

GAHC010208402016



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

Case No. : WP(C) 6748/2016

MD. JAMAL UDDIN ALIAS BADIA JAMAL
S/O MUKLESUR RAHMAN VILL- AZAD NAGAR, P.S. DOBOKA DIST.
NAGAON NOW HOJAI, ASSAM

VERSUS

1:THE UNION OF INDIA and 6 ORS
TO BE REP. BY SECRETARY TO THE GOVT. OF INDIA, HOME
DEPARTMENT, NORTH BLOCK, NEW DELHI.

2:STATE OF ASSAM
TO BE REP. BY COMMISSIONER and SECRETARY TO THE GOVT. OF ASSAM
HOME DEPARTMENT, DISPUR, GUWAHATI -06.

3:ADDITIONAL DIRECTOR GENERAL OF POLICE
ASSAM, BORDER, BHANGAGARH, GUWAHATI-05.

4:DEPUTY COMMISSIONER
NAGAON, ASSAM.

5:DEPUTY COMMISSIONER
HOJAI, SHANKARDEV NAGAR, ASSAM.

6:SUPERINTENDENT OF POLICE BORDER
NAGAON, ASSAM.

7:SUPERINTENDENT OF POLICE BORDER
HOJAI, ASSAM

Advocate for the Petitioner : MR.N H MAZARBHUYAN

Advocate for the Respondent :

BEFORE
HON'BLE MR. JUSTICE UJJAL BHUYAN
HON BLE MR. JUSTICE AJIT BORTHAKUR

ORDER

Date : 31-05-2018

(UJJAL BHUYAN, J)

Heard Ms. L. Wazeeda, learned counsel for the petitioner and Mr. J. Payeng, learned Special Counsel, Foreigners Tribunal (FT).

By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of the order dated 29.12.2015 passed by the Foreigners Tribunal, Nagaon Court No. 10th at Doboka in FT(D) Case No. 152/2015 (*State Vs Md. Jamaluddin*) declaring the petitioner to be a foreigner who had illegally entered into India (Assam) from Bangladesh after 25.03.1971.

One of the grounds of challenge is that petitioner was earlier declared to be not a foreigner by the then Foreigners Tribunal, Hojai in Case No. FT/H/904/2007 (*State Vs Md. Jamaluddin*) vide order dated 28.03.2013. Once declared as not a foreigner, subsequent declaration as a foreigner would not be justified. Therefore, impugned order cannot be sustained.

This Court vide order dated 10.11.2016 had issued notice while requisitioning the case record and passed an interim order to the effect that petitioner should be allowed to remain on bail subject to his appearance before the Superintendent of Police (Border), Hojai and furnishing of adequate surety.

Subsequently, this matter was tagged along with a bunch of writ petitions, the lead case being WP(C) No. 7339/2015 (*Musstt. Amina Khatun Vs Union of India*) where the following question of law was considered:-

“Whether the plea of res judicata as provided under Section 11 of the Code of Civil Procedure, 1908 would be attracted to a proceeding under the Foreigners Act, 1946 read with the Foreigners (Tribunals) Order, 1964?”

By a common order dated 19.04.2018, this Court has held that as an illegal proposition, principle of *res judicata* embodied in Section 11 of the Code of Civil Procedure, 1908 would

not be attracted to a proceeding under the **Foreigners Act, 1946** and the **Foreigners (Tribunals) Order, 1964**. It was held thus:-

“71. In contradistinction, an opinion rendered by a Foreigners Tribunal upon a reference made to it by the referral authority under paragraph 2(1) of the Foreigners Tribunals Order remains an opinion even after the Central Government acts on it and takes steps for expulsion of the declared foreigner under Section 3 of the Foreigners Act based on such opinion. It does not change its character from opinion to judgment upon execution. In Mainul Hoque (supra), this Court has held that a Foreigners Tribunal assigned the task of rendering an opinion on a reference made to it by the Superintendent of Police (Border) is not a Court. Therefore, a Member of Foreigners Tribunal is not a judge. Viewed in the above context, a negative opinion rendered by a Foreigners Tribunal opining that the proceedee is not a foreigner is not a judgment and cannot bind the Central Government or the delegated authority i.e., the jurisdictional Superintendent of Police (Border) for all times to come and certainly cannot debar them from seeking a fresh opinion, if circumstances so warrant.

72. Therefore, an opinion rendered by a Foreigners Tribunal is not a judgment. Foreigners Tribunal is only to render an opinion on the reference made to it but the ultimate decision rests with the Central Government under Section 3 of the Foreigners Act. If the Central Government or the delegated authority, which in the case of Assam is the Superintendent of Police (Border), finds that the negative opinion rendered was contrary to the materials on record or there was no proper appreciation of the materials on record or if new materials emerge against a suspect or if the opinion of a Foreigners Tribunal is palpably wrong, can the Central Government or the Superintendent of Police (Border) be debarred from seeking a fresh opinion from a Foreigners Tribunal? For example, we may take up the case of Md. Amiruddin, petitioner in WP(C) No.797/2017. In his case, the earlier Member of Foreigners Tribunal, Hojai in Case No. FT/H/303/2013 (State Vs. Amiruddin) after summing up the testimony of the proceedee and describing the exhibits, opined that the proceedee was not a foreigner. The opinion was rendered as under:-

“I have gone through and examined all documents, produced and exhibited by the respondent very carefully and considering all these above, I give my opinion that the respondent Md. Amiruddin, son of late Ambor Ali is not a foreigner.”

