



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

Case No. : WP (C) 4683/2018

1. Abdul Mutalib @ Abul Matalib,
S/O Late Rajab Ali,
R/O. Vill-Khalapia, P.S.-Mikirbheta,
Dist. Morigaon, Assam. PIN-782105.

Petitioner

-Versus-

1. The State of Assam,
Rep. by the Commissioner and Secretary,
Govt. of Assam, Home Deptt.,
Dispur, Guwahati-6.
2. The Deputy Commissioner,
Dist.Morigaon,
Assam, PIN-782105.
3. The Superintendent of Police,
Dist.Morigaon, Assam, PIN-782105.
4. The Superintendent of Police (Border),
Dist. Nagaon, Assam, PIN-782001.
5. The Electoral Registration Officer,
Batadrava LAC,
Dist. Morigaon, Assam.
6. The Union of India,

Rep. by the Secretary,
Min. of Home Affairs,
New Delhi-110001,

7. The State Coordinator NRC,
P.O. and P.S.-Bhangagarh,
Dist.Kamrup (M),
Guwahati-781005 Assam.

Respondents

Advocate for the Petitioner : 1. Mr. P.N. Sharma.
Advocates for the for Respondent(s): 1. Ms. A, Verma, (SC, Home
Deptt.)
: 2. Mr. P. Sarma, (Sr. GA, Assam)
: 3. Mr. H. Kuli, on behalf of Mr.
A.I. Ali (SC, Election Commission)

Date of judgment : 13.06.2024

BEFORE
HON'BLE MR. JUSTICE MANASH RANJAN PATHAK
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

JUDGMENT & ORDER

(Mridul Kumar Kalita, J)

- 1.** Heard Mr. P.N. Sharma, learned counsel appearing for the petitioner. Also heard Ms. A. Verma, learned Standing Counsel, Home Department, Assam appearing for the respondent Nos. 1, 3 and 4, as well as Mr. P. Sarma, learned Additional Senior

Government Advocate, Assam for the respondent No. 2 and Mr. H. Kuli, learned counsel appearing on behalf of Mr. A.I. Ali, learned Standing Counsel, Election Commission of India appearing for the respondent No. 5.

2. This writ petition has been filed by the petitioner, namely, Md. Abdul Mutalib, @ Abul Matalib impugning the *ex parte* opinion/order, dated 29.02.2016, passed by the learned Foreigners Tribunal No. 3rd, Morigaon in F.T. Case No. 19/2016, whereby, the above-named petitioner was declared as a Foreigner, under the Foreigners Act, 1946 who had illegally entered into India (Assam) on or after 25.03.1971.

3. Notice in this case was issued on 23.07.2018 and the case record, in original, of F.T. Case No. 19/2016 was called for from the learned Foreigners Tribunal No. 3rd, Morigaon. The said case record has been received.

4. The facts, which transpires on perusal of the case record of F.T. Case No. 19/2016, relevant for consideration of the instant writ petition, in brief, are as follows:-

- i.** Suspecting the petitioner, namely, Md. Abdul Mutalib, @ Abul Matalib, son of late Rajab Ali to be a Foreigner, who had illegally entered into India (Assam) from Bangladesh after 01.01.1966, the

Superintendent of Police (Border), Morigaon had directed to conduct an enquiry in F.T. Case No. 78/2004 dated 28.07.2004 and on the basis of the enquiry report submitted by the Enquiry Officer, a reference under the provisions of Foreigners (Tribunals) Order, 1964 was made to the learned Foreigners Tribunal, Nagaon by the Superintendent of Police (Border), Morigaon for determining the nationality of above-named petitioner as per the provisions of the Foreigners Act, 1946.

- ii.** No records are available before us regarding receipt of the aforesaid reference by the learned Foreigners Tribunal, Nagaon. However, from the available records, it transpires that on 09.06.2015, the aforesaid case was received by learned Foreigners Tribunal No. 2nd, Morigaon, wherein the reference was registered as F.T. Case No. 622/2012.
- iii.** Thereafter, by order dated 09.06.2015, notice was issued by the learned Foreigners Tribunal No. 2nd, Morigaon to the petitioner by fixing 17.07.2015 for his appearance before the said Tribunal and for filing the written statement in support of his claim of nationality.
- iv.** On 17.07.2015, the notice issued to the petitioner was returned without service and same was again

re-issued by fixing 28.08.2015 for appearance and filing of written statement.

