

GAHC010090762023



REPORTABLE

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

Case No. : WP(C)/2370/2023

AZIZ MIYA @ MD. AZIZ MIA
S/O- LATE SONARUDDIN MIYA,
VILL- KACHARIPARA,
P.S.- BARPETA, DIST- BARPETA,
ASSAM.

VERSUS

THE UNION OF INDIA AND 5 ORS
REPRESENTED BY THE SECRETARY TO THE MINISTRY OF HOME
AFFAIRS,
GOVT. OF INDIA, SHASTRI BHAWAN,
TILOK MARG, NEW DELHI-1.

2:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM

DEPARTMENT OF HOME
DISPUR

GUWAHATI-6.

3:THE ELECTION COMMISSIONER OF INDIA
THROUGH ITS SECRETARY

NIRBACHAN SADAN
NEW DELHI-1.

4:THE STATE CO-ORDINATOR
NATIONAL REGISTER OF CITIZENS (NRC)
ASSAM
BHANGAGARH
GUWAHATI-5.

5:THE DEPUTY COMMISSIONER OF KAMRUP(M)
DISTRICT- KAMRUP(M)
ASSAM.

6:THE SUPERINTENDENT OF POLICE(B)
CITY
GUWAHATI
DIST- KAMRUP(M)
ASSAM

Advocate for the Petitioner : MR. R ALI

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

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

JUDGMENT

Date : 09-06-2023
(AM Bujor Barua, J)

Heard Mr. R Ali learned counsel for the petitioner. Also heard Ms. A Verma, learned Special Standing Counsel, Foreigners Tribunal for the Home Department, Government of Assam as well as the Superintendent of Police (B) Hojai, Ms. L Devi, learned CGC for the respondents in the Union of India as well as the authorities under the NRC, Mr. AI Ali, learned counsel for the authorities under the Election Commission of India, and Ms. K Phukan, learned Government Advocate for the Deputy Commissioner, Hojai.

2. The petitioner Aziz Mia was referred to the Foreigners' Tribunal No. 2, Kamrup(M) for rendering an opinion as to whether he is a foreigner as defined in the Foreigners' Act, 1946, who entered the State of Assam from the specified territory, resulting in registration of FT Case No. 165/2015 corresponding to IM(D)T Case No. 239/2001.

3. In the proceeding before the Tribunal, the petitioner made an application with a prayer that the proceedings itself be dropped, inasmuch as, the inquiring authority in its report submitted that during the inquiry the petitioner could produce a voters' list of 1966 which belong to his father to prove that he is not a foreigner and accordingly, the inquiring authority had given a view that the petitioner is not an illegal migrant, but in spite of such report by the inquiring authority, the Superintendant of Police (Border), Kamrup made a reference to the Foreigners' Tribunal resulting in registration of the aforesaid FT Case No. 165/2015. By the Order dated 20.03.2023, the Tribunal was of the view that as the referral authority had suspected the petitioner to be an illegal migrant post 25.03.1971, the prayer to drop the proceeding against the petitioner cannot be accepted. Being aggrieved, this writ petition is instituted.

4. Mr. R Ali, learned counsel for the petitioner submits that under the paragraph No. 97 of the Judgment of the full Bench of this Court in the *State of Assam & Ors. Vs. Moslem Mondal & Ors.*, reported in 2013 (1) GLT 809, there is a requirement under the law that before making a reference, an inquiry should also be conducted by the authorities giving an opportunity to the suspected person to prove before the authority itself that he is not a foreigner. By taking

recourse to paragraph 97 of *Moslem Mondal (supra)*, it is the submission of Mr. R Ali, learned counsel for the petitioner that as in the instant case, the petitioner succeeded in proving before the inquiring authority that he is not a foreigner and therefore the subsequent reference by the Superintendant of Police (Border) to the Foreigners' Tribunal is a defective reference and further as the reference itself is defective no jurisdiction is vested upon the Tribunal to proceed against the petitioner. Accordingly, it is the submission that the conclusion arrived at by the Tribunal in the order impugned dated 20.03.2023 is unsustainable in law.

5. To substantiate his submission, the petitioner relies upon an earlier judgment rendered by the Division Bench in WP(C) No. 2674/2016 in *Monowara Khatun vs. Union of India & Ors.* By referring to the said judgment of the Division Bench, it is the submission of Mr. R Ali, learned counsel for the petitioner that as the reference made by the Superintendant of Police (Border), Kamrup was defective, therefore, there is a requirement under the law to return the reference back to the Superintendant of Police (Border), Kamrup and in the circumstance the reference before the Tribunal would not be maintainable any further.

