

GAHC010277402018



2025:GAU-AS:3423

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

Case No. : WP(C)/8701/2018

FAKAR UDDIN
S/O. LT. KHAIMUDDIN, VILL. BHERALDI, MOUZA- BARPETA, P.S. AND
DIST. BARPETA, ASSAM.

VERSUS

THE UNION OF INDIA AND 6 ORS.
REP. BY ITS SECRETARY, DEPTT. OF HOME, NEW DELHI-01.

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

3:THE ELECTION COMMISSION OF INDIA

NEW DELHI-110001.

4:THE DY. COMMISSIONER

BARPETA
ASSAM-781301.

5:THE MEMBER

FOREIGNERS TRIBUNAL 1ST
BARPETA-781301.

6:THE SUPDT. OF POLICE (B)

BARPETA

ASSAM-781301.

7:THE STATE COORDINATOR

NRC
ASSAM
ACHYUT PLAZA (1ST FLOOR) BHARALUPUR
BHANGAGHAR
GUWAHATI-05

BEFORE

HONOURABLE MR. JUSTICE KALYAN RAI SURANA

HON'BLE MRS. JUSTICE MALASRI NANDI

Advocates for petitioner	Mr. A.R. Sikdar, Mr. N. Ahmed, Mr. S.I. Talukdar, Mr. M.M. Zaman, Advocates.
Advocates for respondent no.1	Mr. S.P. Choudhury.
Advocates for respondent nos.2 & 6	Mr. J. Payeng, standing counsel.
Advocates for respondent no.3	Mr. A.I. Ali.
Advocate for respondent no.4	Mr. P. Sarmah, Addl. Senior Govt. Advocate.
Advocate for respondent no.5	None appears.
Advocates for respondent no.7	Mr. G. Sarma, standing counsel.
Date of hearing	06/02/25
Date of order	26/03/25

JUDGMENT AND ORDER

(C.A.V.)

(K.R. Surana, J)

Heard Mr. A.R. Sikdar, learned counsel for the petitioner. Also heard Mr. S.P. Choudhury, learned CGC for the Union of India, Mr. A.I. Ali, learned counsel for the Election Commission of India; Mr. J. Payeng, learned standing counsel for FT matters; Mr. G. Sarma, learned standing counsel for N.R.C.; and Mr. P. Sarmah, learned Addl. Senior Govt. Advocate.

Challenge in this writ petition:

2) By filing this writ petition under Article 226 of the Constitution of India, the petitioner has assailed the opinion dated 21.08.2018, passed by the learned Member, Foreigners Tribunal No. 1st, Barpeta, in F.T. Case No. 289/2016 [arising out of F.T. Ref. Case No. 25/16], thereby declaring the petitioner to be a foreigner, who has entered into India (Assam) on or after 25.03.1971.

Case of the petitioner before the Foreigners Tribunal:

3) In brief, the case of the petitioner is that upon service of notice, he had appeared and filed his written statement before the learned Tribunal and contested the proceeding. Later on, he had filed his additional written statement. The petitioner had denied that he was a foreigner and claimed that his parents were Indian citizens and he was born and grew up at Village-Bheraldi, Mouza, P.S. and District- Barpeta, Assam. The name of his grandfather is Innas Ali and his father's name is Khaimuddin.

4) The evidence-on-affidavit is in consonance with the contents of the written statement and additional written statement. Hence, the contents of the written statement and the additional written statement are not reproduced herein. However, it would suffice to mention that along with his additional written statement, the petitioner had filed the following eight documents, viz.,

voter lists of 1966, 1970, 1989 and 1997, copy of *jamabandi*, birth registration certificate, registration certificate, *Gaonburah* certificate.

5) The petitioner has examined himself as DW-1 and had exhibited the following documents, viz., (i) copy of voter list of 1966 (Ext.A); (ii) copy of *jamabandi* (Ext.B); (iii) copy of voter list of 1989 (Ext.C); (iv) copy of Electoral Roll of 1997 (Ext.D); (v) copy of electoral roll of 1966 (Ext.E); (vi) copy of electoral roll of 1997 (Ext.F); (vii) copy of Registration Card dated 30.09.2011, issued by the Secretary, Board of Secondary Education, Assam (Ext.G); (viii) copy of birth certificate of his son (Ext.H); (ix) *Gaonburah's* certificate dated 22.10.2017 (Ext.I); (x) affidavit sworn by the petitioner to explain the discrepancy in his name, and the names of his father, grandfather, father-in-law, wife's grandfather (Ext.J). The DW-1 was cross-examined and discharged.

6) The petitioner had examined one Jaliluddin as DW-2, who in his evidence-on-affidavit had projected himself as the uncle of the petitioner. He had exhibited the following documents, viz., copy of electoral roll of 1997 (Ext.K); copy of electoral roll of 2016 (Ext.L); Elector Photo Identity Card (Ext.M); affidavit to explain the discrepancy in the name of his father, mother and elder brother (Ext.N). He was cross-examined and discharged.

Submission by the learned counsel for the petitioner:

7) The learned counsel for the petitioner has submitted that the learned Tribunal had not considered the documentary evidence of the petitioner in its proper perspective and arrived at a wrong conclusion. Moreover, it was submitted that the evidence of DW-2 was not properly discussed. Accordingly, it was submitted that the impugned opinion was not sustainable on facts and in law.

