

GAHC010176732020



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

Case No. : WP(C)/5307/2020

KARFUL NESSA

W/O- LT. KOFER ALI, D/O- LT. KOBATH AKAND, R/O- VILL- KATAJAR
GAON, P.S. GOBARDHANA, DIST.- BAKSA, ASSAM, PIN- 781315

VERSUS

THE UNION OF INDIA AND 7 ORS
REP. BY THE SECY., MINISTRY OF HOME AFFAIRS, GOVT. OF INDIA,
SHASTRI BHAWAN, NEW DELHI- 110001

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

3:THE ELECTION COMMISSION OF INDIA
REP. BY THE CHIEF ELECTION COMMISSION
NIRVACHAN SADAN
ASHOKA ROAD
NEW DELHI- 110001

4:THE STATE COORDINATOR
NATIONAL REGISTRATION OF CITIZENS
ASSAM
1ST FLOOR
ACHYUT PLAZA
G.S.ROAD
BHANGAGARH
GHY
ASSAM
PIN- 781005

5:THE FOREIGNERS TRIBUNAL
BARPETA 10TH
ASSAM
DIST.- BARPETA
ASSAM
PIN- 781301

6:THE DY. COMMISSIONER
BAKSA
P.O.- MUSHALPUR
DIST.- BAKSA
ASSAM
PIN- 781347

7:THE SUPERINTENDENT OF POLICE (B)
BAKSA
P.O.- MUSHALPUR
DIST.- BAKSA
ASSAM
PIN- 781347

8:THE OFFICER-IN-CHARGE
OF GOBARDHANA P.S.
P.O. GOBARDHANA
DIST.- BAKSA
ASSAM
PIN- 78131

Advocate for the Petitioner : MS. D GHOSH

Advocate for the Respondent : ASSTT.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA
HONOURABLE MR. JUSTICE ROBIN PHUKAN

Date : 21-03-2023

JUDGMENT & ORDER (ORAL)

(A.M. Bujor Barua, J)

Heard Ms. D Ghosh, learned counsel for the petitioner, Mr. U K Goswami,

learned CGC for the respondents in the Union of India, Mr. J Payeng, learned counsel for the respondents in the Home Department of Government of Assam, Mr. AI Ali, learned counsel for the respondents in the Election Commission of India, Mr. KK Parasar, learned counsel for the respondents in the NRC and Ms. U Das, learned counsel for the Deputy Commissioner, Barpeta.

2. The petitioner Karful Nessa had been referred to the Foreigners Tribunal No. 10, Barpeta for rendering an opinion as to whether she is a person who entered the State of Assam on or after 25.03.1971 from the specified territory which resulted in registration of Case No. F.T. 384/2016. The Tribunal rendered its opinion dated 13.02.2018 declaring the petitioner to be a person who entered the State of Assam on or after 25.03.1971 and accordingly directed that she be pushed back to the specified territory in exercise of the powers under Section 13(3) of the Foreigners Tribunal Order, 1964. Being aggrieved, this writ petition is instituted.

3. In the writ proceeding, the petitioner relies upon the voters list of 1966 of village 129 Baladmari Part-IV, police station-Goalpara in the present district Goalpara, which contains the name of Kobat Akond son of late Saraf Uddin at serial No. 6 and that of Fuljan Nessa wife of Kobat Akond at serial No. 7 as well as Gendeli Bewa wife of late Saraf Uddin at serial No. 8. Reliance is also placed on the voters list of 1970 of village 129 Baladmari Char Part-IV under Goalpara police station, which also contains the name of Kobat Akond, son of Late Saraf Uddin at serial No. 9, Fuljan Nessa wife of Kobat Akond at serial No. 10 and Gendeli Bewa, wife of late Saraf Uddin at serial No. 11.

4. In the writ proceeding, the petitioner relies upon a certificate dated 18.11.2016 of the Secretary, Baladmari Char Gaon Panchayat as well as the evidence rendered by Imon Ali (Dewani), where his father's name is not very

legible except for his surname Akond, who is also a resident of village Baladmari Char as DW-2 and that of Karim Akand, son of late Kobath Akand, aged about 53 years, resident of village Baladmari Char Part-II under Goalpara police station.

