

GAHC010046482021

REPORTABLE



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

Case No. : WP(C)/2279/2021

RUKIA BEGUM BARBHUIYA @ RUKIA BEGUM
W/O- KARIM UDDIN, D/O- LT. HAFIZ UDDIN BARBHUIYA OF VILL- SEWTI
PART-I, P.S. KATIGORAH, DIST.- CACHAR, ASSAM

VERSUS

THE UNION OF INDIA AND 5 ORS
REP. BY THE COMM. AND SECY. TO THE GOVT. OF INDIA, HOME DEPTT.,
NEW DELHI-1, INDIA

2:THE STATE OF ASSAM
THE COMM. AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY-6

3:THE STATE CO-ORDINATOR
NATIONAL REGISTER OF CITIZENS (NRC)
ASSAM
ACHYUT PLAZA
BHANGAGARH
GHY-5

4:THE ELECTION COMMISSION OF INDIA
TO BE REP. BY THE COMMISSIONER
NIRVACHAN SADAN
ASHOKA ROAD
DELHI- 110001

5:THE DY. COMMISSIONER
CACHAR
P.O. P.S. SILCHAR
DIST.- CACHAR
ASSAM

6:THE SUPERINTENDENT OF POLICE (B)
CACHAR
DIST.- CACHAR
ASSA

Advocate for the Petitioner : MR. A M S MAZUMDER

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

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA
HONOURABLE MR. JUSTICE NELSON SAILO

JUDGMENT & ORDER (ORAL)

12.06.2023

(AM Bujor Barua, J)

Heard Mr. AMS Mazumder, learned counsel for the petitioner. Also heard Mr. D Mozumdar, learned Additional Advocate General, Assam, assisted by Mr. G Sarma, learned Special Standing Counsel, Foreigners Tribunal for the Home Department, Government of Assam as well as the Superintendent of Police (B) Cachar, Ms. L Devi, learned CGC for the respondents in the Union of India, as well as for the authorities under the NRC, Mr. AI Ali, learned counsel for the authorities under the Election Commission of India and Ms. U Das, learned Government Advocate for the Deputy Commissioner, Cachar.

2. The petitioner Rukia Begum Barbhuiya @ Rukia Begum was referred to the

Foreigners Tribunal 4th Cachar Silchar resulting in the registration of F. 4th/D/415/2015. The Tribunal passed an order dated 25.01.2019 which is extracted as below:

“O.P. is absent without any step. S.P.(B) Cachar referred the case for opinion whether OP is Indian or Foreigner. In the reference L.V.O. stated that OP produced valid document for which she has to be beyond doubt. The reference itself and as per verdict of the Gauhati High Court in WP(C) No. 7104/2015 stated that if tribunal prima facie arrives at a satisfaction that reference made to it is faulty and contrary to the materials on record, the tribunal should send back the reference to the referral authority with a disagreement note pointing out that the error or fault in the reference. Once reference is returned back to the referral authority, it would be the duty of the referral authority to make a fresh reference to the tribunal after removing the defect or fault as pointed out by the tribunal. Hence, this reference is returned back to the S.P.(B), Cachar to make a fresh reference after removing the defect or faults. With this observation instant case is disposed of.”

3. A reading of the order dated 25.01.2019 goes to show that the Tribunal by following the judgment of this Court rendered in Falani Bibi Vs. Union of India & 6 Others dated 18.08.2017 passed in WP(C)No.7104/2015 had arrived at its conclusion that the reference itself is faulty and contrary to the materials on record and therefore it be sent back to the referral authority with a disagreement note pointing out the error or fault in the reference. Although the law as understood by the Tribunal as laid down in Falani Bibi (supra) had been quoted and also stated that if the reference is erroneous or faulty it has to be returned back to the referral authority with a disagreement note pointing out the error or fault, but the order dated 25.01.2019 does not discern any disagreement note being put up by the Tribunal pointing out as to what was the fault or defect. We have to understand that the laws that may be laid down in

any judgments are to be followed only by following the purports of the judgment itself and not merely quote a judgment and in the guise of following the judgment do an act as may be enabled in such judgment. A reading of the order dated 25.01.2019 does not reveal that the Tribunal had done the needful of putting up a disagreement note, pointing out the error or fault in the reference and merely because in Falani Bibi (supra), a provision has been made for referring back a judgment to the referral authority, in the instant case also, the Tribunal deemed it appropriate to refer it back to the referring authority.

