

GAHC010122212019



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

Case No. : WP(C)/3745/2019

ASMINA KHATUN AND 2 ORS.
W/O MD. INTAZ ALI, R/O VILL. KALIKAJARI, P.S. MIKIRBHETA, DIST.-
MORIGAON, ASSAM

2: JAKIR HUSSAIN
S/O MD. INTAZ ALI
R/O VILL. KALIKAJARI
P.S. MIKIRBHETA
DIST.-MORIGAON
ASSAM

3: IMRANA KHATUN
D/O MD. INTAZ ALI
R/O VILL. KALIKAJARI
P.S. MIKIRBHETA
DIST.-MORIGAON
ASSA

VERSUS

THE UNION OF INDIA AND 3 ORS.
REP. BY THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY OF HOME
AFFAIRS, JAISALMER HOUSE, 26, MANSINGH ROAD, NEW DELHI-110011

2:THE STATE OF ASSAM
REP. BY THE SECRETARY
DEPTT. OF HOME
DISPUR
GUWAHATI-6

3:THE SUPERINTENDENT OF POLICE (BORDER)
MORIGAON
DIST.-MORIGAON
ASSAM

PIN-782105

4:THE ELECTION OFFICER
MORIGAON
DIST. MORIGAON
ASSAM
PIN-78210

Advocate for the Petitioner : MR. U DUTTA

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

Linked Case : WP(C)/8399/2022

MD. INTAZ ALI
S/O- LATE JAMIRUDDIN

RESIDENT OF VILLAGE- KALIKAJARI

P.S.- MIKIRBHETA

DISTRICT- MORIGAON
ASSAM

PIN- 782016.

VERSUS

THE UNION OF INDIA AND 3 ORS
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA

MINISTRY OF HOME AFFAIRS

JAISALMER HOUSE
26
MANSINGH ROAD
NEW DELHI- 110011.

2:THE STATE OF ASSAM
REPRESENTED BY THE SECRETARY

DEPARTMENT OF HOME

DISPUR

GUWAHATI- 781006.

3:THE SUPERINTENDENT OF POLICE (BORDER)

MORIGAON

DISTRICT- MORIGAON

ASSAM

PIN- 782105

4:THE ELECTION OFFICER

MORIGAON

DISTRICT- MORIGAON

ASSAM

PIN- 782105.

Advocate for : MR. U DUTTA

Advocate for : DY.S.G.I. appearing for THE UNION OF INDIA AND 3 ORS

BEFORE

HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT & ORDER (ORAL)

Date : 28-03-2023

(A.M. Bujor Barua, J)

Heard Mr. U. Dutta, learned counsel for the petitioners and Ms. L. Devi, learned counsel for the respondent No. 1, being the Union of India. Also heard Mr. J. Payeng, learned counsel for the respondents No. 2 and 3, being the authorities in the Home Department and Mr. T. Pegu, learned counsel for the respondent No. 4, being the authority in the Election Commission of India.

2. As the present proceeding also involves a question involving the proposition laid down by the three judges bench of this Court in the case of *State of Assam & Ors. Vs. Moslem Mondal & Ors. reported in 2013 (1) GLT 809* and its implication in the manner in which the State of Assam in the Home Department is carrying out the proceedings against the suspected foreigners,

Mr. D. Nath, learned Senior Government Advocate has also appeared on behalf of the State of Assam in the Home Department.

3. WP(C) No. 3745/2019 has been instituted by Musstt. Asmina Khatun, Md. Jakir Hussain and Musstt. Imrana Khatun being aggrieved by an opinion dated 21.12.2018 of the Foreigners' Tribunal No. 3, Morigaon in F.T.(C) No. 203/2015 declaring them to be foreigners. It is noted that Musstt. Asmina Khatun is the wife of Md. Intaz Ali, resident of village Kalikajari, P.S. Mikirbheta in the Morigaon district, whereas Md. Jakir Hussain and Musstt. Imrana Khatun are respectively the son and daughter of Md. Intaz Ali. WP(C) No. 8399/2022 has been instituted by Md. Intaz Ali son of late Jamiruddin, resident of village Kalikajari, P.S. Mikirbheta in the Morigaon district also being aggrieved by an opinion dated 21.12.2018 of the Foreigners' Tribunal No. 3, Morigaon in F.T.(C) No. 203/2015. In the writ petitions, the petitioners raise a question of law with reference to the provisions in paragraph 97 of the judgment rendered by the three judges bench of this Court in *Moslem Mondal (supra)* to the effect that if an enquiry/investigation as provided in the said paragraph is not conducted, the resultant proceedings before the Foreigners' Tribunal itself would be vitiated and the entire proceedings are liable to be set aside. A further question of law raised by the petitioners is that the enquiry and the reference had been made only against Md. Intaz Ali being the writ petitioner in WP(C) No. 8399/2022 and no such enquiry was held against the three writ petitioners in WP(C) No. 3745/2019 and therefore by relying upon the proposition laid down by this Court in paragraph 9 of its judgment rendered in *Sudhir Roy & Ors. Vs. Union of India & Ors., reported in 2019 (1) GLT 353*, the proceedings against the said writ petitioners in WP(C) No. 3745/2019 are vitiated and therefore the opinion rendered by the Tribunal in respect of such writ petitioners are also liable to be

set aside.

