

GAHC010057972024



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

W.P(C) No.1859/2024

Md. Jonab Ali @ Janab Ali,
Aged about 40 years
Son of Majom Ali
Resident of Village-Malibari Satra,
P.S. Boko, District-Kamrup, Assam

.....Petitioner

-Versus-

1. The Union of India, represented by the Commissioner & Secretary to the Ministry of Home Affairs, Government of India, New Delhi-1.
2. The State of Assam, represented by the Commissioner & Secretary to the Government of Assam, Home Department, Dispur, Guwahati –6.
3. The State Co-ordinator, National Register of Citizens (NRC), Assam, Achyut Plaza, Bhangagarh, Guwahati-5
4. The Election Commission of Assam, represented by the Commissioner, Beltola-Basistha Road, Housefed Complex, Guwahati-6, Assam

5. The Deputy Commissioner,
Kamrup, Amingaon, Assam

6. The Superintendent of Police
(Border), Kamrup, Amingaon

.....Respondents

- B E F O R E -

**HON'BLE MR. JUSTICE MANSAH RANJAN PATHAK
HON'BLE MR. JUSTICE SOUMITRA SAIKIA**

For the Petitioner : Mr. D.P. Borah, Advocate.

For the Respondents : Mr. P.S. Bhattacharyya, CGC for R-1
Ms. A. Verma, SC, FT for R-2 & 6
Mr. H. Kuli, SC, ECI for R-4
Mr. P. Sarma, Addl. Sr. Government
Advocate, Assam for R-5

Date of hearing : **18.09.2024**

Date of Judgment & Order : **19.12.2024**

JUDGMENT & ORDER (CAV)

[Soumitra Saikia, J.]

This writ petition is filed by the petitioner challenging the opinion dated 29.12.2023 passed by the Member, Foreigners Tribunal No. 2, Kamrup at Boko, Assam in B.F.T. Case No 342/15 arising out of FT Case No. 880/09 whereby a reference made before the Tribunal was answered in affirmative and the petitioner was held to be not an Indian Citizen. The Tribunal opined that the petitioner could not establish his linkage with an Indian parent relatable to a period before 25.03.1971.

2. Pursuant to issuance of Notice by the Tribunal, the petitioner appeared before the Tribunal and contested the reference made by the State to decide the question whether the petitioner is an illegal migrant who had entered into the territory of Assam from the specified territory on or after the cut-off date which is 25.03.1971. The petitioner filed his written statement and also adduced evidences.

3. This Court by order dated 04.04.2024 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 in the presence of learned counsel for both parties.

5. In his written statements, the petitioner's projected case is that he was born in the village Latariadia under the Boko Police Station in the district of Kamrup, Assam. It was stated that his father and grandfather were born in the village of Changordia which is under the jurisdiction of Boko Police Station in the district of Kamrup, Assam. He projected one Majom Ali and one Musstt. Rangmati Nessa as his parents. His projected grandparents were Momjan Nessa and Monser Ali. In the written Statement, it is stated that his grandfather had a brother namely Songser Sheikh and his father had a brother namely Majar Ali. He has 10(ten) siblings including himself, namely, Janab Ali, Usman Ali,

Sumar Ali, Nisan Ali, Ajbhanu Nessa, Saiful Nessa, Majiran Nessa, Paritan Nessa, Batasi Nessa, Kulson Nessa. It is also stated that the opposite party/petitioner was married to Najma Khatun and after marriage, they have three (3) children namely, Naser Ali, Hamed Ali and Jahida Khatun. It is stated in his written statement, that due to erosion by the river Brahmaputra, the grandfather of the petitioner, his parents and other family members shifted from Village Changordia (Chaordia) to the nearest village-Sontoli, Mouza-Sontoli, District-Kamrup, Assam on about 1962. It is also stated that his grandfather was the absolute owner and possessor of a plot of land and his grandfather name has been recorded in the Land Annual Khiraj Patta of 1963-1964 as Monser Ali Sheikh, Son of Umedali Sheikh in the Annual Khiraj Patta No. 12 under Village-Sontoli, Mouza-Pachim Chamaria, District-Kamrup, Assam. It is also stated that the grandfather of the petitioner had another two plots of land at Village-Sontoli vide Patta No. 23 and at Village-Tangonmari vide Patta No. 74 and his grandfather had also paid land revenue to the concerned authority of the said two plots of land and as such the concerned authority had issued a Land Revenue Receipt in the name of the grandfather of the opposite party/petitioner for the year of 1966 as Monser, Son of Umedali vide Book No. 22546 Sl. No.041.

