

(2021) 08 GAU CK 0072

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 2221 Of 2020

Md. Sujab Ali

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 20-08-2021

Acts Referred:

Foreigners Act, 1946 — Section 9

Evidence Act, 1872 — Section 50, 59, 67, 101, 106

Citation : (2021) 08 GAU CK 0072

Hon'ble Judges : N. Kotiswar Singh, J;Soumitra Saikia, J

Bench : Division Bench

Advocate : J. Ahmed, P.S. Bhattacharjee, J. Payeng, L. Devi, B. Das

Final Decision : Allowed

Judgement

1. This writ petition is preferred by the petitioner-Sujab Ali, being aggrieved by the Order dated 27.02.2020 passed by F.T Kamrup (M) 2nd Guwahati-

3 in F.T. Case No. 1638/2015, by which, on a reference being made that he entered Assam, illegally without any valid travel documents after 24th of

March, 1971, was answered in the affirmative in favour of the State and against the petitioner by declaring him to be a Foreigner of post 25.03.1971

from Bangladesh and ordered for his detention, deportation and deletion of his name from all voters lists.

2. Heard learned Counsel for the parties and perused the records of the Tribunal.

3. The petitioner's case before the Tribunal is that he is a citizen of India, having been born on 11.01.1992 in the district of Dhubri in the village

South Salmara, Part-1 and he was educated in the Teltari Noeagaon L.P. School, village- Teltari, Noeagaon, P.S. South Salmara, District-Dhubri,

Assam. In the written statement filed before the Tribunal the petitioner projected

one Abdul Majid @ Abdul Majid Sheikh to be his grandfather and Nosiman Nessa to be his grandmother. His great grandfather was Kasimuddin and his great grandmother was Goroman Nessa. The petitioner claims that Sayed Ali was his father and Toyer Bhanu Nessa @ Toyer Bhanu Nessa Bibi, his mother. The petitioner stated in his Written Statement that his father was born on 01.01.1958 in village-Isshav Dewangirpara and started living with his parents there but due to river erosion his father and his relatives shifted to another place namely, Natinir Alaga Part-II and later got married to Toyer Bhanu Nessa @ Toyer Bhanu Nessa Bibi and three children were born to them namely, Tozamal Hoque @ Tojammel Hoque, Mojammel Hoque and the writ petitioner namely, Sujab Ali.

The petitioner claims that he is the permanent resident of village-South Salmara, Part-I, P.S-South Salmara in the district of South Salmara and is a

mason by profession. He denied the claim of the State made in the reference that he is a foreigner who had entered Assam after 25th of March, 1971

from the specified area namely Bangladesh. The petitioner produced three witnesses in support of his claim, namely, D.W.1, (the petitioner

himself), Tojammel Hoque, his elder brother as D.W.2 and one Sayed Ali stated to be his father as D.W.3. One Sukur Ali Deo, the cousin of the

grandfather of the proceedee was also examined as D.W.4. The petitioner exhibited 39 documents before the Tribunal.

4. The learned counsel for the petitioner submits that inspite of sufficient evidences laid before the Tribunal both in the form of documentary and oral evidences, the Foreigners Tribunal failed to appreciate the evidences presented and declared the petitioner to be a foreigner.

The learned counsel for the petitioner strongly urges that the manner in which the Tribunal came to the conclusion is totally in conflict with the

provisions of law in as much as the relevant materials and the evidences which were placed before the Tribunal were not considered in the proper

perspective and consequently, the evidences which are admittedly in support of the statements made by the proceedee in order to substantiate his

claim that he is a citizen of India, were overlooked. As a consequence of the order, the petitioner was arrested and he is presently in detention.

