

**(2009) 12 GAU CK 0027**  
**In the Gauhati High Court**  
**Case No : Writ Petition (C) No. 4031 of 2009**

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|---------------------------------------|------------|
| Malek Uddin @ Abdul Malek @ Malek Ali | APPELLANT  |
| Vs                                    |            |
| State of Assam and Others             | RESPONDENT |

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**Date of Decision :** 23-12-2009

**Acts Referred:**

Foreigners Act, 1946 — Section 9

**Citation :** (2010) 2 GLD 150

**Hon'ble Judges :** B.K. Sharma, J

**Bench :** Single Bench

**Advocate :** M.U. Mahmud, for the Appellant; S. Chakraborty, CGSC and R. Chakraborty, Addl. Sr. Govt. Advocate, for the Respondent

**Final Decision :** Dismissed

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## Judgement

B.K. Sharma, J.—The petitioner, who has been declared to be a foreigner (Bangladeshi national) by the Foreigners Tribunal-III Barpeta in FT Case No. 113(III)/2007 has invoked the writ jurisdiction of the Court assailing the legality and validity of the judgment and order dated 19.2.2009, passed by the Foreigners Tribunal.

2. The impugned judgment and order is ex-parte one as the petitioner failed to appear before the Tribunal after initial appearance. According to the petitioner, on receipt of notice from the Tribunal, he had engaged an advocate and appeared before the Tribunal on 7.11.2007 and also submitted written statement and relevant documents.

3. In paragraph 10 of the writ petition, the petitioner has stated that after submission of written statement, the Tribunal directed him to adduce witnesses but he could not do so as he was suffering from illness. Accordingly, the Tribunal on the basis of the evidence on record passed the impugned judgment and order. It is the case of the petitioner that the Tribunal has committed manifest error of law in declaring him to be a foreign national. Thus on failure of the petitioner to

discharge the burden of proof an envisaged u/s 9 of the Foreigners Act, the Tribunal had no other option than to pass the impugned judgment and order.

4. I have heard Mr. M.U. Mahmud, learned Counsel for the petitioner as well as Mr. S. Chakraborty, learned Addl. Senior Govt. Advocate, Assam. I have also perused the records of the Tribunal.

5. In the writ petition, the petitioner has described him as Malek Uddin alias Abdul Malek alias Malek Ali, son of Khalek alias Abdul Khalek. Thus, according to the petitioner he is known by three names. The records of the Tribunal have revealed that the proceeding against the petitioner was in the name of Malek Uddin S/o, Khalek without any alias in either name. Notice was also served in that name. The petitioner also appeared before the Tribunal in that name when he submitted his application dated 30.7.2007 praying for adjournment enabling him to file written statement. In the Vakalat-nama also, the petitioner named him as Malek Uddin without any alias. On 30.8.2007, the petitioner once again prayed for adjournment to file written statement. Same was repeated on 9.10.2007. In both the applications, the petitioner described him as Malek Uddin.

6. On 7.11.2007, the petitioner submitted his written statement describing him as Malek Uddin. In support of the written statement, an affidavit was filed in which also he named himself as Malek Uddin. Alongwith the written statement, the petitioner produced photocopies of Family Identity Card naming one Khalek Ali of Village Naligaon. He also produced photocopy of a certificate dated 26.7.2007 purportedly issued by Kajalgaon Village Council Developing Committee certifying that Abdul Malek is known to the Council since long and that his father's name appeared in the voter list of 2005. Document No. 3 is again a photocopy of a certificate issued by one Talebar Rahman on 28.4.2007 certifying that one Abdul Khalek, father late Jangnuddin is a resident of Naligaon and that his name was included in the voter list of 1970. Another certificate which is also a photocopy is dated 23.7.2005 and is to the same effect. A photocopy of the voter list of 1996 containing the name of Abdul Khalek was also produced.

7. Above were the documents on the basis of which the petitioner claimed Indian citizenship by birth, before the Tribunal. By no stretch of imagination, such documents that too; photocopies can establish the Indian citizenship of the petitioner, which he claims to be by birth. As per the declaration made in the affidavit filed in support of the writ petition, the petitioner is aged about 42 years. If that be so, it is not understood as to why the petitioner could not annex even a single copy of a voter list containing his name. Only voter list on which the petitioner placed reliance is of 1996 purportedly containing the name of his father.

8. The petitioner was to adduce evidence for which he prayed for time on 17.12.2007 and the same was allowed. Time was again prayed for on 15.3.2008 and the same was allowed as a last chance. However, again a prayer was made on 5.5.2008. Thereafter, the matter was fixed on 12.5.2008 but the petitioner

remained absent. On the next date fixed i.e. 8.7.2008 also, the petitioner remained absent without steps. On 20.9.2008, the petitioner reappeared before the Tribunal and prayed for another date to adduce evidence, which was allowed. Same was allowed fixing the matter on 19.11.2008. On 19.11.2008, another petition was filed seeking adjournment to adduce evidence and the same was allowed fixing the matter on 29.12.2008.

9. On 29.12.2008, the petitioner remained absent and on the subsequent dates, which are 20.1.2009 and 4.2.2009, also he remained absent and did not adduce any evidence.

10. In the aforesaid facts and circumstances, the Tribunal had no other alternative than to proceed ex-parte against the petitioner. Accordingly, the impugned judgment and order was passed on 19.2.2009.

