear in the voter list of 1989, 1997 and 2011. The GB of village Galia and Kumullipara issued certificate. He is having a daughter Minuwara Khatun and a son and submitted school certificate of his son Malek Ali. He had cast his vote and also have voter ID card. His wife, himself and their children are all Indian

citizen by birth. He has married Maleka Khatun about 30/35 years ago. His wife Maleka Khatun and his name appears in the voter list of 1989 at village Galia. About 18 years ago he shifted to Kumuliapara along with his wife and children due to erosion of river Beki. After shifting to Kumaliapara his name was enrolled in the voter list of Kumuliapara along with his wife. She was marked as 'D' Voter at village Galia after shifting from there. Maleka Khatun is an Indian citizen by birth and her parents were also born at village Kumuliapara.

25. On consideration of the above depositions and the written statement of the petitioner, we noticed that the petitioner has relied on the various voter lists and other documents of her projected parents and herself to establish the linkage. The petitioner had stated that she was born and brought up the in the village Kumullipara, Mouza-Ghilazari, P.S-Howly, District-Barpeta. She has also explained that the name of her father is Md. Mohammad Khan @ Mohammad Ali and Mohammad Ali Khan and the name of her mother is Sufia Khatun @ Sufia Khatun Bidhaba @ Sokia Khatun. She had also deposed that she was married to DW-3 about 34 years ago and at the time of marriage, she was 18 years old. Her father Mohammad Khan's name appears in the voter-list of 1966 and 1970 of village Kumullipara under No. 50 Barpeta LAC and exhibited the voter-list of 1966 and 1970. The petitioner had stated that the correct name of her mother is Sofia Khatun although there are minor discrepancies in the spelling as Sokia Khatun and Safia Khatun Bidhoba in the voter-list. However, the above names recorded in the voter-list are one and same person. Record reveals that there was no cross examination by the State.

26. DW 2 had stated that petitioner is her daughter who was born at village Kumuliapara, and married to DW 3 who is the resident of village Galia in the District of Barpeta. DW 3 has also deposed that the petitioner is his wife and

was born and brought up at village Kumulipara and married to him at village Galia. DW 3 had further deposed that Mohammad Khan, whose name appears in the voter-list of 1966, 1970 and 1989, is the father of the petitioner and Sofia Khatun is the mother of petitioner and they reside in the same house. We noticed that the above witnesses were cross examined but nothing is discerned of its rebuttal.

27. The petitioner had stated that Sakia Khatun, Sofia Khatun Bidhawa and Sapia Khatun is one and the same person, who is her mother. The name of the petitioner's mother in 1966 voter-list is recorded as Sopiya khatun, wife of Md. Mohammad and in 1970 as Sapiya Khatun wife of Mohammad, in 1989 voter-list as Sukia Khatun wife of Mohammad Ali Khan, in 1997 voter-list as Sofiya Khatun wife of Mohammad and finally, in 2011 voter-list as Sofia Khatun Bidhoba wife of Mohammad Ali and all the voter-list are of the same village Kumullipara, under same Sub-Division and Mouza.

28. Having considered above, it appears that Sapia Khatun, Sufia Khatun Bidhoba, wife of Mohammad @ Mohammad Ali, are name of the mother of the petitioner even though there is a variation in the spelling. However, we find that no proper linkage with her projected parents is established as no document is proved to that effect. Even the voter lists relied upon by the petitioner, although not a proof of citizenship, does not show the connection with her projected father as no voter list wherein the names of the petitioner and her projected parents is exhibited and proved except voter list of 2011, wherein the name of the petitioner as Maleka Khatun, is shown as daughter of Mohammad Ali.

29. Coming to the documentary evidences on the record, we find that Ext-A and B are compared with original photostat copies of certified copies of voter lists of 1966 and 1970 wherein the names of the projected parents of the

petitioner are recorded at Sl. Nos. 341 and 342 and 445 and 446 respectively with common House No.117 of village Kumullipara under 50 No. Barpeta LAC. Ext-C is compared with original the photostat copy of certified copy of voter list of 2011 wherein the names of the projected mother and her name is recorded as Sufia Khatun Bidhaba and Maleka Khatun respectively vide Sl.No.123 and 124 respectively and common House No.32 under 43 No. Barpeta LAC and these two names came into existence on and from 2011 when their names are recorded in the voter list of 2011._

30. On bare comparison of voter lists of 1970 and 2011 marked as Ext-B and Ext-C, we concur with the finding of the learned Tribunal that if Sapia Khatun wife of Mohammad and Sufia Khatun Bidhaba wife of Mohammad Ali would have been same and one person the age of such person should have been recorded as 68 years instead of 57 years, therefore, major difference has been created in between two persons and which can be concluded that they are two different persons and voters of 43 No. Barpeta LAC.

