

GAHC010123372017



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

Case No. : WP(C)/1238/2017

MUSSTT. JAHANARA KHATOON @ MUSSTT. JAHANARA BEGUM
W/O MD. ZAMIR ALI D/O LT. HURMUZ ALI R/O VILL- BAKRAPATTA P.O.
BAKRAPATTA, P.S. SOOTEA DIST. BISWANATH, PIN - 784175, ASSAM.

VERSUS

THE UNION OF INDIA and 8 ORS.
TO BE REP. BY SECRETARY TO THE GOVT. OF INDIA, HOME
DEPARTMENT, NORTH BLOCK, NEW DELHI.

2:THE STATE OF ASSAM
TO BE REP. BY COMMISSIONER AND SECRETARY TO THE GOVT. OF
ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI-06.

3:THE ADDITIONAL DIRECTOR GENERAL OF POLICE
ASSAM BORDER BHANGAGARH
GUWAHATI-5.

4:THE DEPUTY COMMISSIONER
BISWANATH DISTRICT
ASSAM.

5:THE SUPERINTENDENT OF POLICE BORDER
BISWANATH DISTRICT
ASSAM

6:THE SUPERINTENDENT OF POLICE BORDER
SONITPUR DISTRICT
TEZPUR
ASSAM.

7:THE SUPERINTENDENT OF POLICE
BISWANATH DISTRICT
ASSAM

8:THE ELECTION OFFICER
BISWANATH DISTRICT
ASSAM.

9:THE OFFICER -IN-CHARGE
SOOTIA POLICE STATION
DIST. BISWANATH
ASSAM

Advocate for the Petitioner : MR.A S TAPADER

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

BEFORE

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK
HON'BLE MR. JUSTICE N. UNNI KRISHNAN NAIR

Date of Hearing and Judgment : 10-11-2023

JUDGMENT AND ORDER (ORAL)

(M. R. Pathak, J)

Heard Mr. A. S. Tapader, learned counsel for the petitioner and Mr. K. K. Parasar, learned Central Government Counsel for the respondent No. 1. Also heard Mr. J. Payeng, learned Standing Counsel, Home & Political Department, Assam for the respondent Nos. 2, 3, 5, 6, 7 and 9; Mr. P. Sharma, learned Additional Senior Government Advocate, Assam for the respondent No. 4 and Mr. A. I. Ali, learned Standing Counsel, Election Commission of India for the respondent No. 8.

2) The petitioner has filed this petition on 25.01.2017 praying amongst others, to set aside and quash all and entire proceeding of Foreigners' Tribunal Case No. F.T.C. (6) 331/2016 initiated against her under the Foreigners Act, 1946, pending before the learned

Member, Foreigners' Tribunal No.6, Sonitpur, Tezpur, Assam submitting that in an earlier proceeding under the Foreigners Act, 1946 that commenced on the reference made by the Superintendent of Police (Border), Sonitpur, Tezpur in S.P. Case No. 16/15, the learned Member, Foreigners' Tribunal, 2nd, Sonitpur, Tezpur by order dated 26.05.2015 passed in F.T. Case No. 27/2015 opined that the petitioner is not a foreigner.

3) The petitioner contended that on another reference being made by the Superintendent of Police (Border), Sonitpur, Tezpur, the learned Member, Foreigners' Tribunal No.6, Tezpur at Sootea, initiated a fresh proceeding under the Foreigners Act, 1946 by registering the Case No. F.T.C. (6) 331/2016, wherein notice was issued to her, which she received on 12.04.2016.

4) Petitioner stated that the earlier proceeding against her in F.T. Case No. 27/2015 was initiated on being referred by the Superintendent of Police (Border), Sonitpur, Tezpur and she alleged that the subsequent case against her was at the instance of the Officer-in-Charge of Sootea Police Station. As per the petitioner that fact is clear from the two notices of two different cases issued to her and the process by which she is harassed by police alleging that she is a foreigner. Hence, this writ petition by the petitioner.

5) The petitioner also stated that in the notice given to her in the earlier case, i.e., in F.T. Case No. 27/2015 her name was shown as Musst. Jahanara Khatoon, whereas, in the subsequent case, i.e., in the Case No. F.T.C. (6) 331/2016 she was shown as Jahanara Begum, stating further that in both the cases name of her husband Md. Jamir Ali, her father late Harmuz Ali and her address resident of village Boktapatta, Police Station-Sootea, District-Sonitpur remained same.

6) Petitioner submitted that in the earlier case against her, i.e., in F.T. Case No. 27/2015 she filed her Written Statement and documents and was also examined as witness by the Tribunal concerned and on the basis of such evidence on record and the documents produced by her, submission of learned Assistant Government Pleader, the Foreigners' Tribunal, 2nd, Sonitpur, Tezpur in F.T. Case No. 27/2015 being satisfied passed the order on 26.05.2015 that she was found not to be a foreigner which otherwise implies that she is a citizen of India.

7) Considering such submission of the petitioner, the Court in Motion stage, on

06.03.2017 while issuing notice to the respondents, passed an order requisitioning the case records of said Case No. F.T.C. (6) 331/2016 from the Foreigners' Tribunal No.6, Sonitpur, Tezpur at Sootea and in the interim stayed the further proceedings of said Case No. F.T.C. (6) 331/2016 pending before the Foreigners' Tribunal No.6, Sonitpur, Tezpur at Sootea.

8) We have perused the records of said Case No. F.T.C. (6) 331/2016 that was called for by the Court on 06.03.2017.

9) It is seen from the said record that the Superintendent of Police (Border), Sonitpur, Tezpur in F.T. Case No. 251/13 vide communication dated 13.09.2013 informed the Sub Inspector of Police (UB) of Sootea Police Station that it was learnt that Musstt. Jahanara Begum, wife of Jamir Ali of Village - Bokraputta under Sootea Police Station is a suspected foreigner as per the village survey report and by the said communication dated 13.09.2013, the said SI was directed to start an enquiry under the provisions of Foreigners Tribunal Amendment Order, 1964 and 1985 and to submit the report immediately for further action.

10) After an enquiry, the concerned SI on 20.10.2013 submitted the report before the Superintendent of Police (Border), Sonitpur, Tezpur submitting that said Musstt. Jahanara Begum, wife of Jamir Ali of Village - Bokraputta failed to produce the relevant documents in support of her Indian nationality and was found that she had entered into India after 25.03.1971 and therefore, requested the authority to submit the case before the concerned Foreigners' Tribunal for necessary opinion. On receipt of said report from the concerned SI of Sootea Police Station, the Superintendent of Police (Border), Sonitpur, Tezpur vide communication under Memo No. TZP (B) 2013/5668 dated 30.12.2013 forwarded the said F.T. Case No. 251/2013 to the learned Member, Foreigners' Tribunal, Tezpur, Sonitpur, requesting the said authority for its necessary opinion about the nationality of said Musstt. Jahanara Begum, i.e. the petitioner.

11) On receipt of said reference from the SP (B), Sonitpur, Tezpur dated 30.12.2013, FT Case No. FTC (6) 331/2016 was registered, wherein, the Tribunal on 23.02.2016 issued notice to the petitioner fixing the case 11.03.2016. As the said notice was received by the village Headman, the Tribunal on 12.04.2016 issued the second notice to the petitioner fixing 04.05.2016, that was received by the son of the petitioner Ahieyar Khan.

12) From the records of the case, it is seen that the petitioner appeared before the said Foreigners' Tribunal No.6, Sonitpur, Tezpur in the FT Case No. FTC (6) 331/2016 on 04.05.2016, 25.05.2016, 22.06.2016 and sought for time to file Written Statement in the matter, which were accordingly allowed by the said Tribunal. The petitioner on 05.07.2016 appeared before the said Tribunal and filed her Written Statement as Musstt. Jahanara Khatoon in said FT Case No. FTC (6) 331/2016 before the said Foreigners' Tribunal No.6, Sonitpur, Tezpur at Sootea. But, on the subsequent dates i.e., on 26.07.2016, 18.08.2016, 31.08.2016 and 09.09.2016, when the matter was fixed for evidence of the petitioner, she remained absent before the said Tribunal. On 15.09.2016, the date on which the case was fixed for necessary order, the petitioner remained absent without steps and for her long absence in the case on the dates fixed, the Tribunal came to a finding that the proceedee willfully remained absent from the proceeding of the case and accordingly, her evidence was closed fixing 29.09.2016 for argument and order. On 29.09.2016, the petitioner remained absent without steps and the Tribunal fixed the matter on 07.10.2016 for necessary order. On 07.10.2016 the petitioner again remained absent before the Tribunal and as such issued bailable warrant of arrest of Rs.500/- against her, fixing 19.10.2016 for argument and order.

13) On 19.10.2016 the petitioner remained absent before the Tribunal in said Case No. FTC (6) 331/2016. The Tribunal considered the written statement filed by the petitioner on 05.07.2016 along with the documents she annexed with it in support of her case as well as her contention made in said written statement that in F.T. Case No. 27/2015 the learned Member, Foreigners' Tribunal, 2nd, Sonitpur, Tezpur by order dated 26.05.2015 opined that she is not a foreigner.