8) It was submitted that the report of the Investigating Officer was vague and it shows that no investigation was carried out and merely because the petitioner could not show any documents at the time when the police personnel had interrogated him, he was suspected to be a foreigner. Accordingly, it was submitted that the investigation carried out against the petitioner was not fair and that the petitioner was not provided with the grounds to suspect him as a foreigner and moreover, the notice of the learned Tribunal did not disclose the stream of alleged foreigner to which the petitioner is suspected. Therefore, the proceeding against the petitioner was bad in law. In this regard, the learned counsel for the petitioner has cited the case of (i) *Md. Rahim Ali @ Abdur Rahim v. The State of Assam & Ors.*, (2024) 0 Supreme(SC) 575: AIR 2024 SC 3551, (ii) *State of Haryana & Anr. v. Rattan Singh*, (1977) 2 SCC 491, (iii) *Haidar Ali v. Union of India & Ors.*, 2021 (3) GLT 85, (iv) *Sona Kha @ Sona Khan v. Union of India & Ors.*, 2021 (3) GLT 12, (v) *Idrish Ali v. The Union of India & Ors.*, W.P.(C) 4116/2019, decided on 27.02.2020, (vi) *Santosh Das v. Union of India & Ors.*, (2017) 5 GLR 510, (vii) *State of Assam & Ors. v. Moslem Mondal & Ors.*, 2013 (1) GLT 809.

9) Accordingly, it was prayed that the impugned opinion be set aside and in the event, if the Court is not inclined to set aside the impugned opinion, then the alternative prayer is to remand the matter to the learned Tribunal for a fresh opinion.

10) It was submitted that under the scheme of the Foreigners (Tribunals) Order, 1964, only evidence is envisaged and written statement is not envisaged. Therefore, it was submitted that the evidence tendered by the petitioner could not have been rejected only because of lack of pleadings. In the said context, it was submitted that the name of petitioner's mother was not

disclosed in the written statement, but stated in evidence-on-affidavit, which was disbelieved.

11) Hence, it was submitted that if there was any decision, which was contrary to the cases cited by him, those should not be considered as those cases do not lay down the correct law.

Submission by the learned standing counsel for FT matters:

12) Per contra, the learned standing counsel for the FT matters has made his submission in support of the impugned opinion. It was submitted that in the case of *Anand Ghosh v. Union of India & Ors.*, 2017 (2) GLT 996, it has been held that non-mentioning of the stream when the person had entered into India in the notice was of no consequence.

13) It has been submitted that the petitioner is trying to link himself with some voters by projecting them to be his father and grandfather, by taking a plea that their names were incorrectly written in the electoral roll, which is not believable because of discrepancy in the age of the persons.

14) It was submitted that the cases cited by the learned counsel for the petitioner would not help the petitioner because on facts, the cases were distinguishable.

15) In support of his submissions, reliance was placed on the following cases, viz., (i) *Sarbananda Sonowal v. The Union of India & Ors.*, (2007) 1 SCC 774, (ii) *Commissioner of Sales Tax & Ors. v. M/s. Subhas & Company*, (2003) 3 SCC 454, (iii) *Jainaluddin v. Union of India & Ors.*, W.P.(C) 3071/2016, decided on 03.04.2018, (iv) *Rubia Begum Borbhuiya v. Union of India & Ors.*, W.P.(C) No. 2279/2021, decided on 12.06.2023, (v) *Dukhi Ali (Md.) v. Union of India*, W.P.(C) 3805/2016, decided on 08.03.2018.

Reasons and decision:

16) Carefully perused the materials available on record, including the records received from the learned Foreigners Tribunal and considered the submissions as well as the cases cited at the Bar.

17) One of the points raised by the learned counsel for the petitioner that the reference was vague and investigation was not properly conducted.

18) The record received from the learned Tribunal has been carefully perused. It is seen that vide an undated memo, the Superintendent of Police (Border), Barpeta had directed the Officer-in-Charge of Border Unit, Barpeta Police Station to conduct an enquiry as to whether the petitioner is a foreigner or not and to submit a report in the prescribed form no. 2 through the Addl. S.P. (B)/ Dy.S.P.(B), Barpeta at the earliest. As per report dated 31.01.2016, the Sub-Inspector of Police (Border), had informed the Superintendent of Police (Border), Barpeta that upon demand the petitioner could not produce any document regarding his nationality and he suspected that the petitioner had entered into India illegally from Bangladesh after 25.03.1971 and accordingly, he had requested for registration of a F.T. case.

19) As the learned counsel for the petitioner had submitted that proper enquiry was not conducted by the police, the Court has carefully examined the "enquiry report on suspected foreigner". The said report contains (a) the name of the petitioner and his wife, and two sons; (b) current address of the petitioner, (c) he was staying on Govt. land since last 40 years; (d) specific statement that place of birth not disclosed; (e) it is stated that no document was produced. The record of the Tribunal also contains notice issued by the Border Branch of Barpeta P.S., statement of the petitioner and one

witness, surety bond, etc. The Superintendent of Police (Border), Barpeta had expressed in his report that it appears that the petitioner is suspected to be a foreigner who has entered into India illegally from Bangladesh after 25.03.1971. Accordingly, reference was made by him before the Foreigners Tribunal.

20) The petitioner had submitted two evidence-on-affidavits. The first one is dated 05.04.2017 and the second one is dated 30.05.2017. In his first evidence-on-affidavit, the petitioner, as DW-1, had stated that he was born and brought up at village- Bheraldi under 50 No. Barpeta LAC. The name of his grandfather, Innas Ali appeared in the voter list of 1966 (Ext.A). His father's name was recorded on 30.02.1977, in the *jamabandi* land record (Ext.B), and his father's and his name appeared in the voter list of 1989 at serial no. 146 and 147, house no. 40, Part No. 107 of Village- Bheraldi, under 43 No. Barpeta LAC (Ext.C). His father's also appeared in the voter list of 1997. His wife's grandfather's name, Nowab Ali, also appeared in the voter list of 1966 vide serial no. 90, house no. 33, Part No. 63, of Village- Taparbori, under 50 No. Barpeta LAC (Ext.D). His wife's father's name appeared in the voter list of 1997. His wife's name, Kamala Nessa, appeared in the voter list of 1997. The name of his son Rakibul Islam's name is entered in the birth certificate, issued by Nagaon BPHC (Ext.E). His son, Kamal Hassan's name is entered in the Registration Card, issued by Board of Secondary Education, Assam (SEBA for short) (Ext.F). The *Gaonburah* has issued a residential certificate in the name of the petitioner (Ext.G). The petitioner had filed an affidavit, declaring that his actual and correct name is Fakaruddin, but in the voter list of 1989 and 1997, it is wrongly written as Fakar Ali (Ext.H).

