GAHC010291382019

2026:GAU-AS:11440

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

Case No. : WP(C)/9127/2019

AMULYA PAUL
S/O- LT. SACHINDRA PAUL, R/O- VILL- BHOGDOL, P.O. ORANG, P.S. ORANG, DIST.- UDALGURI, BTAD, ASSAM, PIN- 784114

VERSUS

THE UNION OF INDIA AND 5 ORS.
BEING REP. BY THE SECY. TO THE GOVT. OF INDIA, MINISTRY OF HOME AFFAIRS (CENTRAL SECRETARIAT), P.O. NEW DELHI, PIN- 110001

2:THE STATE OF ASSAM
BEING REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
ASSAM SACHIBALAYA
DISPUR
P.O. GHY
PIN- 781006

3:THE ELECTION COMMISSION OF INDIA
NIRVACHAN SADAN
ASHOKA ROAD
NEW DELHI- 110001

4:THE OFFICE OF THE STATE CO-ORDINATOR OF NATIONAL REGISTER OF CITIZENS (NRC)
ASSAM
1ST FLOOR
ACHYUT PLAZA
G.S.ROAD
BHANGAGARH
GHY-05
DIST.- KAMRUP (M)

ASSAM

5:THE DY. COMMISSIONER
UDALGURI
ASSAM
PIN- 782105

6:THE SUPERINTENDENT OF POLICE (B)
UDALGURI
ASSAM
PIN- 78210

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

For the petitioner : Mr. A.R. Shome, Advocate.

For respondents : Mr. N. Upadhaya, CGC.
: Ms. A. Verma, standing counsel.
: Mr. P. Sarmah, Addl. Sr. Govt. Advocate.
: Mr. A.I. Ali, standing counsel

Date on which judgment is reserved : 06.08.2026

Date of pronouncement of judgment : 13.08.2026

Whether the pronouncement is of the operative part of the judgment? : No

Whether the full judgment has been Pronounced? : Yes

JUDGMENT AND ORDER

(*CAV*)

(K.R. Surana, J)

Heard Mr. A.R. Shome, learned counsel for the petitioner. Also heard Mr. N. Upadhaya, learned CGC, Mr. A.I. Ali, learned standing counsel for the ECI, Mr. P. Sarmah, learned Addl. Senior Govt. Advocate and Ms. A. Verma,

learned standing counsel for the Border matters, FT and NRC.

2. By filing this writ petition under Article 226 of the constitution of India, the petitioner, namely, Amulya Paul, has assailed the *ex parte* opinion dated 13.09.2018, passed by the learned Member, Foreigners Tribunal (2nd), Darrang, Mangaldai in F.T. 2nd Case No.620/2008, arising out of Ref case No.7380/98, by which the petitioner was declared to be illegal migrant of post 25.03.1971 stream.

3. This writ petition was filed on 26.11.2019 and notice was issued by order dated 13.05.2020, and records were called for examination and the petitioner was allowed to go on bail. The matter was thereafter, listed on 17.07.2026 and then on 05.08.2026, when with the consent of all sides, the learned counsel for the petitioner was heard at the "motion stage". As similar matters were being heard, the matter was adjourned for hearing the learned CGC, State and Departmental counsel. Accordingly, the matter was finally heard on 06.08.2026 at the "motion stage".

4. The learned counsel for the petitioner has made three-fold following submissions:-

a. It was submitted that as per the process server's report notice of the proceeding dated 10.01.2017, issued by the learned Tribunal was served on the petitioner, but though the service report contains the purported signature of the petitioner, but the process server's report does not mention about the date on which the notice was served on the petitioner.

b. It is further submitted that as per the form of notice it was alleged

that the petitioner had entered into India on 01.01.1966 and 25.03.1971. However, as per the impugned *ex parte* opinion, the petitioner was declared to be foreigner who had illegally entered into Assam after 25.03.1971.

c. It was submitted that in the column no.4 of the Form of Enquiry under Annexure-A, the year of his birth is mentioned as 1965 and therefore, the petitioner would be a citizen of India under Section 3 of the Citizenship Act.

5. In support of the prayer to assail the *ex parte* opinion, the learned counsel for the petitioner has referred to the case *Sabitri Dey @ Swasthi Dey v. Union of India and Ors., Civil Appeal No. 2820/2024, decided on 13.07.2026* by the Supreme Court of India, reported in *2026 INSC 694*.

6. Per contra, the learned standing counsel for the FT and Border matters has made her submissions to oppose the prayer for setting aside the *ex parte* opinion and she has referred to the records received from the learned Tribunal. The learned CGC and the learned Addl. Senior Govt. Advocate had adopted the submissions made by the learned standing counsel for the FT and Border matters.

7. Considered the submission and the case cited by the learned counsel for the petitioner. Also perused the records received from the learned Tribunal.

On ex parte opinion:

8. The records reveal that the petitioner was duly served with a notice issued on 30.03.2010, to appear before the learned Tribunal on

19.04.2010 and the service report contains his signature. After service, the service report dated 13.04.2010 was returned to the learned Tribunal. As per order dated 19.04.2010, the petitioner had entered appearance in the case and submitted his *hazira* (attendance-sheet filed before Tribunal) and the said *hazira* is available in the Tribunal's record. Accordingly, the next date of the proceedings was fixed on 12.08.2010. Since his first and last appearance before the learned Tribunal on 19.04.2010, the petitioner had remained continuously absent without any steps for more than 8 (eight) years from 12.08.2010 till 13.09.2018. Thereafter, the learned Tribunal had passed the *ex parte* opinion on 13.09.2018.

