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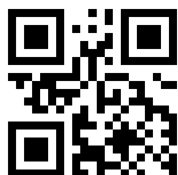

# THE GAUHATI HIGH COURT

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

**Case No. : WP(C)/1818/2019**

Haidar Ali, aged about 33 years

Son of Harmuz Ali
Village Kawaimari Block No. 12
P.O. Golibanda, P.S. Sarthebari,
District- Barpeta-781375.

…… Petitioner

**-VERSUS-**

1. Union of India to be represented by Secretary to the Government of India, Home Department, North Block, New Delhi. PIN : 110001.

2. The State of Assam, to be represented by Commissioner & Secretary to the Govt. of Assam, Home Department, Dispur, Guwhati-06.

3. The Deputy Commissioner, Barpeta, Assam, Pin-781301.

4. The Election Commission of India to be represented by District Election Officer, Barpeta, Assam, PIN- 781301.

5. The Superintendent of Police (Border), Barpeta, Assam. 781301.

6. The State Coordinator, NRC, Achyut Plaza, Bhangagarh, Guwahati-781005.

…..Respondents

**:: BEFORE::**
**HON'BLE MR. JUSTICE N. KOTISWAR SINGH**
**HON'BLE MR. JUSTICE MANISH CHOUDHURY**

| | |
|---|---|
| For the Petitioner | : Mr. M. J. Quadir, Advocate<br>: Mr. K. Mira, Advocate. |
| For the Respondents | : Ms. A. Gayan, CGC.<br>: Mr. A. Kalita, SC, FT.<br>: Ms. B. Das, SC, ECI.<br>: Ms. L. Devi, SC, NRC. |
| Date of Hearing | : 15.03.2021. |
| Date of Judgment | : 30.03.2021 |

**JUDGMENT & ORDER (CAV)**

*(N. Kotiswar Singh, J)*

Heard Mr. M. J. Quadir, learned counsel for the petitioner. Also heard Mr. A. Kalita, learned Standing Counsel, FT appearing for respondent Nos.2, 3 and 5; Ms. A. Gayan, learned Central Government Counsel, appearing for respondent No.1; Ms. B. Das, learned Standing Counsel, ECI for respondent No.4 and Ms. L. Devi, learned Standing Counsel, NRC for respondent No.6.

**2**. The present petition has been filed challenging the order dated 30.01.19 passed by the learned Member, Foreigners' Tribunal-III, Barpeta in F.T. Case No. 1444(III) of 2013 [Ref. IMDT Case No. 1550/03] opining the petitioner as an illegal migrant and consequently declared the petitioner as a foreigner u/s 2(a) of the Foreigners Act, 1946.

**3**. The Tribunal took up the matter on a reference being made by the Superintendent of Police (B), Barpeta against the present petitioner, namely, Haider Ali, S/o- Harmuz Ali, of village No.12 Kawaimari under P.S. Sarthebari, District Barpeta, Assam. On receipt of notice from the Tribunal, the petitioner appeared before the Tribunal on 11.06.2018 and submitted his written

statement along with supporting documents to substantiate his claim that he is an Indian citizen.

**4**. The petitioner in his written statement filed before the Tribunal submitted that the allegation that the petitioner is a foreigner is false and was made without proper investigation. It was contended that the investigating authority did not make any field visit during the investigation and never asked the petitioner to produce any documents and as such, the said proceeding was liable to be dismissed on that ground.

**5**. On merit, it was submitted by the petitioner that he is the son of one Harmuz Ali and his mother's name is Haowa Khatun and his grandfather was one Late Nadu Miya, the father of Harmuz Ali, who however, expired sometime in the year 1993 at village-Kawaimari, 12 No. Block under Sarthebari P.S. in the district of Barpeta. He also stated that he was born and brought up at village Kawaimari, 12 No. Block under Sarthebari. He stated that he was born on 31.12.1985.

**6**. He also claimed that his grandparents' names appeared as Nadu Miya and Aymona Nessa in the voters lists of 1965 & 1970 of village- Nalirpam, Mouza-Paka, P.S.- Barpeta in the then district of Kamrup (presently Barpeta district) vide Sl. No. 268 & 271 and 282 & 285 respectively, with House No. 61 & 61, Part No. 39 & 40 respectively under No.53 Sarukhetri LAC.

It was also mentioned that the petitioner's parents as well as grandparents shifted from original village of Nalirpam to village Karagari Nonke Block No. 12 in the year 1985. Since then, the petitioner has been living with his parents there in village Karagari Nonke Block No. 12.

It has been also clarified by the petitioner that village Karagari Nonke Block No. 12 is also known as village Kawaimari, Block 12.

**7**. It was also contended that the petitioner's parents' names appeared as Harmuz Ali (father) and Howa Khatun (mother) in the voters lists of 1989 & 1997 of village Karagari Nonke Block 12 No. under Paka Mouza, P.S. Barpeta

in Barpeta District vide Sl. Nos. 563 & 564 and 550 & 551, House Nos. 389 & 163, Part Nos. 60 & 59 respectively under 46 Saruketri LAC.

**8**. It was also stated that the names of the petitioner's parents along with his name appeared in the voters lists of 2010 & 2018 of village Karagari Nonke, Block 12 No. under Paka Mouzam P.S. Barpeta in the district of Barpeta vide Sl Nos. 696, 697 & 698 and 253, 254 & 255 House Nos. 163 and 163, Part Nos. 93 & 116 respectively under 46 Sarukhetri LAC.

**9**. The petitioner also claimed that his grandfather had landed property in Nalirpam village, Mouza Paka which, on his death, was inherited by his father and his brothers, that is, the uncles of the petitioner namely Hikmat Ali, Akmat Ali and Hazrat Ali, for which he also produced a certified copy of the Jamabandi dated 19.02.2008 and a revenue receipt.