21) The petitioner has also stated that his grandfather's actual and correct name is Innas Ali, but in the voter list of 1966, it is wrongly written as

Innas Ali Matbar. His father's actual and correct name is Khaimuddin, but in the voter list of 1989, his name is wrongly written as Faimuddin. His father-in-law's actual and correct name is Majbar Ali, but in the voter list of 1989, his name is wrongly written as Majibar Rahman. Similarly, his wife's grandfather's actual and correct name is Nowab Ali, but in the voter list of 1970, it is wrongly written as Nowali.

22) In his second evidence-on-affidavit, the name of DW-1 is typed as "Fakaruddin& others". He has stated that he was born and brought up at village-Bheraldi, his father's name is Khaimuddin and his brother's name is Sanu Miya. He has reiterated the contents of Ext. Nos. A to H, which are referred hereinbefore. He has also stated that The *Gaonburah* has issued a residential certificate in the name of the petitioner (Ext.I). The DW-1 has filed an affidavit, declaring that his actual and correct name is Fakaruddin, but in the voter list of 1989 and 1997, it is wrongly written as Fakar Ali (Ext.J).

23) The DW-1 has further stated in his evidence-on-affidavit that his father died before 2016 and so his name is not mentioned in the voter list of 2016. His brother's name appeared in the voter list of 2016. He has stated that his wife's name is Kamala Nessa and the name of her parents are Majibar Rahman and Maharjan Nessa and the names of her brothers are Surhab Ali, Iyasin Ali, Ohab Ali and Afesar Ali and they are permanently residing at village-Taparbori. He has also stated that the name of his wife's grandfather-in-law, appears in the voter list of 1966 (Ext.E) and his name also appears in the voter list of 1970. His wife's name appears in the voter list of 1997 and the name of his wife's parents and brothers appear in the voter list of 2017. He has stated that the name of his son Rakibul Islam's name is entered in the birth certificate, issued by Nagaon BPHC (Ext.G) and that his son, Kamal Hassan's name is

entered in the Registration Card, issued by SEBA (Ext.H).

24) In his cross-examination, DW-1 had stated that his father, Khaimuddin passed away about 8 years ago. His mother, Phul Khatoon had passed away. He had stated that his grandfather's name Innas Ali appeared in voter list of 1966 (Ext.A). He had also stated that the name of his grandfather, Innas Ali, along with his father's name, Khaimuddin and uncle's name, Jaliluddin appeared in the *jamabandi* land document against a plot of land at village-Bheraldi (Ext.B) and his own name appeared along with his father's name in the voter list of 1989 (Ext.C) and his father's name appeared in the voter list of 1997 (Ext.D). The *Gaonburah* of village Bheraldi had issued certificate (Ext.9).

25) The petitioner has examined one Jaliluddin as DW-2. He is aged 48 years and is the projected uncle of the petitioner. In his evidence-on-affidavit, he has stated that he and his nephew (i.e. petitioner) were born and brought-up at village- Bheraldi. The name of his parents is Innas Ali, son of Ghutu @ Ghutu Mandal and Kholasa Bibi and their names appeared in the vote list of 1966 (Ext.A exhibited by DW-1), and in the voter list of 1970. He had stated that his father was a *pattadar* of a plot of land measuring 4B-0K-15L, covered by Patta No. 34, Dag Nos. 205, 224 and 242, situated at village-Bheraldi, Mouza, P.S. and Dist. Barpeta. The said land was inherited by him and his two elder brothers, Khaliluddin and Khaimuddin (father of petitioner) vide order dated 30.01.1977 and 28.02.1981. It was mutated in the name of the petitioner and his two brothers vide order dated 30.05.2013 (Ext.B exhibited by DW-1). DW-2 had stated that his name appeared in the voter list of 1989, with his mother, elder brother (father of petitioner) and petitioner in voter list of 1989 (Ext.C exhibited by DW-1). His name appeared in the voter lists of 1997 (Ext.K) and 2016 (Ext.L) and he had exhibited his Elector Photo Identity Card

(EPIC for short) (Ext.M). By an affidavit (Ext.N), he had stated that his parent's actual names are Innas Ali and Kholasa Bibi, but in voter list of 1966, his father's name is recorded as Innas Ali Matbar. In the voter list of 1989, his mother's name is recorded as Mulasa Bibi. His elder brother's name is Khaimuddin (father of petitioner), but it is recorded as Faimuddin in the voter list of 1989. In his cross-examination, DW-2 had stated that his father had died 35 years back and his mother had died about 16 years back. His father and mother had casted their vote in the year 1966 and 1970 and the father of the petitioner had cast his vote in the year 1989.

26) At the outset, it may be stated that although several documents were exhibited and marked as Ext.A to Ext.N, but the contents of the said exhibits were not proved.