5. The learned counsel for the petitioner in support of his contentions has relied upon the following Judgments:-

1. WP(C) No. 1818 of 2019, Haidar Ali Vs. The Union of India & Ors., decided on 30.03.2021.
2. Sirajul Haque Vs. The State of Assam & Ors., 2019 (5) SCC 534, decided on 14.02.2019.
3. The State of Assam & Anr. Vs. Moslem Mandal & Ors., 2013 (1) GLT-809, decided on 03.01.2013.
4. Bant Singh & Anr. Vs. Niranjan Singh (D) by Lrs. & Anr., 2008(4) SCC 75, decided on 15.02.2008.
5. Tulsa & Ors. Vs. Durghatiya & Ors., 2008 (4) SCC-520, decided on 15.01.2008.
6. Dolgobinda Paricha â?" Vs. Nimai Charan Misra & Ors., 1959 Supl (2) SCR-814, AIR 1959 SC-914 decided on 27.04.1959.
7. Abdul Matali @ Mataleb (MD)- Vs. Union of India & Ors., 2015(2) GLT 617, decided on 08.11.2013.
8. Motior Rahman- Vs. Union of India & Ors., 2020 (I) GLT 330, decided on 26.11.2019.
9. Bhima Tima Dhotrem Vs. The Pioneer Chemical Co., (1968) 70 BOMLR-683 Bom LR decided on 23.06.1967.

6. Per contra, the learned Special counsel Mr. J. Payeng, appearing for the State strongly opposes the contentions made

by the learned counsel for the petitioner by submitting that Section 9 of the Foreigners Act, 1946 stipulates that the burden of proof lies on the person

against whom the allegation is made that he is a foreigner. The learned Government counsel submits that the order of the Foreignersâ?? Tribunal is a

very elaborate one which minutely describes the evidences brought out by the petitioner seeking to project himself to be an Indian citizen. The learned

Government counsel further submits that the interpretation of Section 9 has been elaborately dealt with by the Apex Court in the case of Sarbananda

Sonowal Vs. Union of India & Anr. reported in (2005) 5 SCC 665 and therefore, the same is binding on all including this High Court. It has been

accordingly submitted that the Tribunal having dealt with the matter in terms of the Judicial pronouncements made by the Apex Court as well as by

this Court in several matters, the impugned order passed by the Foreignersâ?? Tribunal F.T Kamrup (M) 2nd Guwahati-3 in F.T. Case No.

1638/2015 does not require any interference by this Court.

7. The petitioner in support of his case exhibited the following 39 documents

before the Foreignersâ?? Tribunal:-

â??Exhibit- 1 : Pan Card in the name of Sayed All S/o Abdul Majid showing Date of Birth 01.10.1958.

Exhibit-2: Voter ID Card of Sayed All S/o A. Majid.

Exhibit-3 : 1951 NRC copy in the name of Khoeja Sk S/o Kasimuddin 60 yrs and others of village 301 Isob Dewanir Para, P.S. South

Salmara, Sub-Division-Dhubri.

Exhibit-4: Land Deed in the name of Sayed Ali S/o Abdul Mazid dated 05.11.1969.

Exhibit-5 : Land Deed In the name of Musstt Toyor Bhan Nessa, W/o Md. Sayed Ali dated 09.05.1980.

Exhibit-6: School certificate dated 01.09.1989 issued by Headmaster of 181 No. Dakhin Salmara J.B Prathamik Vidyalaya in the name of

Musstt. Toyab Bhanu Nessa D/o Md Siraj Uddin Bepari.

Exhibit-7 : Certified Voter list of 1970 of 32 Dakhin Salmara LAC, H/No. 18, SI. No. 84 contains name of A. Sukur S/o Khanja 28 yrs.

Exhibit-8 : Certified Voter list of 1977 of 22 Dakhin Salmara LAC, H/No. 76, SI. No. 237, 238 contains name of A. Sukur S/o Khanja 36

yrs, Sabiran Nessa W/o Sukur 34 yrs.

Exhibit-9 : Certified Voter list of 1985 of 22 Dakhin Salmara LAC, H/No. 173, SI. No. 305, 306, 307, 308 contains name of Sukur S/o

Khunja 39 yrs, Samran W/o Sukur 35 yrs, Samiyel S/o Sukur 23 yrs, Jarina W/o Khunja 74 yrs.

Exhibit-10 ; Certified Voter list of 1989 of 22 Dakhin Salmara LAC, H/No. 140, SI. No. 701, 702, 703, 704 contains name of Sukur All S/o

Khuju Dewanl 46 yrs, Samiran Nessa W/o Sukur 36 yrs, Samiyal Hoque Â§/o Sukur 25 yrs, Mamtaj Begum W/o Samiyal 27 yrs.