**10**. In the written statement, the petitioner also mentioned that he has the Electoral Photo Identity Card issued by the Election Commission of India and his father has a similar card.

**11**. Petitioner also stated that he passed H.S.L.C. Examination, 2002 from Kawaimari Anchalic High School, Kawaimari. The Gaonbura of Barsimla village who was also the in-charge Gaonbura of village of Kawaimari 12 No. Block issued a Certificate in favour of the petitioner that he is the son of Harmuz Ali.

**12**. Accordingly, the petitioner claimed to be the son of Harmuz Ali and grandson of Late Nadu Miya, who were all Indian citizens, by clearly establishing the linkage with them on the basis of the aforesaid documents.

**13**. The petitioner filed the following documents before the Tribunal in support of his claim that he is an Indian.

| SL No. | Description of documents |
|---|---|
| Documents No. A & B: | Photocopy Certified copies of voters lists of 1965 and 1970 showing the petitioner's grandparents name. |

| | |
|---|---|
| Document No. C: | Photo copy of voters list of 1989 showing his parents' names. |
| Documents No. D &E: | Certified copies of voters lists of 1997 & 2010 showing his name along with his parents' names. |
| Document No. F: | Certified copy of the voters lists of 2018 showing his name along with his parents' names. |
| Documents No. G & H: | Photo copies of Voter Identity Cards in the name of the petitioner and his father respectively. |
| Documents No. I & J: | Photo Copy of School leaving Certificate issued by Kawaimari Anchalik High School in the favour of the petitioner and High School Leaving Certificate issued by SEBA in his name with his father's name. |
| Document No. K : | Photo copy of birth certificate of the petitioner. |
| Document No. L: | Certificate issued by Gaonbura of Village Barsimla. |

**14**. The petitioner examined himself as DW-1 and the petitioner's father Harmuz Ali was examined as DW-2. The I/C Principal of Kayakuchi H.S. School was also examined as DW-3 in support of the transfer certificate dated 05.11.1981 showing the name of the petitioner's father, Harmuz Ali as the son of Nadu Miah. The Gaonburah of Barsimla village was examined as DW-4 in support of the certificate issued by him.

**15**. The Tribunal examined the originals of the documents which were produced before the Tribunal and after comparing with the copies filed before the Tribunal, returned the original documents. These documents were exhibited. It appears that there was no objection to the admissibility of any of these documents and the State also did not lead any evidence to rebut these evidences adduced by the petitioner.

**16**. Learned Tribunal, on consideration of evidence and materials on record, however, held that the petitioner had failed to discharge his burden of proving that he is an Indian as required under Section 9 of Foreigners Act, 1946 and accordingly, declared him to be a foreigner under Section 2(a) of the Foreigners Act, 1946.

**17**. In coming to the aforesaid conclusion, the Tribunal held in para 4 of the opinion as follows:

> "4. After submission of written statement the proceedee submitted evidence-in-chief as DW-1 on 22.06.2018 and exhibited some documents as Ext.-A, Ext.-B, Ext.-C, Ext-D, certified copies of voters' list, Ext.-G, Ext.G(I) School certificate and admit card, Ext.-H birth certificate, Ext.-I, Ext.-J Gaonburah's certificates and Annexure 1 & 2 voters' list of 1989 and 2018. He claims that in the Ext.-A, grandfather and grandmother's names were appeared but in the voters' list of 1970 there are seven nos. of persons including grandfather and grandmother. The proceedee has not mentioned their link with him in his W/S and evidence with the said persons, whose names appeared in the voters' list of 1970. In the voters' list of 1965 and 1970, House No. was appeared as 61 and same received on 27.11.93 and 22.12.16. In the year of 1985, the proceedee's father and grandfather shifted to village Karagari Nonke Block No. 12 from village Nalirpam and enlisted the name of father and mother in the voters' list of 1997. But in regards of other persons relatives not explained specially Nadi Miya, Anymona. As such, the proceedee could not established the linkage in proper manner."

*(emphasis added)*

Thus, according to the Tribunal, the proceedee petitioner had failed to mention the link of the petitioner with the other persons mentioned in the voters list of 1970 and also with his father and grandparents Nadu Miya and Aymona in his written statement. Accordingly, the Tribunal held that the proceedee could not establish the linkage in a proper manner.

We are not able to agree with the aforesaid conclusion for the

following reasons.

**18**. In the written statement as well as in the examination-in-chief, the petitioner had mentioned the names of his grandparents whose names were reflected in the voters list of 1965 with the necessary details, viz., name of the village, house number, mouza, police station etc. In the voters list of 1970, the names of the grandparents of the petitioner, are also shown, with similar descriptions but, along with the names of the other voters.

**19**. In our opinion, non-explanation of the linkage of the petitioner with others whose names were shown along with his grandparents in the voters list of 1970 does not affect the credibility or genuineness of the evidence in the form of voters list of 1970, to show the linkage of the petitioner with his grandparents.

**20**. The "fact in issue" required to be considered by the Tribunal was whether Harmuz Ali was the father of the petitioner and Haowa Khatun, his mother, and in turn, whether Nadu Miya and Aymona Nessa were parents of Harmuz Ali, who undisputedly were all Indian citizens.

The voters list of 1965 shows that the names of Nadu Mia and Aymona Nessa are included who the petitioner claims to be his grandparents, thereby showing that they were Indian citizens.

The name of Harmuz Ali, the father of the petitioner is also shown along with his father as "Nadu" under the voters list of 1971 showing the relationship under the same House number 61, same village (Nalirpam), mouza (Paka), Part No.40, same Sub-division of Barpeta and other details.