6. In the written statement, it is stated that the grandfather of the petitioner died on or about 1966 and as such his name was deleted from the subsequent voters lists. It is also stated that the petitioner's father's name Majom Ali

Son of Monmer has been recorded in the voters list of 1971 vide Sl. No. 362, House No. 42, 36, Part No. 48 under 55 No Boko LAC of the village-Sontoli, Mouza-Sontoli, P.S.-Boko, District-Kamrup, Assam and also in the voters list of 1978, vide Sl. No. 184, 185, House No. 42, under 48 No Boko LAC of the village-Sontoli, Mouza-Sontoli, P.S.-Boko, District-Kamrup, Assam. It is stated that although the petitioner's father submitted particulars to the Enumerator for registering his father's name and names of other family members in the voter list for the year 1985 but because of the shifting of his father and other family members from Sontoli to the nearest village Latariadia in 1985, the names were not registered. The family again shifted from Village-Latariadia to village-Malibari Satra under Boko Police Station on about 2004 due the erosion of the river Brahmaputra. It is stated that in the voters list of 1993, 1997, 2005, the names of his father Majom Ali and other family members are recorded. It is stated that the name of the petitioner is recorded in the voters list of 2005 as Jonab Ali Son of Majom Ali at Sl. No. 822, House No. 536 T, Part No. 37 at the Village-Malibari Satra, Mouza-Nagarbera, District-Kamrup, Assam under 48 No Boko LAC. Although he shifted from village- Latariadia in the year 2004 to Village- Malibari Satra, Mouza- Nagarbera, District-Kamrup, Assam under 48 No. Boko LAC, his name in the voter list of 2005 was also recorded vide Sl. No. 149, House No. 650, Part No. 50 at Village Latariadia, Mouza Sontoli, District, Kamrup, Assam under 48 No. Boko LAC and after the year 2005, the name of the petitioner has been deleted from the voter list of the Village-Latariadia.

7. It is also stated that the names of his father, mother, his brother, his name and his wife's name have been recorded in the voters list of 2015 at SI No. 907, 908, 909, 910, 911 respectively, House No. 536, Part No. 52 at Village-Malibari Satra, Mouza-Nagarbera, District-kamrup, Assam under 48 No Boko LAC and also in voter list of 2022 vide SI. No. 1257, 1258, 1259, 1260, 1261 respectively, in House No. 536, Part No. 62 at the village- Malibari Satra, Mouza-Nagarbera, District-Kamrup, Assam under the 48 No Boko LAC.

8. It is also stated that the petitioner has been issued voter identity card in the year 2013 whereas name of the petitioner has been recorded as Janab Ali vide card No. MRF5243801. He also has been issued an AADHAAR card in his name wherein his name as recorded as Janab Ali vide Aadhaar No. 523054805798. He has a PAN Card, wherein his name has again been recorded as Janab Ali Son of Majam Ali vide PAN No. CNPPA1330M. It is further stated that he was issued two Gaon Pradhan certificates by the Gaon Pradhan of Chamaria Revenue Circle vide certificate dated 09.10.2022 and Gaon Pradhan of Malibari Satra vide certificate No. 429 dated 04.03.2023 certifying that he is the Son of Majam Ali and thereby the certificates establishes the link with his father in addition to the voters list and the land documents.

9. It is stated in the written statements that his great grandfather's name is recorded in some places as Umedali

Sheikh and in some places as Umedali. He submits that 'Umedali Sheikh' and 'Umedali' are one and the same person. Similarly, his grandfather's name is recorded sometimes as Monser Ali Sheikh and sometimes as Monser Ali and also Monser. He therefore submits that 'Monser Ali Sheikh', 'Monser Ali' and 'Monser' are one and the same person, who is his grandfather. His father's name is also recorded sometimes as Janab Ali and sometime as Jonab Ali and sometimes as Jonab. He therefore submits that 'Janab Ali', 'Jonab Ali' and 'Jonab' are one and the same person who is his father.

10. The petitioner filed his evidence on affidavit in support of the contentions made in the written statement as DW-1. He presented his father as his witness as DW-2.