4. Over and above the aforesaid two questions of law being raised by the writ petitioners, the petitioner Md. Intaz Ali in WP(C) No. 8399/2022 seeks to discharge the burden under Section 9 of the Foreigners Act, 1946 by referring to the voters' list of 1971 in respect of village Nagabandha, Mouza Lahorighat in the Nagaon district which contains the name of Md. Jamiruddin son of Khalil at Sl. No. 1063. The petitioner Md. Intaz Ali also refers to the voters' list of 1985 of village Nagabandha, Mouza Lahorighat in the Nagaon district which contains the name of Md. Jamiruddin son of Khalil at Sl. No. 194, Musstt. Sabarjan wife of Jamiruddin at Sl. No. 195 and that of Md. Muktab Ali son of Jamiruddin at Sl. No. 196, by claiming that Musstt. Sabarjan is his mother and Md. Muktab Ali is his brother. The petitioner also places reliance upon a Jamabandi in respect of a plot of land of village Nagabandha wherein as per the order of the Circle Officer dated 27.11.2019, the land had been mutated by deleting the name of Jamiruddin son of Khalil and by including the names of Md. Muktab Hussain son of Jamiruddin, Musstt. Hasen Banu daughter of Jamiruddin and Md. Intaz Ali son of Jamiruddin. Accordingly the petitioner Md. Intaz Ali claims that he is the Intaz Ali as reflected in the order of the Circle Officer dated 27.11.2019 and therefore he is the son of Jamiruddin of village Nagabandha whose name appears in the voters' list of 1971 of the said village and claims to have discharged the burden that he is a citizen of India.

5. Mr. J. Payeng, learned counsel for the respondents in the Home Department states that the Jamabandi relied upon by the petitioner Md. Intaz Ali was not before the Tribunal because the proceedings in the Tribunal was prior to the order of the Circle Officer dated 27.11.2019.

6. Mr. D. Nath, learned Senior Government Advocate appearing for the Home

Department of the Government of Assam raises a contention that the propositions laid down in paragraph 97 of the judgment of this Court in *Moslem Mondal (supra)* are provisions in furtherance of Article 21 of the Constitution of India and it does not lay down a jurisdictional procedure so that in the event, an enquiry or investigation contemplated under the said proposition could not be carried out in a given case, the same would vitiate any proceeding that has been initiated before the Foreigners' Tribunal without due adherence to the requirement laid down in the said paragraph 97. Mr. D. Nath raises another contention that these proceedings are of a different nature vis-a-vis any other criminal investigation or proceeding wherein the prospective foreigners do have a tendency, whenever any enquiry/investigation is being contemplated or carried out, to disappear and make themselves unavailable for the enquiry and the investigation. By exhibiting such tendency, the attempt of the prospective proceedees are to avoid the judicial system of being detected whether the person concerned is a foreigner or not. According to Mr. D. Nath, learned Senior Government Advocate, to mitigate such eventualities, the provisions of paragraph 97 of the judgment in *Moslem Mondal (supra)* would have to be read in the context of each individual case.

7. Mr. U. Dutta, learned counsel for the petitioners has raised a contention that the provisions laid down in paragraph 97 of the judgment in *Moslem Mondal (supra)* is a provision which would be mandatory in nature and any deviation thereof would lead the subsequent proceeding that may be initiated to be vitiated. The further submission raised is that the judgment in *Moslem Mondal (supra)* having been rendered by a three judges bench, a Division Bench cannot take a contrary view as it would violate the principle of judicial discipline and therefore the question raised by the State authorities cannot be gone into.

