

GAHC010068482020



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

Case No. : WP(C)/2125/2020

ABDUL MATLEB AND 2 ORS.
SON OF LATE ABDUL MAJID, RESIDENT OF GARMARI (TARAJAN), P.S.
MIKIRBHETA, DIST. MORIGAON, ASSAM.

2: MD SAHARUDDIN AHMED
SON OF ABDUL MATLEB
RESIDENT OF GARMARI (TARAJAN)
P.S. MIKIRBHETA
DIST. MORIGAON
ASSAM.

3: HALIMA KHATOON @ HALIMA BEGUM
RESIDENT OF GARMARI (TARAJAN)
P.S. MIKIRBHETA
DIST. MORIGAON
ASSAM

VERSUS

UNION OF INDIA AND 6 ORS.
THROUGH THE SECRETARY OF THE MINISTRY OF HOME AFFAIRS, NEW
DELHI.

2: THE STATE OF ASSAM
THROUGH THE COMMISSIONER AND SECRETARY TO THE GOVT. OF
ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI-6.

3:THE ELECTION COMMISSION OF INDIA
REPRESENTED BY THE DISTRICT ELECTION OFFICER
MORIGAON
ASSAM.

4:THE STATE CO-ORDINATOR
NRC
ACHYUT PLAZA
BHANGAGAR GUWAHATI.

5:THE ADDLL. DIRECTOR GENERAL OF POLICE (BORDER)
BHANGAGARH
GUWAHATI-5.

6:THE DEPUTY COMMISSIONER
MORIGAON
ASSAM.

7:THE SUPERINTENDENT OF POLICE (BORDER)
MORIGAON
ASSAM

Advocate for the Petitioner : MR. J SARMAH

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

BEFORE
HONOURABLE MR. JUSTICE MANASH RANJAN PATHAK
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

ORDER

24-04-2024

(M.R.Pathak, J)

Heard Mr. J Sarma, learned counsel for the petitioners. Also heard Ms. A Verma, learned Standing counsel, Home Department, Assam for the respondent Nos. 2, 5 & 7, Mr. T Pegu, learned counsel appearing on behalf of Mr. A I Ali, learned Standing counsel, Election Commission of India for the respondent No. 3 as well as Mr. P Sharma, learned Additional Senior Government Advocate, Assam for the respondent No. 6.

- 2.** The petitioners have filed this writ petition being dissatisfied with the order dated 27.02.2019 passed by the learned Foreigners Tribunal No. 3rd, Morigaon in Case No. F.T.(C) 53/2015, whereby the said Tribunal opined them to be foreigners under the Foreigners Act, 1946, who had illegally entered into the territory of India on or after 25.03.1971.
- 3.** This Court by order dated 12.06.2020 while calling for the records of said Case No. F.T. (C) 53/2015 from the Foreigners Tribunal No. 3rd, Morigaon, in the interim, granted bail to the petitioners and further directed not to take them into custody and not to deport them from the territory of India.
- 4.** The contention of the petitioners herein is that without there being any reference against them by the Superintendent of Police (Border), Morigaon, i.e., the concerned Referral Authority, the Foreigners Tribunal No. 3rd, Morigaon in Case No. F.T.(C) 53/2015 issued notice to them and thereafter going through the materials adduced by the parties declared them to be foreigners under the Foreigners Act, 1946.
- 5.** Petitioners submitted that in violation of the provisions of the Foreigners (Tribunals) Order, 1964, the said Foreigners Tribunal by the impugned order dated 27.02.2019 illegally declared them to be foreigners under the Foreigners Act, 1946, as there was no reference against them which is a mandatory provision under the said 1964 Orders which was framed under the said 1946 Act, having statutory force.
- 6.** It is also submitted by the petitioners that the reference was against the wife of the petitioner No. 1 and mother of the petitioner Nos. 2 & 3, namely Musstt. Sahura Khatoon.
- 7.** On perusal of the records, we have seen that after making an enquiry under the provisions of the Illegal Migrants (Determination by Tribunals), Act 1983 during its force, the Superintendent of Police (Border), Morigaon on 11.04.2005 made a reference to the Illegal Migrants (Determination) Tribunal in IMDT Case No. 30/2004 initiated on 12.01.2004 seeking an opinion as to whether said Musstt. Sahura Khatoon, wife of Md. Abdul Matleb, village-Gormari under Mikirbheta Police Station of district-Morigaon is an illegal migrant or not.
- 8.** After the said IMDT Act, 1983 was declared to be illegal by the Hon'ble Supreme Court in the case of *Sarbananda Sonowal -Vs- Union of India* reported in (2005) 5 SCC 665, the

pending cases initiated under the IMDT Act were re-numbered and proceeding under the Foreigners Act, 1946 were initiated against such proceedees.