27) The records of the Tribunal disclose that the petitioner had submitted his written statement on 30.01.2017. He had submitted his evidence-on-affidavit on 05.04.2017 and the case was fixed on 11.05.2017 for cross-examination of the petitioner. On 11.05.2017, the learned Tribunal allowed the prayer made by the petitioner to allow him to submit his written statement and evidence-on-affidavit as a last chance. Accordingly, the additional written statement and evidence-on-affidavit of the petitioner was filed on 30.05.2017. Petitioner was cross-examined on 24.10.2017 and case was fixed on 10.01.2018 for further evidence. Thereafter, on 30.01.2018, the evidence-on-affidavit of DW-2 was filed and DW-2 had appeared for his cross-examination on 29.06.2018.

28) As the learned counsel for the petitioner has expressed his dissatisfaction with the finding of the learned Tribunal on the appreciation of evidence, it would be in the interest of justice to carefully examine the evidence

on record.

29) The petitioner has not disclosed his whole projected family either in his written statement or in his two evidence-on -affidavits.

30) The petitioner cannot derive his citizenship through his wife's grandfather or father and therefore, the exhibiting of voter list of 1970 of his wife's grandfather, namely, Nowab Ali (vide Ext.D) does not help the petitioner in any manner. Thus, the case of the petitioner has to be examined in light of the other exhibited documents.

31) For reasons not disclosed, the petitioner did not take any steps to exhibit and prove the voter lists of 1970, 1989 and 1997, although he and DW-2 had referred to the said documents in their evidence-on-affidavits.

32) The petitioner had neither disclosed in his written statement nor in his evidence-on-affidavit as to who was Kholasa Bibi, whose name appeared in the voter list of 1966 (Ext.A). But, DW-2 has stated that Kholasa Bibi was his mother. Thus, the DW-2 has tendered improved evidence over the evidence of DW-1, by referring to his mother. It is reiterated that the DW-1 and DW-2 had not exhibited any entries of Ext.A.

33) In respect of *jamabandi* (Ext.B), it is seen that the learned Tribunal, in paragraph 7 of the impugned opinion, has erroneously referred to Ext.B as voter list of 1970. However, in paragraph 9 of the impugned opinion, the learned Tribunal has mentioned that the "proceedee has submitted one jamabandi copy in the year of 30.01.1977 but no other related document regarding these land is submitted." Thus, the entry in the *jamabandi* is of 30.01.1977. The petitioner and DW-2 have not been able to demonstrate before this Court as to how the petitioner has suffered any prejudice when Ext.B

contains an entry that has been made after the cut-off date i.e. 25.03.1971, or to show as to how the said Ext.B would help the petitioner in any manner whatsoever.

34) In respect of voter list of 1989 (Ext.C), it is seen that the same contains entry of 7 (seven) names. The petitioner had referred to the names of his projected father and his own name in Ext.C. However, he has not disclosed in his written statement as to who were the persons whose names were entered in the said voter list bearing serial nos. 144 to 146, and 148 to 150. The DW-2 has stated that the voter list of 1989 contained his name and the names of his mother, elder brother (father of petitioner) and name of his nephew (petitioner) vide serial nos. 150, 149, 146 and 147. Therefore, the DW-2 has also not made any attempt to disclose his relationship with persons whose names appear at serial no. 144, 145, 148 and 149 of the said voter list. Thus, the DW-2 has tendered improved evidence over the evidence of DW-1, yet he has not identified himself, his mother, elder brother and the petitioner through voter serial number. It is again reiterated that the DW-1 and DW-2 have not exhibited any entries of Ext.C.

35) In the first evidence-on-affidavit, DW-1 has mentioned Ext.D to be the voter list of his wife's grandfather-in-law. However, in his second evidence-on-affidavit, the DW-1 has exhibited the voter list of 1997 containing the name of his father as Ext.D and the voter list of his wife's grandfather has been marked as Ext.E. Therefore, in the impugned opinion, the document marked as Ext.D is referred to as the voter list of 1997 and the voter list of the wife's projected grandfather is marked as Ext.E. It is clarified that in the Tribunal's record, the copy of voter list of 1997 is marked as Ext.D and the voter list of the wife's projected grandfather is marked as Ext.E.

36) Two names are entered in the voter list of 1997 (Ext.D). The DW-1 had stated that the said voter list contained the name of father of the petitioner. But, he is silent regarding the identity of the second person whose name is entered in the voter list. It is again reiterated that the DW-1 has not exhibited any entries of Ext.D.

37) The petitioner cannot derive his citizenship through his wife's grandfather, wife's parents and wife's brothers. The learned counsel for the petitioner has not advanced any submissions regarding the voter list of the wife's projected grandfather (Ext.E) and the voter list of 1997 (Ext.F), containing the name of projected parents and brothers of petitioner's wife. Therefore, the said Ext.E and Ext.F is not found to help the petitioner in any manner.

38) The SEBA Registration Certificate of petitioner's projected son, Kamal Hassan (Ext.G) and the birth certificate of the petitioner's son, Rakibul Islam (Ext.H), being documents of post 25.03.1971, does not help the petitioner to establish his own existence in India after 25.03.1971. Therefore, the said two exhibits are not found to help the petitioner in any manner whatsoever.

39) *Gaonburah's* certificate (Ext.I), merely certifies that the petitioner is a resident of village Bheraldi. Thus, the said exhibited document fails to establish the petitioner to be a resident of village Bheraldi prior to 25.03.1971.

40) The DW-2 has exhibited his voter list of 1997 as Ext.K. As per the said voter list, the DW-2 is a voter under serial no. 276, resident of house no. 82, Part no. 107 of 43 No. Barpeta LAC, under village- Bheraldi. The petitioner (DW-1) has also exhibited the voter list of 1997 as Ext.D, where his projected father is a voter under serial no. 165, resident of house no. 49, Part no. 107 of 43 No. Barpeta LAC, under village- Bheraldi. The petitioner as DW-1 has not

admitted that Sanu Begum, whose name appears with his projected father in Ext.D is his mother. Similarly, DW-2 has also not stated who is Sanu Begum. Therefore, in the absence of any contemporaneous record showing that the petitioner's father and DW-2 were brothers, the Court is constrained to hold that a mere oral evidence by DW-1 and DW-2 is not sufficient to hold that the father and the grandfather of the petitioner had their existence in India before 25.03.1971.