5. If the petitioner can establish that she is the daughter of Kobat Akond whose name appears in the voters list of 1966 and 1970 of village Baladmari Char Part-IV, the petitioner would discharge her burden under section 9 of the Foreigners Act, 1946 (in short Act of 1946) to show that she is a citizen of India. To discharge the said burden, the petitioner, firstly as indicated above, relies on the certificate issued by the Secretary, Baladmari Char Gaon Panchayat, where the Secretary of the Gaon Panchayat had not been examined by the petitioner in support of the said certificate. But, as the certificate had been relied upon, we take note of the contents thereof which is extracted as below:-

“Sl. No. 3365

*GOVT. OF ASSAM
OFFICE OF THE 51 NO. BALADMARI CHAR GAON PANCHAYAT
BALADMARI CHAR*

NO:BCGP/V/CERT/2016-17

Date 18/11/2016

TO WHOM IT MAY CONCERN

This is to certify that Sri/Smti Karful Bewa S/o, D/o, W/o, Shri/Late Kobad Akand

Village 2No. Baladmari Char P.O Baladmari Char P.S.

Goalpara Dist Goalpara (Assam)

I wish his/her all success in life.

This Certificate is valid for Linkage Certificate purpose only.

N.B. Her father name is record in the electoral roll 1966 vide Sl No.6 and house no-3 at vill.

199 baladmari pt-iv p.o- Goalpara, Dist- Golapara under 45 east Goalpara LAC.

She had married with LT Kofer Ali S/O- LT Ijar Pramanik at Vill- Katajhar Pathar, P.O- Katajhar Pathar, P.S. Gobardhana, Dist. Barpeta(Assam)

To the best of my knowledge the above statement is true.”

6. The certificate dated 18.11.2016 which also has its own issue number, contains that Karful Nessa is the daughter of Kobad Akand of village No. 2 Baladmari Char under Goalpara police station in the Goalpara district. The certificate also provides that the name of the father of Karful Nessa is recorded in the electoral roll of 1966 of village No. 129 Baladmari Part-IV, district Goalpara and that she was married to Kofar Ali son of Ijar Pramanik of village Katajhar Pathar, police station Gobardhana of Barpeta district. The Secretary of the Panchayat further states in the certificate that to the best of his knowledge, the statements made in the certificate are true.

7. A certificate under the law is a document for which the person certifying the certificate states about the existence of a given fact. The existence of a given fact can either be from the information that may be derived from any record of which the person certifying may be the custodian and accordingly certifies the existence of the fact, as stated in the certificate, which may be derived from the records of which he is the custodian, or the person certifying the certificate may also certify about the existence of a fact if the person so certifying has a personal knowledge about the existence of the fact, or further the person certifying may also certify the existence of a fact on the basis of any belief that the person certifying may have, but again if the existence of a fact is certified on the basis of belief, the person so certifying should also place on record as to what is the source of the material which lead the person to believe in such manner.

8. In Wharton's Law Lexicon, 16th Edition, a certificate is defined as extracted herein below:

“Certificate, a testimony given in writing to declare or verify the truth of anything.”

In Oxford English dictionary of English, a certificate is given the meaning

as '*An official document attesting a fact*'.

In Black's Law Dictionary, a certificate is given the meaning as '*a document in which a fact is formally attested*'.

9. From the afore cited definitions of certificate, it is discernible that a certificate is a testimony in writing to either declare or verify the truth of anything or where a fact is formally attested. If a certificate in writing declares or verify the truth of the existence of any fact or where a fact is formally attested, a natural question would also arise as to what is the source of knowledge of the person who issued such certificate about the existence of the fact.

10. When we examine the contents of the certificate dated 18.11.2016 from the context of the aforesaid requirement of law in order to make the contents of the certificate valid and acceptable, we notice that the Secretary of the Baladmari Char Gaon Panchayat had stated that Karful Nessa is the daughter of Kobad Akand, resident of village No. 2 Baladmari Char. The Secretary does not disclose as to what is the source of his knowledge regarding the existence of the fact that Karful Nessa is the daughter of Kobad Akand of village No. 2 Baladmari Char. Reference is made that the name of the father of Karful Nessa is recorded in the electoral roll of 1966 at serial No. 6 House No. 3 of village 129 Baladmari Part-IV in the Goalpara district. But no further material is available as to what is the source of knowledge of the Secretary of the Baladmari Char Gaon Panchayat that the father of the petitioner is the same person namely Kobad Akand, whose name appears in the voters list of 1966 or whether in spite of having similar names, they are different persons.