To support his contention, Mr. U. Dutta, learned counsel for the petitioners relies upon the pronouncement of the Hon'ble Supreme Court in the case of *M/s Trimurthi Fragrances (P) Ltd. through its Director Shri Pradeep Kumar Agarwal Vs. Government of N.C.T. of Delhi through its Principal Secretary (Finance) & Ors., reported in (2022) AIR(SC) 4868*. A reference is made to paragraph F wherein an earlier judgment of the Hon'ble Supreme Court rendered in *Central Board of Dawoodi Bohra Community & Anr. Vs. State of Maharashtra & Anr., reported in (2005) 2 SCC 673* was quoted and thereafter in paragraph G, a conclusion was arrived that a decision delivered by a bench of larger strength is binding on any subsequent bench of lesser or co-equal strength and that it is the strength of the bench and the number of judges who have taken a particular view which is said to be relevant. Accordingly, the conclusion that was arrived in the said judgment was that it is absolutely clear that a bench of a lesser quorum cannot disagree or dissent from the view of the law taken by a larger quorum and quorum means the bench strength which was hearing the matter. Mr. U. Dutta, learned counsel for the petitioners in his submission also refers to the in the case of *Official Liquidator Vs. Dayanand & Ors., reported in (2008) 10 SCC 1*, wherein at paragraph 90 the Hon'ble Supreme Court had observed that despite several pronouncements on the subject, there is a substantial increase in the number of cases involving violation of the basics of judicial discipline and the learned single judges and benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger benches by citing minor difference in the facts as the ground for doing so. The Hon'ble Supreme Court concluded that therefore it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and

encourages chance litigation.

8. By raising the submission that a Division Bench cannot take a different view from that of the proposition laid down by a three judges bench, Mr. U Dutta, learned counsel for the petitioners refers to another Division Bench judgment of this Court in *Rina Rani Das –vs- Union of India and others, in WP(C) No. 2706/2019 in its order dated 10.03.2021*, wherein the provision of paragraph 97 of the judgment of the three judges bench in *Moslem Mondal (supra)* was deliberated and discussed. In paragraph 16 of the judgment in *Rina Rani Das (supra)*, it was provided that proper pre-referral investigation is absolutely necessary to obviate the problem that had arisen in the matter before the Court in *Rina Rani Das (supra)*.

9. In *Rina Rani Das (supra)*, the issue was that while serving notice on the proceedee, the person against whom the proceedings were initiated was not properly identified inasmuch as, there was an issue raised that the opinion rendered by the Tribunal was given in respect of 'Rima Das', which was sought to be made applicable to 'Rina Rani Das'. In the aforesaid circumstance, the Court examined the relevance of an enquiry/investigation before the proceeding was initiated and in the circumstance, arrived at its conclusion in paragraph 16 that a proper pre-referral investigation is absolutely necessary to obviate to such problem i.e. to avoid the problems of identity of an opinion being made applicable to a person against whom there was no reference or no proceeding held. Accordingly, the Court expressed the view that pre-reference investigation cannot be mechanical and there must be proper application of mind by the authorities concerned and the persons concerned in the locality including the proposed proceedee must be examined wherever possible.

10. In the circumstance, in paragraph 20 of the said judgment in *Rina Rani*

Das (supra), the Division Bench had held that the referral authority must adhere to the norms laid down in paragraph 96, 97, 98 of *Moslem Mondal (supra)* as otherwise the proceeding before the Tribunal would be vitiated.

11. Mr. U Dutta, learned counsel for the petitioners without much reference to the circumstance in which the proceeding against *Rina Rani Das (supra)* was held, merely seeks to rely upon the provision of paragraph 20(1), wherein it was held that if the provision in paragraph 97 of *Moslem Mondal (supra)* is not scrupulously followed, the proceedings before the Tribunal would be vitiated. Mr. U Dutta, learned counsel for the petitioners seeks to raise his submission that in the instant case, the petitioner Md. Intaz Ali and his family members were not properly enquired or investigated and therefore, the proceedings as well as the resultant opinion dated 21.12.2018 of the Tribunal would be vitiated.

12. With regard to the other submission of Mr. U Dutta, learned counsel for the petitioners that the writ petitioners in WP(C) No. 3745/2019, who are the family members of the other writ petitioner Md. Intaz Ali were not duly enquired or investigated, and therefore could not have been referred in the same reference as made to Md. Intaz Ali relies upon the proposition in *Sudhir Roy (supra)* and submits that the proceedings against the writ petitioners in WP(C) No. 3745/2019 are vitiated although otherwise it may be maintainable against the other writ petitioner Md. Intaz Ali.

13. Mr. D Nath, learned Senior Government Advocate for the respondents in the Home Department of the Government of Assam on the other hand relies upon the pronouncement of the Hon'ble Supreme Court rendered in *Veerendra -vs- State of Madhya Pradesh, reported in (2022) 8 SCC 668*, wherein it had been held that merely because of certain defects or shortcomings in the investigation, an accused who had been subjected to a criminal trial cannot get

acquittal only for the reason of the shortcomings in the investigation. Accordingly, Mr. D Nath, learned Senior Government Advocate seeks to invoke the said principle in the instant case and submits that even though the enquiry or the investigation was not carried out or not carried out as per the requirement of law in respect of the writ petitioners, the same by itself will not vitiate the resultant proceedings that had been initiated against them merely on the reason of such shortcomings or defects in the investigation.

