

GAHC010005262015



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

Case No. : WA/49/2020

MD ABUL HUSSAIN and 6 ORS
S/O LT. TAJUMUDDIN DEWAN, R/O NO. 1 NARAMARI, P.O.
BANGALDHARA, DIST. MORIGAON, ASSAM

2: AMIRJAN NESSA
W/O MD. ABUL HUSSAIN
R/O NO. 1 NARAMARI
P.O. BANGALDHARA
DIST. MORIGAON
ASSAM

3: MIR HAMZA @ AMIR HUSSAIN
S/O MD. ABUL HUSSAIN
R/O NO. 1 NARAMARI
P.O. BANGALDHARA
DIST. MORIGAON
ASSAM

4: AMIR HAMZA
S/O MD. ABUL HUSSAIN
R/O NO. 1 NARAMARI
P.O. BANGALDHARA
DIST. MORIGAON
ASSAM

5: NURUL AMIN @ NURUL ALI
S/O MD. ABUL HUSSAIN
R/O NO. 1 NARAMARI
P.O. BANGALDHARA
DIST. MORIGAON
ASSAM

6: RUHUL AMIN
S/O MD. ABUL HUSSAIN
R/O NO. 1 NARAMARI

P.O. BANGALDHARA
DIST. MORIGAON
ASSAM

7: RAFIQUL ISLAM
S/O MD. ABUL HUSSAIN
R/O NO. 1 NARAMARI
P.O. BANGALDHARA
DIST. MORIGAON
ASSA

VERSUS

THE UNION OF INDIA and 2 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF INDIA,
MINISTRY OF HOME AFFAIRS, NEW DELHI

2:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
DEPTT. OF HOME AFFAIRS
DISPUR
GUWAHATI-06

3:THE DEPUTY COMMISSIONER
MORIGAON
ASSAM

4:THE SUPERINTENDENT OF POLICE (B)
MORIGAON
ASSA

Advocate for the Petitioner : S HUDA, MR. A R SIKDAR,MD. ARIF,MR. N HOQUE

Advocate for the Respondent : ASSTT.S.G.I., MR. R K D CHOUDHURY, DY. SOLICITOR
GENERAL OF INDIA,GA, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

ORDER

Date : 20-08-2024

[Soumitra Saikia, J]

Heard Mr. A.R. Sikdar, learned counsel for the appellants. Also heard Mr. R.K. Dev Choudhury, learned DSGI, Mr. H.K. Hazarika, learned Government advocate, Assam and Mr. G. Sarma, learned Standing Counsel, FT.

2] This writ appeal is directed against the order dated 11.09.2015 passed in WP(C) No.2128/2010, whereby the opinion/order passed by the Foreigners' Tribunal (1st), Morigaon in Case No. FT(C) 324/2006 (Police Ref. Case No.IM(D)T 24/1996) on dated 01.02.2010 was upheld and the writ petition was dismissed.

3] The appellant No.1 was suspected to be illegal migrant coming from the specified territory and accordingly, reference was made before the Foreigners' Tribunal (1st), Morigaon in Case No. FT(C) 324/2006 (Police Ref. Case No.IM(D)T 24/1996).

4] The Tribunal issued Notice to the appellant No.1 and all his family members, namely, appellant Nos. 2 to 7. Upon due examination of the materials available before it, the Tribunal by the judgment and order dated 01.02.2010

held the opposite parties/appellants herein as foreigners under Section 2 (a) of the Foreigners' Act, 1946 and that they had entered Assam after 25.03.1971 from the specified territory. The names of all the appellants, if enrolled in any voter list in Assam, were directed to be deleted from the relevant block.

5] Being aggrieved, the appellants as writ petitioners had approached this Court by filing WP(C) No. 2128/2010, challenging the opinion/order dated 01.02.2010 passed by the Foreigners' Tribunal (1st), Morigaon in Case No.FT(C) 324/2006 (Police Ref. Case No.IM(D)T 24/1996). The learned Single Judge upon due consideration of the matter declined to interfere with the order passed by the Foreigners' Tribunal and instead, dismissed the writ petition. The Superintendent of Police (Border) was directed to apprehend the appellants/petitioners immediately and keep them in the detention camp till deportation to their country of origin. Their names were also directed to be deleted from the voters lists, if any. Aggrieved by the order dated 11.09.2015 passed in WP(C) No.2128/2010 by the learned Single Judge, the present writ appeal has been preferred.

6] The present appeal has been preferred on the following grounds amongst others:

I. For that the learned Tribunal as well as the Hon'ble Single Judge have committed error both in facts as well as in law by passing the impugned judgments.