11. It is noticed that in the proceedings before the Foreigners Tribunal, it is a common practice to rely and exhibit certificates issued either by the Secretary of

a Gaon Panchayat or by the Gaon Bura of a given village, which contains that the person to whom the certificate is issued is either the son or daughter of a given person whose name appears in a voters list of a particular year of a given village, who may be acceptable as a citizen of India or that the person concerned to whom the certificate is issued was earlier a resident of some other village and is presently an inhabitant or resident of the village of which the person certifying is the Gaon Bura or the Secretary of the Gaon Panchayat.

12. The certificate providing that the person concerned to whom the certificate is issued is an inhabitant or a resident of the village of which the certifying person is the Gaon Bura or the Secretary of the Gaon Panchayat, would be acceptable in law as evidence to the extent that the person to whom the certificate is issued, is a resident of the village, but the further information that the certificate may contain that the person to whom the certificate is issued is the son or daughter of a given person and that the name of that person appears in the voters list of either of that place or some other place, which otherwise may be acceptable for the purpose of proving the citizenship or that the person to whom the certificate is issued was earlier a resident of another village and son or daughter of a given particular person of that village whose name again appears in the voters list of the other village, would have to be fortified by the person issuing the certificate either to be based on some record of which the person certifying is the custodian or that the person certifying has any personal knowledge about the existence of the given fact.

13. In most of the certificates, it is noticed that the dominant purpose of the certificate is to show that the person to whom the certificate is issued is the present resident or inhabitant of the village concerned of which the person issuing the certificate is either a Gaon Bura or the Secretary of the Gaon

Panchayat. But such certificates are also sought to be relied upon for the further information that it may contain as to who is the father of the person to whom the certificate is issued and further that the name of the person who is referred as the father appears in any acceptable voters list for proving the citizenship.

14. For the other part of the information contained in such certificate regarding the identity of a person as to whose son/daughter the person is and whether the person who is stated to be the father is actually the father and whether the name of the father appears in any acceptable voters list to prove the citizenship, in our view would require some further evidence to be rendered by the person issuing such certificates. In the absence of any such further evidence being rendered by the person who issues such certificates, the contents of the certificate to the extent to establish the identity of the person in whose favour the certificate is issued and also as to who his father is and of which place the father is a resident and in the voters list of which place the name of the father appears, would be unacceptable under the law of evidence. To overcome such situation, the proceedee concerned would have to examine the person who issue such certificate either as a Gaon Bura or as a Secretary of the Gaon Panchayat and in such evidence, it would be incumbent upon the Gaon Bura or the Secretary of the Gaon Panchayat to disclose his/her source of information as regards the identity of the person to whom the certificate is issued as well as that of his father, the residence of the father and as to in which voters list the name of the father appears.

15. In the absence of such further evidence, the certificate on its own or to that extent if the person certifying the certificate either being the Gaon Bura or the Secretary of the Gaon Panchayat does not disclose the source of his

information, the same would be unacceptable under the law of evidence inasmuch as, such information may either be hearsay or may be information without any acceptable basis.

16. In ***Rupajan Begum Vs. Union of India & Ors.*** reported in **(2018)1 SCC 579**, the evidentiary value of a certificate issued by a Gaon Panchayat Secretary was elaborately discussed. In paragraph 12 of the judgment of the Supreme Court in ***Rupajan Begum*** (supra), the origin of the relevance of the certificate issued by a Gaon Panchayat Secretary was discussed, which provides that the origin of the certificate can be traced back to the provisions by the Registrar General of India with regard to issuance of such certificate.

17. In one of the proceedings before the Court, we had the benefit of going through a report being submitted by the State CID as regards the concept of issuing a certificate by the Secretary of a Gaon Panchayat. As per the report of the State CID, the origin of the concept of issuing a certificate by the Secretary of a Gaon Panchayat is on the basis of a communication dated 05.05.2015 from the Registrar General and Census Commissioner of India, Ministry of Home Affairs, Government of India which was issued to the State Coordinator of NRC of Assam, wherein an approved format was provided for issuing certificates by the Secretary of the Gaon Panchayats and Executive Magistrates to the married women as supporting documents in the NRC process. Accordingly, the Commissioner & Secretary to the Government of Assam in the Home and Political Department cum State Coordinator of NRC by his communication dated 05.05.2015 addressed to all the Deputy Commissioners had provided that a certificate may be issued by the Secretary of a Gaon Panchayat in respect of the rural areas and by the Circle Officers or Executive Magistrates in respect of the urban areas to facilitate the process of NRC in respect of married women who

had migrated to a new place by virtue of their marriage. The first paragraph of the communication dated 05.05.2015 is as extracted below:-

“1. Such certificate is issued only to establish linkage of the married women with her parents and her husband. This certificate shall be accepted only as a supporting document for establishing linkage with the parent(s) of the married woman for whom the certificate is issued. This document shall be valid only if accompanied by Legacy Data or any of the other admissible documents issued for the person with whom linkage is claimed for inclusion in updated NRC. However, production of Legacy Data or any other admissible documents will be required at the time of submission of Application Form for inclusion in updated NRC and need not be insisted upon at the time of issue of such certificate or its countersignature.”

18. A reading of the first paragraph of the communication dated 05.05.2015 makes it discernible that the certificate to be issued by the Secretary of the Gaon Panchayat is for the purpose to establish a link of a married woman with her parents and her husband and that it was specifically provided that such certificate shall be accepted only as supporting document to establish the linkage with the parents. A reading of the format provided by the Registrar General and Census Commissioner of India, Ministry of Home Affairs, Government of India also makes it discernible that such certificates to be issued by the Secretary of the Gaon Panchayat would be numbered with the serial number and date, meaning thereby that the records of issuing such certificates are to be maintained. A reading of the format provided by the Registrar General indicates that the dominant purpose of such certificate is to the place of residence of the married woman after her marriage and also an indication of the identity with her father and mother and the original place of residence prior to the marriage.

19. The aforesaid materials make it discernible that originally the relevance of a certificate being issued by the Secretary of the Gaon Panchayat relates to a married woman as regards the parental home and her marital home where she

was required to have shifted pursuant to her marriage. In the aforesaid context, in paragraph 15 of its judgment in ***Rupajan Begum*** (supra), the Supreme Court had provided that the certificate issued by the Gaon Panchayat Secretary merely acknowledges the shifting of residence of a married woman from one village to another. In paragraph 15 of the same judgment it is also provided that the certificate issued by the Gaon Panchayat Secretary itself by no means establishes any claim of citizenship of the holder of the certificate and in the process regarding the NRC, the certificate by the Gaon Panchayat Secretary is included in the illustrative list of documents, by specifying it to be only a supporting document and not a document which establishes any citizenship. It is further provided in paragraph 15 that the claim accompanied by such certificate from the Gaon Panchayat Secretary without details of the legacy of the person is to be discarded and the certificate is to be used only for the limited purpose of providing a linkage after due enquiry and verification. In paragraph 16 it is reiterated that the certificate issued by the Gaon Panchayat Secretary by no means is a proof of citizenship.

20. In paragraph 16 it is also provided that the certificate issued by the Gaon Panchayat Secretary has to be verified at two stages, the first is the authenticity of the certificate itself and second is the authenticity of the contents thereof. The latter verification regarding the authenticity of the contents of the certificate of the Gaon Panchayat Secretary is viewed by the Supreme Court 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 due opportunity to the holder of the certificate and if the document and its contents are subjected to a thorough search and probe, no reason can be seen as to why the said certificate would be unacceptable. The contours within which

a certificate issued by a Gaon Panchayat Secretary can be acceptable had been clearly provided by the Supreme Court in paragraphs 15 and 16 of its judgment in ***Rupajan Begum*** (supra), which are reproduced herein below:-

“15. The certificate issued by the G.P. Secretary merely acknowledges the shifting of residence of a married woman from one village to another. The said certificate by itself and by no means establishes any claim of citizenship of the holder of the certificate. This is made clear in the illustrative list of documents itself by specifying the same to be only a supporting document. The certificate in question only enables its holder to establish a link between the holder and the person from whom legacy is claimed. It has been made clear in the several reports of the learned State Coordinator, NRC, Assam that a claim accompanied by such a certificate, without details of the legacy person, is to be discarded and in the event information is to be used for the limited purpose of providing a linkage after due enquiry and verification.