11. In his evidence as DW-1, he deposed in support of the statements made in the written statement.

12. The father of the petitioner as D.W-2 deposed that the petitioner/opposite party was his son and was born in village Changordia He deposed that he and his father was born in the same village. D.W-2 deposed that his parents' names are Monser Ali and Momjan Nessa and that his father had brother namely Songser Sheikh. He further deposed that he has six siblings but he remembered only four siblings namely, Moymona Nessa, Lal Bhanu Nessa, Fuljaan Nessa and Hanufa Nessa. D.W-2 deposed that his wife's name is Rangmati Nessa and he has ten children and the opposite

party/petitioner was married to Najma Khatun and they have three children. D.W.-2 deposed that he did not know whether his grandfather casted vote or not and he heard that his father casted votes in the years 1954 and 1960. D.W.-2 also deposed that he does not know the land details and also does not know the year in which his father died. D.W.-2 deposed that he had casted his vote in the year 1971 along with his father and brother but he does know the voting centre. He further deposed that he cast his vote in the year 1983 in village Latariadia and the year 2005 in Village-Malibari.

13. The Gaon Pradhans were examined as Court Witnesses as C.W.-1 and C.W.-2. In respect of the certificate issued by the Gaon Pradhan of village-Malibari Satra, who was examined as C.W-1, the witness although identified the said certificate as Exhibit-O but in his deposition, he stated that the certificate was issued only based on the Voter ID card presented by the petitioner. The said witness also deposed that he did not bring the counter folio of the said certificate.

Similarly, the Government Gaon Pradhan of Village-Bar Saru Arikati and in-charge Gaonpradhan of Village-Latariadia and Panikhaity who was examined as C.W-2 identified the seal and signature of the certificate issued by him which was exhibited as Ext-N. He stated before the Court that the said certificate was issued based on the statements made by the opposite party/petitioner and that he did not know more about the opposite party/petitioner and nor did

he bring the counter folio of the said certificate with him at the time of his deposition before the Court.

14. The exhibits produced before the Court are as under:

1. *Exhibit-A is a certified copy of the electoral roll for the year 1960.*
2. *Exhibit-B is a Annual Khiraj Patta*
3. *Exhibit-C is a land revenue receipt*
4. *Exhibit-D is a certified copy of the electoral roll for the year 1971*
5. *Exhibit-E is a certified copy of the electoral roll for the year 1993*
6. *Exhibit-F is a certified copy of the electoral roll for the year 1997*
7. *Exhibit-G is a certified copy of the electoral roll for the year 2005*
8. *Exhibit-H is a certified copy of the electoral roll for the year 2010*
9. *Exhibit-I is a certified copy of the electoral roll for the year 2015*
10. *Exhibit-J is a certified copy of the electoral roll for the year 2022*
11. *Exhibit-K is a Voter ID card*
12. *Exhibit-L is a Aadhaar Card*
13. *Exhibit-M is a PAN Card*
14. *Exhibit-N is a Gaonpradhan certificate issued by Gaon Pradhan, Bor Saru Arikati dated 09.10.2022*

*15. Exhibit-O is a Gaonpradhan certificate issued by
Gaon Pradhan, Malibari Satra dated 04.03.2023*

*16. Exhibit-P is an affidavit of the petitioner dated
03.03.2023*

15. The Ext-A is the voter list of 1960 wherein the names of Songser Sheikh, Monser Sheikh and Jeherun Nessa are shown to be residents of Village- Changordia under Boko Police Station in the district of Kamrup, Assam. The names appeared at SI No. 51, 52 and 53 on the said voters list. As per Ext-A, according to the petitioner, names of his grandfather Monser Sheikh appeared along with brother Songser Sheikh and Jeherun Nessa wife of Songser Sheikh.

16. Ext-B is the land Annual Khiraj Patta of 1963-64, this document as is evident from the records does not clearly reflects name of the person who has been issued this patta. The document of Annual Khiraj Patta can be an evidence of land allotted to a person on annual lease basis. This land Annual Khiraj Patta as per the Revenue Regulations is issued on the basis of 'draft citha'. No supporting evidence was placed before the Tribunal to establish properly the ownership which the petitioner is trying to project through the annual land khiraj patta. This land Annual Khiraj Patta although was stated to have been allotted to his late grandfather, the name inserted in the said land Annual khiraj Patta is not legible. If this piece of evidence is to be considered to be reliable, then in view of the statement made by the petitioner that his grandfather expired on or about

1966, no land document was exhibited before the Tribunal to show that the legal heirs of his late grandfather namely his father who still alive had his name mutated in that plot of land by the process prescribed under the Revenue Regulations. There is no clear statement as to the status of the said plot of land.