It appears that the voters list of 1971 in which the names of the petitioner's father, Harmuz Ali is shown along with his father Nadu, was not exhibited before the Tribunal. However, on comparing the same, we have noted that all the other particulars are also same, viz., the house number, name of the village, name of the mouza, sub-division etc. Though, this Court would not normally entertain any fresh document which was not produced

before the Tribunal, we for our own satisfaction compared the certified copy of the voters list of 1971 annexed to this petition with the voters list of 1970 available on record. Since, the authenticity of the certified copy of the voters list of 1971 annexed in the petitioner has not been controverted, we have considered the same. It may be also noted that there are other documents which have been relied upon by the petitioner, as we shall see later, sufficiently corroborates the claim of the petitioner.

Thus, the fact that Harmuz Ali is the son of Nadu Mia is clearly established by these voters lists of 1970, 1971 and 1965.

**21**. It may be also noted that the State never questioned the authenticity or genuineness of the voters lists of 1965 and 1970 before the Tribunal. Thus, these documents had remained unrebutted.

**22**. What was crucial and required of the petitioner was to prove before the Tribunal was that Harmuz Ali was his father and that his father, Harmuz Ali was the son of Nadu Miya, who were admittedly Indians. The fact that Harmuz Ali was the son of Nadu Miya has been already duly proved by the aforesaid voters lists of 1970 and 1965, genuineness of which was not questioned by the State. Thus, non explanation of relationship of the petitioner with other persons mentioned in the voters list of 1970 cannot be a ground for disbelieving the correctness of the entry of the names of the grandparents in the voters list, when the correctness of the entry of the names of the petitioner's father and grandfather was not questioned. Thus, the plea of the petitioner that his father, Harmuz Ali was the son of Nadu Miya stands proved. What is, thereafter, required to be proved was whether Harmuz Ali was the father of the petitioner, which in our view was also proved as will be discussed hereinafter.

**23**. The learned Tribunal also noted that during the cross-examination of the petitioner's father Harmuz Ali, he stated that he had three brothers, namely, Hekmot Ali, late Akmot Ali and Hazarat Ali and two sisters Sabiya

Nessa and Nurjahan Begum, which fact the petitioner did not disclose in his evidence. It has been observed by the Tribunal that the petitioner had not disclosed the names of his brothers and sisters except Joydor Ali.

Learned Tribunal, accordingly, proceeded to observe that if the petitioner did not disclose these material facts in his written statement or evidence, serious adverse inference can be drawn against the petitioner for non-disclosure.

Further, the Tribunal also observed regarding the landed property that the petitioner did not disclose the same in the written statement and in his evidence and as such, in view of the failure to disclose the material facts, his claim will be defeated.

Accordingly, it has been held in para 5 of the opinion as follows:

> "5. Apart from this, the proceedee during his cross he stated that the proceedee's father Harmuz Ali has three brothers namely Hekmot Ali, late Akmot Ali and Hazarat Ali and two sisters, Sabiya Nessa and Nurjahan Begum. He has not disclosed in the W/S and evidence. Under the Foreigners' Tribunal the proceedee ought to have disclosed all materials facts in the W/S which is known to his special/specific knowledge. If he has not disclosed the materials facts a serious adverse inference arises against the proceedee. He has not disclosed the name of the brothers and sisters except Joydor Ali. In regards of the landed property the proceedee has not disclosed in the W/S and evidence. Failure to disclose the material facts the proceedee claims will defeated. As such, his evidence is not sufficient, reliable and trustworthy. Under the Foreigners' Act the averments of W/S required to be proved by producing and adducing reliable and cogent evidence."

**24**. As regards these observations and conclusions, we are unable to agree with the Tribunal.

What is important to note is that the "fact in issue" before the Tribunal was, whether the petitioner was the son of Harmuz Ali and in turn, was the grandson of Nadu Miya, the father of Harmuz Ali, and whether the petitioner could trace his ancestry to the said Nadu Miya through Harmuz Ali, as Nadu

Miya was admittedly an Indian who had been casting his vote since 1966. As such, the fact in issue was not whether the petitioner had other relatives also. Thus, non-mentioning of his other relatives as well as that of his father cannot be a ground for disbelieving his testimony and the documents relied upon by the petitioner. Of course, if the petitioner had disclosed in more detail the family tree, it would rather strengthen his claim, but failure to disclose the names of all the members of the family cannot weaken his case and render his evidence unreliable, nor reduce the credibility of his evidence, when there are other corroborating evidences.

**25**. If the petitioner is able to prove on the basis of reliable and cogent evidences that the petitioner is the son of Harmuz Ali and Harmuz Ali was in turn, the son of Nadu Miya, the petitioner can be said to have successfully established his linkage with his father and with his grandfather who were undisputedly Indians and as such, he can be said to have established his case as a citizen of this country. All the evidences are corroborative in nature and failure to disclose all the relevant facts does not ipso facto lead to the inference that his evidence is unreliable. The more evidences one adduces, the better for him. But there is no law nor dictum that if the proceedee does not disclose the names of all the other relatives, other than what matters and does not produce all the relevant evidences other than what matters, his evidence cannot be believed.

**26**. At this stage, we would like to make an observation that the expression "written statement" as used in the proceeding before the Tribunal is a misnomer, which is not to be confused with "written statement" as understood under the Code of Civil Procedure, 1908.

"Written statement" under the CPC is a statement of defence submitted by the defendant in response to the averments, allegations and claims made in the plaint filed by the plaintiff.

As provided under Order VIII Rule (2) CPC, the defendant must raise

by his pleading all the matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and must raise all such grounds of defence as, *if not raised, would be likely to take the opposite party by surprise.* Further, as provided under Order VIII Rule (3), the defendant in his written statement is to specifically deal with each allegation of fact of which he does not admit to be true, as it is not sufficient for a defendant to deny generally the grounds alleged by the plaintiff.