Exhibit-11 : Certified Voter list of 1994 of 22 Dakhin Salmara LAC, H/No. 10, SI, No. 26, 27, 28, 29 contains name of Sukur Ali S/o Khuja

Dewani 52 yrs, Samiran Nessa W/o Sukur Ali 27 yrs, Samiyal Hoque S/o Sukur All 27 yrs, Mamata Khatun W/o Samiyal Hoque 23 yrs,

Exhibit-12 : Certified Voter list of 2005 of 22 Dakhin Salmara LAC, H/No. 8, SI. No. 19, 20, 21 contains name of Sukur Ali D S/o Khuinja

Sheikh 57 yrs, Samiran Nessa W/o Sukur Ali S 47 yrs, Abdus Subur S/o Sukur Ali D 27 yrs.

Exhibit-13 : Certified Voter list of 2011 of 22 Dakhin Salmara LAC, H/No. 8, SI. No. 21, 22, 23 contains name of Sukur Ali D S/o Khuinja

Sheikh 64 yrs, Samiran Nessa W/o Sukur Ali S 54 yrs, Subur Ali Ansari S/o Sukur Ali D 32 yrs.

Exhibit-14 : Certified Voter list of 2015 of 22 Dakhin Salmara LAC, P/No. 140, H/No. 8, SI. No. 20, 21, 22 contains name of Sukur Ali D

S/o Khuinja. Sheikh 66 yrs, Samiran Nessa W/o Sukur Ali D 56 yrs, Subur Ali Ansari S/o Sukur Ali D 34 yrs.

Exhibit-15 : Certified Voter list of 2019 of 22 Dakhin Salmara LAC, P/No. 175, H/No. 8, SI. No. 33 22 contains name of Sukur Ali D S/o

Khuinja Sheikh 69 yrs.

Exhibit-16 : Voter ID Card of Sukur Ali Deo S/o Khuinaja Sheikh.

Exhibit-17 : Certified Voter list of 1979 of 22 Dakhin Salmara LAC, H/No. 80KA, SI. No. 621, 622 contains name of Soyed Ali S/o Abdul

Majid 30 yrs, Toirbhanu Bibi W/o Sabed 22 yrs.

Exhibit-18 : Certified Voter list of 1985 of 22 Dakhin Salmara LAC, H/No. 170, SI. No. 297, 298 contains name of Soyed S/o Abdul 35 yrs,

Toirbhanu W/o Soyed 30 yrs.

Exhibit-19 ; Certified Voter list of 1989 of 22 Dakhin Salmara LAC, H/No. 137, SI. No. 690, 691 contains name of Soyed Ali S/o A Majid 32

yrs, Toirbhan W/o Soyed Ali 27 yrs.

Exhibit-20 : Certified Voter list of 1994 of 22 Dakhin Salmara LAC, H/No. 20, SI. No. 45 contains name of Soyed Ali S/o A Majid 35 yrs.

Exhibit-21 : Certified Voter list of 1997 of 22 Dakhin Salmara LAC, H/No. 247, SI. No. 643 contains name of Soyed Ali S/o A Majid 41 yrs.

Exhibit-22 : Certified Voter list of 2005 of 22 Dakhin Salmara LAC, P/No. 104, H/No. 136, SI. No. 315 contains name of Soyed Ali S/o A

Majid 47 yrs.

Exhibit-23 : Certified Voter list of 2011 of 22 Dakhin Salmara LAC, P/No. 140, H/No. 136, SI. No. 319 contains name of Soyed Ali S/o A.

Majid 54 yrs.

Exhibit-24 : Certified Voter list of 2015 of 22 Dakhin Salmara LAC, P/No. 140, H/No. 136, SI. No. 316 contains name of Soyed Ali S/o A.

Majid 56 yrs.

Exhibit-25 : Certified Voter list of 2019 of 22 Dakhin Salmara LAC, P/No. 175, H/No. 136, SI. No. 426 contains name of Soyed Ali S/o A.

Majid 59 yrs.

Exhibit-26 : Certified Voter list of 2002 of 22 Dakhin Salmara LAC, H/No. 49, contains name of Tojammel Hoque S/o Sayed Ali 22 yrs.

Exhibit-27 : Certified Voter list of 2005 of 22 Dakhin Salmara LAC, P/No. 89, H/No. 271, contains name of Tojammel Hoque S/o Sayed Ali
25 yrs.