9. The learned Tribunal's record further reveals that after the petitioner had defaulted in appearing before the learned Tribunal, the learned Tribunal had again issued another notice on 06.05.2011 and the said notice was also duly served upon the petitioner, which was received by him by putting his signature on the service report. The service report containing petitioner's signature was returned on 15.06.2011. However, the petitioner, despite receiving the second notice, did not appear and did not take any steps before the learned Tribunal.

10. Thereafter, the learned Tribunal had once again issued another notice dated 10.01.2017, to the petitioner. The said third notice was duly served on the petitioner by putting his signature on the service report. By the said notice, the petitioner was directed to appear on 13.02.2017. The service report was returned back to the learned Tribunal on 13.02.2017, but the petitioner again did not appear or took any steps before the learned Tribunal.

11. Despite notice being served thrice, the learned Tribunal had

adjourned the case on 17 (seventeen) dates awaiting appearance of the petitioner. Thereafter, the impugned *ex parte* opinion was passed on 13.09.2018.

12. Hence, this is not a case where there was a single default by the petitioner in appearing before the learned Foreigners Tribunal. Notice was duly served to the petitioner thrice, which is evident from the fact that at the back-page of the notice, the signature of the petitioner is available, which is neither disputed nor denied by the petitioner. This is also not a case where the learned Tribunal had shown any haste in passing the opinion, rather, this is a case where the learned Tribunal had not complied with the mandate of Paragraph 3(14) of the Foreigners (Tribunals) Order, 1964 by not making any attempt to dispose of the proceeding within the time of 60 days from the date of reference, as provided thereunder.

Suppression of facts in this writ petition:

13. The fact that notice/ summons was served thrice to the petitioner has been withheld by the petitioner and the said fact has been suppressed. Therefore, had the Court did not examine the records, it would not have come to light that the petitioner was served with notice/summons thrice. The petitioner has suppressed that he had appeared before the learned Tribunal on 19.04.2010, and then abandoned his defence.

14. Suppression of facts disentitles the petitioner a right to be heard. Yet, as the issue of citizenship is involved, for ends of justice, the merit of the case has also been examined.

On the initiation of reference:

15. The Tribunal's record reveals that in the year 1997, the name of the petitioner was entered in the electoral roll for 70 Mazbat Legislative Assembly Constituency (hereinafter referred to as LAC for short). The Election Commission India had ordered intensive revision of electoral roll for the 70 Mazbat LAC in Assam with reference to 01.01.1997 as the qualifying date. Resultantly, house to house enumeration was conducted during the period from 16.01.1997 to 15.04.1997. The Electoral Registration Officer (hereinafter referred to as ERO for short) of the said 70 Mazbat LAC, having doubt about the citizenship of the petitioner, had directed on-the-spot local verification. On consideration of the report of such verification, the ERO had expressed that there was a reasonable doubt that the petitioner is not a citizen of India. Accordingly, the matter was forwarded to the Superintendent of Police, Darrang, Mangaldai, who is the competent authority under the erstwhile Illegal Migrants (Determination by Tribunals) Act, 1983 [IM(DT) Act]; the Foreigners Act, 1946; and rules made thereunder, to ascertain as to whether or not the petitioner is a citizen of India. On receipt of the Verification Report, the reference, as per the format prescribed under the erstwhile IM(DT) Act was submitted by the ERO on 24.10.1979, enclosing therewith the LVO's report and the notice informing the petitioner. It is seen from the record that the Superintendent of Police, Darrang, Mangaldai, had directed a Sub-Inspector (Border) to verify and submit the report. Thereafter, the reference was submitted before the erstwhile Illegal Migrants (Determination) Tribunal [IM(D)T for short].

16. The Supreme Court of India, in the case of *Sarbananda Sonowal v. Union of India, (2005) 5 SCC 665*, declared the IM(DT) Act to be *ultra vires* and all the proceedings before the then IM(D)T's were transferred to the Foreigner's Tribunals having jurisdiction. As a consequence, the said case was

transferred to the learned Foreigners Tribunal (2nd), Darrang, Mangaldai, for disposal. Thus, the form of enquiry, which was being used under the erstwhile IM(DT) Act, has remained on the record.

17. However, with the declaring of the erstwhile IM(DT) Act, 1983 as *ultra vires*, the legal position has altered. Under IM(DT) Act, the onus was on the State and/or the complainant to prove that the suspect is a foreigner. However, under Section 9 of the Foreigners Act, 1946, the burden of proof lies on the proceedee/suspect to prove that he/she is not a foreigner but an Indian citizen.

18. This position has been referred to by the Supreme Court of India in the case of *Sarbananda Sonowal (supra) (paragraph 26)*, and reiterated in the case of *Sarbananda Sonowal v. Union of India, (2007) 1 SCC 174* (hereinafter referred to as *Sarbananda Sonowal-II* for convenience).

