

GAHC010186772020



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

Case No. : WP(C)/72/2021

DULAL DAS
S/O LATE PRAFULLA DAS, VILL. KHIRING KHIRING, P.S. KAKI, DIST.
HOJAI, ASSAM, PIN 782435

VERSUS

THE UNION OF INDIA
TO BE REPRESENTED BY SECY. TO THE GOVT. OF INDIA, HOME DEPTT.,
NORTH BLOCK, NEW DELHI

2:THE ELECTION COMMISSION OF INDIA

NIRVACHAN SADAN
ASHOKA ROAD
NEW DELHI
PIN 110001

3:THE STATE OF ASSAM

TO BE REPRESENTED BY COMMISSIONER AND SECY. TO THE GOVT. OF
ASSAM
HOME DEPTT
DISPUR
GUWAHATI 06

4:THE STATE CO-ORDINATOR OF NRC

ASSAM
BHANGAGARH
GUWAHATI-5

5:ADDITIONAL DIRECTOR GENERAL OF POLICE

ASSAM (BORDER)
BHANGAGARH
GUWAHATI-05

6:THE DEPUTY COMMISSIONER

HOJAI
SHANKARDEVNAGAR
ASSAM
PIN 782435

7:THE SUPERINTENDENT OF POLICE (BORDER)

HOJAI
ASSAM
PIN 782435

8:THE MEMBER

FOREIGNERS TRIBUNAL HOJAI
SANKARDEVNAGAR
DIST. HOJAI
ASSAM
PIN 78243

Advocates for the petitioner : Mr. N. Islam

Advocates for the respondents : Mr. A. I. Ali,
For respondent No. 2

Ms. A. Verma,
For respondent Nos. 3, 5, 7 & 8

Mr. R. Talukdar,
For respondent No. 6

:::BEFORE:::

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of Judgment & Order : 03.01.2024

JUDGMENT & ORDER (ORAL)

(M. Thakuria, J)

This writ petition is against the *ex parte* order/opinion dated 17.05.2017 passed by the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar in Case No. FT/H/2175/2012, whereby the petitioner has been declared as a foreigner under the Foreigners Act, 1946, who had illegally entered into the territory of India after 25.03.1971.

2. Though, the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar, who passed the said *ex parte* order dated 17.05.2017 has been made a party respondent No. 8 herein, but according to us the said respondent is not a necessary party for proper adjudication of the case. Accordingly, the respondent No. 8 be struck off from the cause title.

3. Heard Mr. N. Islam, learned counsel for the petitioner. Also heard Mr. A. I. Ali, learned Standing Counsel, Election Commission of India for respondent No. 2; Ms. A. Verma, learned Standing Counsel, Home Department, Assam for respondent Nos. 3, 5 & 7 and Mr. R. Talukdar, learned Government Advocate, Assam for respondent No. 6.

4. In pursuance of a reference made by the Superintendent of Police

(Border) of Nagaon District (as it was then, now Hojai), Case No. FT/H/2175/2012 was accordingly registered against the present petitioner before the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar. Considering that even after proper service of the notice of the case, as the proceedee (the petitioner herein) remained absent in the matter, the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar on 17.05.2017 in said Case No. FT/H/2175/2012 passed the *ex parte* order opining him as a foreigner, who had illegally entered into the territory of India after 25.03.1971.

5. Being aggrieved and dissatisfied with the said impugned *ex parte* order of the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar dated 17.05.2017, passed in Case No. FT/H/2175/2012, noted above, the petitioner filed this writ petition on 14.12.2020 praying amongst others, for setting aside the said *ex parte* order dated 17.05.2017 and to allow him to contest the said Case No. FT/H/2175/2012 by filing his Written Statement as well as the relevant documents to prove his nationality.