Exhibit -28 : Certified Voter list of 2011 of 22 Dakhin Salmara LAC, P/No. 123, H/No. 271, SI No. 641, 642, 643 contains name of

Tojammel Hoque S/o Sayed Ali 32 yrs, Sujab Ali S/o Sayed Ali 24 yrs, Sahera Khatun W/o Sujab Ali 22 yrs.

Exhibit-29 : Certified Voter list of 2015 of 22 Dakhin Salmara LAC, P/No. 123, H/No. 271, SI No. 694, 695, 696, 697 contains name of

Tojammel Hoque S/o Sayed Ali 34 yrs, Sujab Ali S/o Sayed Ali 26 yrs, Begum Moklesa Khatun W/o Tojammel Hoque 25 yrs, Sahera Khatun

W/o Sujab Ali 24 yrs.

Exhibit-30 : Certified Voter list of 2019 of 22 Dakhin Salmara LAC, P/No. 154, H/No. 271, SI No. 750, 751, 752, 753 contains name of

Tojammel Hoque S/o Sayed Ali 37 yrs, Sujab Ali S/o Sayed Ali 29 yrs, Begum Moklesa Khatun W/o Tojammel Hoque 28 yrs, Sahera Khatun

W/o Sujab Ali 27 yrs.

Exhibit-31 : Voter ID Card of Tojammel Hoque S/o Sayed Ali.

Exhibit-32 : HSLC examination Admit Card of Year 1997 issued by Controller of Examination, SEBA, Assam, Guwahati-781921 in the name
of Tozammel Hoque S/o Md Soyed Ali.

Exhibit-33 : Certified Voter list of 2011 of 22 Dakhin Salmara LAC, P/No. 123, H/No. 271, SI No. 641, 642, 643 contains name of Tojammel

Hoque S/o Sayed Ali 32 yrs, Sujab Ali S/o Sayed Ali 24 yrs, Sahera Khatun W/o Sujab Ali 22 yrs.

Exhibit-34 : Certified Voter list of 2015 of 22 Dakhin Salmara LAC, P/No. 123, H/No. 271, SI No. 694, 695, 696, 697 contains name of

Tojammel Hoque S/o Sayed Ali 34 yrs, Sujab Ali S/o Sayed Ali 26 yrs, Begum Moklesa Khatun W/o Tojammel Hoque 25 yrs, Sahera Khatun

W/o Sujab Ali 24 yrs.

Exhibit-35 : Certified Voter list of 2019 of 22 Dakhin Salmara LAC, P/No. 154, H/ No. 271, SI No. 750, 751, 752, 753 contains name of

Tojammel Hoque S/o Sayed Ali 37 yrs, Sujab Ali S/o Sayed Ali 29 yrs, Begum - Moklesa Khatun W/o Tojammel Hoque 28 yrs, Sahera Khatun

W/o Sujab Ali 27 yrs.

Exhibit-36 : Resident Certificate dated 07.11.2019 issued by Gaonbura of S/ Salmara Pt-I in the name of Sujab Ali S/o Sayed Ali of village

South Salmara Pt-I, Dist. South Salmara Mankachar.

Exhibit-37 : Draft NRC published on 30th July 2018 containing name of Md Tojammel Hoque S/o Sayed Ali, Sujab Ali S/o Sayed Ali and

others.

Exhibit-38 : Voter ID Card No. GCL1240977 of Sujab Ali S/o Sayed Ali aged 25 yrs issued on 01.10.2013.

Exhibit-39 : School Certificate dated 31.12.2019 issued by Head Teacher of 835 Asamer Alga L.P School In the name of Sayed Ali S/o Lt.

Abdul Mazid Sheikh stating he completed education In December 1972.

8. The Tribunal however, held that the various documents which were exhibited, did not prove the link between the petitioner and his projected father.

The oral evidence adduced by the petitioner and his three witnesses were also not considered to be sufficient to establish the link between his father

or mother to support his contentions that they were present in India prior to 24th of March, 1971.

9. The learned Tribunal in so far as Exhibit 6: School Certificate, Exhibit 32: HSLC examination Admit Card, Exhibit 36: Resident Certificate dated

07.11.2019 and Exhibit 39: School Certificate dated 31.12.2019 showing the name of Sayed Ali, are concerned, held that these are not admissible in

evidence as the same were not proved by examining the competent authority, who issued the certificates. In so far as Exhibit 1: PAN Card and

Exhibit 2: Voter ID Card of petitioner and Exhibit 3: 1951 NRC copy showing the name of Khoeja Sheikh, son of Kasimuddin projected to be the great

grandfather of the petitioner, are concerned, these were considered to be not admissible in evidence on the basis of several orders and judgments of

this Court.