19. Moreover, it may be stated that this Court, in the case of *Shukurjan Nessa @ Sukurjan v Union of India & Ors., W.P.(C) 245/2019, decided on 28.02.2025*, had elaborately dealt with the reference initiated by the ERO. The relevant part of the said judgment and order is extracted hereinbelow:-

> ***14***. *The point raised by the learned counsel for the petitioner that the reference was blank and not properly filled up and therefore, the grounds of suspecting the petitioner to be a foreigner has not been furnished to her is taken up first.*
> ***15***. *In this case, the reference was made by the Superintendent of Police (Border), Barpeta, on receipt of communication dated 16.03.1998, issued by the Electoral Registration Officer, 44 No. Jania L.A.C., which is accompanied with a three page Local Verification Report (Annexure-A) by one Sri Khagen Kalita, J.E. In the said LVO Report dated 17.10.1997, it has been mentioned at two places to the effect that no documents produced during field verification.*
> ***16***. *Therefore, this is not a case where any enquiry was made under the provisions of Foreigners Act, 1946 or Rules framed thereunder, where investigation*

is done under the authority of the Superintendent of Police (Border). The jurisdictional Superintendent of Police (Border) is the prescribed authority to make reference before the Illegal Migrants (Determination) Tribunal constituted under the erstwhile Illegal Migrants (Determination by Tribunals) Act, 1983 and Rules framed thereunder.

***17**. There is an important facet, which is contained in the judgment and order of this Court in the case of Sayam Uddin (supra), which must be referred to. We are in respectful agreement with the said judgment and therefore, paragraphs 11 to 22 thereof are quoted below:-*

> *11. In the year 1997, Election Commission of India had undertaken an intensive revision of electoral rolls in the State of Assam as apprehensions were expressed from various quarters that the electoral rolls were infested with the names of foreigners/illegal migrants. In the course of this exercise citizenship status of as many as 3,13,046 persons whose names were in the draft voters lists were found to be doubtful and accordingly they were marked as doubtful "D" voters in the electoral rolls after local verification.*
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> *12. Legality of this exercise was challenged before this Court in HRA Choudhury Vs Election Commission of India, reported in 2002 (1) GLT 1. The challenge made was rejected by a Division Bench of this Court. In HRA Choudhury (supra) this Court examined the guidelines dated 17.07.1997 of the Election Commission of India laying down the procedure to carry out the exercise.*
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> *12.1. As per paragraph 3.8 of the guidelines the Electoral Registration Officer was required to consider the verification report received from the Local Verification Officer. If he was satisfied on such report and such other material/information as may be available about the eligibility of a person, he should allow his name to continue on the electoral roll. Where, however, he was not so satisfied and had reasonable doubt about the citizenship of any person, he was required to refer such doubtful cases to the competent authority under the then Illegal Migrants (Determination by Tribunals) Act, 1983 or the Foreigners Act, 1946 as the case may be. For convenience of the Electoral Registration Officers, Election Commission devised proformas.*
>
> *12.2. As per paragraph 3.9, after the case of a person was referred by the Electoral Registration Officer to the competent authority, he should wait for the decision of the relevant Tribunal in relation to that person and act according to such decision.*
>
> *12.3. As per paragraph 3.10, where the relevant Tribunal decided that any such person was not a citizen of India, Electoral Registration Officer should proceed under Rule 21 A of the Registration of Electors Rolls, 1960 to have the name of such person deleted from the electoral roll before it was finally published.*
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> *12.4. This Court in HRA Choudhury (supra) held that such guidelines and decision of the Election Commission were in accordance with Article 324*

of the Constitution of India besides conforming to the principles of natural justice. It was held that such guidelines cannot be held to be arbitrary or vitiated by mala fide or partiality.

13. At this stage, it may be mentioned that the Illegal Migrants (Determination by Tribunals) Act, 1983 is no longer in existence, the same having been declared unconstitutional by the Supreme Court in Sarbananda Sonowal Vs Union of India reported in (2005) 5 SCC 665. Therefore, in so far paragraph 3.8 of the guidelines dated 17.07.1997 is concerned, the reference would be under the Foreigners Act, 1946.

14. The above exercise was repeated in the year 2005 with the Election Commission of India again going for intensive revision of electoral rolls in the State of Assam taking 01.01.2005 as the qualifying date. In this connection, guidelines dated 17.06.2004 were issued by the Election Commission of India. Paragraph 2.2 of the guidelines dealt with "D" voters. It was mentioned that the guidelines issued in 1997 would be followed while dealing with such category of persons. Paragraph 8 dealt with verification by Electoral Registration Officers. It laid down the procedure while carrying out such verification including verification by Local Verification Officer. As per paragraph 8.6, Local Verification Officer would conduct the verification by making an on the spot visit and the person concerned could adduce any one or more of the documents mentioned therein in support of his claim as a citizen of India. After due verification, the Local Verification Officer was required to submit his report in the prescribed format. Under paragraph 8.8, Electoral Registration Officer on receipt of the verification report from the Local Verification Officer should consider the same. Where he was satisfied about the eligibility of a person, he should allow the name of such person to continue on the electoral roll but where he was not so satisfied and had reasonable doubt about the citizenship of any person he should refer such doubtful cases to the competent authority under the then Illegal Migrants (Determination by Tribunals) Act, 1983 or the Foreigners Act, 1946 in a prepared format (Annexure-B to the guidelines dated 17.06.2004) to the competent authority for making reference to the Tribunal and await the decision of such Tribunal.

15. As pointed out by Mr. Barua, in Mameja Khatun (supra) a Single Bench of this Court directed that "D" voters should not be allowed to cast their votes with the clarification that "D" voters would include persons whose names were included in the electoral rolls but their citizenship was doubted or disputed and also those whose cases were pending before the Foreigners Tribunals. This decision of the learned Single Bench was confirmed by the Division Bench in Writ Appeal No. 114/2011 (State Vs Mameja Khatun). By the judgment and order dated 13.10.2015, the Division Bench directed Election Commission of India and other authorities to implement the directions of the Single Bench in letter and spirit.