6. It is submitted by Mr. N. Islam, learned counsel for the petitioner that he is an Indian citizen by birth and he was born at village Khiring Khiring under erstwhile jurisdiction of Hojai, now Kaki of earlier Nagaon District, now Hojai District of Assam. It is stated that the petitioner along with his parents cast their votes regularly. The petitioner stated that he did not receive any notice from the Foreigners Tribunal, Hojai, Sankardev Nagar in said Case No. FT/H/2175/2012 and on coming to know about the said *ex parte* order dated 17.05.2017 declaring him as a foreigner of post 1971 stream, he immediately applied for the certified copy of the said order and after obtaining the same, he on 03.09.2019 filed an application before the Foreigners Tribunal, Hojai, Sankardev Nagar

praying for vacating the said *ex parte* order dated 17.05.2017. But the said learned Tribunal did not consider the same. As such, he preferred the present petition praying to set aside and quash the impugned *ex parte* order dated 17.05.2017, passed by the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar.

7. The learned counsel for the petitioner, Mr. N. Islam further submitted that if the petitioner is allowed to contest the case by setting aside the *ex parte* order passed against him, he has sufficient evidence and documents to prove his nationality/ citizenship. The learned counsel further submitted that during the time of NOC verification only, the petitioner could come to know about the said *ex parte* order dated 17.05.2017 passed against him in said Case No. FT/H/2175/2012 by the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar, in which he never received any notice/summon from the said Foreigners Tribunal and that the said *ex parte* order dated 17.05.2017 was passed against him without serving any due and proper notice of the said Case No. FT/H/2175/2012 upon him.

8. On the other hand, Ms. A. Verma, learned Standing Counsel, Home Department, Assam has submitted that the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar, committed no error or mistake in passing the impugned *ex-parte* order dated 17.05.2017, noted above, and that the said *ex-parte* opinion had to be passed by the learned Tribunal considering the service of notice on the petitioner through substituted manner. Ms. A. Verma, learned Standing Counsel, Home Department submitted that the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar rightly passed the impugned *ex-parte* order dated 17.05.2017 on the basis of the reference made by the

Superintendent of Police (Border), Nagaon.

9. We have considered the submissions made by the learned counsels for the parties and also perused the original record of the Case No. FT/H/2175/2012 that was called for.

10. The record of the case reveals that after registration of the case in pursuance of the reference made by Superintendent of Police (Border), Nagaon, the notice of the Case No. FT/H/2175/2012 was issued to the present petitioner on 13.12.2012 and on several occasions on subsequent dates by the Foreigners Tribunal, Hojai, Sankardev Nagar that were returned un-served as the proceedee/petitioner was not found in his given address. Accordingly, the said Tribunal reissued the notice of the said case again on 16.09.2016 to the petitioner, fixing 20.10.2016 for his appearance. On 20.10.2016, the notice was returned with a report from the concerned process server that the addressee (the petitioner herein) left his said address to unknown place. As such, the process server in presence of the Government Village Headman obtaining his signature hanged the notice/summon in a tree in front of the house of the addressee within the jurisdiction of the said Village Headman.

11. Considering the said service of notice of the case on the proceedee/petitioner was complete by hanging in a tree within the residence of the petitioner in presence of Government Village Headman as the witness, the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar, accordingly, considered that the notice was deemed to be served on the proceedee (petitioner herein) of the case and thereafter, the case proceeded *ex parte*.

12. Thereafter, the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar on 24.02.2017 fixed the said Case No. FT/H/2175/2012 for *ex parte*

hearing on 17.05.2017 and accordingly, as the reference remained un-rebutted and since the petitioner failed to discharge his mandatory burden to establish that he is not a foreigner as alleged by the State, the said Tribunal on 17.05.2017 passed the *ex parte* order in said Case No. FT/H/2175/2012, declaring the present petitioner as a foreigner, who had illegally entered into India after 25.03.1971.

13. From the records of the case, it is also seen that on receipt of an application dated 04.09.2019 from the present petitioner for vacating the *ex parte* order dated 17.05.2017, the record of said Case No. FT/H/2175/2012 was again put up on 04.09.2019 itself and the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar on 04.09.2019 rejected the same on the ground that it was not filed under proper provisions, sections and order of law.