41) The voter lists of 1977 (Ext.K), voter list of 2016 (Ext.L), and EPIC of DW-2 (Ext.M) are the documents which shows the DW-2 as a voter. The said documents are not sufficient to prove that the father and the grandfather of the petitioner had their existence in India before 25.03.1971.

42) Now the evidentiary value of an affidavit for correction of names is being examined.

43) The petitioner has exhibited an affidavit sworn on 29.07.2017 as Ext.J. By the said affidavit, it is projected that there was spelling error in (i) the name of petitioner in the voter list of 1989 and 1997; (ii) the name of his projected grandfather in the voter list of 1966; (iii) the name of his projected father in the voter list of 1989; (iv) the name of his father-in-law in voter list of 1989; and (v) the name of his wife's grandfather in voter list of 1966 and 1970.

44) Similarly, the DW-2, by exhibiting an affidavit sworn on 22.05.2018 as Ext.N, has also projected that there was a spelling error in (i) the name of his father in voter list of 1966, (ii) name of his mother in voter list of 1989; (iii) the name of his elder brother in voter list of 1989.

45) In respect of discrepancies in the names in the voter list or other exhibited documents, like the ones sought to be explained vide affidavits,

exhibited as Ext.J and Ext.N respectively, this Court, in the case of *Basiron Bibi v. Union of India & Ors.*, (2018) 3 GLR 196: 2018 (1) GLT 372; (2017) 0 Supreme(Gau) 1335, having dealt with the case of *Abdul Matali @ Mataleb (Md.) v. Union of India & Ors.*, 2015 (2) GLT 617, it has been held as under:-

29. *Reliance placed in the case of Abdul Matali @ Mataleb (Md.) (supra), can be of no assistance to the petitioner inasmuch, as it has already been clarified by this Court in previous decisions that the said decision did not lay down any law and was a decision confined to the facts and circumstances of that case. Regarding discrepancies in the voters' lists which the petitioner contended were not her creation being entered into by officials of Election Commission and therefore should not be used adversely against the petitioner, such contention is without any substance. 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. 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.*

46) Therefore, the affidavit exhibited by DW-1 as Ext.J and affidavit exhibited by DW-2 as Ext.N cannot be treated as an acceptable evidence to prove that there were spelling discrepancies in the name of the voters.

47) The learned counsel for the petitioner has cited the case of *Md. Rahim Ali @ Abdur Rahim v. The State of Assam & Ors.*, 2024 INSC 511: (2024) 0 Supreme(SC) 575, and it was submitted that Supreme Court of India has held spelling mistakes do occur in the voter lists. The relevant paragraphs 40 to 44 thereof are quoted below:-

40. *The initial infirmity of there being nothing on record as regards what grounds or material were actually available with the authorities to question the appellant's status as to his nationality, is fatal to the projected case. The appellant had obtained documents/certificates from various officers with regard to his/his parents' continuous presence in India much prior to the date 25.03.1971, which were produced before the Tribunal and have been noted by the Tribunal in its*

report dated 16.11.2017. Another relevant aspect is the prevalent situation on the ground where uninformed/illiterate persons or persons not being well-informed, in the absence of any requirement to obtain and hold an official document and without possessing property in their own names, would not have any official document issued by the government, State or Central. It is neither difficult nor inconceivable to fathom such scenario amongst the rural populace, including within Assam.

41. 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.

42. The State of Assam, as per the Census 2011, boasts of 72.19% literacy rate, with females at 66.27% and males at 77.85%. However, this was not the case during the 1960s or even 1970s. Not just in Assam but in many States, it is seen that names of people, even on important government documents can have and do have varied spellings depending on them being in English or Hindi or Bangla or Assamese or any other language, for that matter. Moreover, names of persons which are written either by the persons preparing the Voters List or by the personnel making entries into different Government records, the spelling of the name, based upon its pronunciation, may take on slight variations. It is not uncommon throughout India that different spellings may be written in the regional/ vernacular language and in English. Such/same person will have a differently spelt name in English and the local language. This is more pronounced where due to specific pronunciation habits or styles there can be different spellings for the same name in different languages viz. English/Hindi/Urdu/ Assamese/Bangla etc.

43. The appellant had produced a document showing that his father and mother had been resident of Village Dolur Pather since 1965; that his sibling had also been declared not to be a foreigner by the Tribunal, and; his elder brother and he were both voters as per the 1985 Electoral Roll relating to 41 Bhabanipur Legislative Assembly Constituency. Further, upon his marriage, the appellant came

to Village Kasimpur in District - Nalbari, Assam where his name appeared in the Electoral Roll of 1997 for 61 Dharmapur Legislative Assembly Constituency.

44. *From an overall discussion on the report/opinion of the Tribunal dated 16.11.2017, it is clear that there are minor discrepancy(ies) in the appellant's documents, however their authenticity is not in doubt. In the considered opinion of this Court, the same would further buttress the appellant's claim, that not being in the wrong, and being an ignorant person, he, truthfully and faithfully produced the official records as they were in his possession. We do not see any attempt by the appellant to get his official records prepared meticulously without any discrepancy. The conduct of an illegal migrant would not be so casual.*

48) In the cited case, herein before quoted paragraph 43 reveals that the appellant before the Supreme Court of India had produced a document showing that his father and mother had been resident of Village Dolur Pather since 1965; that his sibling had also been declared not to be a foreigner by the Tribunal, and; his elder brother and he were both voters as per the 1985 Electoral Roll relating to 41 Bhabanipur Legislative Assembly Constituency. Further, upon his marriage, the appellant came to Village Kasimpur in District - Nalbari, Assam where his name appeared in the Electoral Roll of 1997 for 61 Dharmapur Legislative Assembly Constituency.