16. At this stage, it may also be mentioned that in WP(C) No. 274/2009 filed by Assam Public Works which is pending before the Supreme Court of India wherein NRC updation exercise in the State of Assam is being monitored by the Supreme Court of India, on 25.10.2013, Supreme Court clarified that as far as persons in the "D" list are concerned, undoubtedly they were doubtful voters and therefore their names could not be included unless the NRC is updated and unless the Foreigners Tribunals declared them to be Indian citizens.

17. The Foreigners Act, 1946 is an act to confer upon the Central Government certain powers in respect of foreigners. This Act provides for the exercise of certain powers by the Central Government in respect of the entry of foreigners into India; their presence in India and their departure therefrom. Section 2 (a) defines a "foreigner" to mean a person who is not a citizen of India. Section 3 confers power to the Central Government to make orders making provision either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigners, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or their continued presence therein.

17.1. In exercise of the powers conferred by Section 3 of the Foreigners Act, 1946, Central Government made the Foreigners (Tribunals) Order, 1964. As per order 2 (1), the Central Government may by order refer the question as to whether a person is or is not a foreigner within the meaning of the Foreigners Act, 1946 to a Tribunal to be constituted for the purpose for its opinion.

18. Ministry of Home Affairs, Govt. of India had issued notification dated 19.04.1958 in exercise of powers conferred by Clause-(1) of Article 258 of the Constitution of India whereby the President with the consent of the State Government concerned entrusted to the Governments of each of the States mentioned therein including the State of Assam the functions of the Central Government in making orders of the nature specified in Section 3 of the Foreigners Act, 1946. Another notification dated 17.02.1976 was issued by the Government of India, Ministry of Home Affairs in the exercise of the powers conferred by Article 258 (1) of the Constitution entrusting the Superintendents of Police and Deputy Commissioners (In-charge of Police) under the Government of Assam the functions of the Central Government in making orders of the nature specified in Section 3 of the Foreigners Act, 1946 within their respective jurisdictions subject to the conditions mentioned therein which included the condition that exercise of such functions would be in respect of nationals of Bangladesh and that while exercising such functions, Superintendents of Police and Deputy Commissioners (In-charge of Police) shall comply with such general or special directions as the Government of Assam or the Central Government may issue from time to

time.

19. Article 258 of the Constitution deals with power of the Union to confer powers etc on States in certain cases. Clause (1) of Article 258 starts with a non-obstante clause. It says that notwithstanding anything in the Constitution, President may with the consent of the Government of a State entrust either conditionally or unconditionally to that Government or to its officers, functions in relation to any matter to which the executive power of the Union extends. Clause (3) provides for making of payment by the Government of India to the State concerned such sum as may be agreed upon or in default of agreement through arbitration in respect of any extra-cost of administration incurred by the State in connection with the exercise of powers and duties of the Government of India conferred or imposed upon a State Government.

20. Thus, under the Central Government notifications dated 19.04.1958 and 17.02.1976, Government of Assam, Superintendents of Police and Deputy Commissioners (In-charge of Police) have been delegated the power to make reference to the Foreigners Tribunal under order 2 (1) of the Foreigners (Tribunals) Order, 1964 to seek opinion as to whether the proceedee is a foreigner or not within the meaning of the Foreigners Act, 1946.

21. Thus from the above, what transpires is that there are two categories of "D" voters:- (i). those who were marked as "D" voters in the electoral roll by the Electoral Registration Officer following enquiry by Local Verification Officer; and (ii). those whose references are pending before the Foreigners Tribunals.

22. In so far Electoral Registration Officer is concerned the exercise undertaken by him while marking a person as a "D" voter in the electoral roll is a quasi judicial exercise. If he holds the view after examining the enquiry report of the Local Verification Officer that the concerned person is not a citizen of India he is required to forward the case of that person to the competent authority i.e., the Superintendent of Police. If it is so forwarded by the Electoral Registration Officer, the jurisdictional Superintendent of Police has to make a reference to the competent Foreigners Tribunals under order 2(1) of the Foreigners (Tribunals) Order, 1964 based on the report received from the Electoral Registration Officer. Question of making further enquiry by the Superintendent of Police in such a case would not arise because enquiry has already been made by the Electoral Registration Officer by exercising quasi judicial powers and the Superintendent of Police cannot sit over such decision of the Electoral Registration Officer. He has to forward the same by making the reference to the competent Foreigners Tribunal for its opinion.

***17**. The said judgment by the learned Single Judge has stood affirmed by the virtue of judgment and order dated 29.07.2019, passed by the Division Bench of this Court in the case of Sayam Uddin v. The Union of India & Ors., W.A. 170/2019.*

***18**. The learned counsel for the petitioner had cited the case of Moslem Mondal*

(supra) and Amina Khatun (supra) to support his contention that if LVO report is blank, the reference is vitiated. In this regard, it would be relevant to mention that as per the contents of para-10 of the case of Moslem Mondal (supra), the Superintendent of Police, Barpeta, suspecting the respondent therein as illegal migrant within the meaning of the Illegal Migrants (Determination by Tribunals) Act, 1983, made a reference under Section 8 (1) of the said Act read with Rule 9 (A) of the Rules framed thereunder and accordingly, Case No. 1311/2003 was registered before the IM(D)T, Barpeta and the said proceeding was subsequently transferred to the Foreigners Tribunal and registered as F.T. Case No. 243/2006. Therefore, in the said case, reference was not made by Electoral Registration Officer (EVO for short). Hence, the decision of Moslem Mondal (supra), being distinguishable on facts, is not found to help the petitioner in any manner.