31. Ext-D is compared with original the photostat copy of Electoral Photo Identity Card of Shofiya Khatun Bidhaba, the name of the petitioner's projected mother as Shofiya Khatun Bidhaba instead of Sapiya Khatun. Ext-E is compared with original the photostat copy of certificate of Secretary, 102 No. Kumullipara Gaon Panchyat countersigned by B.D.O not proved by examining the issuing authority and attesting authority as witnesses. Ext-F and Ext-G are the certificates of Gaonburahs of Kumullipara and Galia and same are not proved by examining the authors. Ext-H, Ext-I and Ext-J are compared with original the photostat copies of certified copies of voter lists of 1966, 1970 and 1997 wherein the names of the members of the husband of the petitioner having no evidentiary value to decide the citizenship. Ext-K and Ext-L are the certificates of

Gaonburahs of Kumullipara and Golia respectively and are not proved by examining the authors. Ext-M is the Affidavit of the petitioner executed before Notary Public at Barpeta having no evidentiary value. Ext-N is the compared photostat copy of Elector Photo Identity Card of Malekha Khatun wherein relation name is shown as Mahammad Ali which does not indicates the father daughter relation. Ext-O is the compared photostat copy of Transfer/Leaving certificate of Head Master, Kumullipara Khandakarpara M.E. Madrassa and the contents of the documents are not proved by examining the author. Ext-P is the photostat copy of Birth certificate of Minowara Khatun and in Ext-P Minowara Khatun has been described as daughter of Maleka Khatun and Magrab Ali. Ext-Q is the photostat copy of Elector Photo Identity Card of Magrab Ali who has been described as son of one Toraf Ali and same has been proved. However, proof of Elector Photo Identity Card of Magrab Ali would not help for establishment of linkage of the petitioner with her projected parents.

32. On the scrutiny of the evidences, we find that the petitioner has failed to prove herself to be a daughter of genuine Indian parents by discharging her burden of proof as provided under Section 9 of the Foreigner's Act, 1946. DW2 and DW3 have also failed to support the the petitioner by adducing their respective corroborative and substantive evidences except the claims of daughter and the marriage. Thus, we are of the considered opinion that the learned tribunal has rightly declared the petitioner to be foreigner who entered in Assam on or after 25.03.1971 without valid documents.

33. Now, we would consider the case laws relied on by the learned counsel for the parties.

In the case of **Sarbananda Sonowal** (supra), the interpretation of section 9 of the Foreigners Act, 1946, has been elaborately dealt with by the

Hon'ble Supreme Court and held that 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 u/s 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.

In the case of **Bhanwaroo Khan** (supra), the Hon'ble Supreme Court has held that long stay in the Country and enrolment in the voters list would not confer any right to an alien to continue to stay in the country.

In the case of **Basiron Bibi** (supra), a Coordinate Bench of this Court on discrepancies in the voters' lists which the petitioner of that case contended that same were not her creation but being entered into by officials of Election Commission and therefore should not be used adversely against the petitioner, had rejected the contention being without any substance and has held that the voters' lists were adduced as evidence by the petitioner herself to prove her case that she was not a foreigner but a citizen of India and the petitioner cannot insist that only that portions of the voters' lists which are in her favour

should be accepted and those portions going against her should be over-looked. This is not how a document put forward as a piece of evidence should be examined. The document has to be appreciated as a whole.

In the case of **Hazara Khatoon** (supra), the Coordinate Bench of this Court has held that from a reading of section 9, it is apparent that the onus of proving that the proceedee is a foreigner or is not a foreigner of such description as the case may be, shall lie upon such person, notwithstanding anything contained in the Indian Evidence Act. In other words, the burden of proof that the proceedee is not a foreigner would lie upon the proceedee himself or herself. In a proceeding under the Foreigners Act of 1946, in order to discharge such burden, proceedee relies upon a particular given person, whose name appears either in a voters list of 1966 or 1970 or whose name appears in a particular land document pertaining to the said period or relies upon any other if the acceptable and admissible document, which establishes the existence of such person within the territory of India during the relevant period of time, i.e., prior to 25.3.1971. The discharge of the burden of proof as required under section 9 of the Foreigners Act of 1946 would be that the proceedee concerned would have to prove his lineage to the particular person, whose name appears in the aforesaid documents pertaining to the period prior to 25.3.1971. Although section 9 of the Foreigners Act of 1946 provides that the onus of proving that the proceedee is not a foreigner would lie upon such person notwithstanding anything contained in the Indian Evidence Act, 1872, but in order to understand the concept of burden of proof, we may still rely upon the concept of burden of proof as provided under section 101 of the Indian Evidence Act of 1872.

