

MD MISHER ALI @ MESER ALI

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v.

THE UNION OF INDIA AND OTHERS

(Civil Appeal Nos 1058-1059 of 2021)

MARCH 24, 2021

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**[DR. DHANANJAYA Y CHANDRACHUD, M. R. SHAH
AND SANJIV KHANNA, JJ.]**

Foreigner's (Tribunal) Order 1964: Para 3(5)(f) and 3A – Illegal Migrant – In the instant case, Superintendent of Police made a reference before Foreigner's Tribunal alleging that the appellant is an illegal migrant who entered into India without valid documents from Bangladesh after 24 March 1971 – Record indicated that notice to the appellant was served “by hanging” at his temporary address in the district Sivasagar – Foreigner's Tribunal declared appellant to be a foreigner who had illegally entered into India – Appellant filed writ petition before High Court which was dismissed on the ground that notice was properly served under Para 3(5)(f) of Order 1964 – High Court also held that the burden to prove his citizenship lies on the appellant since the facts were within his knowledge and by neglecting to pursue the proceedings, appellant failed to discharge the burden – On appeal, held: Tribunal was apprised of the fact that the permanent place of residence of the appellant was in district Dhubri in Assam – However, notice was served at his temporary address in the district Sivasagar – No effort was made to effect service at the permanent place of residence – Para 3(5)(f) of Order 1964 is not attracted in the facts as there was no change of place of work or residence of appellant – It was within knowledge of the investigating officer that the appellant had a permanent place of residence at Assam – Para 3A which provides time limit for setting aside ex-parte order also has no applicability as service was not properly effected – Judgment of High Court is set aside – Case restored to the Foreigner's Tribunal, Jorhat, Assam.

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Allowing the appeals, the Court

HELD: 1.1 Order dated 22 March 2018 of the Foreigner's Tribunal indicates that the Tribunal was apprised of the fact that while the address of the appellant is shown as “...District

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- A Sivasagar”, the permanent residential address of the appellant has been indicated at District Dhubri, Assam. This is also fortified by the statement of the appellant recorded by the Senior Inspector of Police. The statement indicates that the address of the appellant corresponds to the permanent residential address which is noted in the Tribunal’s order. Apart from this, the counter affidavit has
- B also adverted to the interrogation report before the Inspector of Police which again refers to the “address in India” as District Dhuburi, Assam. [Paras 8, 9][368-F-H; 369-B-C]

- 1.2 Evidently, no effort was made to effect service at the permanent place of residence. Para 3(5)(f) of the Order 1964
- C provision deals with a situation where a “proceedee” has changed the place of residence or place of work without intimation to the investigating agency. The material which has been placed on record by the State of Assam in the counter affidavit demonstrates that the provisions of paragraph 3(5)(f) were not attracted since
- D it was within the knowledge of the investigating officer that the appellant has a permanent place of residence, as reflected in the earlier part of the order. Paragraph 3A contemplates that where an ex-parte order is passed for non-appearance, the person who is proceeded against may move an application within 30 days to set aside the ex-parte order by demonstrating sufficient cause
- E for not appearing before the Foreigner’s Tribunal. This can have no application on the facts of the present case where, as has now been duly established before this Court, service was not properly effected. Paragraph 3A which provides a time-limit of thirty days to file an appeal would undoubtedly apply in a situation where
- F service has been duly effected despite which, the person who is proceeded against has failed to appear and in which case a remedy is provided under paragraph 3A. This can have no application in the facts of the present case. [Paras 10, 11][369-D-H; 370-A-C]

- CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.1058-1059 of 2021.
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From the Judgment and Order dated 06.12.2019 of the High Court of Gauhati in WP (C) No.6462 of 2019 and order dated 17.02.2020 in Review Petition No.05 of 2020.

- Fuzail Ahmad Ayyubi, Ibad Mushtaq, Ms. Akanksha Rai, Advs.
- H for the Appellant.

Rupinder Singh Suri, ASG, Bhuvan Mishra, Kush Chaturvedi, B. A
V. Balaram Das, Shuvodeep Roy, Rahul Raj Mishra, Mrs. Swarupama
Chaturvedi, Ashutosh Mohan, Ms. Neha Rai, Advs. for the Respondents.

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

1. Leave granted. B

2. The Guwahati High Court dismissed a petition filed by the
appellant to challenge an order dated 22 March 2018 of the Foreigner’s
Tribunal, Jorhat, Assam in FT Case No SVR/310/2010. A review petition
has since been dismissed by the High Court on 6 December 2019. C

3. A reference was made by the Superintendent of Police (Border)
Sivsagar district before the Foreigner’s Tribunal, alleging that the appellant
is an illegal migrant who had entered into India without valid documents
from Bangladesh after 24 March 1971. The record before this Court
indicates that the notice to the respondent was sought to be served “by
hanging” in the presence of Shri Prabhat Gogoi, the Government Gaon
Burha of Bengali Gari Gaon and Shri Nivas Paul, the landlord of the
appellant. The appellant is alleged to have left his place of residence. An
order was passed by the Foreigner’s Tribunal on 22 March 2018 declaring
the appellant to be a foreigner who had illegally entered into India from
Bangladesh after 24 March 1971. D E

4. Aggrieved by the order of the Tribunal, the appellant instituted
a writ petition under Article 226 of the Constitution before the High
Court. The High Court held that the notice was pasted in a conspicuous
place of the last reported/known place of residence and that it was
properly served under paragraph 3(5)(f) of the Foreigners (Tribunals)
Order 1964. The High Court has also held that the burden to prove his
citizenship lies on the appellant since the facts are within his knowledge
and by neglecting to pursue the proceedings, the appellant has failed to
discharge the burden. The review petition was dismissed on the ground
that the parameters of review under Order 47 of the Code of Civil
Procedure were not established. F G

5. Notice was issued in these proceedings on 21 August 2020. In
pursuance of the order issuing notice, both the Union of India and the
State of Assam have entered appearance and filed their counter affidavits.