II. For that the learned Single Judge and the learned Member of Foreigner Tribunal Fails to appreciate the evidences both oral and documentary in a judicial manner ignoring the law laid down by the Apex Court.

III. For that the learned Single Judge and the Learned Member of the Foreigners Tribunal have failed to appreciate the evidences in the light of the law laid down by the Apex Court for appreciation of the evidences. The Hon'ble Supreme Court makes it clear that in appreciation on the oral evidence and on the documentary evidence the Court should keep in mind the efficiency and correctness of the documents and also the Hon'ble Court should keep in mind while appreciating the evidences that the documents contain the names of persons in different alphabets where the spelling mistakes are inherently done in all such documents.

IV. That the appellant produced the following documents-1, voter list of 1965, 1971 & 1977. 2. A copy of marriage agreement, 3. Land document etc. The appellant No.1 was examined himself as O.P.W.-1. The documentary evidences produced and also the oral evidences adduced in the Court if properly appreciated on the basis of the principle laid down by the Apex Court, The Tribunal should have accepted the evidence both oral and documentary and having done so the appellant should have been declared Indian citizen by birth.

V. For that the Judgment of the learned Single Judge suffers from clear violation of legal principles in as much as he has accepted in to the wrong interpretation of the documents and rejection of the oral evidence on no grounds whatsoever.

VI. For that the learned Single Judge has failed to apply his mind as a Writ Court exercising special Jurisdiction. He has committed error of accepting the finding and reasoning of Tribunal without applying his judicial mind.

VII. For that the learned Single Judge has committed error in accepting the findings and doubtful interpretation/ inferences of the Tribunal without applying his judicial mind as Writ Court having extra Jurisdiction and powers.

VIII. For that the learned Single Judge has committed an error in failing to appreciate the documents submitted in the case particularly the documents issued by the state respondents which are known to contain errors of record inasmuch there was no proper judicial approach/ evaluation of the documentary evidence submitted by the appellants.

IX. For that the learned Single Judge has not only failed to appreciate the evidence in proper perspective but also has misread and misinterpreted the evidence in as much as in paragraph 3 of the Judgment the learned Single Judge held that-It has rightly been held by the Tribunal and even if Tajimuddin's name appeared in the voter list of 1965 and 1971, the same will have no consequence as the petitioner is his adopted son.

The appellant No.1 is an adopted son which is correct. Besides he is a foundling son, found at Dharamtul Railway Station, Morigaon in a territory of India without having any background on the origin of his birth as such he will achieve Citizenship in a territory where he was found at his childhood at the age of 5/6 years. The conjecture relating to his adoption, marriage, begotten children came after him when he is a bonafide Citizen of India under the doctrine enshrined in the International law for having citizenship by a foundling son.

X. For that, in any view of matter the above impugned judgment and order dated 21.07.2015 is illegal and liable to be set aside and quashed.

7] While the matter was pending before the Court, by order dated 22.08.2023, a Coordinate Bench had passed the following order:

Heard Mr. A R Sikdar, learned counsel for the petitioner. We have also

requested the presence of Mr. RKD Choudhury, learned Dy. SGI appearing for the Union of India.

2. The petitioner No.1 before the Court namely Md. Abul Hussain is a person who is presently aged about 72 years and the other petitioners are the wife and sons of Md. Abul Hussain.

3. PW-1 Khalilur Rahman, son of Lt. Mainuddin, who is a teacher, in his deposition before the Tribunal stated that Abul Hussain was brought by his father when he was a child in an abandoned condition. After 3 / 4 years, Abul Hussain was then brought up by the Gaonburah of the village Dhaniram Saikia and after staying in the house of Dhaniram Saikia for a particular period of time, he was thereafter brought up in the house of Tajimuddin. It is an admitted position that Mainuddin, Dhaniram Saikia and Tajimuddin are no more. In the circumstance, a question would arise as to who is this petitioner and as he had been referred before the Tribunal, a further question for determination would be as to whether he is a foreigner under the Foreigners Act, 1946. The materials on record as referred above indicates that the petitioner/proceedee Abul Hussain was found abandoned at Dharamtul Railway Station by Mainuddin and Mainuddin took him to his house and brought him up for a particular period of time, thereafter, his custody was with Dhaniram Saikia, the Gaonburah who also brought him up for a particular period of time and thereafter it was Tajimuddin who had brought him up. The petitioner Abul Hussain has no knowledge or information as to who he is or as to from where he had come. On the question of discharging the burden under Section 9 of the Foreigners Act, both possibilities are open that he may be a son of parents who may be Indian citizens, but was abandoned or it was equally possible that he is an illegal migrant himself or he is the son of illegal migrants who was abandoned resulting in Mainuddin finding him in the abandoned condition at Dharamtul Railway Station as stated. As Abul Hussain has no knowledge about his origin, it will be an impossibility under the law to now expect him to prove whether he is not a foreigner by discharging the burden as to who he is or from where he had come. As the three persons Mainuddin, Dhaniram Saikia and Tajimuddin are also no more there cannot remain any situation where an enquiry can be made from the aforesaid three

persons regarding the origin of the petitioner, Abul Hussain.