4. In the aforesaid process, a purported corrected reference had been made against the petitioner Rukia Begum Barbhuiya @ Rukia Begum and accordingly an order dated 12.03.2020 was passed in Case No.F 4th/D/415/2015. Upon the purported corrected reference being made to the Tribunal and the petitioner upon receiving notice, appeared before the Tribunal and made an application that she may be allowed to file an additional written statement. The Tribunal by the order dated 30.08.2018 rejected such prayer of the petitioner for filing an additional written statement. In the circumstance, the petitioner filed another petition dated 28.02.2020 reiterating the prayer for accepting an additional written statement and evidence-in-chief, but the Tribunal by its order dated 12.03.2020 had again rejected the claim for filing an additional written statement with a further view being taken that there was no reason that the petitioner was prevented by sufficient reasons for not filing the additional documents and the evidence-in-chief. Being aggrieved this writ petition is instituted.

5. Mr. AMS Mazumder, learned counsel for the petitioner assails the order dated 25.01.2019 of the Foreigners Tribunal by which the reference was returned back to the referral authority and takes a plea that such returning back of the reference itself is a decision and, therefore, there cannot be any further reference being made on the same subject matter, although in the guise of a corrected reference.

6. Mr. D Mozumdar, learned Additional Advocate General, Assam was requested to appear on behalf of the Home Department Government of Assam *inasmuch as*, a question has arisen as to whether upon a reference being returned back on the ground of it being a faulty reference, any further reference can be made on the same subject matter in a more corrected manner. In this context, we take note that the Tribunal had returned back the reference by relying upon a judgment of this Court rendered in Falani Bibi (supra) wherein in paragraph 16 thereof a discussion had been made as to what may constitute a faulty reference. Paragraph 16 of the judgment in Falani Bibi (supra) is extracted as below:

“16. From a careful reading of Order 2(1), what is discernible is that a reference is made to a Tribunal for its opinion whether a person is or is not a foreigner within the meaning of Section 2(a) of the Foreigners Act, 1946. The Tribunal gets its jurisdiction to render its opinion only when a reference is made to it. Without a reference being made, Tribunal cannot exercise its jurisdiction to opine that a person is or is not a foreigner. It is only when a reference is made as above that the Tribunal assumes jurisdiction to render its opinion. Therefore, to our mind, Tribunal would have to confine to the terms of the reference made to it and cannot go beyond the same. Admittedly, in this case, reference was that petitioner was a foreigner who had illegally entered into India (Assam) from the specified territory during the period 01.01.1966 to 24.03.1971. The

Tribunal was required to answer the reference either in favour of the State or in favour of the proceedee. If the reference was to be answered in favour of the State and it was answered rightly so by the Tribunal, the natural corollary would be that petitioner is a foreigner belonging to the 01.01.1966 to 24.03.1971 stream. Therefore, the view taken by the Tribunal that the Foreigners Act, 1946 or the Orders framed thereunder do not bind it to the terms of the reference is not correct."

7. From a reading of the provisions in paragraph 16 of the judgment in Falani Bibi (supra), it is discernible that in the said matter, a reference was made as to whether the person concerned came into the State of Assam from the specified territory between the period 01.01.1966 to 24.03.1971. But upon considering the materials on record that had been produced before the Tribunal by the proceedee concerned, the Tribunal was of the view that the person concerned had entered the State of Assam from the specified territory on or after 25.03.1971. In the circumstance, the Tribunal declared the person concerned to be a foreigner by arriving at a conclusion that the Foreigners Act 1946 or the orders framed thereunder do not bind the Tribunal to the terms of the reference. The said view of the Tribunal was assailed in a writ petition in Falani Bibi (supra) and while adjudicating the said writ petition, the Court had formed the views as provided in paragraph 16 thereof, which are extracted hereinabove.