***19**. However, in the case of Amina Khatun (supra), which was decided on 28.04.2022, the reference was made by the Superintendent of Police (Border), based on LVO by the ERO. But when the said writ petition was being heard and decided by a Coordinate Bench, it appears that the previous decision of the learned Single Judge of this Court in the case of Sayam Uddin v. The Union of India & Ors., 2019 (4) GLT 456, as affirmed by the Division Bench of this Court in the case of Sayam Uddin v. Union of India & Ors., W.A. 170/2019, decided on 29.07.2019, were not brought to the notice of this Court. Therefore, under such circumstances, the Court is of the considered opinion that under the well settled principles of stare decisis, the decision in the case of Amina Khatun (supra) would be per incurium. Accordingly, the decision rendered in the case of Amina Khatun (supra) will also not be of any help to the petitioner.*

***20**. In the present case, the proceedings which were hitherto pending before the Illegal Migrants (Determination) Tribunals were transferred by the Supreme Court of India to the Foreigners Tribunal vide directions issued in the case of Sarbananda Sonowal (supra). The said fact has been stated in para-1 of the impugned opinion. Hence, this Court would refrain from making any observations on the LVO Report in this case because the Foreigners Tribunals would have no power or jurisdiction to remand the reference back to the Superintendent of Police (Border) for a fresh enquiry by the LVO/ERO.*

***21**. Therefore, the challenge to the proceeding before the learned Foreigners Tribunal on the ground that certain paragraphs and/or columns of the Local Verification Officer's (LVO) Report, as forwarded by the Electoral Registration Officer (ERO) were left blank, is held to be not maintainable on facts and in law morefully referred to hereinbefore. The point of determination no. (i) is answered accordingly.*"

20. Hence, as the proceedings of F.T. Case No. 620/2008, was transferred by virtue of orders passed by the Supreme Court of India in the case

of *Sarbananda Sonowal (supra)*, and in light of the decision this Court in the case of (i) *Sayam Uddin (supra)(decision by learned Single Bench)*, (ii) *Sayam Uddin (supra)(Division Bench)*, and (iii) *Shukurjan Nessa @ Sukurjan (supra)*, it would not be open to this Court to question the transfer of reference.

21. It may be stated that the petitioner, despite being served with notice of appearance thrice, did not question the manner in which reference was made. Therefore, following the decision of the Supreme Court of India in the case of *Sabitri Dey @ Swasthi Dey (supra)*, and *Council for Research in Ayurvedic Sciences & Ors. v. Bikartan Das, 2023 INSC 733: (2023) 0 Supreme(SC) 763*, where the Supreme Court of India had referred to the extent of power which can be exercised by High Court under certiorari jurisdiction, the petitioner has not been able to make out a case where this Court would examine the Reference submitted by the ERO and thereafter by the Superintendent of Police, Darrang, Mangaldai.

22. The three points urged by the learned counsel for the petitioner are now taken up:-

a. *Process server's report:*

i. It was submitted is that the process server's report does not contain the date of service.

ii. It is not in dispute that the process server's report contain clear intimation to the petitioner to appear on the next date of the proceeding, which was fixed on 13.02.2018.

iii. Though the date on which notice was served to the petitioner is not mentioned. But in this case, the petitioner had

suppressed material fact that notice was actually served on him. The petitioner has not pleaded that the notice was served within the due date, but was served after the date of appearance. His case of total denial of service of notice, which is *ex facie* untrue.

iv. As narrated hereinbefore, the petitioner was served with notice/summons of appearance thrice. The petitioner had appeared before the learned Tribunal on 19.04.2010, but took a conscious decision not to participate in the proceeding and defend himself despite the fact that as per the contents of the said notice, the petitioner was accused of being a foreigner and that the burden of proof lies on him.

v. In this case, despite the notice of the case being served thrice, which were received by him, the learned Tribunal had given 8 (eight) years' time to the petitioner to contest the proceeding. Thus, the learned Tribunal had failed to follow the mandate of Paragraph 3(14) of the Foreigners (Tribunals) Order, 1964, to dispose of the reference within a period of 60 (sixty) days from the date of receipt of reference.

vi. Under the aforesaid facts, by showing leniency to the petitioner, the proceedings before the Foreigners Tribunal cannot be made a farcical exercise. If the same is done, any proceedee can walk in and walk out of the Foreigners Tribunal as per his/her own sweet wish and desire. Allow an *ex parte* order to be passed, and then assail the said *ex parte* opinion whenever he so wishes. Such a procedure, is definitely not the mandate of the case of

Sabitri Dey @ Swasthi Dey (supra), cited by the learned counsel for the petitioner.

vii. Accordingly, the Court is constrained to hold that under the distinguishable facts and circumstance of this case, the said cited decision of *Sabitri Dey @ Swasthi Dey (supra)*, is not found to help the petitioner in any manner.

viii. Moreover, in this case, the learned Tribunal has examined the materials produced before it by the State and those materials have been referred to in the impugned opinion.