- v.** However, by order dated 28.08.2015, the Foreigners Tribunal Case No. 622/2012 was transferred from the learned Foreigners Tribunal No.2nd, Morigaon to the learned Foreigners Tribunal No. 3rd, Morigaon for disposal.
- vi.** On perusal of the available records, it appears that in paragraph No. 5 of the impugned opinion, it has been mentioned that on transfer, the case record of F.T. Case No. 19/2016 was put up on 03.01.2016, and 29.02.2016 was fixed for necessary orders. However, the only order sheet of F.T. Case No. 19/2016, which is available on record, is of 29.02.2016 and nothing could be discernible from the case record as to when and how the case was re-registered as F.T. Case No. 19/2016 from F.T. Case No. 622/2012.
- vii.** By order dated 29.02.2016, passed in F.T. Case No. 19/2016, the learned Foreigners Tribunal No. 3rd, Morigaon, on consideration of report of the process server dated 24.08.2015, held that the notice issued to the petitioner is deemed to be served and decided to proceed *ex parte* against the petitioner and ultimately, the said Tribunal gave an *ex parte*

opinion declaring the petitioner to be a Foreigner under the Foreigners Act, 1946, who had illegally entered into India (Assam) after 25.03.1971.

- viii.** It also transpires from record that the above-named petitioner after coming to know about the aforesaid *ex parte* order filed an application under Order 3A(1) of the Foreigners (Tribunals) Order, 1964 for setting aside the said *ex parte* dated 29.02.2016. On the basis of the said application Misc. Case No. 09/2017 was registered.
- ix.** However, by order dated 09.08.2017, passed in Misc. Case No. 09/2017, learned Foreigners Tribunal No. 3rd, Morigaon, rejected the prayer of the petitioner and dismissed the said Misc. Case.

5. Mr. P.N. Sharma, learned counsel for the petitioner has submitted that the petitioner was not aware about the pendency of F.T. Case No. 19/2016, against him, before the learned Foreigners Tribunal No. 3rd, Morigaon. It is only when one Abdul Hakim of his village was arrested by police and when the petitioner made an enquiry, he came to know that an *ex parte* order dated 29.02.2016 has been passed against him declaring him to be a Foreigner. Immediately, thereafter, he applied for certified copy of the said order and filed an

application for setting aside the *ex parte* order, the said application was registered as Misc. Case No. 09/2017.

6. Learned counsel for the petitioner has submitted that the petitioner is a citizen of India by birth and he was born and brought up at village-Amlokhi under Dhing Police Station in Nagaon District of Assam and later on, he shifted to village-Khalapia under Mikirbheta Police Station in the District of Morigaon, Assam and his name has also been enlisted in the voter-list of 1971.

7. Learned counsel for the petitioner has also submitted that as the above-named petitioner had never received any notice in F.T. Case No. 19/2016 from the learned Foreigners Tribunal No. 3rd, Morigaon, he was not afforded reasonable opportunity of showing that he is not a Foreigner and hence, it is prayed that the *ex parte* order dated 29.02.2016, passed in F.T. Case No.19/2016, as well as order dated 09.08.2017, passed in Misc. Case No. 09/2017 may be set aside and he may be afforded a reasonable opportunity of showing his nationality before the learned Foreigners Tribunal No. 3rd, Morigaon.

8. On the other hand, Ms. A. Verma, learned Standing Counsel, Home Department, Assam has submitted that the petitioner had refused to accept the notice from the process

server on three occasions, i.e. 25.07.2015, 10.08.2015 and 20.08.2015 and therefore, the notice was hanged on his dwelling house in presence of local witnesses namely, Abdul Barak and Md. Rafiqul. She has also submitted that the Government Gaon Burah of Kahuaati/Khalapia had also certified that the petitioner had refused to accept notice on several occasions. She has further submitted that as the notice was duly served on the petitioner and as he failed to appear before the learned Foreigners Tribunal No. 3rd, Morigaon in spite of due service of notice, the Tribunal was right in proceeding *ex parte* against the petitioner and opining him to be a Foreigner, who had entered into India (Assam) after 25.03.1971.

9. Ms. A. Verma, learned Standing Counsel, Home Department, Assam has also submitted that the learned Foreigners Tribunal No. 3rd, Morigaon has correctly dismissed the Misc. Case No. 09/2017 and not vacated the *ex parte* order dated 29.02.2016 passed in F.T. Case No. 19/2016. She has submitted that learned Foreigners Tribunal No. 3rd, Morigaon has dismissed the Misc. Case No. 09/2017 after examining the process server namely, 1. Chandra Kanta Nath, 2. Indra Mohan Nath, 3. Pulendra Nath, 4. Dino Borah, as well as 5. the V.D.P. Secretary, Abdul Barik on 24.07.2017, and after such interaction, the Tribunal was fully convinced about the false allegation made by the petitioner against the process server as

well as his improper conduct of refusing to accept notice when the same was given to him by the process server.