14. We have heard the learned counsel for the parties.

15. As regards the issue raised by Mr. U Dutta, learned counsel for the petitioners that it would be inescapable for the authorities not to conduct an enquiry or investigation as provided in paragraph 97 of *Moslem Mondal (supra)* before referring for an opinion to the Foreigners Tribunal as regards the citizenship of a person and the said provision having been laid down by a three judges bench, a Division Bench would not have the jurisdiction to take a different view, we find that from the issues raised by the State of Assam as regards the provision of paragraph 97 of the judgment in *Moslem Mondal (supra)*, this Court has not been called upon to render any judgment by taking a view which would be different or in deviation to what had been already laid down in *Moslem Mondal (supra)*. Neither this Court is called upon to take a view which would be different or in deviation of what is provided in paragraph 97, nor the Court intends to take a view which would be different or in deviation of paragraph 97. We are in respectful agreement with the propositions laid down by the Hon'ble Supreme Court in paragraphs F and G of its judgment rendered in *M/s Trimurthi Fragrances (P) Ltd (supra)* as well as with that of *Dayanand (supra)* in paragraphs 90 and 91 thereof. The issue raised by the Home Department of the Government of Assam is that in the peculiar nature and

circumstance of the present proceedings, situations are also faced where a proceedee deliberately avoids appearing before the enquiring or investigating authorities with the intention that by not appearing before the authorities in the enquiry or investigation, they can subsequently take a technical view that as there was no enquiry or investigation, therefore as held in paragraph 20(1) of the judgment of this Court rendered in *Rina Rani Das (supra)*, the proceeding initiated against them is vitiated. If such situations do exist when the referring authorities conduct the verification, certainly it is a matter of concern and it would be an escape route for a prospective proceedee to avoid the proceedings and being declared as a foreigner merely by disappearing and making themselves unavailable before the enquiring authority and ensure that in spite of all efforts, the enquiring authority is unable to do the needful as provided in paragraph 97 of the judgment in *Moslem Mondal (supra)*.

16. In this proceeding, we are required to look into the issue only from the aforesaid perspective and not from the general perspective as to whether the provisions in paragraph 97 of *Moslem Mondal (supra)* can be diluted to some extent or that a different view or a deviated view is required to be taken of the provisions thereof. In the circumstance, we examine the provisions of paragraphs 92, 93, 94, 95, 96, 97, 98, which are extracted as below and understand as to what are the exact provisions and propositions laid down therein:-

“(92). As discussed above, the Tribunals constituted under the Foreigners Act read with the 1964 Order have to regulate their own procedure and they have also the quasi-judicial function to discharge and hence in a given case the Tribunal has jurisdiction to entertain and pass necessary order on an application to set aside an ex-parte opinion, provided it is proved to the satisfaction of the Tribunal that the proceedee was not served with the notice in the reference proceeding or that he was prevented by sufficient cause from appearing in the proceeding, reason for which was beyond his control. Such application, however, should not

be entertained in a routine manner. The Tribunal can entertain such application provided the proceedee could demonstrate the existence of the special/exceptional circumstances to entertain the same way of pleading in the application filed for setting aside the ex-parte opinion, otherwise the very purpose of enacting the 1946 Act and the 1964 Order would be frustrated. The Tribunal, therefore, would have the jurisdiction to reject such application at the threshold, if no ground is made out. Question (d): In what manner the investigation is to be carried out by the instrumentality of the State before making a reference to the Tribunal under the provisions of the 1964 Order?

(93) The right to get a fair trial is a basic fundamental and human right. Any procedure which comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution. Fair trial also includes a fair investigation. The concept of fair investigation and fair trial assumes much importance in the matter of detection and deportation of foreigners under the provisions of the Foreigners Act, 1964 Order as well as the 2012 Amendment Order, because of the nature of proceeding as well as the burden cast on the person who is suspected to be a foreigner to prove that he is not a foreigner, by Section 9 of the 1946 Act. The citizenship right is to be jealously protected. The right under Article 21 of the Constitution is available to all persons to protect his life and personal liberty and hence even the right of a non-citizen to have a fair investigation, trial as well fair procedure to be adopted by the Tribunal is guaranteed by Article 21 of the Constitution.

(94) The Apex Court in Dwarka Prasad Agarwal (supra) has opined that the right to get a fair trial is a basic fundamental/human right and denial of fair trial violates Article 14 of the Constitution. In Zahira Habibulla H. Sheikh (supra), commonly known as "best Bakery Case", the Apex Court giving emphasis on the principle of fair trial, has opined that the just application of its principle in substance is to find out the truth and prevent miscarriage of justice. It has also been opined that the concept of fair trial entails the familiar triangulation of interests of the accused, the victim and society, and it is the community that acts through the State and prosecuting agencies. It has also been opined that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Public interest in the proper administration of justice must be given as much importance, if not more, as the interests of the individual accused. While dealing with the role of the Court, the Apex Court observed that the courts have a vital role to play. Its role is to discover, vindicate and establish the truth and hence the trial should be search for the truth and not a bout over technicalities. The Apex Court further observed that the Presiding Judge must cease to be a spectator and a

mere recording machine and he must have active interest and elicit all relevant materials necessary for reaching the correct conclusion to find out the truth and administer justice with fairness and impartiality both to the parties and to the community.