10. The judgments referred to by the petitioner, namely, Haidar Ali Vs Union of India (supra) delivered by this Court pertains to appreciation of

evidences. However, the facts of the present case are distinguishable from the facts involved in the said case, as such not applicable to the present

case. The case of Sirajul Haque (supra) relied upon by the learned counsel for the petitioner is in respect of minor discrepancies which may be noticed

in the Voter's List. In the facts of the present case, Sirajul Hoque (supra) will not come to the aid of the petitioner. In Moslem Mandal (supra)

rendered by Full Bench of this Court, it was held that the principles of appreciation of evidence and the burden of proof will have to be applied on the

facts in each and every case. In so far as Bant Singh (supra) is concerned, the learned counsel for the petitioner relies on the Judgment to support his

contention that the oral evidences adduced by the petitioner were not considered by the Tribunal. In so far as the judgments of the Apex Court in

Tulsa (supra) and Dolgobinda Paricha (supra) are concerned, the same pertain to appreciation of oral evidences by courts.

The learned counsel for the petitioner relied on Dolgobinda Paricha (supra) to submit that all oral evidence must be considered in terms of Section 50

of the Evidence Act. In the context of the present proceedings, though the evidence of the relatives of the proceedee namely, the father, the elder

brother and the grandfather of his cousin were adduced before the Tribunal, the Tribunal failed to consider such evidences adduced by the petitioner.

The decision in Dolgobinda Paricha (supra) has been followed in Bant Singh and Another reported in 2008 (4) SCC 75. The judgment of this Court in

Abdul Matali @ Matalieb (supra) pressed into service by the petitioner, has in the meanwhile been distinguished in a subsequent Division Bench

decision of this Court on facts. Similarly, the judgment of this Court in Motiur Rahman Vs Union of India (supra) will have to be understood in light of

the facts of the case which were in consideration before the Court. The Bombay High Court judgment relied upon by the petitioner pertains to the

interpretation of Section 67 and Section 59 of the Evidence Act. While there can be no quarrel with the proposition laid by the Bombay High Court,

the same will have to be understood in the context of the facts of this case in the present proceedings.

11. Having examined the order impugned in the present proceedings, it is seen that although the petitioner had exhibited as many as 39 documents, the

Foreignersâ?? Tribunal held that Exhibit 4: Land Deed in the name of Sayed Ali S/o- Abdul Mazid dated 05.11.1969, i.e. his father and Exhibit 5:

Land Deed in the name of Musstt. Toyer Bhan Nessa, W/o- Md. Sayed Ali dated 09.05.1980 i.e. his mother, Exhibit 6: School Certificate dated

01.09.1989 issued by Headmaster of 181 No. Dakhin Salmara J.B. Prathamik Vidyalaya in the name of Musstt. Toyab Bhanu Nessa, D/o Md. Siraj

Uddin Bepari, Exhibit 32: HSLC examination Admit Card for the year 1997 issued by Controller of Examination, SEBA, Assam, Guwahati-781021 in

the name of Tozammel Hoque S/o- Md. Sayed Ali, (who is projected to be the elder brother of the petitioner/proceedee), Exhibit 36: Residential

Certificate dated 07.11.2019 issued by the Gaonburah of South Salmara Part-I in the name of Sujab Ali, S/o- Sayed Ali and Exhibit 39: School

Certificate dated 31.12.2019 issued by Head Teacher of 835 Asamer Alga L.P. School in the name of Sayed Ali, S/o-Lt. Abdul Mazid Sheikh; do not

establish the necessary link between the petitioner and his projected father namely, Sayed Ali or his mother namely, Musstt. Toyer Bhan Nessa.

The Tribunal also held that the linkage through his grandfather or great grandfather also could not be established by the petitioner through the

documents exhibited. The Voters lists for the year 2011, 2015 and 2019 which have been exhibited before the Tribunal reflect the name of the

petitioner. The age of the petitioner as pleaded before the Foreignersâ?? Tribunal was 28 years in 2020. As such his birth will be in the year 1992,

and therefore, he became a major in the year 2010. However, the Tribunal disbelieved the Voters List of 2011 (Exhibit 28), Voters List of 2015

(Exhibit 29) and Voters List of 2019 (Exhibit 30) which reflect the name of the petitioner along with his projected brother, his wife and his sister-in-

law. The Tribunal disbelieved the Voters Lists projecting his father or his mother and refused to accept the contention of the petitioner that he had

been able to establish the linkage between his projected father or his mother.

