GAHC010303442019

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

**Case No. : WP(C)/9231/2019**

FORHAD ALI
S/O. LT. HABI RAHMAN @ HABIBAR RAHMAN, R/O. VILL. LOTIBARI PART-III, P.S. ABHAYAPURI, DIST. BONGAIGAON, ASSAM.

VERSUS

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

2:THE STATE OF ASSAM

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

3:THE DY. COMMISSIONER

BONGAIGAON
PIN-783380.

4:THE SUPDT. OF POLICE (B)

BONGAIGAON
PIN-783380.

5:THE ELECTION COMMISSION OF INDIA

NEW DELHI-110001.

6:THE STATE COORDINATOR

NATIONAL REGISTRAR OF CITIZENS (NRC)
ASSAM
GUWAHATI-781005

**Advocate for the Petitioner** : MS. R CHOUDHURY

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

**BEFORE**
**HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA**
**HONOURABLE MRS. JUSTICE MITALI THAKURIA**

**Date : 21-11-2023**

**JUDGMENT & ORDER (ORAL)**

**(AM Bujor Barua, J)**

Heard Ms. R. Choudhury, learned counsel for the petitioner. Also heard Ms. L. Devi, learned CGC appearing on behalf of respondents in the Union of India and the authorities under the NRC being the respondent Nos.1 & 6, Mr. P. Sarma, learned Government Advocate for the State respondents being the respondent No.3, Mr. G. Sarma, learned Standing Counsel representing the respondents Nos. 2 & 4, being the under the Home Deportment, and Mr. T. Pegu, learned counsel for the Election Commission of India being respondent No.5.

**2.** The petitioner, Forhad Ali, had been referred to the Foreigner's Tribunal No.2, Bongaigaon at Abhyapuri, Assam for rendering an opinion as to whether he is a foreigner under the Foreigners Act, 1946 resulting in registration of Case No. BNGN/FT-2/APR/736/2016. The Tribunal rendered an opinion dated 29.10.2019 declaring the petitioner to be a foreigner. Being aggrieved this writ petition is instituted.

**3.** Before the Tribunal, the petitioner relied on the Voters List of 1966 as Exhibit-2; Voters List of 1970 as Exhibit-3; Voters List of 1985 as Exhibit-4; Voters List of 1989 as Exhibit-5; Voters List of 1997 as Exhibit-6; as well as the Voters List of 2011 as Exhibit-7 and Voters List of 2016 as Exhibit-8, where all the voters lists are of Village Lotibari Part-III. The petitioner also relied upon the Jamabandi

of a plot of land of the Village Lotibari Part-III. By relying upon the contents of the information in the Jamabandi and the Voters Lists of 1966 & 1970 as well as the Voters List of 1985 of Village Lotibari Part-III, wherein the names of Habi Rahman and Habibar Rahman, respectively appeared, the petitioner sought to establish that the burden under Section 9 of the Foreigners Act, 1946 has been discharged.

**4.** The Tribunal in its opinion dated 29.10.2019 rejected the Exhibit-11 Jamabandi with an observation that the document is not sufficient to prove that Habi Rahman of Exhibits-1 & 2 and Habibar Rahman of Exhibits-3, 4 & 11 are one and the same person. If the name of Habi Rahman appears in the Voters Lists of 1966 & 1971 and that of Habibar Rahman in the later Voters List of 1985 and the Jamabandi contains the information that the land which earlier stood in the name of Habibar Rahman has been mutated, amongst others, in the name of Forhad Ali, the same may *prima facie* discharge the burden under Section 9 of the Foreigners Act, 1946 that the petitioner proceede, Forhad Ali, is the son of Habi Rahman or Habibar Rahman of the Voters Lists of Village Lotibari Part-III. No material is available on record to show as to why the Tribunal was of the view that the documents are not sufficient to prove that Habi Rahman of Exhibits-1 & 2 and Habibar Rahman of Exhibits-3, 4 & 11 are one and the same person.

**5**. Once the initial burden had been discharged, it is for the respondents to rebut such evidence and in the absence of any rebuttal evidence, we see no material as to how the Tribunal can arrive at its conclusion that the documents are not sufficient to prove that Habi Rahman and Habibar Rahman are one and same person. No material is also available on record which may show that the names of Habi Rahman and Habibar Rahman appeared together in the same document to give an indication that they are different person. In *Sirajul Hoque Vs. State of Assam & Others reported (2019) 5 SCC 534,* the Supreme Court was of the view that the minor variation in the spellings of the name is not to be made a basis to conclude that the two persons may be different persons.

**6.** It is also noticed that the Tribunal by taking note of the discrepancy in the age of the person in successive voters list often rejects the voters list itself to be unreliable by indulging in arithmetic calculation. For example if a person is shown as 40 years in the voters list of 1966 and in the voters list of the same village he is shown as 55 years, often it is noticed that arithmetic calculation are made that the age ought to have been 51 years and not 55 years and accordingly reject both the voters lists. Upon a query raised with the Election Commission the learned counsel appearing for the Commission upon instructions candidly admits that the voters list are not prepared which such immaculate accuracy as

regards the age of the persons depicted therein, and therefore an arithmetic calculation may not be the appropriate indicator to reject all the voters lists. We also have to add that although minor discrepancy in the age of the persons depicted in the voters list may not be of much relevance, but a substantial variation in the age may also be an indicator that the persons appearing in the voters list with such wide variance in the age may be different persons.

**7.** Further, the Exhibit-11 is noticed to be a Jamabandi which is referred to be a Draft Chitha in the opinion of the Tribunal dated 29.10.2019. But again the said Jamabandi appears to be a certificate generated by using 'Dharitree', which is designed, developed and maintained by the NIC, Assam. The copy of the Jamabandi produced by the petitioner is available in the records of the Tribunal.

**8.** A perusal of the Exhibit-11 makes it discernible that it is a computer generated print out, which is a certificate generated by using Dharitree, which again is designed, developed and maintained by NIC, Assam and the document also contains the seal and signature of the Circle Officer of Srijangram Revenue Circle, including the round seal. The Exhibit-11, being a computer generated certificate by using Dharitree, containing the seal and signature of the Circle Officer, the evidentiary value of the same would be governed by Section 65B of the Indian Evidence Act, 1872.

**9.** For ready reference Section 65B of the Indian Evidence Act, 1872 is reproduced herein below:-

"*Section 65 B. Admissibility of electronic records:-*

*(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.*

*(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—*

*(a) The computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;*

*(b) During the said period, information of the kind contained in the electronic record or of*

*the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;*

*(c) Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and*

*(d) The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.*

*(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—*

*(a) By a combination of computers operating over that period; or*

*(b) By different computers operating in succession over that period; or*

*(c) By different combinations of computers operating in succession over that period; or*

*(d) In any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.*

*(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—*

*(a) Identifying the electronic record containing the statement and describing the manner in which it was produced;*

*(b) Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;*

*(c) Dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.*

*(5) For the purposes of this section:-*

*(a) Information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;*

*(b) Whether in the course of activities carried on by any official information is supplied*

*with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;*

*(c) A computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."*

**10.** Section 65B (1) provides that notwithstanding anything contained in the Indian Evidence Act 1872, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer, which is referred as computer output, shall be deemed to be also a document, if the conditions mentioned in Sub-Section 2 of Section 65B is fulfilled. Section 65B (2) provides for the conditions referred in Sub-Section 1, whereas Section 65B (3) provides for certain further requirements. Section 65B (4) provides that in any proceeding where it is desired to give a statement in evidence under Section 65B, a certificate identifying the electronic record and describing the manner in which it was produced, by giving such particulars of any device involved in the production of the electronic record and purportedly signed by a person occupying responsible official position in relation to the operation of the relevant device or the management of the relevant activity shall be evidence of any matter stated in the certificate.

**11.** A reading of Section 65B (4) *inter alia* makes it discernible that the printout of the electronic record which contains the identity of the electronic record as well as the particulars of the device involved in the production of the electronic record and is signed by a person occupying the responsible official position, such print out of the electronic record shall be evidence of any matter that may be certified in such electronically printed certificate. In the instant case, it is noticed that the Exhibit-11 electronic printout certificate contains the information that it is generated by using Dharitree, which is designed, developed and maintained by NIC, Assam. It contains the date, as well as the date of the print and it also contains the QR Code and the Bar Code in respect of such electronic record and moreover signed and sealed by the Circle Officer of Srijangram Revenue Circle at Abhayapuri. We have conferred with Mr. J. Handique, learned counsel for the Revenue Department, in the context of Section 65B (4), as to who is the person occupying a responsible official position in respect of the revenue records maintained in the electronic form and upon instruction, it is informed to the Court that at the level of the Circle, it is the concerned Circle Officer of the Revenue Circle who is the person occupying

the responsible official position.