4. In the above circumstance, we required the petitioner Abul Hussain to remain personally present before the Court for an interaction as to whether anything noticeable can be found as to what may be his origin. Today, Md. Abul Hussain is produced before the Court, but it is noticed that the person is not in a proper physical and mental state to provide any information and it is also stated that recently he had also suffered brain stroke which has even worsened his condition.

5. In the circumstance, a situation has arisen that it is a situation of impossibility to prove under the law as to who Abul Hussain is. Taking note of the aforesaid circumstance, we request the authorities in the Union of India to express their views as to what status can be given to the petitioner strictly confining to the facts and circumstances of the present case without it being a general proposition in any manner. The present physical condition of the petitioner may also be taken note of while taking a decision.

6. In the event, any decision is taken on the status of the petitioner No.1 Md Abul Hussain, a further decision would also have to be taken in respect of his children i.e. in respect of his five sons and whether a case specific similar benefit can also be given to them.

7. A copy of this order be made available to Mr. RKD Choudhury, learned Dy.SGI for further response.

8] Subsequently, the matter having listed before this Bench, the same is taken up today for hearing and disposal.

9] During the course of the submissions before this Court it was pointed out that during the pendency of the writ appeal the appellants No.1 & 2 had already expired. A copy of the death certificate dated 05.05.2024 in respect of the appellant No.1, namely, late Md. Abul Hussain is placed before the Court. Learned counsel for the appellants submits that as per the provisions of law, the reference was made only in respect of the appellant No.1, late Md. Abul

Hussain, who, however, had expired during the proceeding of the appeal. It is submitted that under the provisions of the Foreigners law, references for an opinion by the appropriate Tribunal in respect of persons suspected to have migrated illegally from the specified territory will have to be made individually. It is submitted that in the present case enquiry was made only against the appellant No.1, late Md. Abul Hussain and the reference accordingly was made against the appellant No.1, late Md. Abul Hussain. It is submitted that in the absence of any reference being made against any other appellants, there was no occasion for the Foreigners Tribunal to embark on any enquiry to determine the citizenship of the appellants No.3, 4, 5, 6 & 7 and pass adverse order. It is submitted that this aspect of the matter was also not dealt with by the learned Single Judge while passing the impugned order dated 11.09.2015 in WP(C) No.2128/2010. Under such circumstances, it is submitted that the impugned judgment dated 11.09.2015 passed in WP(C) No.2128/2010 as well as the opinion/order dated 01.02.2010 passed by the Foreigners Tribunal (1st), Morigaon in Case No. FT(C) 324/2006 should be interfered with and set aside and quashed.

10] Mr. R.K. Dev Choudhury, learned DSGI appearing for the respondent No.1 submits that there is no infirmity in the order dated 11.09.2015 passed in WP(C) No.2128/2010 by the learned Single Judge. It has rightly upheld the opinion/order dated 01.02.2010 passed by the Foreigners Tribunal (1st), Morigaon in Case No.FT(C) 324/2006. Therefore, there is no merit in the Writ Appeal and the same should be dismissed. He, however, fairly submits that for an opinion before the Tribunal regarding the citizenship of any person, suspected to be an illegal migrant, individual references are required to be made as per the procedure prescribed.

11] Learned counsel for the parties have been heard and pleadings on the record have been perused. The Trial Court's records, which are available, have also been perused.

12] At the outset, in view of the submissions made by Mr. A.R. Sikdar, learned counsel for the appellants that the appellant Nos. 1 & 2 have expired in the meantime and which statement has not been disputed by the respondents, the names of the appellants No. 1 & 2 are required to be struck off and it is ordered accordingly. The appeal, therefore, is now to be proceeded against the appellants No. 3 to 7.

13] Having carefully examined the Trial Court's records, it is noticed that the reference indeed was directed against only the appellant No.1, namely, Md. Abul Hussain. This is evident from the reference made by the Superintendent of Police (B), Morigaon vide the Memo No.MRG/B/33/96/840 dated 15.10.1996. The reference was initially made before the IM(D)T as it then was being IM(D)T case No.24/96 dated 12.10.1996. From the records it is also evident that an enquiry was caused by the local police station and the statements of various witnesses were recorded in respect of status of the citizenship of late Md. Abul Hussain.