In the case of **Md. Rahim Ali @ Abdur Rahim** (supra), the Hon'ble Supreme Court has held that for avoidance of doubt, we may restate that this

does not imply that strict proof of such allegation has to be given to the accused person but the material on which such allegation is founded has to be shared with the person. For obvious reasons and as pointed out hereinbefore, at this stage, the question of the evidentiary nature of the material and/or its authenticity is not required. However, under the garb of and by taking recourse to Section 9 of the Act, the authority, or for that matter, the Tribunal, cannot give a go-by to the settled principles of natural justice. Audi alteram partem does not merely envisage a fair and reasonable opportunity of being heard. In our opinion, it would encompass within itself the obligation to share material collected with the person/accused concerned. It is no longer *res integra* that principles of natural justice need to be observed even if the statute is silent on that aspect.

The Hon'ble Supreme Court on the facts of the above case has observed that the evidence produced before the Tribunal by the appellant to indicate that his parents had been resident in India much prior to 01.01.1966 whereas his siblings and he himself much prior to 25.03.1971, has been disbelieved only on the ground of mismatch of actual English spelling of the names and discrepancy in dates. As far as the discrepancy (ies) in dates and spellings are concerned, we are of the view that the same are minor in nature. Variation in name spelling is not a foreign phenomenon in preparation of the Electoral Roll. Further, the Electoral Roll has no acceptance in the eyes of law insofar as proof of date of birth is concerned. A casual entry by the enumerators when noting and entering the name(s) and dates of birth(s) as also the address (es) of the person(s) while making preparatory surveys for the purposes of preparing the Electoral Rolls cannot visit the appellant with dire consequences. Moreover, in our country, sometimes a title is prefixed or suffixed to a name such that the same

person may be known also by one or two aliases. The Tribunal seems to have been totally oblivious to all this.

In the case of **Sirajul Hoque** (supra), the Hon'ble Supreme Court has observed that on a perusal of the same, we find that a number of documents have been relied upon by the appellant starting with a voters' list of his grandfather Kematullah in village Sotobashjani. 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.

34. On consideration of the above case laws, we find that the decisions and the observations rendered therein are on the attending facts of those cases, which is clearly distinguishable. Therefore, in our view, same would not automatically be applied in the present case.

35. As noted herein above, in **Sarbananda Sonowal's** case (supra), the interpretation of section 9 of the Foreigners Act, 1946, has been elaborately

dealt with by the Hon'ble Supreme Court. Under section 9, the existence of facts which would be required to be proved by the proceedee is that the concerned person, whose name appears in the documents relied upon by the proceedee alone is the lineage of the proceedee. Any evidence being led in discharge of such burden of proof, which would indicate the lineage of the proceedee to a person merely having the same or a similar name as that of the person appearing in the documents relied upon, in our view would not be sufficient discharge of the burden of proof to establish the existence of the fact that the person named in the referred documents constitutes the lineage of the proceedee. In order to discharge the complete burden of proof, the nature and purport of the evidence must be such that the lineage is established not only with respect to the person, whose name appears in the documents relied upon but at the same time rules out the possibility of it being linked to any other person having a same or a similar name. In the present case, no linkage is proved except the assertion that the projected parents of the petitioner were appeared in the voter lists of 1966 and 1970.

36. Coming to the exercise of extraordinary jurisdiction under Article 226 of the Constitution, particularly, issuance of a writ of certiorari, the Hon'ble Supreme Court in the case of **Central Council for Research in Ayurvedic Sciences** (supra), has held that 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.

37. In view of what has been discussed herein above and on the scrutiny of the evidences, we are of the considered view that the petitioner has failed to prove herself to be a daughter of genuine Indian parents by discharging her burden of proof as provided under Section 9 of the Foreigner's Act 1946. Thus, we are of the considered opinion that the learned tribunal has rightly declared the petitioner to be foreigner who entered in Assam on or after 25.03.1971 without valid documents.

38. Consequently, writ petition stands dismissed.

JUDGE

JUDGE

Comparing Assistant