It has been also provided under Order VIII Rule 1A that where the defendant bases his defence upon a *document in his possession or power,* in support of his defence, or claim for set off or counter-claim, he shall enter such document in a list and shall produce it in court, when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement. It has been further provided under Order VIII Rule 1A(3) that a document which ought to be produced in court by the defendant under this rule, but, is not so produced shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit. Thus, the aforesaid Rule 1A(3) does not prohibit production of document at a later stage which, however, can be done with the leave of the court, but the defendant is to file the document which is in his possession or power. Thus, a defendant is not expected to file the document which is not in his possession or power at the time of filing of written statement, but he can file it later also, however, with the leave of the court.

Order VIII Rule 9 CPC also provides that no pleading subsequent to the written statement of a defendant other than by way of defence to set off or counterclaim shall be presented except by the leave of the court and upon such terms as the court thinks fit, meaning thereby that subsequent pleading is also permissible, however, with the leave of the court.

**27**. Therefore, under the scheme of the CPC, the written statement is to be filed setting up his case *in response to* the averments, allegations and

reliefs claimed in the plaint and the documents also should be produced along with the written statement so that the *plaintiff is not taken by surprise*. It is to be noted that, however, in a proceeding under the Foreigners Tribunal, as the practice at present appears to be that the proceeding is initiated only after a reference is made by the competent referral authority to the Tribunal and the Tribunal after taking cognizance of the reference made to it, merely issues a notice without any other document to the proceedee, only informing that after necessary investigation done in this regard, the proceedee is considered to be an illegal immigrant either during the period of 01.01.1966 and before 25.03.1971, or on or after 25.03.1971, as the case may be. In fact, no other document, other than the notice is given to proceedee as in the present practice. Thus, the proceedee does not know under what circumstances the reference has been made and as to how the Tribunal has decided to initiate the proceedings against the proceedee and what response is to be made except to prove that he is an Indian and not a foreigner. In fact, in this petition, the petitioner has also taken the plea that he had raised objection before the Tribunal that no proper investigation was done nor any authority asked the petitioner to produce any document in support of his citizenship.

Thus, while "written statement" as understood under the CPC is a defence put up by the defendant *with reference to* and in response to the specific averments and allegations made in the plaint in response to the plaint, in the case of a proceeding before the Tribunal, no such plaint or the charge is filed except for informing the proceedee through a mere notice or summon issued by the Tribunal issued by making an allegation that the proceedee is not an Indian but a foreigner who came to India on a certain specific period of time.

In fact, what is happening so far before the Tribunal is that a notice is merely issued to the proceedee informing that he or she is an illegal entrant to the State, in the territory of Assam and India from the specified territory

and certain specific period of time, without any other facts and documents being furnished to him.

From the records, it is also seen that after issuing summons to the proceedee or before issuing summons to the proceedee, the Tribunal does not examine any of the persons who had made the reference or who had conducted the investigation against the proceedee to hold that the proceedee is a foreigner. Thus, the proceedee is totally in dark as to how he came to be considered to be a foreigner and not an Indian.

However, since this petition is disposed of on consideration of other grounds raised, the issue whether a proceedee is entitled to more than mere notice will be considered in an appropriate case.

**28**. It may be also mentioned that the principle behind Order VIII Rule 2 CPC is that all the facts must be specifically pleaded, *to avoid taking the opposite parties by surprise* by having new plea or introducing any fact which was not raised earlier. Same is the case of filing of documents which are in possession or power of the defendant. However, in the proceeding under the Foreigners Tribunal, the onus has been squarely put on the proceedee to prove that he is not a foreigner but an Indian and apart from the notice, no other document is furnished to the proceedee by the Tribunal and as such if the proceedee introduces new facts to discharge his onus, it cannot be said to take the State by surprise, as the proceedee is merely trying to prove his case and is not responding to any other allegation, other than that he is a foreigner.

**29**. From the above, what is important to note is that 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.

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.

In fact, all opportunities should be given to a proceedee to enable him to produce all such documents which come to his possession even at a later stage also, to substantiate his claim that he is an Indian. No pedantic view should be taken, if there has been some delay or if the same is not mentioned in the written statement. Even under the scheme of the CPC, the right to file any document at a later stage, even if at the appellate stage, is always there, subject to leave of the court and if such documents are relevant and highly necessary and could not be produced earlier after exercise of due diligence (vide Order XLI Rule 27 CPC).

Thus, if the proceedee is able to make out a case for filing a document at a later stage, the same cannot be denied and no adverse inference can be drawn. Similarly, if any fact is introduced at the time of adducing evidence, though the same is not mentioned in the written statement, no exception can be made. It cannot be said to be improvement and adverse inference accordingly taken thereof.

Non-mentioning of any person or fact or document in the written statement, if mentioned later, cannot be said to cause any surprise or prejudice to the State so as to ignore such new fact or document. In any event, liberty is always with the State to rebut any evidence after the proceedee has completed adducing evidence.

We have also noted that the witnesses who adduced evidence are cross-examined by the State and as such, if such deposition cannot be shaken during the cross-examination, no adverse inference can be drawn against the petitioner.

**30**. Perusal of the para No. 5 of the opinion of the Tribunal quoted above, indicates that the fact that Harmuz Ali (father of the petitioner) has three brothers, namely, Hekmot Ali, late Akmot Ali and Hazarat Ali and two sisters, namely, Sabiya Nessa and Nurjahan Begum was brought in only during the cross-examination. This disclosure does not in any way, in our view, shake the credibility of the evidence of the proceedee merely because the same was not disclosed in the written statement or in his evidence-in-chief. On the contrary, this disclosure fortifies his evidence and shows the truthfulness of the witness by not hiding any relationship. The disclosure of this information does not contradict any previous statement for it was never stated by the petitioner nor his father that his father did not have any other siblings.

**31**. The observation by the Tribunal that the proceedee ought to have disclosed all material facts in the written statement which were within his special knowledge and if the same is not disclosed, an adverse inference can be drawn against him, does not appear to be sound either in logic or in law.