16. 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. 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.”

21. It is noticeable that once a certificate by the Secretary of the Panchayat is produced and relied before the Tribunal, there is an inherent requirement of the State authorities to make a thorough verification as regards the contents of the certificate of the Gaon Panchayat Secretary. Further there is also a requirement to arrive at a conclusion as regards the authenticity of the certificate and also as regards the authenticity of its contents. Both the requirements, in the view of the Court, would bring in a further invariable requirement to have the author of

the certificate i.e. the Secretary of the Gaon Panchayat, or as the case may be the Gaon Bura, to be also examined before the Tribunal. Upon the Secretary of the Gaon Panchayat or the Gaon Bura being subjected to be examined before the Tribunal, the State authorities in their wisdom can cross-examine them to the extent as may be required in a given circumstance so that the veracity and correctness of the contents of the certificate can be brought out. In doing so as already held the author of such certificate should also disclose his source of information as regards the identity of the person to whom the certificate is issued as well as that of his father, the residence of the father and as to in which voters list the name of the father appears and in such examination or cross-examination, the Secretary of the Gaon Panchayat or the Gaon Bura be required to also disclose their source of information as regards the contents of the certificate.

22. In view of the above, upon the matter being remanded back, the writ petitioner/ proceedee is given the liberty to bring the Secretary of the Gaon Panchayat who is the author of the certificate to render his evidence for the purpose as indicated above. In the event, the writ petitioner/proceedee fails to bring the Secretary of the Gaon Panchayat for his examination, no evidentiary value can be given to the certificate that may have been produced. The State authorities, through the Superintendent of Police (Border), are also directed to make a thorough verification on the authenticity of the certificate issued by the Gaon Panchayat Secretary and also the authenticity of the contents of such certificate. The result of the verification that may be made through the Superintendent of Police (Border), be also placed before the Tribunal.

23. It is clarified that in the event any application is made by the writ petitioner proceedee to the Tribunal requiring the Gaon Panchayat Secretary, to

be brought in before the Tribunal as a witness, the Tribunal should allow such application.

24. For the aforesaid reasons, we disallow the reliance of the petitioner on the certificate dated 18.11.2016 of the Secretary of Baladmari Char Gaon Panchayat and the said certificate shall now be subjected to the evidence that the author of the certificate may render before the Tribunal.

25. As regards the evidence rendered by DW-2 Iamon Ali, son of Akon (illegible), resident of Baladmari Char, it is noticed that the DW-2 in clear terms has stated that the writ petitioner proceedee Karful Nessa is well known to him and that her name is Karful Nessa and that the name of her father is late Kobat Ali Akon and that the name of her mother is Fuljan. The DW-2 also stated in specific terms that Karful Nessa was born in Baladmari Vilalge about 57 years back and that she was married to one Kafar of village Katejhar and that she has three brothers and further that the name of her father is recorded in the voters list of 1966 and 1970 along with his mother.

26. We have noticed that although the evidence rendered by DW-2 is specific to the extent that he has personal knowledge about the identity of the writ petitioner Karful Nessa by virtue of being a co-villager, where the family of the petitioner is known to him, but the State authorities before the Tribunal had not cross-examined the DW-2. We have perused the evidence of DW-2 from the records and the deposition of the DW-2 was made on 16.11.2017.

27. A reading of the order sheet of the Tribunal of 16.11.2017 does not make it discernible in any manner as to whether the State authorities had declined to cross examine the DW-2 or due to inadvertence of either of the authorities, the cross examination did not take place. The State authorities through their cross examination under the law of evidence did have the opportunity to controvert

the evidence of DW-2 and to extract the veracity of the specific evidence that he knows the petitioner Karful Nessa from her birth and that she is the daughter of Kobat Ali Akon and Fuljan Nessa, whose name appear in the voters list of 1966 and 1970 of village Baladmari Char Part-IV.

28. In the absence of any cross examination, under the law of evidence, we are required to accept the evidence rendered in the manner it is presented. But at the same time, as it is not discernible as to whether the cross examination was refused by the State authorities, we are of the view that for the interest of justice, the State authorities also deserves an opportunity to cross examine the DW-2.

29. The petitioner also relies upon the evidence of DW-3 Karim Akand son of Kobat Akand aged about 53 years, resident of village Baladmari. In this respect, it is also noticed that the petitioner relies upon a voters list of 1997 of village Baladmari Part-IV, wherein the name of Karim Akand son of late Kobat Akand appears along with Fuljan Nesa wife of late Kobat Akand. We have already noticed that the name of Fuljan Nessa wife of Kobat Akand had appeared in the voters list of 1966 and 1970 in respect of the same village i.e. Baladmari Part-IV. Fuljan Nessa being subjected to Islamic tradition may write her name as Fuljan Bewa after the demise of the husband and from such point of view, there is no reason not to accept that Fuljan Bewa wife of late Kobat Akand of the 1997 voters list and Fuljan Nessa wife of Kobat Akand of the voters list of 1966 and 1970 of village Baladmari Part-IV are not the same person. As the name of Fuljan Nessa and that of Kobat Akand together appear in the voters list of village Baladmari Part-IV, we see no reason why not to accept that Karim Akand is not the son of Kobat Akand. If Karim Akand had deposed before the Tribunal as DW-3 stating that the petitioner Karful Nessa is his sister, we see no reason

as to why the said evidence should be discarded inasmuch as the State authorities in their cross examination could controvert the said evidence being rendered by Karim Akand.

30. For the purpose, we have perused the cross examination of DW-3 Karim Akand. From the cross examination, it appears that the State authorities instead of cross examining him and controverting the evidence that Karful Nessa is the daughter of Kobat Akand whose name appears in the voters list of 1966 and 1970, through their cross examination had in fact, supported and further fortified the evidence rendered by the DW-3 to establish that the petitioner Karful Nessa is the daughter of Kobat Akand whose name appears in the voters list of 1966 and 1970 of village Baladmari Part-IV.

31. Considering the matter in its entirety, we remand the matter back to the Tribunal to enable the petitioner to examine the Secretary of Baladmari Gaon Panchayat to support the contents of the certificate relied upon by the petitioner and the State authorities will be at liberty to cross examine the Secretary to find out the source of his knowledge regarding the contents of the certificate.

32. As from the order dated 16.11.2017, it is not discernible as to whether the State authorities had refused to cross examine the DW-2, for the interest of justice we also allow the State authorities to cross-examine the DW-2 in any given manner as may be advised. Upon the aforesaid being done, the Tribunal shall pass a reasoned order to be also based on the further evidence from the cross examination of the Secretary of the Gaon Panchayat and that of the DW-2 as may be arrived and in the event the reasoned order is in favour of the petitioner, the same would prevail over the earlier opinion rendered by the Foreigners Tribunal No. 10, Barpeta in FT Case No. 384/2016 and if the reasoned order goes against the petitioner, consequence as per law shall follow.

33. In course of these proceedings in respect of the Foreigners Tribunals, we also take note that the Assistant Government Pleaders are appearing for the State respondents. We are constrained to observe that the Assistant Government Pleaders are not doing the duties as required to be done under the law to protect the interest of the State. In most cases, the Assistant Government Pleaders are simply inactive and merely taking a stand that whatever evidence had been rendered by the proceedee is insufficient to prove their citizenship. The role of the Assistant Government Pleaders is not to merely wait for the proceedee to render evidence and then to take a plea that the evidence is not sufficient. When the proceedee discharges the initial burden under section 9 of the Act of 1946, the burden under the law of evidence shifts to the State to controvert such evidence and this is where the role of the Assistant Government Pleaders would be relevant to find out as to what credible evidence or material can be produced or in what manner the evidence of the proceedee can be controverted to establish that the proceedee could not discharge the burden of proving that the proceedee is a citizen of India.