8. A reading of paragraph 16 of the judgment in Falani Bibi (supra) makes it discernible that the Court had gone into the question that the Tribunal derives its jurisdiction to answer a reference under Order 2(1) of the Foreigners Tribunal Order 1964 and, therefore, it cannot answer any question which may be beyond the reference that had been made. As the reference was made in Falani Bibi (supra) as to whether the person concerned had entered the State of Assam from the specified territory between 01.01.1966 and 24.03.1971, therefore, the

Tribunal could not have answered the reference by holding that the concerned person had entered the State of Assam from the specified territory on or after 25.03.1971.

9. Conceptually, we are in agreement with the view in Falani Bibi (supra) that a Tribunal cannot answer a reference beyond the reference that has been made to it. But at the same time, we are also required to look into as to what would be understood to be a reference made to a Tribunal. To answer the question, we are required to look into the provisions of Rule 2(1) of the Foreigners Tribunal Order 1964 which is extracted as below:

“2. Constitution of Tribunals: - (1) The Central Government may by order, refer the question as to whether a person is not a foreigner within the meaning of the Foreigners Act, 1946 (31 of 1946) to a Tribunal to be constituted for the purpose, for its opinion.”

10. A reading of Rule 2(1) of the Foreigners Tribunal Order 1964 makes it discernible that 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 constituted for the purpose. The statutory provision of Rule 2(1) makes it explicit that the reference to be made by a Tribunal would be the question as to whether a person is or is not a foreigner within the meaning of the Foreigners Act 1946. Section 2(a) of the Foreigners Act 1946 defines foreigner to mean a person who is not a citizen of India. In other words, going by the meaning given to the expression foreigner under Section 2(a) of the Foreigners Act 1946 a reference made to the Tribunal would be as to whether the person concerned is a citizen of India or he is not a citizen of India.

11. To understand the concept of being a citizen or a foreigner in respect of

such category of persons who entered the State of Assam from the specified territory, which in other words, would require an appreciation of the provisions of Section 6 A of the Citizenship Act 1955. Section 6 A of the Citizenship Act 1955 is extracted as below:

“6A. Special provisions as to citizenship of persons covered by the Assam Accord.—

(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, 1964 by 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 for 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 (thereafter 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, for year 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 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, for year is a citizen of India;

(b) who was expelled from India before the commencement of the Citizenship (Amendment) Act, 1985, for year 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.]”

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 State 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.

14. Mr. D Mozumdar, learned Additional Advocate General, Assam has also placed reliance upon the provisions of the Supreme Court rendered in paragraph 13 of its judgment in *State of UP Vs. Ajay Kumar Sharma* reported in (2016) 15 SCC 289 which is extracted as below:

“13. Time and again this Court has emphatically restated the essentials and principles of “precedent” and of stare decisis which are a cardinal feature of the hierarchical character of all common law judicial systems. The doctrine of precedent mandates that an exposition of law must be followed and applied even by coordinate or co-equal Benches and certainly by all smaller Benches and subordinate courts. That is to say that a smaller and a later Bench has no freedom other than to apply the law laid down by the earlier and larger Bench; that is the law which is said to hold the field. Apart from Article 141, it is a policy of the courts to stand by precedent and not to disturb a settled point. The purpose of precedents is to bestow predictability on judicial decisions and it is beyond cavil that certainty in law is an essential ingredient of rule of law. A departure may only be made when a coordinate or co-equal Bench finds the previous decision to be of doubtful logic or efficacy and consequentially, its judicial conscience is so perturbed and aroused that it finds it impossible to follow the existing

ratio. The Bench must then comply with the discipline of requesting the Hon'ble Chief Justice to constitute a larger Bench."