**32**. As to when an adverse inference can be drawn when any fact or information within the knowledge of a person is not disclosed or proved is well settled , both in criminal and civil proceedings.

Section 106 of the Indian Evidence Act provides that if there be any fact which is specially within the knowledge of any person, the burden of proving the fact is open to him. Adverse inference can be drawn if the person fails to discharge the burden.

Similarly, when certain incriminating evidences are brought to the notice of the accused under Section 313 CrPC, which lead to certain information which is specially within his knowledge, on the failure of the accused to explain such incriminating facts and circumstances which are specially within his knowledge, the Court can draw an adverse inference.

**33**. However, it has been also clarified by the Hon'ble Supreme Court that Section 106 of the Indian Evidence Act can be invoked only when the

prosecution has been able to prove the charge beyond reasonable doubt. In absence of any such proof by the prosecution, provisions of Section 106 cannot be invoked and as a corollary, no adverse inference can be drawn against the accused, under such circumstance.

It was held in ***Joydeb Patra v. State of W.B.*, (2014) 12 SCC 444** that,

> **10.** ………………… This Court has repeatedly held that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution and it is only when this burden is discharged that the accused could prove any fact within his special knowledge under Section 106 of the Evidence Act to establish that he was not guilty. In *Sucha Singh* v. *State of Punjab* [(2001) 4 SCC 375 : 2001 SCC (Cri) 717] this Court held: (SCC p. 381, para 19)
>
> > "*19*. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference."
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> Similarly, in *Vikramjit Singh* v. *State of Punjab* [(2006) 12 SCC 306 : (2007) 1 SCC (Cri) 732] this Court reiterated: (SCC p. 313, para 14)
>
> > "*14*. Section 106 of the Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule e.g. where burden of proof may be imposed upon the accused by reason of a statute."

**34**. Similarly, before drawing adverse inference for not answering or giving false reply under Section 313 Cr.P.C. to the incriminating materials brought to the notice of the accused, the prosecution must have proved the ingredients

of the charge beyond reasonable doubt. Any false explanation by the accused cannot replace the burden on the prosecution to prove the charge beyond reasonable doubt, as was held by the Hon'ble Supreme Court in ***Tanviben Pankaj kumar Divetia v. State of Gujarat*, (1997) 7 SCC 156** as follows:

> "**44.** The Court has drawn adverse inference against the accused for making false statement as recorded under Section 313 of the Code of Criminal Procedure. In view of our findings, it cannot be held that the accused made false statements. Even if it is assumed that the accused had made false statements when examined under Section 313 of the Code of Criminal Procedure, the law is well settled that the falsity of the defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea may be considered as an additional circumstance if other circumstances proved and established point out the guilt of the accused. In this connection, reference may be made to the decision of this Court in *Shankarlal Gyarasilal Dixit* v. *State of Maharashtra* [(1981) 2 SCC 35 : 1981 SCC (Cri) 315 : AIR 1981 SC 765] .
>
> (emphasis added)

**35**. As regards, civil proceedings, the question of drawing adverse inference will come into play when there is a specific direction by the court to produce certain documents or when it has been shown that the party is in exclusive possession of certain documents which are relevant to the issues or omission of its production would directly establish the case of the other side.

It was thus, held by the Hon'ble Supreme Court in ***Union of India v. Ibrahim Uddin*, (2012) 8 SCC 148** as follows:

> "**24.** Thus, in view of the above, the law on the issue can be summarised to the effect that the issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The court cannot lose sight of the fact that burden of proof is on the party which makes a factual averment. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents, etc. as is required under

> Order 11 CPC. Conduct and diligence of the other party is also of paramount importance. Presumption of adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the court to direct the other side to produce the document and the other side failed to comply with the court's order, the court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary.
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> …………………………………………………………………………………….
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> ……………………………………………………………………………………..
>
> "**85.16.** The courts below had wrongly drawn adverse inference against the appellant-Defendant 1 for not producing the documents as there was no direction of the court to produce the same. Neither Respondent 1-plaintiff had ever made any application in this respect nor he filed any application under Order 11 CPC submitting any interrogation or for inspection or production of document."

**36**. What is also to be noted is that in any proceeding, whether, criminal or civil, the fact allegedly concealed and not disclosed must be something which is detrimental to the person expected to disclose, which is the reason the person is avoiding disclosure. If the fact is not detrimental, but rather beneficial to the interest of the person concerned, it defies logic that such beneficial fact should be kept undisclosed. That is the reason, a person knowingly conceals and does not disclose certain fact which is within his personal knowledge, as the person thinks that it may prove detrimental to his interest, if disclosed. Accordingly, non-disclosure of such incriminating facts may warrant drawing of adverse inference against such a person.

However, the said principle cannot be applicable in the present case in as much as the facts which the petitioner is alleged to have not disclosed in the written statement but subsequently disclosed during the cross-

examination, cannot be said to be adverse or incriminating to the claim of the petitioner for the reason that existence of other relatives of the petitioner or that of his father does not in any way impeach upon credibility of his statement. Neither, such a disclosure is inconsistent with or contradict any previous evidence. Nor does it make any difference to the "fact in issue". Of course, if the petitioner deliberately gives false information or avoids giving correct information when asked, the issue of drawing adverse inference may arise. But that is not the case here.

**37**. As has been already discussed above, the issue before the Tribunal is focussed on the relationship of the proceedee with his claimed father, Harmuz Ali and grandfather, Nadu Miya who are stated to be Indian citizens by virtue of their names being included in the voters lists of 1965 and 1970 etc.