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A 6. The basic submission of the appellant, urged before the Court
by Mr Fuzail Ahmad Ayyubi, learned counsel is that the order declaring
the appellant to be a foreigner was passed in breach of the principles of
natural justice and hence, a remand to the Tribunal would be warranted.
In this context, it has been submitted that the order of the Foreigner's
B Tribunal indicates that the permanent place of residence of the appellant
is in district Dhubri in Assam, whereas service was sought to be effected
at his temporary address in the district of Sivasagar. Learned counsel
submitted that since the authorities had knowledge of the fact that the
permanent place of residence of the appellant was in district Dhubri, the
fact that no effort was made to serve him at this address would be
C sufficient to indicate that the order has been passed in violation of the
principles of natural justice.

7. On the other hand, Mr Shuvodeep Roy, learned counsel
appearing on behalf of the State of Assam has adverted to paragraph
3A of the Foreigners (Tribunals) Order 1964. It has been submitted that
D the appellant failed to avail of the opportunity under paragraph 3A of
moving a proceeding within 30 days before the Foreigner's Tribunal for
setting aside the *ex-parte* order. That apart, it has been submitted that
under paragraph 3(5)(f), if there is a change in the place of residence or
of work without intimation to the investigating agency, the process server
is authorized to serve the notice at the place where the individual ordinarily
E resides or last resided or reportedly resided or personally worked for
gain or carried on business. Hence, it has been submitted that this
procedure was complied with and consequently, the order of the Tribunal
which has been affirmed by the High Court does not warrant interference.

8. At the outset, it would be material to advert to paragraph 1 of
F the order dated 22 March 2018 of the Foreigner's Tribunal, which is
extracted below:

G “Originally this case was referred by the Superintendent of Police
(B) Sivasagar District, under Foreigners Act 1946 vide Police
Enquiry No.135/10 expressing doubt about the nationality of the
proceedee namely Md. Misher Ali, S/o Md. Dasher Ali C/o Sri
Nivas Paul, Village Haluating Bazar, P.S. Haluating, Dist. Sivasagar
and Permanent residence of Vill. Ballabil, P.S. Mankachar, Dist.
Dhuburi, Assam, with a prayer to decide as to whether the
proceedee is a citizen of India or a foreigner. Subsequently this

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case was transferred to this Tribunal for decision as per provision of Foreigner's Act 1946." A

9. The above extract indicates that the Tribunal was apprised of the fact that while the address of the appellant is shown as "C/o Shri Nivas Paul, Village Haluating Bazar, PS Haluating, District Sivasagar", the permanent residential address of the appellant has been indicated at Village Ballabil, PS Mankachar, District Dhubri, Assam. This is also fortified by the statement of the appellant which was recorded by the Senior Inspector of Police on 16 March 2010, a copy of which annexed to the counter filed by the State of Assam. The statement indicates that the address of the appellant corresponds to the permanent residential address which is noted in paragraph 1 of the Tribunal's order as extracted above. Apart from this, the counter affidavit has also adverted to the interrogation report before the Inspector of Police dated 22 January 2010, which again refers to the "address in India" as village Ballabil, PS Mankachar, District Dhuburi, Assam. B C

10. Evidently, no effort had been made to effect service at the permanent place of residence. Para 3(5)(f) of the Foreigners (Tribunals) Order 1964 is extracted below: D

"3(5)(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." E F

11. The above provision deals with a situation where a "proceedee" has changed the place of residence or place of work without intimation to the investigating agency. The material which has been placed on record by the State of Assam in the counter affidavit demonstrates that the provisions of paragraph 3(5)(f) were not attracted, since it was within the knowledge of the investigating officer that the appellant has a permanent place of residence, as reflected in the earlier part of the G H

- A order. We are not impressed with the submission that the appellant has not availed of the remedy under paragraph 3A. This is for the simple reason that paragraph 3A contemplates that where an *ex-parte* order is passed for non-appearance, the person who is proceeded against may move an application within 30 days to set aside the *ex-parte* order by demonstrating sufficient cause for not appearing before the Foreigner's
- B Tribunal. This can have no application on the facts of the present case where, as has now been duly established before this Court, service was not properly effected. Paragraph 3A which provides a time-limit of thirty days to file an appeal would undoubtedly apply in a situation where service has been duly effected despite which, the person who is proceeded against
- C has failed to appear and in which case a remedy is provided under paragraph 3A. This can have no application in the facts of the present case.

12. For the reasons which have been indicated above, we are of the view that the appeals should succeed. We accordingly allow the
- D appeals and set aside the impugned judgment of the High Court dated 6 December 2019, as well as the order of the Foreigner's Tribunal dated 22 March 2018. We accordingly restore Case No FT/SVR/310/2010 (arising out of Police Enquiry No 135/10) to the Foreigner's Tribunal, Jorhat, Assam.

- E 13. The appellant has been in custody since 15 May 2019. As a consequence of the setting aside of the order of the Foreigner's Tribunal, the appellant shall, in the meantime, be set at liberty. Before his release from custody, the appellant shall provide his address to the authorities. The appellant shall appear before the Foreigner's Tribunal on 12 April 2021 and continue to cooperate by appearing in person until the
- F proceedings are disposed of. The Tribunal shall allow the appellant a sufficient opportunity, consistent with the principles of natural justice, to file his response and produce documentary and other material. Since a date has been fixed for the appearance of the appellant before the Foreigner's Tribunal, no fresh service of notice would be necessary.

- G 14. Pending applications, if any, stand disposed of.