6. Ms. A Verma, learned counsel for the Home Department of the Govt. of Assam submits that the provisions of paragraph 97 of the judgment of the Full Bench of this Court rendered in *Moslem Mondal (supra)* is only for the purpose of giving an opportunity to the suspected person to prove that he is a citizen and such provision had been incorporated in paragraph 97 of the judgment in *Moslem Mondal (supra)* pursuant to the provisions of Article 21 of the Constitution of India and that the role of the inquiring authority is merely to give

an opportunity to the suspected person and the the inquiring authority is not vested with any power to arrive at a final conclusion as to whether the suspected person who was inquired is a foreigner or is not a foreigner. In the circumstance, one of the issues for determination before the Court would be whether the report of the inquiring authority made pursuant to the provisions of paragraph 97 of *Moslem Mondal (supra)* would be a final decision as to whether a suspected person is a foreigner or not, or the report is merely indicative in nature, which would require the Superintendant of Police (Border) to make a reference to the Tribunal to render an opinion as to whether the suspected person is a foreigner or not.

7. Heard the learned counsel for the parties.

8. The entire argument of Mr. R Ali learned counsel for the petitioner flows from the provisions of paragraph 97 of the judgment rendered by the Full Bench in *Moslem Mondal (supra)* and for the purpose is extracted as below:-

“97 Fair investigation and fair trial being the basic fundamental/human right of a person, which are concomitant to preservation of the fundamental/human right of a person, which are concomitant to preservation of the fundamental right of a person under Article 21 of the Constitution, there has to be a fair and proper investigation by the investigating agency before making a reference to the Tribunal. In such investigation the attempt has to be made to find out the person against whom the investigation is made, so that the person concerned is given the opportunity to demonstrate at that stage itself that he is not a foreigner. In case the person concerned could not be found out in the village where he is reported to reside or in the place where he ordinarily resides or works for gain, the investigating agency has to record the same in presence of the village elder or the village headman or any respectable person of the locality, which in turn would ensure visit of the investigating officer to he place where such person ordinarily resides or reported to reside or works for gain and

making of an effort to find him out for the purpose of giving him the opportunity to produce the documents etc., if any, to demonstrate that he is not a foreigner. The investigating officer, as far as practicable, shall also obtain the signature or thumb impression of the person against whom such investigation is initiated, after recording his statement, if any, provided he makes himself available for that purpose. There are also instances where the person against whom such investigation is initiated, changes his place of residence, may be in search of livelihood or may be avoid detection. To ensure proper investigation and also having regard to intergrity and sovereignty of the nation, once investigation relating to the nationality status of a person starts he must inform the investigating agency in writing about the change of residence, if any, thereafter. In case such person has failed to intimate the investigating agency in writing the subsequent change of his place of residence, the investigating agency has to mention the same in his report with his opinion relating to the status of such person on the basis of materials collected at the place where he earlier resided. That will ensure a fair investigation and submission of a proper report on such investigation to the authority. Needless to say, such investigation need not be a detailed or an exhaustive one keeping in view the nature of the proceeding before the Tribunal and the object sought to be achieved. Hence it need not be equaled with an investigation conducted in criminal cases.”

9. Paragraph No. 97 of the *Moslem Mondal (supra)* flows from the requirement of a fair investigation and fair trial being the basic Fundamental/Human Rights of a person, which are concomitant to preservation of the Fundamental Rights of a person under Article 21 of the Constitution of India. Paragraph 97 provides that the requirement of making an investigation is in furtherance of the principles of affording the person concerned an opportunity to show before the investigating authority itself that the person is not a foreigner. It is also provided that a fair investigation and submission of a proper report on such investigation to the authority would be a requirement and such investigation need not be a detail or an

exhaustive one. Keeping in view the nature of the proceedings before the Tribunal and the objectives to be achieved, paragraph 97 indicates that such investigation may not be a detail or exhaustive one. In view of the nature of the proceedings that would follow before the Tribunal and the objective to be issued in itself an indication that any report that the investigating authority may submit would not be conclusive of the fact to be determined as to whether the suspected person is a foreigner or not.