14. The record of the case clearly reveals that the notices were issued to the proceedee/petitioner concerned on several occasions, but those were returned unserved with similar report that the person concerned could not be traced out in the locality as per the address. However, the notice was served finally by hanging the same in a tree in presence of witness. To that extent, one person had also put his signature in the summon who disclosed his identity as a Village Headman of Azabari Joysagar Khring Khring Revenue Circle under Lanka Revenue Circle. Thus, it is seen that the notice of said Case No. FT/H/2175/2012 was not personally served upon the petitioner and hence his plea that notice was not personally served upon him and that he was not aware about the *ex parte* order cannot be rejected out rightly.

15. Section 3(5)(f) of the Foreigners (Tribunals) Order, 1964, provides as

under:-

"(f). If the proceedee has changed the place of residence or place of work, without intimation to the investigating agency, the process server shall affix a copy of the notice on the outer door or some other conspicuous part of the house in which the proceedee ordinarily resides or last resided or reportedly resided or personally worked for gain or carries on business, and shall return the original to the Foreigners Tribunal from which it was issued with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did do, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

16. The Hon'ble Full Bench in the case of ***State of Assam Vs. Moslem Mondal***, reported in ***(2013) 3 GLR 402***, also discussed pertaining to the service of notice to the proceedee and in paragraph No. 103 at paras (v) and (vi) of the judgment, it has been observed as under:

"103. ...

v. If the proceedee or any available adult member of his family refuses to accept the notice, the process server has to give a report in that regard along with the name and address of a person of the locality, who was present at the time of making such an effort to get the notices served, provided such person is available and willing to be a witness to such service. The signature/thumb impression of such witness, if present and willing, must be obtained.

vi. In case the proceedee has changed the place of residence or place of work, without intimation to the investigating agency, a report in that regard shall be submitted by the process server. A copy of the notice shall then be affixed in a conspicuous place where the proceedee last resided or reportedly resided or worked for gain, containing the name and address of a respectable person of the locality, if available and willing to be a witness for that purpose. The signature/thumb impression of such person, in that case, shall also be obtained in the said report."

17. But, in the instant case, it is seen that there is no report from the process server as to under what circumstances he had to serve the notice through the

process of hanging the same in a tree that cannot be considered to be a conspicuous part of the house in which the proceedee was residing. Thus, it is seen that the service of notice of the case was not complete upon the petitioner and the service of notice through the process of hanging in a tree cannot be considered to be a proper service of notice as per Section 3(5)(f) of the Foreigners (Tribunal) Order, 1964. Accordingly, we are of the considered view that the service of notice was not proper and in the same time, it is also seen that without assigning any valid and proper reason, the prayer for vacating the *ex parte* order was rejected by the Tribunal concerned on 04.09.2019 merely on technical ground.

18. Thus, we find that it is a fit case to remand back the original case record of said Case No. FT/H/2175/2012 to the concerned Foreigners' Tribunal, i.e., learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar and that the petitioner should be given an opportunity to contest the case by filing his Written Statement and to produce the relevant documents/evidences before the said Tribunal to prove his nationality.

19. Accordingly, the impugned order dated 17.05.2017, passed by the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar in Case No. FT/H/2175/2012 is hereby set aside. Consequently, the order dated 04.09.2019 of the said Tribunal passed in Case No. FT/H/2175/2012 is also set aside and quashed.

20. The petitioner herein, i.e., the concerned proceedee is hereby directed to appear before the learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar in said Case No. FT/H/2175/2012 on or before 22.01.2024 along with a certified copy of this order. The petitioner herein is also directed to file his Written

Statement along with Evidence on Affidavit and relevant documents, if any, in said Case No. FT/H/2175/2012 on or before 22.01.2024.

21. The learned Member, Foreigners Tribunal, Hojai, Sankardev Nagar, thereafter shall dispose of said Case No. FT/H/2175/2012 within the stipulated period of time without further delay as provided under the law and the Foreigners (Tribunal) Order, 1964.

22. Resultantly, the present writ petition is allowed to the extent of observation made above.

23. Registry shall return the case record of Case No. FT/H/2175/2012 to the Foreigners Tribunal, Hojai, Sankardev Nagar, forthwith along with a copy of this order.

JUDGE

JUDGE

Comparing Assistant