15. A reading of the provisions in paragraph 13 of the provisions of the Supreme Court in *Ajay Kumar* (supra) makes it discernible that the Supreme Court had emphatically restated the essentials and principles of precedent and of *stare decisis* which are a cardinal feature of the hierarchical character of all common law judicial systems.

16. The term *stare decisis* is defined in the Black's Law Dictionary to mean the doctrine of precedent under which a Court must follow earlier judicial decisions when the same point arise again in a litigation. We are in complete agreement with the principles of precedent and *stare decisis* that the Court must follow the earlier judicial decisions when the same point arise in a litigation, but at the same time, it is also an accepted principle of law that the doctrine of *per incurium* is an exception to the doctrine of *stare decisis*. The doctrine of *per incurium* is defined to be a judicial decision, which was wrongly decided because the judge or the judges were ill informed about the applicability of the law. In the instant case, when the decision in *Falani Bibi* (supra) was rendered, the further technical complication that may arise upon a fresh and corrected reference being made that it may be barred by the principles of *res judicata* was neither urged upon, nor was gone into by the Court. The question whether the reference is faulty or not can only be determined after there is a decision being rendered that the person concerned entered the State of Assam from the specified territory on or after 25.03.1971, whereas the referred question was whether he entered the State of Assam between 01.01.1966 and 25.03.1971. In other words, the conclusion as to whether the reference is faulty or not can be

arrived at only after the final decision has been rendered on the materials being produced and, therefore, as a decision had been rendered upon the materials being produced, the same issue if again referred back with any correction in the wordings in the reference may invoke the principles of *res judicata* that it cannot be referred and answered again as it would be a subsequent reference on the same issue which is between the same parties and was decided in a prior proceeding. In the circumstance, we are of the view that the principle of *per inquirium* would be applicable in the instant case rather than the principle of *stare decisis*.

17. In view of the above, as the principle of *per inquirium* is more applicable rather than it being the principle of *stare decisis*, the principles laid down in paragraph 13 of Ajay Sharma (supra) can also be answered accordingly that the earlier decision in Falani Bibi (supra) needs a further clarification to the extent that if the conclusion as regards the faulty reference can be arrived at only upon a final decision, it would be in the interest of all parties to have the final decision being converted to an opinion rather than to undergo the technicality of returning the reference having it corrected and decided once again. From such point of view, we are unable agree with the order dated 25.01.2019 of the Tribunal in F. 4th/D/415/2015.

18. In view of such answer, we are of the view that the subsequent order dated 12.03.2020 would have to be considered from another perspective. Although, technically the corrected reference would not be maintainable, but, however, even if the earlier decision arrived at that the petitioner is a person who had

entered the State of Assam from the specified territory on or after 25.03.1971 is itself a final decision, but the petitioner also deserves an opportunity to assail such final decision on its own merit. If the petitioner is of the view that some further materials are also available and such materials may be produced in the form of an additional affidavit, it would always be in the interest of justice to give every opportunity to the petitioner to prove his citizenship. In view of the above and under the circumstance, we also interfere with the order dated 12.03.2020 of the Tribunal in Case No.F 4th/D/415/2015 and allow the petitioner to submit any further additional affidavit or any further materials that he may desire to prove his citizenship and in the event, the petitioner produces any such material, the Tribunal may pass its reasoned order as may be applicable.

19. The respondents in the Home Department may also make their own verification and submit a report before the Tribunal on the claim of the petitioner upon the materials that may be produced.

20. Accordingly the petitioner to appear before the Tribunal on 26.07.2023.

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 again where a citizen is defined under the Citizenship Act 1955.

22. The Tribunal upon doing the needful and after examining the evidences and materials shall pass a reasoned order.
23. Till the reasoned order is passed, no coercive action be taken against the petitioner.
24. Writ petition stands disposed of in the above terms.
25. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant