

GAHC010276382018



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

Case No. : WP(C)/8888/2018

AJIT RAI
S/O LATE MAN BAHADUR RAI
R/O NO. 1 BOKANALA
P.O. NO. 2 BOKANALA, PIN- 787032,
P.S. BOGINODI,
DIST. LAKHIMPUR, ASSAM

VERSUS

THE UNION OF INDIA AND 6 ORS.
REP. BY THE SECRETARY, MINISTRY OF HOME AFFAIRS, NEW DELHI, PIN -
78110001.

2:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI - 781006.

3:THE MEMBER
FOREIGNERS TRIBUNAL-1
NORTH LAKHIMPUR
DIST. LAKHIMPUR
PIN - 787001.

4:THE ELECTION COMMISSION OF INDIA
NEW DELHI
PIN- 110001.

5:THE COORDINATOR
NRC
ASSAM
GUWAHATI
PIN -781005.

6:THE DEPUTY COMMISSIONER
NORTH LAKHIMPUR
DIST. LAKHIMPUR
ASSAM
PIN - 787001.

7:THE SUPERINTENDENT OF POLICE (BORDER)
NORTH LAKHIMPUR
DIST. LAKHIMPUR
ASSAM
PIN - 787001

Advocate for the Petitioner : MS. S G BARUAH

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

BEFORE
HONOURABLE MR. JUSTICE MANASH RANJAN PATHAK
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 27-05-2024
(M.K. Kalita, J)

1. Heard Mr. B. Borgohain, learned counsel for the petitioner. Also heard G. Sarma, learned Standing Counsel, Home Department, Government of Assam, Mr. P. Sarma, learned Additional Senior Government Advocate, Assam, Mr. B. Chakravarty, learned CGC and Mr. A. I. Ali, learned standing counsel for the Election Commission of India.

2. This writ petition has been filed by the petitioner, namely, *Ajit Rai* impugning the *ex-parte* order/opinion dated 21.09.2013 passed by the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur in LFT-II(D) Case No. 748/08, whereby the above named petitioner was declared as a foreigner of Nepal origin.

3. The petitioner has also impugned the order dated 15.09.2018 passed by the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur in Misc Case No. 21/08 arising out of LFT-II(D) Case No. 748/08 whereby the prayer made by the present petitioner before the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur for setting aside the *ex-parte* order dated 21.09.2013 was rejected.

4. The facts relevant for consideration of the instant writ petition, in brief, are as follows:-

i. On the basis of communication dated 03.11.1997 received from the Electoral Registration Officer (ERO) for 112 Dhakuakhana (ST) Legislative Assembly Constituency expressing doubts about the citizenship of the above named petitioner, the Superintendent of Police (Border), Lakhimpur, made a reference under the provisions of Illegal Migrants (Determination by Tribunal) Act, 1983 (*hereinafter referred to as "IM(D)T Act"*), while the said Act was in force, to the Illegal Migrants (Determination) Tribunal, North Lakhimpur to decide the question as to whether the present petitioner is a citizen of India or not.

ii. On the basis of the said reference, LFT-II(D) Case No. 748/08 was registered. Later on, after striking down of the IM(D)T Act by the Hon'ble Supreme Court of India in the case of "**Sarbananda Sonowal Vs. Union of India and Anr.**" reported in "**(2005) 5 SCC 665**" and as per the directions of the Hon'ble Supreme Court of India passed therein, the said LFT-II(D) Case No. 748/08 was transferred to the Foreigners Tribunal-II, Lakhimpur, North Lakhimpur converting it to a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order,

1964.

iii. After registration of the LFT-II(D) Case No. 748/08 before the Foreigners Tribunal-II, Lakhimpur, North Lakhimpur, by its order dated 16.08.2013, notice was issued to the above named petitioner for appearing before the said Tribunal and for submitting written statement and evidence in support of his case, fixing the next date on 30.08.2013.

iv. On 30.08.2013, the notice issued to the petitioner, returned with a report that as the petitioner could not be found in his house, the notice was served by handing over the copy of the same to his younger brother. As the petitioner failed to appear before the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur on 30.08.2013, it decided to proceed *ex-parte* against the present petitioner and fixed the next date on 09.09.2013 for *ex-parte* hearing.

v. On 09.09.2013, the case was adjourned. Ultimately by order dated 16.09.2013, the reference was heard *ex-parte* and it was answered against the petitioner opining him to be a foreigner of Nepal origin.

vi. Thereafter, on 27.08.2018, the petitioner filed a petition before the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur for setting aside the *ex-parte* order dated 21.09.2013. On the basis of said petition, a Misc. Case i.e., Misc. Case No. 21/18 was registered in connection with LFT-II(D) Case No. 748/08. However, by order dated 15.09.2018, learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur rejected the prayer of the petitioner on the ground that the petitioner had approached the Tribunal for setting aside the *ex-parte* order after the

expiry of five years from the date of passing of the *ex-parte* order as well as also on the ground that the notice issued to the petitioner was received by his younger brother, who was found to be living in the same house and the learned Foreigners Tribunal found it to be unbelievable that the petitioner's younger brother after receiving the copy of the notice would not disclose the same to the petitioner. The learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur, while rejecting the prayer for setting aside the *ex-parte* order dated 21.09.2013, had also observed that the petitioner had failed to demonstrate any special or exceptional circumstances which prevented him from appearing before the it to contest the case.