(95). In Zahira Habibulla H. Sheikh (5) (supra) the Apex Court opined that every State has a constitutional obligation and duty to protect the life and liberty of its citizens, which is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology. The Apex Court further opined that the fair trial consists not only in technical observance of frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice. In Samadhan Dhudaka Koli (supra) the Apex Court has reiterated its view that the prosecution must also be fair to the accused. Fairness in investigation as also trial is a human right of an accused. In Himanshu Singh Sabharwal (supra) the Apex Court reiterating the earlier view, has further opined that the fair trial is inherent in the concept of due process of law and the fair hearing requires an opportunity to preserve the process. In Nirmala Singh Kahlon vs State of Punjab and Ors reported in AIR 2009 SC 984, the Apex Court has reiterated that fair investigation and fair trial are concomitant to observance of fundamental right of an accused under Article 21 of the Constitution and hence through the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society, a victim of a crime, thus, is equally entitled to a fair investigation. In National Human Rights Commission (supra) commonly known as Godhra Riot Case, the Apex Court has reiterated the requirement of having fair investigation and the trial.

(96) One of the contentions of the proceedees is that through the referral authority is required to make the reference to the Tribunal after making a fair investigation, no such proper and fair investigation is conducted and the police at their own whims and caprice gives a report, in some cases even without visiting the place where such proceedee resides and also without giving any opportunity to produce the relevant documents to substantiate that the proceedee is not a foreigner, and such report is accepted by the referral authority and accordingly the reference is made to the Tribunal, on the basis of which the reference is registered against such person.

(97) Fair investigation and fair trial being the basic 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

investigating 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 a 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 the place where such person ordinarily resides or reported to reside or works for gain and making 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, any be in search of livelihood or may be to avoid detection. To ensure proper investigation and also having regard to integrity and sovereignty of the nation, once investigation related to the nationality status of a person starts 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 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 equalled with an investigation conducted in criminal cases.

(98) The reference by the referral authority also cannot be mechanical. The referral authority has to apply his mind on the materials collected by the investigating officer during investigation and make the reference on being satisfied that there are grounds for making such reference. The referral authority, however, need not pass a detailed order recording his satisfaction. An order agreeing with the investigation would suffice. The referral authority also, while making the reference, shall produce all the materials collected during investigation before the Tribunal as the Tribunal is required prima facie to satisfy itself about the existence of the main grounds before issuing the notice to the proceedee."

17. In paragraph 92 of the judgment of *Moslem Mondal (supra)*, a question being "Question (D)" had been framed as to in what manner the investigation is to be carried out by the instrumentality of the State before making a reference

to the Tribunal under the provisions of Foreigners Order, 1964. In paragraph 93, it is provided that the right to get a fair trial is a basic, fundamental and human right and that a fair trial also includes a fair investigation. In paragraph 93, it is further provided that the right under Article 21 of the Constitution of India is available to all persons to protect his life and personal liberty and hence even the right of a non-citizen to have a fair investigation, fair trial as well as fair procedure to be adopted by the Tribunal is guaranteed under Article 21 of the Constitution of India. Accordingly, it has to be understood that the right to have a fair investigation is derived from the fundamental rights under Article 21 of the Constitution of India.

18. To substantiate the submission on the requirement of there being a fair investigation, Mr. U Dutta, learned counsel for the petitioners relies upon the proposition laid down in paragraph 38 of the Hon'ble Supreme Court in *Dwarka Prasad Agarwal (D) by LRS and another –vs- B. D. Agarwal and others, reported in (2003) 6 SCC 230*, which is extracted below:-

“38. *There is another aspect of the matter which must also be taken notice of. A party cannot be made to suffer adversely either indirectly or directly by reason of an order passed by any court of law which is not binding on him. The very basis upon which a judicial process can be resorted to is reasonableness and fairness in a trial. Under our Constitution as also the international treaties and conventions, the right to get a fair trial is a basic fundamental/human right. Any procedure which comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution of India. Right to a fair trial by an independent and impartial Tribunal is part of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 [See Clark (Procurator Fiscal, Kirkcaldy) v. Kelly [(2003) 1 All ER 1106 (PC)]]. Furthermore, even if the petitioner herein had filed a writ petition before the High Court in terms of Article 226 of the Constitution of India, the same would not have been entertained as the impugned order had been passed consequent to and in furtherance of the purported consent order passed by the High Court. Ordinarily, the High Court would not have issued a writ of certiorari for quashing its own order. Even in that view of the matter it is apposite that this petition under Article 32 should be entertained.”*

19. The judgment cited by the learned counsel for the petitioners i.e. paragraph 38 in *Dwarka Prasad Agarwal (D) (supra)* does not appear to be a relevant proposition on the submission on the requirement of a fair investigation but as in *Moslem Mondal (supra)* a three judges judgment of this Court had provided that fair trial also includes a fair investigation, we look into the aspect as to what would be a fair investigation in respect of the proceedings under the Foreigners Act, 1946.