9. From the records of the case, we have seen that though there was no such reference against the present petitioners and such reference by the Superintendent of Police (Border), Morigaon was against Musstt. Sahura Khatoon, wife of Md. Abdul Matleb only, but the Foreigners Tribunal No. 3rd, Morigaon on 14.08.2015 issued notice not only to said Musstt. Sahura Khatoon but also to the present petitioners.

10. While the said proceeding before the Foreigners Tribunal No. 3rd, Morigaon was pending for adjudication, Musstt. Sahura Khatoon expired, against whom the reference was made by the Superintendent of Police (Border), Morigaon. But the said Foreigners Tribunal without there being any reference against the present petitioners proceeded with the matter and declared them to be foreigners under the Foreigners Act, 1946.

11. Order 2(1) of the said 1964 Order clearly provides 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 (31 of 1946) to a Tribunal to be constituted for the purpose, for its opinion.*

12. In the case in hand, the concerned authority, i.e., the Superintendent of Police (Border), Morigaon referred the matter to the Foreigners Tribunal No. 3rd, Morigaon to determine as to whether said Musstt. Sahura Khatoon was a foreigner or not and there was no such reference against the present petitioners regarding their nationality.

13. A Co-Ordinate Bench of this Court in the case of *Aktara Khatun and Others. -Vs- State of Assam and Others* reported in 2017 (2) GLT 974 have held that –

“24.....once a proceedee is declared to be a foreigner it would only be a logical corollary to such declaration that his brothers, sisters and other family members would also be foreigners. Therefore, it becomes the duty of the jurisdictional Superintendent of Police (B) to cause enquiry in respect of the brothers, sisters and other family members of the declared foreigners and thereafter, to make a reference to the competent Foreigners' Tribunal against such brothers, sisters and other family members” .

14. A Co-Ordinate Bench of this Court in the case of *Sudhir Roy and Others. -Vs- Union of India and Others.* reported in 2019 (1) GLT 353 have held that –

“9. As regards the declaration of the wife, sons and daughters of the petitioner to be foreigners, we have perused the records and have taken note of that the reference was made only against the petitioner and not against his wife, sons and daughters. Although the law in this respect has been settled by this Court in Aktara Khatun Vs. State of Assam & Ors., reported in 2017 (2) GLT 974 that a presumption can also be drawn against the family members of the proceedee who has been declared as foreigner, but at the same time we are also of the view that such presumption would by itself not lead to a conclusion that the family members of a proceedee who has been declared to be a foreigner are also foreigners. The same may be a good cause for initiating an enquiry and making a reference against the family members, but without following the due procedure of law of conducting an enquiry and making a reference and being adjudicated by the Tribunal, the family members cannot be declared to be foreigners”.

15. For the reasons above, the impugned order dated 27.02.2019 passed by the learned Foreigners Tribunal No. 3rd, Morigaon in Case No. F.T.(C) 53/2015, being not sustainable in law, hereby stands set aside and quashed.

16. Accordingly, the interim order dated 12.06.2020 passed earlier in the present proceeding stands merged with this order.

17. However, it is made clear that if the Superintendent of Police (Border), Morigaon or any other authority concerned makes any reference against the present petitioners before the concerned Foreigners Tribunal, the said Tribunal shall be at liberty to proceed against the present petitioners as per the provisions of the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 for determination of their nationality, in accordance with law.

18. With the above observations, this writ petition stands disposed of.

19. Registry shall return the records of Case No. F.T.(C) 53/2015 to the Foreigners Tribunal No. 3rd, Morigaon forthwith, along with a copy of this order.

JUDGE

JUDGE

Comparing Assistant