34. The proceedings before the Foreigners Tribunal are governed by Section 9 of the Act of 1946. Section 9 of the Act of 1946 is extracted as below:-

“9. Burden of proof.

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

35. A reading of Section 9 of Act of 1946 makes it discernible that in such proceedings where the question of determination is whether any person is or is not a foreigner 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, notwithstanding anything contained in the Indian Evidence Act, 1872, would lie on such person against whom the proceedings are initiated. In other words, contrary to the provision of Section 101 of the Indian Evidence Act, 1872, the burden to prove the existence of the fact that such person or the proceedee is not a foreigner would lie on the proceedee and not on the State authorities although the proceedings may have been initiated on a reference being made by the State authorities.

36. In the circumstance, a question would arise as to what would be the further role of the State authorities upon the proceedee having discharged or partly discharged the burden under Section 9 of the Act of 1946. While discharging the burden, the proceedee may have discharged the complete burden to prove that he is not a foreigner or the materials and documents that may be produced and relied upon can also be construed to be not a complete discharge of the burden but to be a discharge in part or to be short of discharging the complete burden. In the circumstance, where the proceedee discharges either a part of the burden to prove that he is not a foreigner or where he discharges according to him the complete burden, in such circumstance, to arrive at as to what would be the further role of the State authorities, we refer to the provisions laid down by the Supreme Court in paragraph 26 of its judgment in ***Sarbananda Sonowal Vs. Union of India***, reported in **(2005)5 SCC 665**, which is extracted as below:-

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 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

37. A reading of the afore extracted paragraph 26 of the judgment of the Supreme Court in ***Sarbananda Sonowal*** (supra) makes it discernible that after the proceedee had given his or her evidence to discharge the burden under Section 9, the State authorities can verify the facts and can lead evidence in rebuttal of such evidence. A reading of the said provision makes it explicitly clear that once the burden had been discharged by the proceedee, either in complete or in part, it is for the State authorities to make a verification of the facts and the authenticity and acceptability of the materials and documents that may have been produced and to lead evidence in rebuttal thereof. The further provision in paragraph 26 of the said judgment is that 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 the State authorities to first lead evidence on the aforesaid points. The said provision itself makes it clear that there is a presumption that in these proceedings before the Foreigners Tribunal, the State authorities may not have any material of their own to establish and assert that the proceedee is a foreigner. As there is also a presumption under the law that the State authorities may not have the necessary materials and documents with them to assert that the proceedee is a foreigner, there is more the necessity in the event of any material being led by

the proceedee before the Tribunal for the State authorities to verify the authenticity and applicability of such material in the proceeding. As already observed by the Supreme Court in ***Rupajan Begum*** (supra), the authenticity of the material would again have to be in two parts i.e. the authenticity of the material or document itself and secondly the authenticity of the contents of such material or document.

38. In the aforesaid circumstance, for a more appropriate adjudication of the proceedings before the Foreigners Tribunal, it would be apposite on the part of the State authorities, as well as a requirement of the Tribunal, to insist upon that the State authorities to make their own verification as regards the documents and materials that may be relied and produced by the proceedee in discharge of his burden under Section 9 of the Act of 1946 and also as to the authenticity and acceptability of the contents of such materials and documents and thereupon if found that the materials and documents so relied upon and produced is either unauthentic or its contents are incorrect or they are not applicable in respect of the proceedee, the same be brought forward before the Tribunal so that an appropriate adjudication can be made on the issues raised.

39. In this respect we see a much greater role of the Assistant Government Pleaders who appears on behalf of the State authorities before the Tribunal as well as that of the authorities through the office of the Superintendent of Police (Border) of the respective districts. It is stated that in many number of Tribunals the Assistant Government Pleaders are not appointed which may inhibit the process of carrying out the procedure indicated above. We further provide that in such Tribunals, where the Assistant Government Pleaders are not appointed, the Superintendent of Police (Border) may make arrangement of an appropriate official of the police department to remain present, so that the official can take

note of the requirements of any verification to be made by the State authorities for the purpose of rebuttal of the evidence that may be led by the proceedee.