12. The Tribunal while referring to all the 39 exhibits has not described as to why the Voters Lists or the other documents including the land

documents projected were not accepted by the Tribunal. The Tribunal did not give reasons as to why the exhibits are not admissible in evidence. What

is also noticed is that the oral evidences by four (4) witnesses produced by the petitioner including himself have been disbelieved without giving any

reasons.

13. This Court in the full Bench Judgment of State of Assam & Anr vs- Moslem Mandal & Ors., 2013 (I) GLT 809 in para 77 and 78 had

specifically laid down that the evidence adduced before the Tribunal will have to be considered and analyzed to come to a finding that the same are

not sufficient for establishing the link sought to be established by any proceedee. The relevant paragraphs of the judgment extracted below:-

77. According to Phipson, who is considered to be an authority on the Law of Evidence, the phrase, "burden of proof", has three

meanings, namely, (i) the persuasive burden, the burden of proof as a matter of law and pleading the burden of establishing a case,

whether by preponderance of evidence or beyond a reasonable doubt; (ii) the evidential burden, the burden of proof in the sense of

adducing evidence; and (iii) the burden of establishing the admissibility of evidence. While persuasive burden i.e. onus probandi never

shifts and is always stable, the evidential burden may shift constantly, according as one scale of evidence or other preponderates. Onus

probandi rests upon the party, who would fail if no evidence at all is adduced. The general principle of burden of proof that he who

invokes the aid of law should be the first to prove his case may be affected by statutory provision, e.g. in a case where the matters within the

knowledge of the person against whom a proceeding is initiated, like the proceeding under the provisions of the 1946 Act, as it will not only

be difficult but also impossible for the State, at whose instance reference is made to the Tribunal, to first lead evidence on the question as to

whether a person against whom such proceeding is initiated is a foreigner or not. The provision of Section 9 of the 1946 Act is, therefore, in

accordance with the underlying policy of Section 106 of the Evidence Act, which provides that when any fact is especially within the

knowledge of any person, the burden of proving that fact is upon him. In a proceeding before the Tribunal under the provisions of the 1946

Act, the provisions of Section 101 of the Evidence Act is not at all applicable, an exception having been carved out by Section 9 of the said

Act. Even in a proceeding where the provisions of Sections 101 and 106 of the Evidence Act are applicable, the burden of proving any fact

which is especially within the knowledge of any person, is upon such person, by virtue of Section 106 of the Evidence Act, which is an

exception to Section 101 i.e. the general rule of the burden of proof in such proceeding.

78. In a proceeding under the Foreigners Act, 1946 read with 1964 Order the issue is whether the proceedee is a foreigner. It being a fact

especially within the knowledge of the proceedee, the burden of proving that he is a citizen is, therefore, upon him, because of Section 9 of

the 1946 Act and it is, therefore, his obligation to provide enough evidence to establish that he is not a foreigner. In an ex-parte proceeding

before the Tribunal constituted under the provisions of 1964 Order the said position would not be changed as the burden of proving that

the proceedee is not a foreigner continues to be upon the proceedee, which cannot shift and when the proceedee does not adduce any

evidence to discharge such burden, the Tribunal has no alternative but to opine the proceedee as a foreigner, having regard to the main

grounds on which the reference has been initiated and the notice having been issued to the proceedee. Unlike in a suit in the Civil Court,

where the Court may require the plaintiff to adduce evidence to prove his case even in an ex-parte proceeding, as the burden of proof lies

on the plaintiff in view of Section 101 of the Evidence Act, in a proceeding before the Tribunal under the provisions of 1946 Act read with

1964 Order, the same is not required, meaning thereby that the State is not required to adduce evidence in an ex-parte proceeding, as the

burden lies on the proceedee to prove to the satisfaction of the Tribunal that he is not a foreigner, in view of the provisions contained in

Section 9 of the 1946 Act.â??