10. Learned Standing Counsel has also submitted that in the instant case, the petitioner has refused to accept the notice, issued to him by the learned Foreigners Tribunal, on three occasions as aforesaid, at his own risk and peril. She has further submitted that as the petitioner himself neglected in accepting the notice and in participating in the proceeding pending against him before the learned Foreigners Tribunal, he himself failed to relieve the burden cast on a proceedee by Section 9 of the Foreigners Act, 1946 of proving his citizenship and now, no leniency should be shown to the petitioner.

11. She has also submitted that the scope of interference under Article 226 of the Constitution of India by this Court in a decision of the Foreigners Tribunal is limited to correcting errors of jurisdiction or when the decision is made by the Tribunal without giving an opportunity of hearing or when the opinion is rendered in violation of the principles of natural justice or where there appears to be an error on the face of record, and according to her, none of the aforesaid grounds exists in the instant case, therefore, she has prayed for dismissing of the instant writ petition.

12. In support of her submissions, learned Standing Counsel, Home Department has cited following rulings:-

- i. **"Ijjat Ali Vs. Union of India & 5 Ors."** [order dated 12.10.2020 of a co-ordinate bench of this Court in WP (C) No. 8361/2009];
- ii. **"Sarijan Nessa Vs. Union of India & 5 Ors."** [order dated 05.01.2021 of a co-ordinate bench of this Court in WP (C) No. 1293/2020];
- iii. **"Central Counsel for Research in Ayurvedic Sciences & Another Vs. Bikartan Das &Anr."** reported in- **"2023 SCC Online SC 996"**.
- iv. **"The State of Assam and others Vs Moslem Mondal and others"** reported in **"2013(1) GLT 809"**.

13. We have considered the submissions made by learned counsel for both the sides and have perused the materials available on record, including the original records of F.T. Case No. 19/2016 which was called for from the learned Foreigners Tribunal No. 3rd, Morigaon.

14. We are in agreement with the submissions made by the learned Standing Counsel, Home Department, Assam that the scope of interference under Article 226 of the Constitution of India by this Court in a decision of Foreigners Tribunal is limited

to correcting the errors of jurisdiction or when the decision is made by the Tribunal without giving opportunity of hearing or when the opinion is rendered in violation of the principles of natural justice or where there appears to be an error apparent on the face of record. However, in the instant case, certain glaring inconsistencies and errors, which are apparent from the record, have come to our notice, which we shall discuss in the following paragraphs.

15. Before we discuss, the errors apparent on the face of record noticed by us, it is pertinent to mention herein that in the cases cited by learned Standing Counsel, Home Department, Assam namely, "***Ijjat Ali Vs. Union of India & 5 Ors.***" (supra) and "***Sarijan Nessa Vs. Union of India & 5 Ors.***" (supra), there were sufficient materials on record for the Court to come to the conclusion that sufficient opportunities were granted to the petitioners to establish the claim of their nationality, therefore, the Court refused to interfere with the orders impugned in those cases. However, same is not the case in the instant case.

16. We have noticed, on perusal of the case record of the F.T. Case No. 19/2016, that on 17.07.2015, notice was issued, to the petitioner, by the learned Foreigners Tribunal No. 2nd, Morigaon, in F.T. Case No. 622/2012, for appearing before it

and for filing of written statement, on 28.08.2015. It also appears that, on 28.08.2015, the F.T. Case No. 622/2012 was transferred from the learned Foreigners Tribunal No. 2nd, Morigaon to the learned Foreigners Tribunal No. 3rd, Morigaon. It also appears from record available before us that after receiving the records of F.T. Case No. 622/2012 on transfer, and after re-numbering of the said case as F.T. Case No. 19/2016, no fresh notice was issued to the petitioner. Instead of that, on 29.02.2016, learned Foreigners Tribunal No. 3rd, Morigaon, on the basis of the report of process server with regard to notice issued to the petitioner by learned Foreigners Tribunal No. 2nd, Morigaon in F.T. Case No. 622/2012 had fixed the F.T. Case No. 19/2016 for *ex parte* hearing and on the same day passed the impugned order declaring the petitioner to be a Foreigner who had entered into India (Assam) after 25.03.1971.