49) However, in the present case in hand, the petitioner has not disclosed all material facts in his written statement including the names and other particulars of his family tree. The evidence of DW-2 is an improvement over the evidence of the petitioner (DW-1). The petitioner has made no attempt to prove all the voter list containing the name of his grandfather and father since 1966 till the year 2016, when the FT Case was registered against him. Except for the *jamabandi* (Ext.B), the petitioner has not proved any document to show how the name of his grandfather and father was spelt. Although the petitioner has exhibited the certificate issued by the *Gaonburah* as Ext.I, he has not called for the author/signatory of the said document to prove the contents

of Ext.I. The *Gaonburah*, i.e. the village Headman did not certify that there were discrepancies in the name of the petitioner's grandfather and father.

50) The petitioner has not called for the officials of the Election Commission of India or the State Election Officer to give evidence if there was a spelling mistake in the name of petitioner's grandfather and father. That there may be a spelling mistake in the electoral roll is a mere presumption and such presumptions runs counter to the presumption prescribed under Section 114, Illustration (e) of the Evidence Act, 1872, which provides that "judicial and official acts have been regularly performed."

51) Under Sub-Section (1) of Section 119, Illustration (e) of the Bharatiya Sakshya Adhiniyam, 2023, it is also prescribed that "judicial and official acts have been regularly performed." However, under Sub-section (2) of the Bharatiya Sakshya Adhiniyam, 2023, it is prescribed as under:-

(2) The Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:-

* * *

(vi) as to Illustration (e)- a judicial act, the regularity of which is in question, was performed under exceptional circumstances.

52) Therefore, unless the petitioner successfully demonstrates that spelling mistakes in voter lists is a fact which need not be proved or that presumption lies in favour of existence of mistakes in voter list, the existence of spelling error in the documents exhibited by the petitioner cannot be presumed.

53) The Supreme Court of India, in paragraph 43 of the case of *Md. Rahim Ali @ Abdul Rahim (supra)*, has referred to the documents, based on which the observations have been made in paragraph 40 to 44, quoted hereinbefore. The facts of the present case is not similar and therefore,

distinguishable.

54) The learned counsel for the petitioner has cited the case of *Haidar Ali v. Union of India & Ors. 2021 (3) GLT 85*, to show that this Court the Foreigners Tribunal constituted under the Foreigners (Tribunals) Order, 1964 merely provides a proceedee a reasonable opportunity for making a representation and producing evidence in support of his case before the Tribunal and as such, normally, the rules of pleadings including that of "written statement" as provided under the CPC are not applicable. It was further held that as a corollary, the principles contained in the CPC relating to the scope of written statement and limitations placed thereon cannot be strictly applied in the proceedings before the Tribunal though the principles may generally be applied.

55) With greatest respect to the said judgment, the Court may now refer to the previous decision of the co-ordinate Bench of this Court in the case of *Rashminara Begum v. Union of India & Ors., (2017) 4 GLR 282; 2017 (4) GLT 346; (2017) 4 NEJ 652; (2017) 0 Supreme(Gau) 411*. The relevant paragraphs 17 to 23 thereof [as extracted from Supreme(Gau)], are quoted below:-

17. *Before proceeding to the written statement and evidence adduced by the petitioner, it would be apposite to briefly notice the legal framework under which a reference is decided by a Foreigners Tribunal.*

18. *After declaration of the Illegal Migrants (Determination by Tribunals) Act, 1983 as unconstitutional by the Supreme Court in Sarbananda Sonowal vs. Union of India, (2005) 5 SCC 665, the references are now made and decided under the provisions of the Foreigners Act, 1946 (Act) read with the Foreigners (Tribunals) Order, 1964 (Order). Though a detailed analysis of all the provisions of the Act and the Order may not be necessary for the purpose of adjudication of this case, what is important to note is that unlike under Illegal Migrants (Determination by Tribunals) Act, 1983, Section 9 of the Foreigners Act, 1946 mandates that onus of proving citizenship of a person is upon that person who claims to be a citizen of India. Section 9 of the Foreigners Act, 1946 is extracted as under:-*

“9. Burden of proof.—If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given there under, whether any person is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person.”

19. *The principle governing Section 9 of the Foreigners Act, 1946 is in tune with the requirement of Section 106 of the Indian Evidence Act, 1872 which is an exception to the general requirement of burden of proof inasmuch as ordinarily the burden is on that person who seeks a judgment of the court, to prove the existence of facts which he asserts, necessary for the court to give judgment. Section 106 of the Evidence Act deals with a situation where certain facts are especially within the knowledge of any person in which event the burden of proving that fact is upon such person. Section 106 of the Evidence Act reads as under:-*

“106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

20. *Explaining the rationale behind Section 9 of the Foreigners Act, 1946, Supreme Court in Sarbananda Sonowal (supra) 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 his date of birth, place of birth, name of his parents, place of birth and citizenship. Sometimes the place of birth of his grandparents may also be relevant. All these facts would be necessarily within the knowledge of the person concerned and not of the authorities of the State. After he has given evidence, the State authorities can verify the facts and lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship of 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.*

21. *At this stage it may be mentioned that the regime which has been put in place for identification for foreigners in the State of Assam is fundamentally different from the rest of the country. This fact was taken note of by the Supreme Court in the subsequent case of Sarbananda Sonowal vs Union of India, (2007) 1 SCC 174, where in para 26 it was mentioned that Foreigners Tribunal has not been set up in any other part of India except the State of Assam. A different regime therefore exists in Assam from the rest of the country. In the rest of the country foreigners are identified by the executive machinery of the State. Thus the province of Assam only has been singled out for adopting a different procedure. The*

problem in regard to illegal migration faced by Assam is also faced by other States including the States of West Bengal, Tripura etc.

22. *Having noticed the above, we may have a brief glance at the Foreigners (Tribunals) Order, 1964, as amended, which lays down the procedure to be followed by the Foreigners Tribunal while determining the status of a proceedee. References are made by the State through the concerned Superintendent of Police (Border) to the Foreigners Tribunal for its opinion as to whether the proceedee is a foreigner or not. Procedure followed by the Foreigners Tribunal while rendering such opinion is summary in nature. Therefore, having regard to the object of the Foreigners Act, 1946 it is desirable that opinion should be rendered expeditiously. A perusal of Order 3 of the aforesaid 1964 Order would go to show that a Foreigners Tribunal is required to dispose of a reference within a period of 60 days from the date of receipt of the reference from the competent authority. If notice is served upon the proceedee and the proceedee appears before the Foreigners Tribunal, the Tribunal shall give to the proceedee 10 days time to submit written statement and further 10 days time to produce evidence in support of her case.*

23. *Reference to the aforesaid provisions is necessary to put in context the several adjournments sought for by the petitioner to adduce evidence on the ground of shortage of documents and the subsequent evidence of the petitioner.*

56) It thus, appears that when the case of *Haidar Ali (supra)*, was decided, the previous decision of the coordinate Bench of this Court was not placed for consideration before the coordinate Bench.

57) The Court would now refer to the observations made by the Constitution Bench of the Supreme Court in connection with the principle of *stare decisis* in the case of *National Insurance Company Limited v. Pranay Sethi*, (2017) 16 SCC 680: (2017) 0 Supreme(SC) 1050. Paragraph 29 thereof [extracted from Supreme(SC)] is quoted below:-

We are compelled to state here that in Munna Lal Jain v. Bipin Kumar Sharma, (2015) 6 SCC 347, the three-Judge Bench should have been guided by the principle stated in Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65, which has concurred with the view expressed in Sarla Verma v. Delhi Transport Authority & Ors., (2009) 6 SCC 121, or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in Reshma Kumari (supra) being earlier in point of time

would be a binding precedent and not the decision in Rajesh v. Rajbir Singh, (2013) 9 SCC 54.

58) Thus, guided by the observations made by the Supreme Court of India in the Constitution Bench judgment rendered in the case of *Pranay Sethi (supra)*, in light of the pre-existing decision of a co-ordinate Bench of this Court in *Rashminara Begum (supra)*, the judgment of *Haidar Ali (supra)*, with greatest respect, being later in point of time, cannot be held to be a binding precedent in this case.

59) The learned counsel for the petitioner had cited the case of *State of Haryana v. Rattaan Singh, (1977) 2 SCC 491*. The said case is in connection with disciplinary proceeding and moreover, no submission has been made as to how the said decision could be applied in cases where the petitioner's citizenship is in doubt.

60) The learned counsel for the petitioner had placed reliance on paragraph 34 of the case of *Md. Rahim Ali (supra)*, and it was submitted that the notice issued by the learned Tribunal had charged the petitioner under two heads. In one, the petitioner is charged to be a foreigner of post 25.03.1971. In the other, the petitioner is charged to be a foreigner between 01.01.1966 and 25.03.1971. Thus, it was submitted that the petitioner was vaguely suspected to be a foreigner and that the petitioner was not furnished with main grounds to suspect the petitioner of being a foreigner. In this regard, it would be apposite to quote paragraph 34 of the case of *Md. Rahim Ali @ Abdur Ali (supra)* :-

34. *However, the question is that does Section 9 of the Act empower the Executive to pick a person at random, knock at his/her/their door, tell him/her/they/them 'We suspect you of being a foreigner,' and then rest easy basis Section 9? Let us contextualise this to the facts at hand. The originating point of inquiry is the S.P. (B) Nalbari's direction to Sub-Inspector Dutta on 12.05.2004. The*

pleadings and the record are silent as to what was the basis of the S.P. (B) Nalbari's direction? What materials or information had come to his knowledge or possession that warranted his direction? Obviously, the State cannot proceed in such manner. Neither can we as a Court countenance such approach.

61) In paragraph 18 above, a brief reference is made to the contents of the enquiry report of the Superintendent of Police (Border), Barpeta. It cannot be said that the grounds of suspecting the petitioner to be a foreigner of post 25.03.1971 is found to be clearly spelt out. It is not the case of the petitioner that on his appearance, the said report was not there in the record and/or that it was not supplied to him. It is not the pleaded case of the petitioner either before this Court or before the learned Foreigners Tribunal that he has suffered any prejudice for not being furnished with the enquiry report. Moreover, no demand for being supplied with the said report appears to have been made, which can be gathered from the absence of such statement in the writ petition. Therefore, the case of *Md. Rahim Ali @ Abdur Rahim (supra)*, as well as the case of *Sona Kha @ Sona Khan v. Union of India & Ors., 2021 (3) GLT 12*, cited by the learned counsel for the petitioner does not appear to help the petitioner in any manner.

62) It would be apposite to now refer to the decision of this Court in the case of *Ananda Ghosh v. Union of India (2017) 3 GLR 815: 2017 (2) GLT 996: (2017) 0 Supreme(Gau) 794*.