10. Clause 2 of the Foreigners (Tribunal) Orders, 1964 provides that the Central Government may by order refer the question as to whether the 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. It is stated that the Central Government by an appropriate notification had delegated its power under Clause 2 of the Foreigners (Tribunal) Orders, 1964 to the Superintendent of Police Superintendent of Police (Border) of the respective districts to make any order referring the question on the citizenship of a person to a Tribunal constituted for the purpose for its opinion. The provisions of Clause 2 of the Foreigners (Tribunal) Orders, 1964 makes it explicit that it is the Superintendent of Police Superintendent of Police (Border) who would be the authority to take a decision based upon the report of the inquiry or any further materials that may be available as to whether a person concerned is required to be referred to a Tribunal for its opinion as to whether he is a foreigner or not.

11. A reading of the provisions of Clause 2 of the Foreigners (Tribunal) Orders, 1964 as indicated above also leads to a conclusion that the report of the investigating authority that may have been submitted as to whether the suspected person is a foreigner or not would be merely indicative in nature and

cannot be said to have attained a finality on the status of the suspected person as to whether he is a foreigner. From such point of view, we are unable to accept the submission of Mr. R Ali learned counsel for the petitioner that as because the inquiring authority in the instant case had given a report that the petitioner is not a foreigner, therefore, the Superintendant of Police (Border) did not have any jurisdiction to make a reference to the Tribunal for an opinion as to whether he is a citizen or not and accordingly the reference itself made is a defective reference which is required to be returned back.

11. The concept of returning back the reference is being submitted by placing reliance on the judgment of the Division Bench rendered in *Monowara Khatun (supra)*. The relevant paragraph in *Monowara Khatun (supra)* had been provided as abstracted:-

“In the light of the above position, we feel that Tribunal ought to have the returned the reference back to the referral authority, i.e., Superintendant of Police (Border), Dhubri. Notice issued by the Tribunal was apparently contrary to the reference made.

Though this Court has clarified that if Tribunal finds a reference to be contrary to the materials on record or finds the reference to be faulty, it should remand the matter back to the referral authority for making a fresh reference but in the instant case, we find from the affidavit of the Director General of Police, Assam dated 18.06.2016 that report of the Enquiry Officer as well as endorsement of the Superintendant of Police (Border), Dhubri were made after proper application of mind.

In such circumstances, without entering into merits, we feel that impugned order passed by the Tribunal dated 14.03.2016 cannot be sustained and is accordingly set aside.

Writ petition is disposed of

Registry to send down the LCR forthwith and inform the concerned Foreigners Tribunal, Superintendent of Police (Border) and Deputy Commissioner for taking necessary follow-up steps.

A copy of this order may also be furnished to learned Standing Counsel, Election Commission of India and State Coordinator, NRC, Assam."

12. In the matter of *Monowara Khatun (supra)*, the factual situation was that the Superintendent of Police (Border) after proper application of mind on the report of the inquiring authority came to a conclusion that the suspected person therein did not appear to be a foreigner. In other words, it was the Superintendent of Police Superintendent of Police (Border) who had arrived at such a conclusion and no finality was given to any report of an inquiring authority. In the instant case, it is noticed that although the report of the inquiring authority may be that the petitioner is not a foreigner but the Superintendent of Police (Border) upon going through the materials on record did not arrive at any conclusion that the petitioner is not a foreigner which again also impliedly flows from his conduct that he had made a reference to the Tribunal for rendering an opinion on the said question.

13. On facts of the present case, we have noticed that the inquiring authority in its report dated 28.03.2001 had stated that during the inquiry the petitioner had produced the voters' list of 1966 which belonged to his father and therefore, the petitioner is not a foreigner.

14. We are constrained to observe that a mere claim by a suspected person by referring to a voters' list claiming a person therein to be his father is not a conclusive proof and that by doing so, the person has discharged the burden

that he is not a foreigner. This is because there is also a further requirement to prove that the person who is reflected in the voters' list relied upon is actually the father of the person who makes the claim the claim will have to be substantiated with further material/materials acceptable in law.

15. Accordingly, the report of the inquiring authority on its own cannot be viewed to be conclusive in nature that the petitioner is not a foreigner. From such point of view, we do not notice any infirmity in the reference made by the Superintendant of Police (Border), Kamrup to the Foreigners' Tribunal No. 2, Kamrup (M) for rendering an opinion as to whether the petitioner is a foreigner who entered the State of Assam from the specified territory.

16. In view of above, we do not find any ground to interfere with the order dated 20.03.2023 of the Tribunal.

17. Accordingly, the writ petition is dismissed.

18. The petitioner shall now appear before the Tribunal on 13.07.2023 to prove his case that he is not a foreigner.

Send back the LCR immediately.

JUDGE

JUDGE

Comparing Assistant