17. Ext-C is the land revenue receipt of the year 1966. However as no further collateral or supporting evidence in connection to the land revenue receipt was produced, that by itself will not be sufficient to establish that the land belonged to his grandfather. It is possible that the petitioner is projecting a case that the land which belonged to his grandfather and which was allotted to him by the land Annual Khiraj Patta and on which the land revenue was paid by his grandfather came to be eroded because of flood and which led to the purported shifting of the family from Changordia to Lataradia. This averment on its own is not sufficient to return a finding that the person mentioned in the land Annual Khiraj Patta was his grandfather and that land allotted to him was eroded in flood and consequently requiring the family to move to Lataradia. No certificates from any authority including the Gaon Pradhan/Gaon Burah of the village Panchayat has been exhibited before the Tribunal to show that the family had shifted due to flood and the land allotted to the petitioner's grandfather came to be eroded.

18. A Notary executed affidavit was filed in support of Ext-B and Ext-C. However, an affidavit to that effect cannot be relied upon in the absence of collateral and supporting documents on the basis of which such statements are made in the affidavit.

19. Ext-D is the certified copy of the voter list of 1971 which reflects only one name which is the name of the projected father of the petitioner namely Majom Ali son of Monmer whereas in his written statement and evidence, he submits that the name of his grandfather is Monser. The Annexure-6 from the records is an extract of the voters list for the year 1978, here the name of Majom is reflected at Sl. No. 184 as son of Mokhsen.

20. Similarly Ext-E, certified copy of the voter list for the year 1993 shows only a singular name of Majom Ali son of Monser.

21. The Exhibits-F, G, H, I and J are the certified copies of the voters list for the years of 1997, 2005, 2010, 2015 and 2022 respectively.

22. Exhibit-G shows the name of the petitioner as son of Majom Ali for the year 2005. Ext-H shows the name of the petitioner as son of Majom Ali as well as the names of Majom Ali son of Monser Ali who is the projected father, Ranmati Nessa wife of Majom Ali namely the projected mother of the petitioner, Usman Ali son of Majom Ali namely the projected

brother of the petitioner as well as Najma Khatun namely the projected wife of the petitioner. Similarly, these names are also seen in the certified copy of the voters list of 2015 as well as the certified copy of the voters list of 2022. The village is shown as Malibari Satra.

23. Ext-N is the Gaonpradhan Certificate issued by one N. Islam, Gaonpradhan Village- Bar Soru Arikati. This exhibit certifies that the petitioner Janab Ali is the son of Majam Ali of Village-Panikhaiti/Latariadia under the Post Office of Mahtoli, Mouza Sontoli, P.S. Boko, Dist-Kamrup, Assam. In the said certificate, the petitioner's age is shown to be about 24 years old and it is certified that his name was recorded in the voters list of 2005. However, there is an endorsement in the said certificate by the Gaonpradhan in vernacular which translated to English will mean- *the above named person is from Sontoli village under Sontoli Mouza and his father's name appears in voters list of 1971*. This certificate is dated 09.10.2022. However, the Gaon Pradhan upon being summoned by the Tribunal appeared and in his deposition, he categorically stated that the certificate was issued based on the statement of the opposite party/petitioner and that he does not know more about the proceedee nor has he brought the counter folio of the book from which the certificate has been issued. Under such circumstances, the Tribunal did not accept the certificate to be reliable.

24. Similarly, Ext-O is also another certificate issued by the Gaon Pradhan of Malibari Satra vide certificate No. 429

dated 04.03.2023. By the said certificate, the Gaon Pradhan certified that the petitioner is a son of Majom Ali and is a resident of Malibari Satra. Again before the Tribunal, the Gaon Pradhan who appeared to prove the said certificate in his deposition, it is stated that the said certificate was issued based on the voter ID card and he did not bring the counter folio of the said certificate. Consequently, contents of the certificate were held to be not proved by the Tribunal.

25. A perusal of both the Exhibits-N and O reflect that these two certificates contradict each other and also the statements made by the petitioner in his written statement and his evidence before the Court. Ext-N is issued by the Gaon Pradhan of Chamaria Revenue Circle on Village-Bar Soru Arikati.