ix. As per the mandate of the Section 9 of the Foreigners Act, 1946 and the decision of the Supreme Court of India in the case of *Sarbananda Sonowal -I (supra)*, the burden of proof lies on the petitioner to show that he is an Indian and not a foreigner, which he has miserably failed to discharge. This Court, while exercising *certiorari* jurisdiction, would be slow in appreciating documents which the petitioner had failed to produce before the learned Tribunal. The said view of this Court is guided by observations made by the Supreme Court of India in paragraphs 34 to 38 of the case of *Sabitri Dey @ Swasthi Dey (supra)*.

x. It may be clarified herein that under the ERO's reference, the same is a power exercised under the Rules/ Notifications/ Election Manual of the Election Commission of India, which are under the Representation of the People Act, 1950 and the Superintendent of Police (Border) has no role in the investigation and therefore, in terms of Section 9 of the Foreigners Act, 1946,

the burden of proof would lie solely on the petitioner, for which the Court would be guided by the observations made by the Supreme Court of India in paragraph 26 of the case of *Sarbananda Sonowal- I (supra)*.

xi. Therefore, the first point urged by the learned counsel for the petitioner is answered by holding that the non-disclosure of the date of service of notice, in this case in hand, is not fatal.

b. The second point: The form of notice mentions that the petitioner had entered into India on 01.01.1966 and 25.03.1971:

i. It was urged by the learned counsel for the petitioner that as per the form of notice it was alleged that the petitioner had entered into India on 01.01.1966 and 25.03.1971. However, as per the impugned *ex parte* opinion, going beyond the reference, the learned Tribunal had declared the petitioner to be foreigner who had illegally entered into Assam after 25.03.1971.

ii. Under Section 2(a) of the Foreigners Act, 1946, "foreigner" means a person who is not a citizen of India.

iii. The reference to the persons entering into India between 01.01.1966 and 25.03.1971 is made in Section 6-A (3) of the Citizenship Act, 1955. The provisions of Section 6-A of the Citizenship Act, 1955 provides for special provisions as to citizenship of persons covered by the Assam Accord. Section 6-A of the Citizenship Act, 1955 is quoted below:-

iv. ***6A.*** *[Special provisions as to citizenship of persons covered by*

the Assam Accord. [Inserted by Act 65 of 1985, Section 2 (w.e.f. 7.12.1985).]

(1) For the purposes of this section

(a) Assam means the territories included in the State of Assam immediately before the commencement of the Citizenship (Amendment) Act, 1985;

(b) detected to be a foreigner means detected to be a foreigner in accordance with the provisions of the Foreigners Act, 1946 (31 of 1946), and the Foreigners (Tribunals) Order, 1964by a Tribunal constituted under the said Order;

(c) specified territory means the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985;

(d) a person shall be deemed to be of Indian origin, if he, or either of his parents or any of his grandparents was born in undivided India;

(e) a person shall be deemed to have been detected to be a foreigner on the date on which a Tribunal constituted under the Foreigners (Tribunals) Order, 1964 submits its opinion to the effect that he is a foreigner to the officer or authority concerned.

(2) Subject to the provisions of sub-sections (6) and (7), all persons of Indian origin who came before the 1st day of January, 1966 to Assam from the specified territory (including such of those whose names were included in the electoral rolls used for the purposes of the General Election to the House of the People held in 1967) and who have been ordinarily resident in Assam since the dates of their entry into Assam shall be deemed to be citizens of India as from the 1st day of January, 1966.

(3) Subject to the provisions of sub-sections (6) and (7), every person of Indian origin who

(a) came to Assam on or after the 1st day of January, 1966 but before the 25th day of March, 1971 from the specified territory; and

(b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and

(c) has been detected to be a foreigner, shall register himself in accordance with the rules made by the Central Government in this behalf under section 18 with such authority (hereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll for any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom.

Explanation. - In the case of every person seeking registration under this sub-section, the opinion of the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 holding such person to be a foreigner, shall be deemed to be sufficient proof of the requirement under clause (c) of this sub-section and if any question arises as to whether such person complies with any other requirement under this sub-section, the registering authority shall,

(i) if such opinion contains a finding with respect to such other requirement, decide the question in conformity with such finding;

(ii) if such opinion does not contain a finding with respect to such other requirement, refer the question to a Tribunal constituted under the said Order having jurisdiction in accordance with such rules as the Central Government may make in this behalf under section 18 and decide the question in conformity with the opinion received on such reference.

(4) a person registered under sub-section (3) shall have, as from the date on which he has been detected to be a foreigner and till the expiry of a period of ten years from that date, the same rights and obligations as a citizen of India (including the right to obtain a passport under the Passports Act, 1967 (15 of 1967) and the obligations connected therewith), but shall not be entitled to have his name included in any electoral roll for any Assembly or Parliamentary constituency at any time before the expiry of the said period of ten years.

(5) a person registered under sub-section (3) shall be deemed to be a citizen of India for all purposes as from the date of expiry of a period of ten years from the date on which he has been detected to be a

foreigner.

(6) Without prejudice to the provisions of section 8,

(a) if any person referred to in sub-section (2) submits in the prescribed manner and form and to the prescribed authority within sixty days from the date of commencement of the Citizenship (Amendment) Act, 1985, a declaration that he does not wish to be a citizen of India, such person shall not be deemed to have become a citizen of India under that sub-section;

(b) if any person referred to in sub-section (3) submits in the prescribed manner and form and to the prescribed authority within sixty days from the date of commencement of the Citizenship (Amendment) Act, 1985, for year or from the date on which he has been detected to be a foreigner, whichever is later, a declaration that he does not wish to be governed by the provisions of that sub-section and sub-sections (4) and (5), it shall not be necessary for such person to register himself under sub-section (3).Explanation. - Where a person required to file a declaration under this sub-section does not have the capacity to enter into a contract, such declaration may be filed on his behalf by any person competent under the law for the time being in force to act on his behalf.