72.1. There was no appreciation of the evidence tendered by the proceedee – whether the evidence were admissible? Whether the documents were proved? Whether there was relevancy of evidence? No reasons were mentioned and no reasonings given while rendering the aforesaid opinion. Such an opinion is no opinion at all in the eye of law and on the basis of such an opinion, neither the Central Government nor the delegated authority, i.e., the jurisdictional Superintendent of Police (Border) can be debarred from seeking a fresh opinion.

73. In the light of what we have discussed above and particularly having regard to the fact that State of Assam is facing external aggression and security and integrity of the nation has been threatened on account of large scale illegal migration of foreigners from Bangladesh into Assam, to hold that principle of res judicata would be applicable to a proceeding under the Foreigners Act and the Foreigners (Tribunals) Order would be self-defeating and against the overarching public policy, i.e., to ensure national security and to protect the integrity of the nation.

74. It naturally follows that a Foreigners Tribunal cannot decline to render an opinion on

the ground of res judicata. If a previous opinion favourable to the proceedee is placed before the Foreigners Tribunal by a proceedee, Foreigners Tribunal will consider the same (provided it is found to be genuine and proved) and thereafter render its opinion. If the subsequent opinion is adverse to the proceedee and is challenged by the proceedee in a proceeding under Article 226 of the Constitution of India, then the High Court will consider both the opinions while examining the correctness of the latter. Each challenge would have to be decided on case to case basis.

75. *Though the principle of res judicata is based on public policy, the same will stand subsumed under the overarching public policy governing a sovereign nation while dealing with illegal foreigners under the Foreigners Act and the Foreigners (Tribunals) Order.*

78. *For all the aforesaid reasons, we hold that as a legal proposition, principle of res judicata embodied in Section 11 of the Code would not be attracted to a proceeding under the Foreigners Act and the Foreigners (Tribunals) Order.”*

Adverting to the facts of the present case, in so far the previous order dated 28.03.2013 is concerned, we find that the then learned Member had recorded the case of the petitioner as stated in the written statement and evidence; details of the five exhibits and thereafter gave his conclusion as under:-

“I have gone through and examined all the documents produced and exhibited by the Respondents very carefully and considering all, I give my opinion that Md. Jamaluddin, the Respondent of FT/H/904/2007 and Md. Samsul Haque, the Respondent of FT/H/905/2007, sons of late Muklesur Rahman are not foreigners.”

We are afraid such an opinion can be construed to be an opinion on merit. There was no appreciation at all of the evidence tendered by the petitioner and without such appreciation, the then learned Member had abruptly and without any reasoning came to the conclusion that petitioner was not a foreigner.

Be that as it may, in so far the related reference is concerned, we find that initially IMDT Case No. 389/2001 was registered against the petitioner. Therefore, the related reference was earlier in point of time. After the IMDT Act was declared unconstitutional by the Supreme Court, the related reference came to be re-registered as FT(D) Case No. 152/2015 and was assigned to the Foreigners Tribunal, Nagaon Court No. 10th at Doboka for opinion. We fail to understand as to why in 2007 another reference was made against the petitioner which culminated in the order dated 28.03.2013 declaring the petitioner to be not a foreigner. As discussed and held by us in **Musstt. Amina Khatun** (supra), such an opinion *dehors* any reason

and appreciation of evidence cannot have a binding effect. As a matter of fact, such an opinion is no opinion at all in the eye of law and cannot bind the referral authority for all times to come. Therefore, there was no legal bar for the Tribunal to proceed with the related reference.

Having said that we find that petitioner had responded to the notice issued by the Tribunal and had filed written statement but subsequently, remained absent when the turn for adducing evidence came.

Since the averments made in the written statement were not proved by the petitioner by adducing evidence, Tribunal decided to proceed with the reference whereafter impugned order dated 29.12.2015 was passed.

On due consideration, we feel that it would be in the interest of justice if one more opportunity is granted to the petitioner to adduce evidence, he having filed his written statement.

Consequently, we set aside the order dated 29.12.2015 and direct the petitioner to appear before the Foreigners Tribunal, Nagaon Court No. 10th at Doboka in connection with FT(D) Case No. 152/2015 alongwith his evidence-in-chief by way of affidavit on **20.06.2018 at 10:30 a.m.** whereafter Tribunal shall proceed with the reference in accordance with law from the stage of adducing evidence and conclude the same within a period of 60 (sixty) days from the date of appearance.

Needless to say, if there is any default on the part of the petitioner henceforth, Tribunal would be at liberty to pass such order(s) as may be deemed fit and proper.

This disposes of the writ petition.

Registry to send down the LCR forthwith and inform the concerned Foreigners' Tribunal, Deputy Commissioner and Superintendent of Police (B) for doing the needful.

Copies of this order may also be furnished to learned Standing Counsel, Election Commission of India and State Coordinator, NRC.

JUDGE

JUDGE

Comparing Assistant