

WP(C) 3875/2013
BEFORE
HON'BLE MR. JUSTICE B. K. SHARMA

JUDGMENT & ORDER
(ORAL)

Heard Mr. M. U. Mondal, learned counsel for the writ petitioner. Also heard Mr. M. Bhagawati, learned Central Government counsel, appearing for the respondents.

2. The petitioner, who has been declared to be a foreign national (illegal Bangladeshi migrant), has filed this writ petition challenging the declaration issued vide order, dated 18.07.2011, by the learned Member, Foreigners Tribunal, Kamrup (Rural), in D.V. (R) Case No. 146/2009/430 (Police Case No. 419/2006) (Union of India vs. Azizur Rahman). The order being ex parte, the petitioner preferred an application for setting aside the ex parte order, but the same was also rejected by order, dated 06.04.2013, passed in Misc. Case No. 01.2013. The said order is also under challenge.

3. Mr. Mondal, learned counsel for the petitioner submits that although the petitioner had received due notice from the Tribunal, but he could not appear due to his illness. Mr. Mondal submits that the fact of the illness of the petitioner ought to have been considered by the learned Tribunal instead of rejecting the petitioner's prayer for setting aside the ex parte order.

4. Mr. M. Bhagawati, learned Government counsel, on the other hand, submits that the petitioner having been provided with ample opportunities to respond to the Reference initiated by the Foreigners Tribunal, the impugned orders are not liable to be interfered with. According to Mr. Bhagawati, the grounds assigned for setting aside the ex parte order are not sufficient and good grounds and accordingly the Tribunal rightly rejected the application of the petitioner for setting aside the ex parte order.

5. I have considered the submissions made by the learned counsel for the parties and have also considered the entire materials on record including the record received from the Tribunal. Admittedly, the petitioner, in spite of service of notice did not respond to the proceeding before the Tribunal. It appears that the petitioner, in spite of service of notice, did not appear before the Tribunal without any step on 27.12.2010, 28.12.2010, 10.01.2011, 07.02.2011, 28.02.2011, 29.03.2011, 02.06.2011, 01.07.2011 and, finally on 18.07.2011, when the ex parte order was passed.

6. As per the requirement of Section 9 of the Foreigners Act, 1946, burden lies on the proceedee to prove that he is an Indian citizen by producing relevant documents.

7. After the ex parte order declaring the petitioner to be a foreign national of post-1971 stream was passed, the petitioner made an application for setting aside the said order. In the application, the petitioner assigned the ground of his illness and also that he had gone to Shillong to earn livelihood. The learned Tribunal has rejected the application dealing with the grounds assigned. The Reference against the petitioner was initiated pursuant to the order of the Election Commission of India for suo motu local verification for revision of Electoral Rolls in the Assembly Constituencies in Assam with reference to 01.01.2005 as the qualifying date. As discussed in the order, dated 06.04.2013, by which the application of the petitioner for setting aside the ex parte order was rejected, the first ground assigned by the petitioner was that he had been suffering from malaria, typhoid and jaundice. The second ground assigned was that he had left for Shillong for earning livelihood after his illness.

8. As recorded in the impugned order and also as found from the records, notice was duly served on the petitioner and he got ample opportunities to defend the Reference, but he did not. The plea of the petitioner that he was sick and left for Shillong in search of livelihood appears to be not true inasmuch as the medical documents show that he was under medical treatment for three months, i.

e., from 20.12.2010 to 30.03.2011. If the petitioner was sick for three months, it was his duty to respond to the proceeding after recovery from illness instead of going to Shillong to earn livelihood, which is also not supported by any document.