(7) Nothing in sub-sections (2) to (6) shall apply in relation to any person

(a) who, immediately before the commencement of the Citizenship (Amendment) Act, 1985, is a citizen of India;

(b) who was expelled from India before the commencement of the Citizenship (Amendment) Act, 1985, under the Foreigners Act, 1946 (31 of 1946).

(8) Save as otherwise expressly provided in this section, the provisions of this section shall have effect notwithstanding anything contained in any other law for the time being in force.]"

v. Therefore, in order to claim to be a citizen of India, the onus is on the petitioner to show that he is a person of Indian origin as provided for in Sub-Section (2) of Section 6-A, and/or

that either of his parents or grandparents were born in undivided India as per the requirement of Clause (d) of Sub-section (1) of Section 6-A.

vi. This Court, in the case of *Rukia Begum Barbhuiya @ Rukia Begum v. The Union Of India and Ors., 2023 4 GLT 1208; 2023 0 Supreme(Gau) 568* had examined the issue of reference of stream of 01.01.1966 and 25.03.1971 and stream of post 25 03.1971. It would be appropriate to extract hereinbelow the relevant part of the said judgment and order:-

vii. "***12**. A reading of the provisions of Section 6 A makes it explicit that it is a special provision as to citizenship of persons covered by the Assam Accord and the core provisions of Section 6 A are that a person who may have entered the State of Assam from the specified territory prior to 01.01.1966 shall be deemed to be a citizen of India from the 1st day of January, 1966. The further provision is that such persons who entered the State of Assam from the specified territory after 01.01.1966, but before 25.03.1971 from the specified territory, and has been detected to be a foreigner, shall register himself with the Foreigners Registering Authority of the district concerned and upon having been registered shall be debarred of any voting rights for a period of ten years, but otherwise retaining all such other rights that a citizen of India may be bestowed with under the provisions and further that upon expiry of the period of ten years, even the voting rights would be restored back. In case of persons, who had entered the State of Assam from the specified territory on or after 25.03.1971, such persons are to be declared as foreigners.*

13. In view of the provisions of Section 6 A of the Citizenship Act 1955, Clause 2(1) of the Foreigners Tribunal Order 1964 would now have to be understood that once a reference is made, the reference would be whether the person concerned is or is not a foreigner, meaning thereby, whether the person concerned is a foreigner, who had entered the Staten of Assam from the specified territory on or after 25.03.1971 or he is a person who belongs to any of the other

categories i.e., a person who entered the State of Assam from the specified territory before 01.01.1966 or between 01.01.1966 and 25.03.1971. No other meaning can be attributed to the reference under Clause 2(1) of the Foreigners Tribunal Order 1964 i.e. whether a person is or is not a foreigner within the meaning of the Foreigners Act 1946. We further take note that even if a reference is made by setting up a question whether the person had entered the State of Assam from the specified territory between 01.01.1966 and 25.03.1971, the reference would have to be understood to be a reference under Clause 2(1) of the Foreigners Tribunal Order 1964 i.e., as to whether he is a foreigner or not. If the reference is worded whether the person concerned, is a person who had entered the State of Assam from the specified territory between 01.01.1966 and 25.03.1971, in order to arrive at any such conclusion that the reference itself is faulty inasmuch as, the decision of the Tribunal upon the materials on record would be that the person concerned had entered the State of Assam from the specified territory on or after 25.03.1971, in such circumstance, the only situation that can be envisaged is that the Tribunal first arrives at a conclusion of its own that the person concerned had entered the State of Assam from the specified territory on or after 25.03.1971, meaning thereby that the reference itself had been answered by the Tribunal. After having answered the reference, it would be an inconceivable situation that merely because the reference is worded whether the person had entered the State of Assam from the specified territory between 01.01.1966 and 25.03.1971 it has to be referred back to the referral authority to make a fair reference now putting up a question whether the person concerned had entered the State of Assam on or after 25.03.1971. In such situation, as the matter would have to be referred back only after a final decision has been arrived at and now if the reference is again made with a corrected expression in the questions framed, the same may lead to further complications that the subsequent reference would be barred by the principles of res judicata inasmuch as it would be a subsequent reference on the same issue between the same set of parties where an earlier decision had already been arrived at. It is noticed that in Falani Bibi (supra) the aforesaid aspect of the further implication of a corrected reference being again made had not been gone into and from such point of view, it can be said that the view taken therein would be per inquiriam of the further consequences of a fresh reference being

made.