26. Ext-P is an affidavit sworn before the Notary by the petitioner regarding the list of documents relating to his grandfather. Any Oral evidence dehors record cannot be considered sufficient to prove the contents of documents. A Co-ordinate Bench in Jalaluddin Vs. Union of India [W.P.(C) No. 7677/2016] has held such a view, which we are also inclined to follow in the facts of the present proceedings.

27. A perusal of the case projected by the petitioner by way of his written statement as well as the evidence adduced in support of his statement, it is seen that the crucial date prior to which the link between the petitioner and his projected parents or grandparents is required to be

established to the effect that his ancestors were citizens of India in 25.03.1971. In support of those statements, the evidence exhibited are the land Annual Khiraj Patta and the revenue payment receipt along with the certified copies of the voters list of his projected father Majom Ali. However, as discussed above, the land Annual Khiraj Patta along with the revenue payment receipt showing the land to have been allotted to his late grandfather cannot be relied upon to conclusively accept the submissions made by the petitioner. Although strictly speaking, the principles of Civil Procedure Code and the law of evidence are not required to be rigidly applied to in cases relating to opinions rendered by Foreigners Tribunal regarding Citizenship of any person, however it has to be held that the petitioner has not been able to support his contentions and projections that his grandfather was allotted that plot of land as from a perusal of the documents from the records, name of the allottee is not legible from the land documents. The Ext-D being a certified copy of the voters list of 1971 which the petitioner projects reflects his father's name is by itself not sufficient to return a finding that he is the son of the said Majom Ali son of Monmer whose name is enlisted in the voters list of 1971. The voters list of 1978 which is also seen from the records reflects the name of one "Majom" as son of "Mokhsen". Thereafter, the name of the projected father Majom Ali son of Monser is seen in the voter list of 1993. Further although in his deposition, D.W-2 deposed that the petitioner is his son, however, mere deposition to that effect without any collateral evidence to show the relationship between D.W-2

and the petitioner as father and son, such statement alone is not sufficient to return a finding that the petitioner is the son of Majom Ali.

28. The evidence presented in support of the petitioner's claim to project him to be an Indian Citizen are the certified copy of Electoral Roll of 1960 as Exhibit-A, Annual Khiraj Patta as Exhibit-B, Land Revenue Certificate as Exhibit-C and the voters list of 1971, 1993, 1997, 2005, 2010, 2015, 2022 as Exhibits-D, E, F, G, H, I, J respectively and Exhibits N and O are Gaon Pradhan certificates.

29. In all these exhibits, the voters list of 1960 is relied upon to connect the petitioner to his grandfather Monser Sheikh . However, there is no reference to his father or any other relatives which can be shown from the voter list of 1960. The voters list of 1971 reflects the name of one "Majom" son on "Mokhsen" which the petitioner projects to be his father "Majom Ali" son on Monser, whereas the projected grandfather of the petitioner in his written statement as well as his evidence is Monser Sheikh and his projected father name is Majom Ali son of Monser Sheikh. All the other voters list pertain to the period after 1971. These voters list of 1960 and 1971 by itself cannot be considered to be sufficient to establish the linkage between the petitioner, his father and his grandfather in view of the discrepancies noticed and discussed. The other exhibits produced by the petitioner in an attempt to establish his link between his father and grandfather are exhibits 'N' and 'O' namely Gaon

Pradhan certificate issued by the Gaon Pradhan of Bar Saru Arikati village and Gaon Pradhan of Malibari Satra.

During their examination by the Court, the Gaon Pradhans deposed that this information was supplied by the petitioner and they do not know anything more. The counterfoil from which the certificate was stated to have been issued was also not placed before the Court and accordingly, the Tribunal discarded these evidences.

30. In so far as exhibits B and C are concerned which is the Annual Khiraj Patta and the Land Revenue Certificate, as discussed above, the Annual Khiraj Patta does not clearly reflect the name of the pattadar which the petitioner claims was his late grandfather. The Land Revenue Paying Receipt reflects the date as 06.12.1966 and the name reflected is also not legible. The Annual Khiraj Patta if was allotted in the name of his grandfather then after expiry of his grandfather, the plot of land ought to have devolved on the father of the petitioner. No further material was placed to establish the linkage between the petitioner and his ancestors.