9. The Full Bench of this Court, in the case of State of Assam and ors. -vs- Moslem Mondal and ors., (2013) 1 GLT 809, while dealing with the power of the Tribunal to set aside ex parte orders, has held that the Tribunal has jurisdiction to entertain such application and pass necessary order provided that it is proved to the satisfaction of the Tribunal that the proceedee was not served with the notice in the Reference proceeding or that the proceedee was prevented by sufficient causes from appearing in the proceeding and the reasons for which beyond his control. It has also been held that such application should not be entertained in a routine manner. The Tribunal can entertain such application provided that the proceedee would demonstrate the existence of special/exceptional circumstances to entertain the same by way of pleadings in the application filed for setting aside the ex parte opinion. It has also been held in the said Full Bench judgement that if the proceedings were not upheld, the very purpose of enacting the 1946 Aft 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. (para 92 of the judgement)

10. So far as the parent order is concerned, when, in spite of service of notice and ample opportunity given to the petitioner by adjourning the Reference on several occasions, the petitioner did not respond to the proceeding, the learned Tribunal had no other option than to pass ex parte order. If the petitioner was sick, the same could have been supported by adequate documents, but the documents produced by the petitioner were for only three months. The petitioner could also go to Shillong to earn livelihood instead of responding to the proceeding before the learned Tribunal. Therefore, the grounds assigned are not sufficient grounds. I do not find any infirmity in the order passed by the learned Tribunal rejecting the prayer of the petitioner for setting aside the ex parte order.

11. In the result, this writ petition stands dismissed. Consequently, it is hereby directed that the petitioner should be apprehended and kept in detention camp immediately with consequential deletion of his name from the voters list.

The petitioner will remain in the detention camp till his deportation from India. The Superintendent of Police, Kamrup (Rural), and the Superintendent of Police (B), Kamrup, shall now take appropriate action in terms of the directions contained in the judgement and order.

12. List this writ petition again after one month for furnishing report by the aforesaid authorities.

13. At this stage, Mr. Mondal, learned counsel for the petitioner submits that even if the petitioner is held to be a foreigner but being within the stream of 01.01.1966 and 24.03.1971, he is not required to be deported and he is now required to be registered with the Registering authority. This aspect of the matter has been dealt with in the order dated 13.08.2013 passed in this proceeding.

The learned Member of the Foreigners Tribunal was directed to furnish clarification in respect of the notice indicating the petitioner to be a foreigner within the stream of 01.01.1966 to 24.03.1971. Such a course of action was adopted in view of the doubt that arose having regard to the fact that in all other documents pertaining to the Reference, the petitioner was identified as a post-25.03.1971 foreigner.

14. Pursuant to the order passed by this Court on 13.08.2013, the learned Member, Foreigners Tribunal, has furnished the report clarifying the position. In the said report it has been stated that the notice was served in the available format of 1966-71 stream. According to the report, in absence of the available format pertaining to post-25.03.1971 foreigners, the notice was issued to the petitioner in the format of 1966-1971 stream although the Reference was initiated suspecting him to be a post-25.03.1971 foreigner.

15. In view of the above, it is not a case for registration of the petitioner with the Registering authority for being a foreigner within the stream of 1966-1971. All the documents including the findings of the learned Tribunal and the

application that was filed by the petitioner for setting aside the ex parte order indicate that the petitioner was suspected to be a post-25.03.1971 foreigner.

Thus, the format of the notice cannot be made use of to claim that the petitioner is a foreigner within the stream of 1966-1971, more particularly when that was not the case of the petitioner before the Foreigners Tribunal.

16. Before parting with the case records, this Court expresses grave concern about the functioning of the Foreigners Tribunals because of non-providing of necessary infrastructures including Format of notice etc. The Union and the State Governments are directed to provide adequate infrastructure to all the Foreigners Tribunal so that they can function properly and effectively and the kind of situation, which has arisen in the instant case because of non-availability of prescribed format, does not arise in future.

17. Furnish copy of this judgement and order to Mr. M. Bhagawati, learned counsel representing the respondents. Copies may also be furnished to the Deputy Commissioner, Kamrup (R) and Superintendent of Police (B), Kamrup. Copy be served to the Union Government in the Department of Home.