*21. We further add that going by the statutory provisions of Clause 2(1) of the Foreigners Tribunal Order 1964 any reference would have to be understood to be a reference to the Tribunal on the question whether the person so referred is a foreigner or not within the meaning of Foreigners Act 1946, where again foreigner is given the meaning of a person who is not a citizen and aga*in where a citizen is defined under the Citizenship Act 1955.

viii. Therefore, as per the provision of Section 2(a) of the Foreigners Act, 1946, the reference can only be as to whether or not the suspected person is a foreigner or not. The stream of period between 01.01.1966 and 25.03.1971 is only available under Section 6-A of the Citizenship Act, 1955. Therefore, the benefit of Section 6-A of the Citizenship Act, 1955 would become available to the petitioner after he has been able to satisfy the learned Foreigners Tribunal that he is covered by the provisions of Section 6-A of the Citizenship Act. But in this case, the petitioner has not been able to prove that he is entitled to the benefit of Section 6-A of the Citizenship Act, 1955.

ix. Therefore, the second point of determination is answered by holding that merely because in the form of notice it was alleged that the petitioner had entered into India on 01.01.1966 and 25.03.1971, would not come in the way of the learned Foreigners Tribunal to answer the reference by holding that the petitioner was a foreigner of post 25.03.1971 stream. Thus, the answer to the reference cannot be held to be

unsustainable by holding that the learned Tribunal had gone beyond the reference by declaring the petitioner to be foreigner who had illegally entered into Assam after 25.03.1971.

c. The third submission: In column no.4 of the Form of Enquiry under Annexure-A, the year of his birth is mentioned as 1965, would mean that the petitioner is a citizen of India.

i. It was submitted that in column no.4 of the Form of Enquiry under Annexure-A, the year of his birth is mentioned as 1965 and therefore, the petitioner would be a citizen of India under Section 3 of the Citizenship Act.

ii. It is reiterated herein that the Form of Enquiry was the one prescribed under the erstwhile IM(DT) Act, 1983. Under the said Act, the burden to prove that a suspect was a foreigner was on the State. However, in a proceeding under the Foreigners Act, 1946, Section 9 thereof casts burden on the proceedee to prove that he/she is not a foreigner but an Indian.

iii. It is in public domain that for election duty, the Election Commission of India requisition Government employees from various departments for election duty.

iv. In the relevant Column No.4 and 5 of Annexure-A, i.e. the Format for Enquiry, the following are mentioned:-

4. Date of birth: 1965 }
5. Place of birth Bhogdal (Orang) } (Oral statement).

v. In this case, the Verification Officer has disclosed his designation as "SE, DIP". Thus, from the said designation, it can be presumed that the Verification Officer was either a Superintending Engineer or a Section Engineer, but not a police officer. Accordingly, whatever entry that has been made in the Format of Enquiry, which is referred to as Annexure-A, is as per disclosure made by the petitioner during enquiry and those entries are not a result of any investigation. The Enquiry Officer has clearly disclosed that those entries were based on oral statement of the petitioner. In Column No.6 and 8 of the form as against the query – Whether he and his father is registered as an elector in any constituency in India, the reply recorded is "No".

vi. Therefore, merely because of the petitioner's oral statement that he was born in 1965 and place of birth is Bhogdal (Orang), it cannot be said that the same constitutes cogent proof that the petitioner is a citizen of India by birth.

vii. The entry made in the said column no. 4 does not establish that he is a citizen of India by descent. The petitioner's disclosure in column no.6 and 8 of the same form is to the effect that neither he nor his father were electors in any Constituency.

viii. Therefore, the third point urged by the learned counsel for the petitioner is decided in the negative and against the petitioner by holding that a mere entry in the Format of Enquiry – Annexure-Am mentioning that as per the oral statement of the petitioner, he was born in 1965 is not a proof of citizenship and it cannot be

held that the petitioner had discharged his burden under Section 9 to prove that he is not a foreigner but an Indian.

23. Thus, in light of the discussions above, the Court is of the considered opinion that in this case, the petitioner had been served with notice to appear before the learned Tribunal on 3 (three) occasions. The notice was duly served and contains the signature of the petitioner towards acknowledgment of receipt of the notice. Moreover, despite notice being served thrice, the Tribunal had granted the petitioner enough opportunity to appear and contest the case, which the petitioner did not avail.

24. In this case, the default on part of the petitioner to appear and contest the case/ proceeding is deliberate and intentional. The petitioner has claimed in this writ petition that only when he went to the Office of the NRC, he came to know that he was declared to be a foreigner. The said statement appears to be *ex facie* false and cannot be believed for the simple reason that in the year 1997, his citizenship was doubted. Therefore, as a consequence, his name would either not appear in any subsequent voter list or even if his names appears in any subsequent voter list, against his name, a "D' mark would be entered. The letter 'D' is an abbreviation of word "doubtful". Thus from the year 1997 till 2018, i.e. 21 years, the petitioner did not take any steps to have his 'D' mark removed, itself is indicative of the fact that he was aware of the proceedings before the erstwhile IM(D)T and before the Foreigners Tribunal (2nd), Darrang, Mangaldai.

25. Therefore, on all counts, the petitioner has not been able to make out a case to interfere with the *ex parte* opinion dated 13.09.2018, passed by the learned Member, Foreigners Tribunal (2nd), Darrang, Mangaldai in F.T. 2nd

Case No.620/2008, arising out of Ref case No.7380/98.

26. Consequently, the writ petition fails and the same is dismissed.

27. The interim bail granted to the petitioner by order dated 13.05.2020, stands recalled. The consequences of the impugned opinion shall follow.

28. The parties are left to bear their own cost.

29. The learned standing counsel for the FT and Border matters is directed to transmit a downloaded copy of this order to the Home and Political (B) Department for their record.

30. The Registry shall return the learned Tribunal's record along with a copy of this order to be made a part of the record by the said learned Tribunal.

JUDGE **JUDGE**

Comparing Assistant

Munna Kumar

Digitally signed by Munna Kumar
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