20. Most of the judgments enunciating the principle of fair investigation pertain to an investigation in a criminal matter where an investigation is being carried out to achieve some other oblique purpose rather than it being an investigation in a matter where certain serious criminal allegations are being raised or where serious allegations are raised but the investigations are deliberately not done in a required manner so as to give undue advantage to a prospective accused. But for the purpose of a proceeding under the Foreigners Act, a fair investigation would be fair enough if the prospective proceedee is given an opportunity to present his claim before the enquiry or the investigating authority that he is otherwise a citizen of India.

21. The said proposition can also be found to have been laid down in paragraph 97 of *Moslem Mondal (supra)*. In paragraph 97 of *Moslem Mondal (supra)* it has specifically been provided that a fair investigation would be a concomitant to preservation of the fundamental rights of a person under Article 21 of the Constitution of India and 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. The proposition in paragraph 97 of *Moslem Mondal (supra)* is consistent with what we have already discussed that in respect of the

proceeding under Foreigners Act, a fair investigation would be sufficient if an opportunity is given to the prospective proceedee to present or demonstrate with any relevant material that he is not a foreigner or that he is an Indian citizen.

22. The provision of paragraph 97 itself makes it discernable that the dominant purpose of an investigation or an enquiry is to provide the prospective proceedee with an opportunity to present or demonstrate that he is an Indian citizen or that he is not a foreigner before he is referred. But the said requirement to give an opportunity to the prospective proceedee to present or demonstrate that he is not a foreigner is again qualified with the further provision of paragraph 97 which provides that to ensure proper investigation and also having regard to the integrity and sovereignty of the nation, once an 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. The said provision in paragraph 97 makes it inherent that to avail the benefits of the opportunity to be given during the investigation, a corresponding cooperation from the prospective proceedee is also a requirement and the requirement is to the extent that the proceedee must at all point of time during the process of investigation should make it known to the investigating authority about his whereabouts or his location where the authority may find him.

23. A corollary to the said provision of requiring the prospective proceedee to inform the investigating authority about his whereabouts would also be that there is a requirement of the prospective proceedee to cooperate with the investigating authority and not to avoid the investigation.

24. The said provisions which are inbuilt within paragraph 97 of the *Moslem Mondal (supra)* make it apparent that the provisions thereof for giving an

opportunity to the prospective proceedee are not to enable a prospective proceedee to move away and disappear from being available before the investigating authority so as to create an obstacle in the continuation of the investigation.

25. In this respect, we also take note that the requirement of an enquiry preceding a reference made to the Foreigners' Tribunal is a provision of Rule 3 of the Illegal Migrants (Determination by Tribunals) Rules, 1983, which is extracted as below:

“3. Preliminary Inquiry- For the purpose of making a reference in relation to any person under sub-section (1) of Section 8 ¹[and sub-section (1) of Section 8A] to the Tribunal (including consideration as to whether a question such as is referred to in that section has arisen in relation to such person), –
(a) the competent authority seized of the matter shall require the Superintendent of Police to direct, or
(b) where such competent authority is the Superintended of Police himself, the Superintendent of Police shall direct, any officer not below the rank of a Sub-Inspector of Police to make an inquiry.”

26. Rule 3 of the Illegal Migrants (Determination by Tribunals) Rule, 1983 makes it a requirement that for the purpose of making a reference under Section 8 of the Illegal Migrants (Determination by Tribunals) Act, 1983 there is a pre-requirement of the Superintendent of Police to make an enquiry through an officer not below the rank of Sub-Inspector of Police as to whether the questions referred in Section 8 or Section 8(A) of the Illegal Migrants (Determination by Tribunals) Act, 1983 exists in a given case.

27. Section 8(1) of the Illegal Migrants (Determination by Tribunals) Act, 1983 provides for a representation to be made by any such person against any order under the Foreigners Act, 1946 requiring him not to remain in India or to any other effect whereas Section 8A (1) refers to any person making an application to the Tribunal for its decision as to whether the person whose name and other

particulars are given in the application, is or is not a foreigner.

28. But be that as it may, the Hon'ble Supreme Court in its judgment rendered in *Sarbananda Sonowal v. Union of India and Another, reported in (2005) 5 SCC 665* had struck down the Illegal Migrants (Determination by Tribunals) Act, 1983 meaning thereby that as a corollary thereof Rule 3 of the Illegal Migrants (Determination by Tribunals) Rules, 1983 had also been set aside by implication. In such situation, there would be no statutory requirement for the referring authority to make any enquiry preceding a reference made to the Tribunal but however, in paragraph 97 of the *Moslem Mondal (supra)* the three judges judgment brings the requirement of an enquiry or an investigation by providing it to be a requirement of Article 21 of the Constitution of India.

29. As the requirement to make an enquiry is no longer a statutory requirement but a requirement under Article 21 of the Constitution, as provided in paragraph 97 of *Moslem Mondal (supra)*, we will have to understand the purport, nature and extent of the enquiry as provided in paragraph 97 of *Moslem Mondal (supra)*.

30. As already, indicated above the dominant purpose of the provisions of paragraph 97 of *Moslem Mondal (supra)* is to afford the prospective proceedee an opportunity to present or demonstrate before the investigating authority itself that he is not a foreigner.

31. The further provision is that the prospective proceedee has to keep the investigating authority informed about his whereabouts and also to give specific location as to where he may be found in the event the proceedee decides to change his residence. The provisions in paragraph 97 of *Moslem Mondal(supra)* itself makes it imperative that the prospective proceedee has to make himself available before the investigating agency which again would mean that he is not

expected to make his disappearance from the availability before the investigating agency so as to frustrate the investigation. Accordingly, we clarify that the provisions of paragraph 97 of *Moslem Mondal(supra)* is available for the purpose of affording the prospective proceedee an opportunity to present that he is a citizen of India and not a foreigner and it cannot be understood to be a provision which may enable the prospective proceedee to frustrate the enquiry or investigation by making himself deliberately unavailable to the investigating agency and thereafter taking advantage of his own unavailability to take the stand that the proceeding that may be drawn against him would be vitiated.

32. We are clarifying further that we are not in any manner deviating, disagreeing or diluting the provisions of paragraph 97 of *Moslem Mondal (supra)*, but only clarifying to the extent as to what would be the effect if the prospective proceedee deliberately disappears and makes himself unavailable before the investigating agency so as to frustrate the entire judicial system.

33. When we have perused the records of the instant case, it is noticed that the investigating agency had given adequate opportunity to the writ petitioner Md. Intaz Ali as well as to the writ petitioner Asmina Khatun. As appropriate opportunity had been given by the investigating agency to the aforesaid two writ petitioners it cannot be said that the requirement of paragraph 97 of *Moslem Mondal (supra)* was not complied with.

34. But in respect of the other two writ petitioners Md. Jakir Hussain and Musstt. Imrana Khatun records do not reveal that the investigating authority had given them the opportunity.

35. Mr. U Dutta, learned counsel for the writ petitioners has raised another contention that the writ petitioners Musstt. Asmina Khatun and Musstt. Imrana Khatun have been referred along with their husband/father namely, Md. Intaz

Ali and, therefore, the reference made in respect of the said three writ petitioners would be vitiated in view of the propositions laid down in paragraph 9 of the judgment rendered in *Sudhir Roy (supra)*. In paragraph 9 of the judgment in *Sudhir Roy (supra)* it had been provided that it may be a good cause for the referring authority to initiate an enquiry and make a reference against the family members of a proceedee, but without following the due procedure of law conducting an enquiry and making a reference and being adjudicated by the Tribunal, the family members cannot be declared to be foreigners.

36. In the instant case, we have noticed that the enquiry had been made against the writ petitioner Musstt. Asmina Khatun as revealed from the records. From such point of view, factually the proposition laid down in paragraph 9 of *Sudhir Roy (supra)* would be inapplicable in respect of the writ petitioner Musstt. Asmina Khatun.

37. We also clarify that nothing is indicated in the records that the writ petitioners Md. Jakir Hussain and Musstt. Imrana Khatun have made themselves unavailable before the enquiring authority or investigating agency so as to disable the authority to make an enquiry. Accordingly, we hold that the references as well as opinion dated 21.12.2018 in Case No.F.T.(C) No.203/2015 rendered against the writ petitioners Md. Jakir Hussain and Musstt. Imrana Khatun would be unsustainable in law. But however, as the said declaration is made on a technical aspect in a combined opinion being rendered against the said writ petitioners along with their father Intaz Ali in deviation of the provisions in paragraph 9 of *Sudhir Roy (supra)*, we grant liberty to the referring authority, if so advised, to give the said two writ petitioners namely Md. Jakir Hussain and Musstt. Imrana Khatun an opportunity to present any materials

that they may have to prove that they are citizens of India and upon such opportunity being given, liberty remains to make a reference against them, if so advised and also maintainable under the law.