11. When the aforesaid fact relating to non-appearance of the petitioner was noticed by this Court, an order was passed on 18.9.2009 directing the petitioner to explain the circumstances. In response to the said order, a submission was made on 26.10.2009 that the petitioner had filed an additional affidavit on 24.9.2009. Accordingly, the case was directed to be listed for order on 28.10.2009 along with the said additional affidavit. The matter was again taken up on 30.10.2009 and it was found that infact, the additional affidavit said to have been filed on 24.9.2009 was not filed and the learned Counsel for the petitioner failed to submit any filing number. It was noticed that the Registry had furnished a report dated 28.10.2009 that no additional affidavit had been filed.

12. The matter was taken up on 31.10.2009. It was submitted that the additional affidavit was filed on 30.10.2009. Thus, there was mis-statement even in respect of filing the additional affidavit before this Court.

13. Be that as it may, let us now examine what is the stand of the petitioner in the additional affidavit. In paragraph 2 of the additional affidavit, the following statement has been made:

2. That the deponent begs to state that at the early stage of trial of the FT (III) Barpeta in case No. 113 (III)/07, he engaged an advocate namely Matleb Mamud of Barpeta and submitted all the relevant document to him. The learned advocate through deponent filed written statement but did not advise him that in support of statement, he shall have to adduce witness. Latter on, the deponent fell in illness and could not meet the advocate, nor the learned lawyer make any communication with the deponent asking to adduce witness. In such a situation, the learned Tribunal passed an ex parte judgment and order, dated 19.2.2009 in connection with FT (III) Barpeta case No. 113 (III)/07 declaring the deponent a foreigner, though he is an Indian citizen by birth supported with well founded documents. Therefore, the Hon"ble Court may allow the deponent to implead the learned advocate namely Mr. Matleb Mamud, Advocate, Barpeta, Assam in the instant writ petition (C) No. 4031/2009 as respondent No. 4.

12. The above statement in the additional affidavit is contrary to the earlier stand in the writ petition. In the writ petition, the only ground assigned for not adducing evidence is the illness of the petitioner for which he could not appear before the Tribunal. However, in the additional affidavit, the petitioner has played the blame game on his advocate without making him party respondent to this proceeding. Although, it is the stand of the petitioner in the additional affidavit that his engaged advocate did not advise him that he would be required to adduce evidence but in the writ petition (paragraph 10), it is the specific stand of the petitioner that the Tribunal directed him to adduce evidence but he could not do so due to his illness. Thus, the petitioner by filing the additional affidavit has taken recourse of falsehood.

13. As against the aforesaid stand of the petitioner in the additional affidavit, the records of the Tribunal have revealed otherwise as discussed above. Although, it is the stand of the petitioner that his engaged advocate did not advise him that he would be required to adduce evidence but it appears from the records that the petitioner filed applications on 17.12.2007, 15.3.2008, 20.9.2008 and 19.11.2008 praying for adjournment to adduce evidence. In the application dated 19.11.2008, the petitioner admitted that he could not produce the originals of the documents annexed to the written statement.

14. From the above, 3 (three) things have emerged. Firstly, the petitioner has taken recourse to falsehood; secondly, although he had filed a written statement but produced only photocopies of document which are in-admissible in evidence; thirdly, he failed to adduce evidence, although opportunity was given to him.

15. Above being the position, I do not find any infirmity in the impugned judgment and order.

16. In paragraph 9 of the writ petition, the petitioner has stated about the filling of the written statement in the Tribunal alongwith the documents annexed to the writ petition. In the writ petition, the petitioner has annexed various documents, which did not form part of the documents annexed to the written statement. Thus, on this count also, the petitioner has made a false statement. The documents annexed to the writ petition are some photocopies of voter lists, which have got no evidentiary value. Mere production of photocopies of voter list cannot establish the Indian citizenship of the petitioner, which he claims to be by birth. The 1965 and 1970 voter lists allegedly contained the name of the father and grand father of the petitioner. However, there is no explanation as to why their names do not appear in any other voter list. The name of the petitioner appeared in the voter list of 2005, photocopy of which has been annexed to the writ petition. The petitioner has also annexed photocopy of 1997 voter list purportedly containing his father's name.

17. In the writ petition, the petitioner has declared his age as 42 years. If that be so, it is not understood as to why his name appeared only in 2005 voter list and none else. Moreover, as has been held by the Apex Court in Bhanwaroo Khan and

Others Vs. Union of India (UOI) and Others, long stay in the country and enrolment in the voter lists would not confer any right on an alien to continue to stay in the country.

18. For all the aforesaid reasons, I do not find any infirmity in the impugned judgment and order dated 19.2.2009 passed by the Foreigners Tribunal (III) Barpeta in FT Case No. 113 (III)/07. Accordingly, the writ petition is dismissed.

19. By order dated 10.11.2009, certain directions were issued to the Superintendent of Police, Barpeta to ensure presence of the petitioner. He is now directed to take the petitioner into custody, if not already in custody and then to detain him in jail/detention camp till such time deported/pushed back to Bangladesh. Direction is also issued to the Deputy Commissioner, Barpeta to ensure deletion of the name of the petitioner from the voter list, if any.

20. Let the compliance report be furnished by the Superintendent of Police and the Deputy Commissioner, Barpeta, for perusal of which, the Registry shall list the matter again on 29.1.2010.

21. Let copies of this judgment and order be sent to the Union of India in the Home Ministry as well as to the Superintendent of Police and the Deputy Commissioner, Barpeta. Further a copy of this order be furnished to Ms. R. Chakraborty, learned Addl. Senior Govt. Advocate, for her necessary follow up.

22. Let the LCR be sent down immediately alongwith a copy of this judgment and order.