40. On the other hand, if the State authorities upon the materials and documents being relied upon and placed by the proceedee is of the view that such materials do not require any verification, it is up to the State authorities, but again in such circumstance the materials and documents produced should be appreciated on its own evidentiary value rather than seeking to discard the same without any acceptable reasons under the law. A reference is also made to the pronouncement of the Supreme Court in ***Sirajul Hoque Vs. State of Assam & Ors.***, reported in ***(2019)5 SCC 534***, wherein in one of the documents the person was indicated as "Kefatulla" and whereas in another document he was shown as "Kematulla" and the aforesaid difference was held to be a discrepancy of fatal nature so as to discard the burden discharged by the proceedee. In another proposition of the Supreme Court laid down in ***Sushil Kumar Vs. Rakesh Kumar AIR 2004 SC 230*** a judicial notice had been taken that there may be variations in the age indicated in the successive voters list. If it is so, a minor variation in the age that may be depicted in the successive voters list is also not be taken to be a discrepancy which would be fatal in nature so as to discard the entire burden of proof discharged by the proceedee. The Tribunal while deciding the reference may also take note of the aforesaid two propositions. In other words, we also feel that there is a requirement of the Tribunals to arrive at a more conclusive opinions supported by appropriate materials and documents and reasons.

41. The verification of the materials and documents that the proceedee may produce and rely upon would also include verifying as to whether the voters lists that are relied upon are authentic and genuine. The other aspect of verification

may be that if the proceedee claims that a person depicted in such voters list is his/her father, the State authorities can proceed to such village, satisfy itself that the person of the voters list who is claimed to be the father is actually his/her father or whether such person of the voters list is some other person. The State authorities can also verify as to who are the family members of the person of the voters list who is claimed to be the father and whether the proceedee is also one such family member. The proceedings of this nature before the Foreigners Tribunal always involves a question as to whether the person referred in the voters list who is claimed to be father and the person who is actually the father of the proceedee are one and the same person or they are different persons merely having the same name.

42. In the proceedings, claims are also made that the proceedee had shifted from one village to another village. To verify as to whether a shifting had taken place, a further verification can be made by the State authorities in respect of the original village as to whether the person referred therefrom had actually shifted as claimed by the proceedee or the referred person continues to exist in the original village, which may indicate that the claim of the proceedee may be false and that the proceedee or his/her father is a different person. Verifications can also be made on the contents of various certificates that are relied upon by the proceedees and further as to whether the person referred in such certificates and the proceedee before the Tribunal are one and the same person or they are different persons. The aforesaid are only indicative in nature and not exhaustive and by their own application of mind, the State authorities can delve into different verifications as may be advised, so that the truth as regards the claim made by the proceedees can be found out.

43. The provisions of this order requiring the procedure to be adopted by the

Tribunals as well as by the State authorities through the Superintendent of Police (Border) shall be in addition to all such prevailing requirements under any other law, either statutory or through Court pronouncements, and shall not be construed to be derogatory to any such existing provisions.

44. Ms. D. Ghosh, learned counsel for the petitioner submits that the petitioner may be allowed to bring some further materials and documents to discharge the burden under Section 9 of the Act of 1946. The petitioner may be allowed to do so, if so advised.

45. A copy of this order be circulated to all the Tribunals and the Superintendents of Police (Border) as well as the learned Additional Government Pleaders, who appear before the Tribunals.

46. In this respect, the Secretary to the Government of Assam in the Home Department is directed to review the entire performance of the Assistant Government Pleaders and ensure that the role of the Assistant Government Pleader is done as per the requirement of law and to protect the interest of the State and not merely to remain present in the proceedings without any pro active role.

47. Mr. J Payeng, learned counsel for the respondents in the Home Department of the Government of Assam raises an objection that in most of the cases before the Foreigners Tribunal, the list of the witnesses is not given.

48. If it is so, the Assistant Government Pleaders can raise this objection before the Tribunal requiring the Tribunal to ensure that the lists of witnesses are provided by the proceedees so that the Assistant Government Pleaders can look into the acceptability of such witnesses.

49. The petitioner shall appear before the Tribunal on 11.05.2023.

50. Till such reasoned order is passed by the Tribunal, no coercive action be

taken against the petitioner.

51. The writ petition is allowed as indicated above.

Send back the LCR immediately.

JUDGE

JUDGE

Comparing Assistant