38. As regards the writ petitioners Md. Intaz Ali and Musstt. Asmina Khatun, as records reveal that the required procedure of law have been followed, we now examine the submissions raised by the said two writ petitioners for discharging the burden under Section 9 of the Foreigners Act, 1946 that they are citizens of India.

39. In respect of the writ petitioner Md. Intaz Ali, reliance is placed on the voters list of 1971 of village Nagabandha, Mouza Lahorighat, PS Lahorighat in the Nagaon district which contains the name of Md. Jamiruddin son of Khalil at Sl.No.1063. Thereupon reliance is placed on the voters list of 1985 of village Nagabandha, Mouza Lahorighat, PS Lahorighat which contains the name of Md. Jamiruddin son of Khalil at Sl.No.194, Musstt. Sabarjan wife of Jamiruddin at Sl.No.195 and Md. Muktab Ali son of Jamiruddin at Sl. No.196 and accordingly claim is made that Musstt. Sabarjan is the wife of Jamiruddin and Md. Muktab Ali son of Jamiruddin is the elder brother of Md. Intaz Ali. Thereupon reliance is placed on the voters list of 1997 of village Nagabandha, Mouza Lahorighat, PS Lahorighat in the Nagaon district which contains the name of Intaz Ali son of Jamir at Sl.No.340 and that of Asmina Khatun wife of Intaz at Sl.No.341. By referring to Sl.No.340 of the voters list of 1997 that Intaz Ali is the son of Jamir of village Nagabandha, a linkage is claimed with Md. Jamiruddin of the voters list of 1971 of village Nagabandha to claim that Intaz Ali is also a citizen of India. But it is also noticed that the further voters list of 2015 relied upon by the petitioner contains the name of Intaz Ali son of Jamiruddin of village Kalikajari, PS Mikirbheta in the Morigaon district and not village Nagabandha.

40. We have noticed that the notice of the Tribunal is issued against Md. Intaz Ali, son of Late Jamir of village Uttar Kalikajari, Islampur. No material is available before the Tribunal that Intaz Ali son of Jamir at Sl.No.340 of the voters list of 1997 of village Nagabandha, Mouza Lahorighat PS Lahorighat in the Nagaon district and Intaz Ali son of Jamiruddin of village Kalikajari, PS Mikirbheta in the Morigaon district of 2015 voters list are one and the same person. The petitioner also referred to a copy of the Jamabandi wherein an order of the Circle Officer dated 27.11.2019 is referred which provides that in respect of a plot of land bearing dag No.184 of village Nagabandha had been mutated by deleting the name of Jamiruddin son of Khalil and substituting it with the name of Md. Muktab Hussain son of Jamiruddin and Musstt. Hasen Banu, daughter of Jamiruddin and Md. Intaz Ali son of Jamiruddin. No lineage is provided that Musstt. Asmina Khatun of village Nagabanda of 1997 voters list may be a citizen of India, but whether Md. Intaz Ali son of Jamir of village Kalikajari of 2015 voters list and Intaz Ali son of Jamir of village Nagabandha of 1997 voters list as well as Md. Intaz Ali appearing in the Jamabandi are one and the same person, also requires a determination.

41. For the purpose the matter stands remanded back to the Tribunal to enable the petitioner Md. Intaz Ali to adduce any evidence that he may desire to rely upon to substantiate that Md. Intaz Ali of village Nagabandha of the voters list of 1997 and Md. Intaz Ali of village Kalikajari of 2015 voters list are one and the same person. As regards the petitioner Musstt. Asmina Khatun, no material is placed before the Court that she is a citizen of India through the lineage of her father, although the lineage of her husband Md.Intaz Ali may be available. We accordingly allow another opportunity to the writ petitioner Musstt. Asmina Khatun to adduce any evidence before the Tribunal which may establish that

she is a citizen of India and thereby discharge the burden under Section 9 of the Foreigners Act 1946.

42. The writ petitioner Md. Intaz Ali and the writ petitioner Musstt. Asmina Khatun to appear before the Foreigners Tribunal No.3 at Morigaon on 11.05.2023.

43. The Tribunal upon considering the evidence and materials that may be produced by the said two writ petitioners Md. Intaz Ali and Musstt. Asmina Khatun shall pass a reasoned order. In the event, the reasoned order is in favour of the petitioners, the same shall prevail over the order dated 21.12.2018 of the Foreigners Tribunal No.3 Morigaon in F.T.(C) Case No.203/2015 and if it is against the petitioners, consequential action shall follow.

44. However, with respect to the writ petitioner Md. Jakir Hussain and Musstt. Imrana Khatun liberty remains to the respondent authority to refer them if so advised by following the due procedure of law as indicated above.

45. Till the reasoned order is passed, no coercive action be taken against the petitioners.

46. Send back the LCR immediately.

47. Both the writ petitions stand disposed of in the above terms.

J U D G E

J U D G E

Comparing Assistant