14) It is to be noted herein that during pendency of said Case No. FTC (6) 331/2016, Biswanath became a separate district from the erstwhile Sonitpur District and the Foreigners' Tribunal No.6 at Sootea including the village Boktapatta, Police Station-Sootea of erstwhile Sonitpur District came under the jurisdiction of Biswanath District.

15) The learned Tribunal in said Case No. FTC (6) 331/2016 found that the point for determination before it was as to whether, the petitioner is a 'citizen' of India or a 'foreigner' is within the meaning of the expression 'foreigner' as defined in the Foreigners' Act, 1946 and

that as per the provisions of Section 9 of the Foreigners' Act, 1946, the onus of proving the same lies on the suspect/proceedee whether he/she is a citizen of India and not a 'foreigner', notwithstanding anything contained in the Indian Evidence Act, 1872. The Tribunal considered that the petitioner did not adduce any evidence to support her case apart from filing certain photocopies of documents which have no evidentiary value except the certificate issued by the Sarkari Gaonburha (Government Village Headman), which was also not proved by examining the issuing person for which even the same could not be considered.

16) After considering entire materials on record and on a detailed discussion, the said Foreigners' Tribunal No.6, Sonitpur, Tezpur at Sootea in the Case No. FTC (6) 331/2016 by the order dated 19.10.2016 came to the conclusion that the petitioner failed to discharge her burden to prove that she acquired citizenship of India by birth through genuine Indian parents and rather found that she entered into India without authority subsequent to 25.03.1971 and accordingly, found her to be a foreigner/ illegal migrant of post 25.03.1971 stream and thereby decided the reference in affirmative.

17) We have seen that the petitioner has filed this writ petition on 25.01.2017 swearing an affidavit at Guwahati on 25.01.2017 itself. But in the writ petition the petitioner did not make any statement that she appeared before the said Foreigners' Tribunal No.6, Sonitpur, Tezpur at Sootea in the Case No. FTC (6) 331/2016 and also filed her written statement in the said matter on 05.07.2016 along with photocopies of certain documents. Petitioner also did not state that after filing her written statement on 05.07.2016, she did not appear in that matter.

18) Though the Superintendent of Police (Border), Biswanath District respondent No.5 on 01.12.2017 filed an affidavit through the Senior Government Advocate, Assam serving a copy of the same to the counsel for the petitioner on 29.04.2017 annexing the copy of the order dated 19.10.2016 passed by the learned Member, Foreigners' Tribunal No.6 at Sootea in said Case No. FTC (6) 331/2016 declaring the petitioner to be a foreigner of post 25.03.1971 stream, the petitioner did not even file any petition challenging the said order of the Tribunal dated 19.10.2016. It is already noted above that the petitioner filed this writ petition on 25.01.2017 by swearing an affidavit on 25.01.2017 itself and all these clearly indicate that she was fully aware of the order dated 19.10.2016, passed by the learned Member,

Foreigners' Tribunal No.6 at Sootea.

19) The facts noted above noticeably reflects that the petitioner willfully suppressed the material facts before the Court in this writ petition about her appearance and about filing of her written statement in said Case No. FTC (6) 331/2016 before the learned Member, Foreigners' Tribunal No.6 at Sootea and also about the order dated 19.10.2016 passed in the said FTC Case. We found that the petitioner willfully misrepresented before the Court by giving an impression that at the time of filing of this writ petition the said Case No. FTC (6) 331/2016 was pending before the learned Member, Foreigners' Tribunal No.6 at Sootea and thereby managed to obtain an interim order from this Court on 06.03.2017 whereby, the proceedings of said Case No. FTC (6) 331/2016 pending before the Foreigners' Tribunal No.6 at Sootea was stayed, though the said matter was finally disposed of on 19.10.2016 much before filing of this writ petition on 25.01.2017.

20) A co-ordinate Bench of this Court in WP(C) No. 7339/2015 decided on 19.04.2018 pertaining to the issue of *res judicata* in cases of proceedings before the Foreigners' Tribunal whether the suspect is a citizen of India and not a foreigner, have held that – *an opinion declaring such a proceedee/suspect as not a foreigner and/or is a citizen of India without appreciation of evidence tendered by the proceedee – whether such evidence were admissible? whether the documents submitted by the proceedee were proved? whether there was relevancy of evidence adduced by the proceedee or on its behalf? without mentioning the reasons and without giving any reasons in that regard, such opinion is no opinion at all in the eye of law and on the basis of such an opinion, neither the Central Government nor the delegated authority, i.e., the jurisdictional Superintendent of Police (Border) can be debarred from seeking a fresh opinion.*

21) The Court in the said order dated 19.04.2018 held that the principle of *res judicata* is based on public policy and the same will stand subsumed under the overreaching a public policy governing a sovereign nation while dealing with illegal foreigners under the Foreigners' Act, by the Foreigners' Tribunal Order. Further holding that as settled by the Hon'ble Apex Court, as per Section 9 of the Foreigners' Act, the burden is upon the suspect/ proceedee to establish that he/she is not a foreigner but a citizen of India in the manner claimed by

him/her and that if such burden is not discharged by the suspect/proceedee it should be held that he/she is a foreigner.