12. *In a recent decision of this Court in the case of Mustt. Abiran Nessa v. Union of India (WA 200/2016), decided on 27.03.2017, it has been held that wrong mentioning of the foreigners stream as classified under Section 6A of the Citizenship Act, 1955 to which the noticee belongs would not vitiate the proceeding before the Tribunal or consequential order passed by the Tribunal if the materials on record discloses that the noticee actually belongs to the stream of foreigners which has been ultimately held to be so by the Tribunal. Wrong mentioning of the stream of foreigners to which the noticee belongs contrary to the reference made*

by the State would not vitiate the order passed by the Tribunal and would not confer any undue advantage to a proceedee or enable a proceedee to improve his status. It was held as follows:-

"10. Thus, materials on record, as found by the learned Single Judge, disclosed that appellant was a foreigner who had illegally entered into India (Assam) from the specified territory after 25.03.1971. The reference was also made accordingly.

11. It is trite that non-mentioning or wrong mentioning of a provision would not invalidate an order if such an order can be traced to a valid source. In such a situation, Court would examine whether the order in question has any legal sanctity and whether it can be traced to a valid source of power. If it can be traced to a valid source of law, wrong mentioning of the provision of law in the order impugned would be immaterial.

12. By applying the same analogy, it can also be said that wrong mentioning of the foreigners stream as classified under Section 6A of the Citizenship Act, 1955, as amended, to which the noticee belongs would not vitiate the proceeding or the consequential order passed by the Tribunal if materials on record disclose that the noticee actually belongs to the stream of foreigners, which has been ultimately held to be so by the Tribunal. Such wrong mentioning contrary to the materials on record or contrary to the reference made would not confer any undue advantage to a proceedee or enable a proceedee to improve his/her status. Therefore, on this count, we cannot condemn the order passed by the Tribunal which has been rightly affirmed by the learned Single Judge."

13. *Having regard to the above, we have no hesitation to hold that when the reference was as to whether petitioner was a foreigner belonging to the post 25.03.1971 stream, non-mentioning of the same or wrong-mentioning of the stream of foreigners to which the petitioner belongs in the notices would not vitiate the ultimate conclusion reached by the Tribunal that petitioner was a foreigner of post 25.03.1971 stream. Since the reference was answered in favour of the State, it ought to be and has rightly been answered in the above manner. As a matter of fact, this issue was not even raised by the petitioner in his written statement possibly because he was fully aware that the allegation against him was of being a foreigner belonging to the post 25.03.1971 stream. Therefore, this ground urged on behalf of the petitioner stands rejected. However, before moving on to the next ground, we would like to observe that the Tribunal ought to have been careful while issuing the notices. We hope and expect that such mistakes would not be repeated in future.*

63) Now coming to the documents exhibited by the petitioner as DW-1 and by his projected uncle, DW-2, it has been mentioned herein before that no entry has been proved. In the said context, it would be apposite to refer to the case of *Narbada Devi Gupta v. Birendra Kr. Jaiswal & Ors., (2003) 8 SCC 745*, wherein the Supreme Court of India has held that the mere production and marking of a document in evidence is not enough, but its execution has to be proved by admissible evidence. It was also held that where documents are admitted by the signatories thereto and marked as exhibits, no further burden to lead additional evidence to prove the writing and its execution survives. In the present case in hand, the petitioner has not exhibited any of the entries in any exhibited documents marked as Ext.A to Ext.N.

64) The voter list is not a document which can prove relationship of persons as father and son or grandfather and grandson in the absence of any other document as corroborative evidence. The electoral roll is available in public domain. Therefore, merely by producing an electoral roll of (i) Khaimuddin (projected father), and (ii) Innas Ali (projected grandfather), the petitioner, whose citizenship is doubtful, cannot establish himself to be the son of Khaimuddin, in the absence of his name in the electoral roll with his projected father. The petitioner has not pleaded or proved the existence of his projected mother alongwith his petitioner's father. Thus, this is a case where the presumption can be drawn under Section 119, Illustration (g) of the Bharatiya Sakshya Adhiniyam, 2023 [section 114, Illustration (g) of erstwhile Evidence Act, 1872, since repealed] to the effect that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

65) The Court is conscious of the fact that in exercise of certiorari

jurisdiction, this Constitutional Court ought not to re-appreciate the evidence, which is best left to the Foreigners Tribunal in this case. However, as the learned counsel for the petitioner had strenuously submitted that the learned Foreigners Tribunal had perfunctorily examined the evidence and mechanically rejected the evidence. Therefore, such exercise by this Court is not intended to be cited as a precedent. Therefore, in other words, it is again clarified that in the quest to satisfy ourselves as to whether the learned Foreigners Tribunal had perfunctorily examined the evidence and mechanically rejected the evidence, the evidence before the learned Tribunal has been examined, which is not to be cited as a precedent because the Court is not exercising appellate jurisdiction.

66) Therefore, in light of the discussions above, the Court is of the considered opinion that the impugned opinion rendered by the learned Member, Foreigners Tribunal No. 1st, Barpeta, in F.T. Case No. 289/2016 [arising out of F.T. Ref. Case No. 25/16], thereby declaring the petitioner to be a foreigner, who has entered into Assam on or after 25.03.1971 is sustainable on facts and in law. The said learned Tribunal is not found to have misread or misconstrued any pleadings and evidence on record. The finding of the learned Tribunal is not found to be vitiated by any reason whatsoever and therefore, warrants no interference by the Court.

67) Accordingly, the Court passes the following –

O R D E R

68) In light of the discussions above, this writ petition fails and is dismissed.

69) The parties are left to bear their own cost.

70) The learned standing counsel for the FT matters shall send a

downloaded copy of this order to the Superintendent of Police (Border), Barpeta.

71) The Registry shall send back the records back to the Foreigners Tribunal 1st, Barpeta along with a copy of this order to be made a part of the record of F.T. Case No. 289/2016 [arising out of F.T. Ref. Case No. 25/16].

JUDGE

JUDGE

Comparing Assistant