31. In so far as the PAN card is concerned, there is no material placed before the Tribunal to suggest that the petitioner is a regular income tax payer and this PAN card was applied by following the procedure prescribed under the Income Tax Act, 1961 and the Rules made thereunder. Even under the relevant Income Tax Act and the Rules, the PAN card is to establish the identity of the assessee who has been given a Permanent Account Number (PAN). The PAN cards

are issued on the basis of applications made duly supported by the required documents. Whether the PAN card produced by the petitioner as an Exhibit was obtained by following the due process prescribed under the provisions of the Act of 1961 and the Rules thereunder, was not placed before the Tribunal or before this Court. Therefore, such PAN card cannot be accepted to be reliable document to establish the Citizenship of any person. This issue had earlier also been considered in *Mustt. Rabia Khatun Vs. Union of India* [W.P.(C) No. 4986/2016].

32. The Aadhaar Card and the EPIC card produced also do not reflect the Citizenship of the petitioner. The very purpose of these proceedings before the Tribunal is to establish the Citizenship of the petitioner which was under scrutiny pursuant to the reference made by the State before the Tribunal. No material are placed before the Tribunal to show as to how the PAN card, Aadhaar Card and EPIC card was applied for by the petitioner and issued. The proper officials of the respective departments ought to have been summoned for due examination along with relevant record in support of the claim of the petitioner.

33. In *Rupajan Begum Vs. Union of India & Ors*, reported in (2018) 1 SCC 579, in respect of a certificate issued by the Gaon Panchayat, the Apex Court held that the certificate issued by the G.P. Secretary, by no means, is proof of citizenship. Such proof will come only if the link between the claimant and the legacy person (who has to

be a citizen) is established. The certificate has to be verified at two stages. The first is the authenticity of the certificate itself; and the second is the authenticity of the contents thereof. The latter process of verification is bound to be an exhaustive process in the course of which the source of information of the facts and all other details recorded in the certificate will be ascertained after giving an opportunity to the holder of the certificate. The Apex Court further held that if the document and its contents are to be subjected to a thorough search and probe we do not see why the said certificate should have been interdicted by the High Court, particularly, in the context of the facts surrounding the enumeration and inclusion of the documents mentioned in the illustrative list of documents, as noticed above. In fact, the said list of illustrative documents was also laid before this Court in the course of the proceedings held from time to time and this Court was aware of the nature and effect of each of the documents mentioned in the list.

34. In *Romila Khatun Vs. Union of India & Ors* [W.P.(C) No. 3807/2016], a Co-ordinate Bench of this Court held that documentary evidence will 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 thereof is another. Not only the documents will have to be proved but its contents will also

have to be proved. Such a document or the contents of the document cannot be proved on the basis of personal knowledge.

35. Coming to the facts of the present case, the certificate issued by the Gaon Burah was on the basis of information supplied by the petitioner. Whether this information was supported by the necessary documents and the same was found to be satisfactory by the Office of the G.P before issuance of the certificate, has not been explained before the Tribunal by the witness, who appeared in support of the said G.P. certificate. Therefore, unless the contents in the certificate are supported by contemporaneous record, mere statement or personal knowledge will not be sufficient to prove the contents of any such documents.

36. Coming to the question of the discharge of the burden on the proceedee before the Tribunal, it is necessary to refer to the law expounded by this Court as well by the Apex Court.

37. 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.).

38. 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.

39. 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 is 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.

40. 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.

41. 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.

42. 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."

43. 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.

44. 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) SCC Online 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 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.

45. Under such circumstances, this Court is of the view that the Tribunal has correctly opined to hold that the petitioner has failed to discharge the burden that he is not an illegal immigrant who had illegally entered into the State of Assam from the specified territory after 25.03.1971.

46. Under such circumstances, this Court is of the view that there is no infirmity in the opinion dated 29.12.2023 passed by the Foreigner's Tribunal No. 2, Kamrup at Boko, Assam whereby the Foreigner's Tribunal concluded that the petitioner has failed to discharge the burden that he is not an illegal immigrant who has entered from the specified territory after 25.03.1971.

47. Accordingly, the writ petition stands dismissed, No order as to costs.

48. Remit the original records to the Foreigners Tribunal No. 2, Kamrup at Boko, Assam immediately along with a copy of this order.

49. Registry shall also communicate this order to the Superintendent of Police (Border), Kamrup, Amingaon for necessary information.

JUDGE

JUDGE

Comparing Assistant