22) The Court in its order dated 19.04.2018 considered the fact that the referral authority suspects a person to be a foreigner and after enquiry, if the suspicion is fortified, reference is made. If the reference is answered by the Foreigners' Tribunal by opining that the suspect was indeed a foreigner, than there shall be no need for the referral authority again to make a second reference, since the referral authority already suspects the suspect to be a foreigner. As such, when the Foreigner' Tribunal opines such a suspect to be a foreigner question of again making a reference by the referral authority to the Foreigners' Tribunal cannot and does not arise.

23) In the said judgment dated 19.04.2018 the Court held that as a legal proposition, principle of *res judicata* embodied in Section 11 of the Code of Civil Procedure would not be attracted to a proceeding under the Foreigners' Act and Foreigners' Tribunals Order.

24) Another co-ordinate Bench in the case of *Rafikul Islam Vs. Union of India and 5 others* [WP(C) No. 251/2023] decided on 03.03.2023 have held that — *The principles of res judicata under the law requires two conditions precedent to be satisfied i.e., the earlier dispute must be between the same parties and secondly, the issue between the parties must be decided. The very condition that the issue must be decided requires that it must be decided by a reasoned order and not by an order merely depicting the view that the Foreigners' Tribunal may have taken without any reason. From such point of view we are unable to accept the plea of the petitioner that the subsequent proceeding against him in F.T. Case No. 05/2019 corresponding to S.P. Case No. 731/2008 is barred by the principles of res judicata.*

25) In the case in hand, on perusal of the order dated 25.05.2016 passed by the learned Member, Foreigners' Tribunal 2nd, Sonitpur, Tezpur in F.T. Case No. 27/2015 corresponding to S.P. Case No. 16/15, annexed to this writ petition filed by the petitioner as Annexure-6 (Pages: 23 - 24 / 25 - 28), we have seen that without appreciating the admissibility of the evidence placed by the petitioner, without considering the relevancy of those evidence, without considering the fact that the documents that were placed by the petitioner including the certificate issued by the Gaonburha of No. 1 Nalbari Gaon, Mouza-Sootea, District -

Sonitpur regarding petitioner permanent residence (Exhibit-A) were not proved by the concerned issuing authority and without stating any reasons as required under the law, the learned Member, Foreigners' Tribunal 2nd, Sonitpur, Tezpur passed the said opinion dated 25.05.2016 in F.T. Case No. 27/2015.

26) Considering the decisions and observations made by the co-ordinate Benches of this Court in the common order dated 19.04.2018 passed in WP(C) No. 7339/2018 and other connected cases as well as the order dated 03.03.2023 passed in WP(C) No. 251/2023, noted above, we are, therefore, of the view that the opinion dated 25.05.2016 passed by the Foreigners' Tribunal 2nd, Sonitpur, Tezpur in F.T. Case No. 27/2015 is not in accordance with law.

27) With regard to suppression or concealment of material facts before the Court it is well settled in law that the relief under the provisions of Article 226 or Article 227 of the Constitution is discretionary and a petitioner who approaches the Court for such relief must come with frank and full disclosure of facts. When a person approaches a Court of equity in exercise of its extraordinary jurisdiction under Articles 226/227 of the Constitution, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective. "Equally, the judicial process should never become an instrument of oppression or abuse or a means in the process of the Court to subvert justice." If he/she fails to do so and suppresses material facts, his/her application is liable to be dismissed.

28) The Hon'ble Apex Court in the case of *Amar Singh -Vs- Union of India*, reported in (2011) 7 SCC 69 have held that — *Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the courts, initiated proceedings without full disclosure of facts. Courts held that such litigants have come with "unclean hands" and are not entitled to be heard on the merits of their case. It is one of the fundamental principles of jurisprudence that litigants must observe total clarity and candour in their pleadings.*

29) From the above, we are of the considered opinion that the petitioner has not approached the Court with clean hands by disclosing the true facts.

30) For the reasons discussed above, this writ petition stands dismissed.

- 31)** The interim order passed earlier on 06.03.2017, stands recalled/ vacated.
- 32)** Registry shall return the records of the Case No. FTC (6) 331/2016 to the Foreigners' Tribunal No.6 at Sootea, District-Biswanath along with a copy of this order.
- 33)** Copy of this order shall also be forwarded to the Superintendent of Police (Border), Biswanath for information and necessary action.

JUDGE

JUDGE

Comparing Assistant