**12.** As Exhibit-11 electronic printed certificate is a certificate of the information contained in the electronic form of the revenue records and it is signed and sealed by the Circle Officer of Srijangran Revenue Circle, we have to accept that the requirements of Section 65B (4) of the Evidence Act, 1872, is fulfilled in the instant case.

**13.** As the Exhibit-11 computer generated certificate, fulfills the requirement of Section 65B (1) to Section 65B (4) of the Evidence Act, 1872, the said document Exhibit-11, would have to be accepted in evidence in respect of the contents stated in the certificate. From such point of view, we are unable to accept the view expressed by the learned Member, Foreigners Tribunal No. 2 Bongaigaon that the Exhibit-11 is a Draft Chitha which was not proved by production of original records and therefore, it would be unacceptable in evidence. As already indicated above, the Exhibit-11, being a computer generated certificate, duly sealed and signed by the person occupying a responsible official position, there is no requirement under the law for the proceede to again prove the contents of the Exhibit-11 Jamabandi by requiring the production of the official original record.

**14.** In the Writ Proceeding, the petitioner relies upon the Voters List of 1966 of Village Lotibari Part-III Police Station North Salmara in the present Goalpara District, which contains the name of Jomser Ali son of Abedali at Sl. No. 9, Surjya Bhanu wife of Jomser at Sl. No. 10, and Habi Rahman son of Jomser at Sl. No. 11. It is claimed that Jomser Ali is the grandfather, Surjya Bhanu is the grandmother and Habi Rahman is the father of the petitioner. The Voters List of 1970 also contains the same information and the age of the persons mentioned in the Voters Lists of 1966 & 1970 are compatible with each other. The Voters List of 1985 contains the name of Habibar Rahman son of Lt. Jamser Ali at Sl. No. 410 and that of Falani Khatun wife of Habibar Rahman at Sl. No. 411, where both are residing in the same House No. 164. It is claimed that Habi Rahman of the Voters List of the year 1966 is in fact Habibar Rahman of the 1985 Voters List.

**15.** Considering the similarity and proximity of the 2 (two) names, i.e. Habi Rahman and Habibar Rahman, and by taking note of the proposition laid down by the Hon'ble Supreme Court in *Sirajul Hoque (Supra)*, that the minor discrepancy in the name of the person being depicted is required to be ignored, we are of the view that merely because of the discrepancy of the name between Habi Rahman and Habibar Rahman, the same cannot be rejected under the law unless the contrary is proved by any relevant material that Habi Rahman and Habibar Rahman would be the two different persons. The

Exhibit-11 Jamabandi also contains the information that the land had been mutated in the name of Forhad Ali son of Habibar Rahman in place of Habibar Rahman in respect of a plot of land at Village Lotibari Part-III. As per the order of the Circle Officer dated 18.01.2017 in Mutation Case No. 2584/2016-17, and if the information contained in the Jamabandi is acceptable which shows that Forhad Ali is the son of Habi Rahman of Village Lotibari Part-III and the name of Habibar Rahman as Habi Rahman as appears in the Voters Lists of the year 1966 & 1970, the petitioner may have discharged the burden under Section 9 of the Foreigners Act, 1946.

**16.** In view of above, we remand back the matter to the Tribunal to examine the complete Voters Lists of the years 1966, 1970, 1977 & 1985 in respect of the Village Lotibari Part-III as well as the information contained in the Exhibit-11 Jamabandi and pass a reasoned order. The petitioner to produce the complete Voters Lists of the aforesaid years as well as the order of the Circle Officer dated 18.01.2017, by which the land was mutated in the name of Forhad Ali, amongst others, in place of Habibar Rahman. If the Tribunal desires, the original records of the Mutation Case Case No. 2584/2016-17 may also be called for to verify under what circumstances the order of mutation was passed and whether it is acceptable in law to establish that Forhad Ali is the son of Habibar Rahman of Village Lotibari Part-III.