5. In this case, by order dated 21.01.2019, this Court had issued notices to the respondents and called for the records of LFT-II(D) Case No. 748/08 from the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur. By the same order, interim protection was also given to the petitioner to the effect that he shall not be deported.

6. The learned counsel for the petitioner has submitted that the notice issued by the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur in LFT-II(D) Case No. 748/08 was received by the younger brother of the petitioner and same was not told to him by his younger brother as there were dispute between brothers regarding paternal properties. Hence, he was not in a position to appear before the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur on the date given in the said notice.

7. On the other hand, Mr. G. Sarma, learned Standing Counsel, Home Department, Government of Assam, has submitted that the Foreigners

Tribunal-II, Lakhimpur, North Lakhimpur had rightly decided to proceed *ex-parte* against the petitioner after he failed to appear before the Court on the date fixed by it in spite of the due service of notice on him.

8. The case record of LFT-II(D) Case No. 748/08 has been received by this Court from the Foreigners Tribunal-II, Lakhimpur, North Lakhimpur.

9. We have considered the submissions made by the learned counsel for both the sides and have perused the materials available on record including the case record of LFT-II(D) Case No. 748/08.

10. It appears from the record of LFT-II(D) Case No. 748/08 that the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur had issued the notice to the petitioner by its order dated 16.08.2013 fixing the next date on 30.08.2013 for service report. It also appears that on 30.08.2013 the notice issued to the petitioner was returned to the learned Foreigners Tribunal after service with report of process server. On the date fixed before the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur, i.e., on 30.08.2013, the petitioner failed to appear before it and by the order dated 30.08.2013, after perusal of the report of the process server, the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur, had decided to proceed *ex-parte* against the present petitioner.

11. It also appears on perusal of the copy of the notice issued to the present petitioner by the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur, which is available in the case record, that the said notice was issued by the said Tribunal on 16.08.2013, fixing the date of appearance by the petitioner as 30.08.2013. It also appears from the report of the process server that the

petitioner was not found in his house and the notice was handed over to the brother of the petitioner whose signature were obtained on the said notice. However, on perusal of the report of the process server, it also appears that it could not be ascertained as to on which date the notice was handed over to the petitioner's brother. It appears that the report of the process server was of 30.08.2013, which was the date fixed for appearance of the petitioner before the Foreigners Tribunal-II, Lakhimpur, North Lakhimpur.

12. Now, the question is if the notice was handed over to the younger brother of the petitioner on 30.08.2013 itself, it may be reasonably presumed that no sufficient time was afforded to the petitioner for appearing before the Foreigners Tribunal as the LFT-II(D) Case No. 748/08 was fixed before the learned Foreigners Tribunal on that day itself i.e., 30.08.2013. Under such circumstances, we are of the considered opinion that from the report of the process server itself, it is apparent that no sufficient time was afforded to the petitioner to respond to the notice and to appear before the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur on the same day itself when the said notice is reported to be handed to his younger brother. We are also of the considered opinion that before arriving at a conclusion of due service of notice on the petitioner, learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur ought to have examined the process server and the witness in whose presence, the notice was handed over to the younger brother of the petitioner before fixing the reference for *ex-parte* hearing. Hence, we are of the considered opinion that the notice issued to the petitioner by the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur in LFT-II(D) Case No. 748/08 may not be regarded as duly served on the petitioner as per the provisions of Clause 3(5) of the Foreigners (Tribunals) Order, 1964.

13. We are, therefore, 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 Foreigners Tribunal-II, Lakhimpur, North Lakhimpur had erred in proceeding *ex-parte* against the present petitioner in LFT-II(D) Case No. 748/08.

14. For reasons discussed in forgoing paragraphs, the impugned order dated 21.09.2013 passed in LFT-II(D) Case No. 748/08 as well as order dated 15.09.2018 passed in Misc Case No. 21/08 arising out of LFT-II(D) Case No. 748/08 are hereby set aside and quashed.

15. The LFT-II(D) Case No. 748/08 is remanded back to the Foreigners Tribunal-II, Lakhimpur, North Lakhimpur for deciding the reference afresh from the stage of filing of written statement and written evidence on affidavit. Since, the petitioner is now fully aware about the said case i.e., LFT-II(D) Case No. 748/08 pending before the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur regarding his nationality, no further notice in the said case is require to be furnished.

16. The petitioner shall appear before the Foreigners Tribunal-II, Lakhimpur, North Lakhimpur in the said LFT-II(D) Case No. 748/08 on 21.06.2024 along with a certified copy of this order. On that date, i.e., 21.06.2024, he shall also file his written statement as well as written evidence-on-affidavit along with relevant documents in the said case, on the basis of which he intends to prove his nationality.

17. It is hereby made clear that on failure on the part of the petitioner to

appear before the Foreigners Tribunal-II, Lakhimpur, North Lakhimpur on the aforementioned date i.e., 21.06.2024 and on the date fixed by the learned Foreigners Tribunal-II, Lakhimpur, North Lakhimpur, it shall be at liberty to proceed against the petitioner in LFT-II(D) Case No. 748/08 as per the provisions of law.

18. The Registry shall return the records of LFT-II(D) Case No. 748/08 along with a copy of this order to the Foreigners Tribunal-II, Lakhimpur, North Lakhimpur forthwith.

19. With above observations and directions, this writ petition is allowed to the extent above.

JUDGE

JUDGE

Comparing Assistant