**38**. In the proceeding before the Foreigners Tribunal, no "fact" nor any "charge" is required to be proved beyond reasonable doubt by the State. The State merely makes an allegation based on certain investigation that the proceedee is a foreigner. The practice followed so far, as can be seen from the records, is that nothing is furnished to the proceedee by the State or the Tribunal, except for the summons/notice stating that the proceedee is a foreigner who entered Assam, India during a particular period of time. In fact, the onus of proving that the proceedee is not a foreigner is placed on him in terms of Section 9 of the Foreigners Act, 1946. Further, the Tribunal does not direct the proceedee to produce any document. It is for the proceedee to produce such evidences and documents in support of his claim that he is an Indian. The more credible evidences he produces, the better for him. Yet, production of less evidences cannot necessarily lead to rejection of the claim of the proceedee nor drawing of any adverse inference.

**39**. As mentioned above, the burden of proof as to whether a proceedee is a foreigner or not, is upon the proceedee as provided under Section 9 of the Foreigners Act, 1946. The State does not discharge any burden, except to the extent that a proper investigation has been conducted before the reference

was made to the Tribunal. Under such eventuality, as the onus is on the proceedee, he must be afforded all the opportunities to put forth his evidence. Therefore, if certain facts are introduced subsequently, which does not contradict his statement or stand taken in his written statement, introduction of such fact subsequently cannot cause any prejudice to the proceedee. In fact, a proceedee must be afforded all the opportunities to prove his case and no hyper technical view should be taken to deny introducing new facts or document, so long as these are relevant and bolster the case of the proceedee. Of course, the Tribunal has to consider permissibility of the same, if the State has already led evidence to rebut the claim of the proceedee. But, so long as the State does not adduce evidence to rebut the claim of the proceedee, the Tribunal ought not to disallow filing or introduction of new facts/documents not mentioned in the written statement.

**40**. Therefore, disclosure of existence of other relatives in course of cross-examination of the witness of the proceedee and non-disclosure of the same in the evidence of the proceedee or in the examination-in-chief or in the written statement cannot be a ground for invoking the said principle to draw adverse inference against the petitioner.

Reference to Section 106 of the Evidence Act is only to show that it is responsibility of the proceedee to prove that he is a citizen of this country by disclosing such relevant facts which are within his knowledge. It does not however, mean that failure to disclose all facts, will lead to drawing of adverse inference. Adverse inference will be drawn against him that he is a foreigner and not an Indian if sufficient cogent materials are not disclosed and proved by the proceedee.

**41**. It may not be out of context to refer to the decision in ***Sarbananda Sonowal v. Union of India*****, (2005) 5 SCC 665** wherein it was held that,

"**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."

**42**. On proper analysis of the aforesaid observation of the Hon'ble Supreme Court, the following aspects emerge:

(i) 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. However, the Supreme Court nowhere states that the aforesaid facts *must be proved* only by documents. The expression used is "*normally he may be required to give evidence".* Thus, it is not mandatory to prove all these to show that he is an Indian citizen. These are, however, relevant facts, if one proves, can establish beyond doubt that he is a citizen of this country. Yet, he may be able to prove his citizenship by other evidences as well.

(ii) Further, disclosure of facts or information other than the ones mentioned in para 26 does not mean that adverse inference can be drawn.

(iii) One may prove one's citizenship without referring accurately to all

the factors mentioned under paragraph 26 of ***Sonowal II*** (supra). For example, if the date of birth or the place of birth is not conclusively proved, but if it is conclusively proved that the father of the proceedee is an Indian citizen, the claim of the proceedee cannot be rejected as a foreigner, as it would fly in the face of logic and common sense.

(iv) Further, it is nowhere mandated that he must prove all these facts by documentary evidence only. Section 59 of the Evidence Act, 1872 says that all facts, except the contents of document or electronic records, may be proved by oral evidence. There may be cases, where the proceedee is an illiterate, and the birth is not registered with any authority, in which event, it would be impossible to produce any documentary evidence to prove his date of birth and place and other facts accurately and one may rely on oral evidence only. In such case, can a claim be thrown out merely because only oral evidence has been led?

(v) Further, after he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary.

**43**. It may be also noted that the standard of proof in discharge of the onus by a proceedee under Section 9 of the Foreigners Act is preponderance of probability as has been also reiterated in the Full Bench decision of this Court in ***State of Assam vs. Moslem Mondal, 2013 (1) GLT 809.*** Thus, the standard of proof being preponderance of probability, there could be minor inconsistencies here and there in the evidence of the proceedee which would not warrant rejection of the claim. This is what the Hon'ble Supreme Court held in ***Sirajul Hoque v. State of Assam*, (2019) 5 SCC 534:**

" **2.** We have heard the learned counsel for both sides extensively and have gone through the documents produced by the appellant ourselves. On a perusal of the same, we find that a number of

> documents have been relied upon by the appellant starting with a voters' list of his grandfather Kematullah in Village Sotobashjani.
>
> **3.** There is no doubt that the great grandfather's name Amtullah appears as Amtullah throughout the document. Equally, there is no doubt about the father's name which appears as Hakim Ali throughout. The only discrepancy found is that in some of the documents Kefatullah later becomes Kematullah. However, what is important to note is that his father's name Amtullah continues as Amtullah and the other family members associated continued as such. Also produced are NRC Registration details of the year 1971 of the grandfather who is noted to be Kefatullah in this document. Other voters lists are then produced where the letter F becomes the letter M with other family names remaining the same. In fact, the appellant has himself produced a document of 1981 from the Income Tax Department giving his Permanent Account Number. Apart from these documents, certain other later documents have also been produced including photo identity cards issued by the Election Commission of India and identity cards issued to his brother including voters lists in which the appellant's name appears.
>
> **4.** Having gone through these documents, we are of the view that it is not possible to state that Kematullah is not the same despite being named Kefatullah in some of the documents. This being so, the grandfather's identity, father's identity, etc. has been established successfully by the appellant. Further, the mere fact that the father may later have gone to another village is no reason to doubt this document."