17. On perusal of the copy of the notice which was issued by the learned Foreigners Tribunal No. 2nd, Morigaon, on 17.07.2015 and which is available in the case record, it appears that the same was issued in respect of F.T. Case No. 622/2012 and the date for appearance of the petitioner and filling written statement by him was mentioned in the said notice as 28.08.2015. As on the said date, i.e. on 28.08.2015, the F.T. Case No. 622/2012 was transferred from the learned Foreigners

Tribunal No. 2nd, Morigaon to learned Foreigners Tribunal No. 3rd, Morigaon and as it was re-numbered to F.T. Case No. 19/2016, even if the report of the process server dated 24.08.2015, wherein it has been reported that on refusal of the petitioner to accept the notice, the same was hanged on the dwelling house of the petitioner, is believed to be true, it is apparent that without a fresh notice being issued to the petitioner, he could not have known that the F.T. Case No. 622/2012 has been re-numbered to F.T. Case No. 19/2016 and same has been transferred to the learned Foreigners Tribunal No. 3rd, Morigaon from the learned Foreigners Tribunal No. 2nd, Morigaon. Hence, we are of the considered opinion that under the peculiar facts and circumstances of this case, the learned Foreigners Tribunal No. 3rd, Morigaon before deciding to proceed *ex parte* against the petitioner, by its order dated 29.02.2016, it ought to have issued fresh notice to the petitioner, informing him about the new F.T. Case No. 19/2016, as well as about the Tribunal, i.e. learned Foreigners Tribunal No. 3rd, Morigaon, before which the petitioner was supposed to appear and file his written statement.

18. Accordingly, we are of the considered opinion that the petitioner was not afforded a reasonable opportunity of showing that he is not a Foreigner. As such, we hold that the learned Foreigners Tribunal No. 3rd, Morigaon had erred in

passing order dated 29.02.2016 for proceeding *ex parte* against the petitioner in F.T. Case No. 19/2016.

19. Similarly, in the impugned order dated 09.08.2017, passed by the learned Foreigners Tribunal No. 3rd, Morigaon in Misc. Case No. 09/2017, wherein, the learned Tribunal declined to set aside the *ex parte* order dated 29.02.2016 passed in F.T. Case No. 19/2016, it appears that though the learned Tribunal had mentioned in the said order that on 24.07.2017, the process server were examined by the said Tribunal and after such examination, the Tribunal came to conclusion that the petitioner has made false allegation against the process server. However, on perusal of the case record, no statement of such examination of process server was found in the record. Further, on perusal of the order sheets available in the case record, it appears that no order was passed by the learned Foreigners Tribunal No. 3rd, Morigaon on 24.07.2017 in Misc. Case No. 09/2017. Learned Foreigners Tribunal No. 3rd, Morigaon also failed to take into consideration the fact that the notice issued to the petitioner on 17.07.2015 was issued in respect of F.T. Case No. 622/2012 by the learned Foreigners Tribunal No. 2nd, Morigaon and not by it and that no fresh notice was issued by it to the petitioner in F.T. Case No. 19/2016. Hence, we are constrained to hold that the conclusion arrived at by the learned Foreigners Tribunal No. 3rd, Morigaon for dismissing the

Misc. Case No. 09/2017 was not based on materials available before it.

20. For reasons discussed in foregoing paragraphs, the impugned *ex parte* order/opinion dated 29.02.2016, passed in F.T. Case No. 19/2016, as well as the impugned order dated 09.08.2017 passed in Misc. Case No. 09/2017 is hereby set aside and quashed and the F.T. Case No. 19/2016 is remanded back to the learned Foreigners Tribunal No. 3rd, Morigaon for deciding the reference again from the stage of filing of written statement and written evidence-on-affidavit by the present petitioner.

21. Since this order has been passed in the presence of learned counsel for the petitioner, and the petitioner has now come to know about F.T. Case No. 19/2016, no fresh notice to the petitioner is required to be issued in the said case by the Foreigners Tribunal No. 3rd, Morigaon.

22. The above-named petitioner shall appear before the learned Foreigners Tribunal No. 3rd, Morigaon in F.T. Case No. 19/2016, along with a certified copy of this order, on 28.06.2024 and shall file his written statement with all the documents, on which he relies to prove his nationality. He shall

also file his written evidence-on-affidavit on the same day, i.e. on 28.06.2024.

23. However, it is hereby made clear that on failure on the part of the petitioner to appear before the learned Foreigners Tribunal No. 3rd, Morigaon on the aforementioned date, i.e. on 28.06.2024 and thereafter, on the dates fixed by it, the said Tribunal shall be at liberty to proceed against the petitioner in F.T. Case No. 19/2016 as per provisions of law.

24. The Registry shall return the records of F.T. Case No. 19/2016 to the learned Foreigners Tribunal No. 3rd, Morigaon forthwith, along with a copy of this order.

25. With the above observations and directions, the said writ petition is accordingly allowed.

JUDGE

JUDGE

Comparing Assistant