14. It is also noticed that the land documents, copies of which were produced by the petitioner before the Tribunal, are seen have been accepted as

exhibits from the LCR. What is not evident from the recital of the impugned order of the Foreignersâ?? Tribunal, is whether these documents were

presented before the Tribunal in the manner and the procedure laid down under the Indian Evidence Act, 1872 in order to substantiate the claim of the

petitioner. What is available in the LCR are photocopies from the certified copies of the land documents. As per provisions of the Evidence Act unless

the documents presented before the court satisfy the procedure laid down under the Evidence Act, the same will not be admissible. However, no such findings are discernable from the recital of the impugned order nor has it been disclosed in the pleadings that the documents presented before the Tribunal are public documents and therefore, the requirements of the provisions of the Evidence Act had been satisfied. Such a plea has not been taken specifically nor has it been dealt with by the Tribunal in spite of the documents being admitted to evidence. If the documents satisfy the requirements of law, then the same will have to be accepted by the Tribunal and then the same have to be analyzed to see whether these support the linkage the petitioner has sought to establish.

15. The impugned order of the Tribunal also does not refer to the evidences adduced on behalf of the proceedee/petitioner. As has been held by the Apex Court in *Dolgobinda Paricha* (supra) in respect of Section 50 of the Evidence Act that there are three essential requirements to Section 50 of the Evidence Act namely, (1) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfill the condition laid down in the later part of the section.

The Apex Court held that "opinion" means something more than mere retelling of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. The Apex Court further held that the true scope and effect of Section 50 of the Evidence Act has been correctly and succinctly put in *Chandu Lal Agarwala Vs Khalilar Rahman* reported in ILR (1942) 2 Cal 299, 309, in the following words,

"It is only 'opinion as expressed by conduct' which is made relevant. This is how the conduct comes in. The offered item of evidence is 'the conduct', but what is made admissible in evidence is 'the opinion', the opinion as expressed by such conduct.

The offered item of evidence thus only moves the court to an intermediate

decision: its immediate effect is only to move the court to see if this conduct establishes any "opinion" of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the court to infer "the opinion", the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the "opinion".

When the conduct is of such a tenor, the court only gets to a relevant piece of evidence, namely, the opinion of a person. It still remains for

the court to weigh such evidence and come to its own opinion as to the factum probandum" as to the relationship in question."

16. Under the circumstances, we find that the documents exhibited and the oral evidences adduced by the petitioner before the Tribunal have not been

considered by the Tribunal, and no reasons are discernible in the impugned order so as to enable this Court to appreciate the basis of rejection of these

evidences by the Tribunal. Under the circumstances we are constrained to interfere with the impugned order dated 27.02.2020 passed by F.T Kamrup

(M) 2nd Guwahati-3 in F.T. Case No. 1638/2015 and remand the matter back to the Tribunal to hear the same again and arrive at a judicious finding

on the basis of proper evaluation and appreciation of the evidences presented before the Foreigners' Tribunal.

17. Accordingly, the impugned order dated: 27.02.2020 is interfered with, set aside and quashed.

18. It is submitted before this Court that the petitioner is in detention since 27.02.2020. In view of the interference of the impugned order, the petitioner

be released forthwith from his detention. However, since the matter has been remanded back for a fresh hearing before the Tribunal, and as the

citizenship of the petitioner has come under a cloud, the petitioner will appear before the Deputy Commissioner of Police (B), Guwahati and furnish a

bail bond of Rs.5000/- (Rupees five thousand) only pursuant to which he shall be permitted to remain on bail during the hearing of the matter afresh.

At the time of executing the bail bond, the Deputy Commissioner of Police (B), Guwahati shall take photograph the petitioner and also record the

biometrics of the iris of both the eyes of the petitioner as well as the fingerprints of both the hands of the petitioner.

19. The matter is accordingly, remanded to the Tribunal for fresh consideration

as directed above.

It is expected that the matter be expeditiously heard and a fresh opinion be rendered on the evidences adduced before the Tribunal in accordance with law.

20. The petitioner on being released on bail shall appear before Foreignersâ?? Tribunal on or before 20th September, 2021 without fail. In the event, the petitioner fails to appear before the Tribunal as directed, the Deputy Commissioner of Police (B), Guwahati will cancel the bail and keep him under detention until such further order as may be passed by the Tribunal.

21. Writ petition is accordingly allowed to the extent indicated above.

22. Remit the LCR forthwith.