**44**. Another ground on which the learned Tribunal did not believe the evidence of DW-2, Harmuz Ali, whom the petitioner claims to be his father, is that the DW-2 has not explained about his linkage with the petitioner.

The Tribunal also observed that the petitioner as well as the DW 2 has not explained about non-appearance of the names of Nadu Miya and Aymona Nessa in the voters' list in between of 1970 to 1993 though Nadu Miya died in the year 1993 at Village Kawaimari 12 No. Block and Aymona Nessa expired in the year 1991.

The Tribunal also observed that though the DW-2 had submitted land documents viz., Jamabandi copy of patta No. 176 along with revenue receipt of village Nalirpam and claimed that his father, Nadu Miya's name appeared in the said documents, and though the Tribunal also observed that the name of

Nadu Miya appeared in the documents and after the death of Nadu Miya, the name of Harmuz Ali and two others were duly mutated in the year 1998, DW-2 neither produced any corroborating documents between 1971 and 1998 and as such, such mutation does not create title as it merely shows collection of revenue of certain specific share of land.

According to the Tribunal, the claim of DW-2 that the said land belonged to Basiruddin and Nadu Miya in between 1966 to 24thMarch, 1971 is not sufficient to show the linkage with the petitioner.

**45**. Accordingly, the Tribunal held in para 6 of its opinion as follows:

> "6. In regards of the DW-2, Harmuz Ali claims to be father of the proceedee and he is the eldest son. He stated that his father died in the year of 1993 at village Kawaimari 12 No. Block and mother was expired in the year 1991. But the proceedee as well as DW-2, neither explained about non appearance of their names in the voters' list in between 1970 to 1993 about the voters' lists of 1983, 1984, 1985 etc. He has supported the exhibits submitted by the proceedee. The DW-2, who has also not explained about the voters' lists of 1970 i.e. the linkage. During evidence the DW-2, who has also submitted a land documents- Jamabandi copy of patta No. 176 along with revenue receipt of village Nalirpam and claimed that his father Nadu Miya's name appeared. On perusal of the documents, it appears that in the year 1956-96, the name of Nadu Miya along with two other caused miyadi and mutated and after the death of Nadu Miya the name of Harmuz Ali and two others duly mutated in the year 1998. The DW-2 neither produced any corroborating documents before 1971, as such, mutation does not create title, it is collection of revenue from the specific share of land. The DW-2 have to be proved that said land was belongs to Basiruddin and Nandu Miya in between 1966 to 24th March' 1971, as such in respect of linkage not sufficient and reliable."

**46**. We are also unable to agree with the aforesaid observations and conclusions.

We are at a loss, as to how the Tribunal could come to this conclusion that the petitioner could not establish his link with his father. The petitioner as

well as his father had testified before the Tribunal about their relationship, supported and corroborated by other documentary evidences, which have not been challenged.

As regards non-explanation by the proceedee or by DW-2 of the non-appearance of the names of his parents Nadu Miya and Aymona Nessa in the voters lists between 1970-1993, because of which the Tribunal held that the petitioner has failed to prove/establish the linkage, we are of the opinion that if the voters lists of 1965, 1970 as well as subsequent voters list of 1989 onwards are found to be unrebutted and not challenged which clearly show the linkage of the petitioner's father, Harmuz Ali with the claimed grandfather, Nadu Miya non-explanation by the proceedee or his father about non-mentioning of names of Nadu Miya and Aymona Nessa in the voters lists of 1970-1989 cannot be the ground to disbelieve the voters lists which clearly show the linkage.

If the voters lists from the period of 1970 to 1989 could be produced showing their names are proved, these could certainly bolster the case of the petitioner, but certainly cannot have the effect of negating the effects of the other voters lists which have been proved and not rebutted by the State.

We are of the opinion that though the Jamabandi and other revenue receipts cannot create the title, nevertheless, these are corroborating evidences to show that the petitioner's father and his grandfather were in possession of certain land during the aforesaid period of 1966 to 1971, and as such they were residents of Assam.

As mentioned above, these documents have also not been rebutted and their authenticity was also not challenged before the Tribunal.

It is to be remembered that the standard of proof in a proceeding under the Tribunal is preponderance of probability and not proof beyond all reasonable doubt. If the petitioner has been able to prove that the names of the petitioner's father and grandfather were shown in 1966 and 1971 and if

the petitioner is able to show his linkage with them on the strength of voters lists after 1971, the Tribunal cannot reject the claim of the petitioner, merely because some documentary evidence were not produced.

**47**. Lastly, the Tribunal held in para No. 7 that the evidence of DW-3, Shiraz Khan, i/c Principal Kayakuchi HS School, cannot be relied upon on the ground that a foreigner may study at any place and may also be born in this country. We are of the view that such an observation is merely a conjecture, not substantiated by any evidence and is contrary to the evidence which has been duly proved by DW-3, i/c Principal of Kayakuchi HS School which had issued the transfer certificate in the name of the Harmuz Ali, the father of the petitioner.

The In-charge Principal appeared before the Tribunal along with documents (Register), counter foil of the certificate, which were duly compared with the original documents and thus proved. The said certificate was compared with the original by the Tribunal. It was proved that the said certificate was issued by the then Principal Kutubuddin Ahmed. He stated before the Tribunal that he could identify the signature of Kutubuddin Ahmed, the then Principal of Kayakuchi Higher Secondary School.

In the cross-examination, also the DW-3 had stated that he appeared before the Tribunal on being summoned and he brought the counter foil which was accordingly compared with the original document. Thus, we are of the view that the transfer certificate which was relied upon by the petitioner was duly proved.

DW-3 was the in-charge of the school and as such was well acquainted with the records of the school. His evidence was not shaken. We see no reason to doubt the genuineness and authenticity of the said certificate, which clearly shows that the petitioner's father 'Harmuz Ali' was the son of 'Nadu Miya', the grandfather of the petitioner and accordingly, the said school certificate can be said to be proved.