**17.** Upon doing the needful, the Tribunal to pass a reasoned order. The petitioner's to appear before the Tribunal on 11.12.2023. In the event, the reasoned order is in favour of the petitioner, the same would prevail over the order dated 29.10.2019, passed in case No. BNGN/FT-2/APR/736/2016 and if it is against him, consequences under the law may follow.

**18.** Till the reasoned order is passed, no coercive action shall be taken against the petitioners.

**19.** In course of the present proceeding as well as other proceedings, it has been noticed that in many cases, a proceedee had been declared to be a foreigner without stating the reason as to why the Tribunal arrives at such a conclusion and also not deciding the matter as per the materials on record. It is noticed that the Tribunals often state and describe the materials which the proceedee relies upon in course of the proceeding and thereafter merely arrives at a conclusion that in the view of the Tribunal, the proceedee is a foreigner.

**20.** Such procedure adopted would have to be deprecated. The Tribunals are entrusted upon the jurisdiction to adjudicate a reference made and decide upon the materials produced before it by giving

reasons as to whether the materials indicated the person to be a foreigner or a citizen. Any conclusion arrived de-hors any decision or adjudication cannot be an acceptable conclusion and it has to be construed that the Tribunals had not discharged the jurisdiction vested upon it under the law.

**21.** As a number of such orders of the Tribunals answering a reference to declare the proceedees to be foreigners without stating any reason and without analyzing the materials on record and without arriving at any decision have been noticed, we also wanted to know as to what procedures have been followed by the Tribunals in declaring the proceedees to be citizens. We are particularly interested in view of a submission made by the learned counsel for the State of Assam in the Home Department that statistically speaking in about 85% of the referred cases, the proceedees have been declared to be citizens.

**22.** We are concerned that if proceedees have been declared to be foreigner without stating any reason and without analyzing the implication of the materials being produced and if the same procedure is adopted to declare a proceedee to be a citizen, there is a good possibility that many number of proceedees who may be foreigners or illegal migrants have been wrongly declared to be citizens by the Tribunals. To examine the aforesaid aspect, we required the learned counsel for the State of Assam in the Home Department to make available a good number of judgments on a random sample basis from the Tribunals all over the State wherein the proceedees have been declared to be citizens. We have perused all such judgments and it is noticed that in some of the decisions by the Tribunals, a good reasoned order had been passed based on analyzing the materials on record and arriving at a decision.

**23.** But we are afraid to observe that in much many more other orders, the same procedure of describing the materials produced is adopted but without analyzing the implication of the materials or without stating any reason and without arriving at any decision, a conclusion is arrived that in the view of the Tribunal, the proceedee concerned is a citizen. In some of the matters, it is noticed that even there is no proper recording as to what material has been relied upon which would be a basis for the conclusion arrived. Such procedure adopted would have a far more serious consequence.

**24.** In view of the above, as almost 85% of the references have resulted in the proceedee being declared to be citizens, where it is noticed that in many such cases neither any decision nor any proper adjudication had been made and a conclusion had been arrived without stating any reason or without even analyzing the implication of the materials produced, we require the Secretary to the Government of Assam in the Home Department, to conduct a departmental review of all such references that had

been answered by the Tribunals declaring the proceedees to be citizens and wherever it is noticed that any such conclusion or declaration had been made without any analysis of the materials or without providing for any reason thereof and without arriving at any decision, the authorities in the State of Assam in the Home Department to take appropriate measures as may be available under the law. It is provided that if any action or measure is taken, it should strictly comply with the required procedure of law as may be applicable for the purpose and should also comply with the principles of natural justice, as may be applicable.

**25.** We are deliberately avoiding to refer to any specific references that has been answered which we have perused, but the general trend is taken note of and accordingly, a responsibility is entrusted upon the State of Assam in the Home Department for doing the needful as indicated.

**26.** Any further action that may be taken pursuant to this order, the result thereof be put up in the public domain or before the people of the State for their knowledge, as the matter of illegal migrants in the State of Assam is an issue which may affect the entire State.

**27.** The petition stands allowed as indicated above. Send back the LCR.

Let a copy of this judgment and order be furnished to Mr. J Payeng, and Mr. G Sarma, learned counsel for the respondents in the Home Department, Government of Assam for doing the needful in respect of such orders in the references which have declared the proceedees to be citizens without analyzing the materials produced before the Tribunals, and/or without stating any reasons and without arriving at any decision.

**JUDGE** **JUDGE**

**Comparing Assistant**