**48**. We have also noted that the petitioner had examined one witness namely, Pusparam Medhi, who was the Gaon Burah of Bar-Simla Village of Barpeta District. He appeared before the Tribunal on being summoned along with the counter foil of certificates which were exhibited as Ext-I and Ext-J. He stated that he issued the certificate (Ext.I) to Haider Ali, S/o- Harmuz Ali and (Ext.J) to Harmuz Ali, S/o- Nadu and he also identified the signatures appended on the said documents. He also stated that the said two persons, namely, Haider Ali and Harmuz Ali were residents of his area. He stated that he issued the two certificates after proper verification. His evidence was not challenged nor shaken during the cross-examination.

However, there has been no discussion about the said evidence of DW-4, the Gaonburah in the opinion given by the Tribunal.

We, accordingly, for the reasons discussed above, do not agree with the conclusions arrived by the learned Tribunal.

**49**. However, the next issue to be considered is, whether we should remand the matter to the Tribunal for reconsideration.

**50**. We are of the opinion that in view of the overwhelming evidence in favour of the petitioner which have been duly proved, remanding the matter to the Tribunal would merely delay the proceedings.

**51**. The petitioner had appeared before the Tribunal in support of his claim and produced a number of documents. As far as the authenticity or reliability of these documents are concerned, the same had not been questioned before the Tribunal and as such it was not proper on the part of the Tribunal to dismiss these documents as not relevant for the purpose of establishing the claim of the petitioner.

**52**. We have noticed that the electoral roll of 1965 clearly mentions the names of Nadu Mia and Aymona Nessa, whom the petitioner claims to be his grandfather and grandmother respectively, being the parents of his father, Harmuz Ali.

The names of the grandparents are again found in the voters list of 1970. Thus, the voters list of 1965 and 1970 clearly indicate that the aforesaid Nadu Miya and Aymona Nessa continued to reside in Assam and were not declared to be foreigners by any authority and were thus, Indian citizens. The name of the petitioner's father Harmuj Ali is shown in the voters' list of 1971 in which his father is shown as Nadu.

It is to be mentioned that in both these voters lists of 1965 and 1970, the name of the village is shown as Nalirpam and the House Number has also been consistently shown as No.61 and as such, we are of the view that these documents clearly indicate the linkage of Nadu Miya with that of Harmuz Ali as father and son.

What is important to be proved is that the parents and grandparents of the petitioner were residing during 1965 and 1970, which would rule out any allegation that they entered Assam after 01.01.1966 or after 25.03.1971. That fact was established without any doubt after the voters lists of 1965 and 1970 were proved, which corroborate the oral evidence of the petitioner and others.

**53**. The petitioner has already explained that their parents and grandparents subsequently shifted from Village Nalirpam to Village Karagari Nonke Block No.12 in the written statement. Accordingly, the name of the petitioner's father appeared in the voters lists of 1989 and 1997 in the same new village at Karagari Nonke Block No. 12, though their names are found in the voters list of 1971 of Nalirpam village, that is, prior to their shifting. The names of the petitioner and petitioner's father Harmuz Ali are found in the voters list 2005 in the same village of Karagari Nonke 12 No. Block.

Similarly, the subsequent voters list of 2010 also show the names of the petitioner and his father in the same village, thus, clearly indicating the linkage of the petitioner with Harmuz Ali and Nadu Miya as father and grandfather respectively.

**54**. As far as the other document, namely, transfer certificate issued by the Principal of Kayakuchi Higher Secondary School, Kayakuchi, Barpeta in favour of the father of the petitioner is concerned, the same has been proved with the examination of the concerned authority of the school, i.e. the In-Charge Principal of the School who was acquainted with the records and signature of the Principal.

We have also seen and examined the admit card issued by the Board of Secondary Education, Assam as well as the Certificate issued by the Board of Secondary Education, Assam in favour of the petitioner who is shown to be the son of Harmuz Ali on passing the High School Leaving Certificate Examination, 2002, which had been compared by the Tribunal with the originals produced before the Tribunal.

Further, these documents have not been questioned. As such, we see no reason to doubt the authenticity of the documents which clearly show the name of the petitioner as Haidar Ali, S/o Harmuz Ali, showing their linkage.

**55**. We have also noted that the Gaonbura had himself testified before the Tribunal who had issued the certificates showing that the petitioner is the son of Harmuz Ali and resident of Village: Kawaimari 12 No. Block and Harmuz Ali is the son of Nadu Miya and both were residents of the said village. Those documents have not been also challenged.

We have also seen the revenue records, i.e. Jamabandi and revenue receipts produced before the Court which were also compared by the Tribunal with the originals, where the names of the petitioner's father and his grandfather were shown. These revenue records relate to the period of 1966-1971.

The Tribunal did not reject these documents but merely made an observation that these documents do not create the title.

We are of the view that even if these documents do not create title, these certainly indicate that the petitioner's father and his grandfather were in

possession of certain property in Assam before 1971 and this can be considered to be corroborating evidences to show that the petitioner is a descendant of persons who were already living in Assam prior to 1971 and 1966.

**56**. Accordingly, we are of the firm opinion that the petitioner has been able to prove that his father was Harmuz Ali and his grandfather was Nadu Miya. The documents clearly show the linkage of the petitioner with his father Harmuz Ali and grandfather, Nadu Miya and accordingly, we have no hesitation to hold that the petitioner is an Indian citizen and not a foreigner.

**57**. For the reasons discussed above, the present petition is allowed by setting aside the impugned order dated 30.01.2019 passed by the learned Member, Foreigners' Tribunal-III, Barpeta in F.T. Case No. 1444(III) of 2013 [Ref. IMDT Case No. 1550/03] by holding the petitioner to be an Indian, not a foreigner.

**JUDGE** **JUDGE**

**Comparing Assistant**