14] A detailed enquiry made by the Superintendent of Police, Morigaon under Rule 4 also reflects that the enquiry was directed only against Md. Abul Hussain.

15] Subsequently, after the judgment of the Apex Court, whereby the IM(D)T Act was struck down, the matter was transferred to the Foreigners' Tribunal (1st), Morigaon. The Foreigners' Tribunal (1st), Morigaon while initiating

the proceedings against Abul Hussain also issued notices against the other appellants who were suspected to be the family members of Md. Abul Hussain. This is how the opinion/order dated 01.02.2010 came to be rendered against Md. Abul Hussain and his other family members, who are the present appellants No. 3 to 7. Consequently, being aggrieved by the judgment, the appellants as writ petitioners had approached this Court by filing WP(C) No.2128/2010 and which, however, came to be dismissed by upholding the opinion/order passed by the Tribunal and thereby, the present appeal has been preferred.

16] In the Foreigners' Tribunals Order, 1964 under Clause 2 (1) it is provided that the Central Government or the State Government or the Union Territory Administration or District Collector or the District Magistrate by order can refer the question as to whether a person is a foreigner within the meaning of Foreigners' Act 1946 to be constituted for the purpose. It is under the provisions of this Foreigners' Tribunal Order, 1964 a reference was made by the State Authorities to determine the status of the citizenship of the appellants to be decided by the competent Foreigners Tribunal.

17] A reference to the Foreigners (Tribunal) Order, 1964, Government of India issued on 23.09.1964 is also necessary at this stage. This Order of 1964 was issued in exercise of powers conferred by Section 3 of the Foreigners Act, 1946 (31 of 1946). A perusal of Clause 2 (1A) and the procedure prescribed under the Clause 3 reveals that any question relating to whether a person is a Foreigner within the meaning of Foreigners Act, 1946 may be referred to a Tribunal constituted for the purpose and the Tribunal thereafter upon due service of notice on the person concerned and after giving the person a

reasonable opportunity of making a representation and producing evidence in support of his case may render its opinion on the reference made as to whether a person is or is not a foreigner. The said Foreigners (Tribunal) Order, 1964 is extracted below for ready reference:

FOREIGNERS (TRIBUNAL) ORDER, 1964
GOVERNMENT of INDIA
MINISTRY OF HOME AFFAIRS

ORDER

New Delhi, the 23rd September, 1964

G.S.R. 1401 – IN exercise of the powers conferred by Section 3 of the Foreigners Act, 1946 (31 of 1946), the Central Government hereby makes the following order, namely :-

1. Short Title –

This order may be called the Foreigners (Tribunals) Order, 1964.

2. Constitution of Tribunals :-

(1) The Central Government may be order, refer the question as to whether a person is not a foreigner within the meaning of the Foreigners Act, 1946 (31 of 1946) to a Tribunal to be constituted for the purpose, for its opinion.

(1A) The registering authority appointed under sub-rule (1) of rule 16F of the Citizenship Rules, 1956 may also refer to the Tribunal the question whether a person of Indian Origin, complies with any of the requirements under sub-section (3) of Section 6A of the Citizenship Act, 1955 (57 of 1955).

(2) The Tribunal shall consist of such number of persons having judicial experience as the Central Government may think fit to appoint.

(3) Where the Tribunal consists of two or more members, one of them shall be appointed as the Chairman thereof.

3. Procedure for disposal of questions :-

(1) The Tribunal shall serve on the person, to whom the question relates, a copy of the main grounds on which he is alleged to be a foreigner and given him a reasonable opportunity of making a representation and producing evidence in support of his case and

after considering such evidence as may produced and after hearing such persons as may desire to be heard, the Tribunal shall submit its opinion to the officer or authority specified in this behalf in the order of reference.

(1A) The Tribunal shall, before giving its opinion on the question referred to in subparagraph (1A) of paragraph-2, give the person in respect of whom the opinion is sought, a reasonable opportunity to represent his case.

(2) Subject to the provisions of this Order, the Tribunal shall have power to regulate its own procedure.

4. Power of Tribunals :-

The Tribunal shall have the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 in respect of the following matters, namely :-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of any document;
- (c) issuing commissions for the examination of any witness."

18] The interpretation of this particular clause was also discussed in a judgment of this Court in *Sudhir Roy & Others vs. the Union of India and Others* reported in 2019 (2) GLT 61. This Court in *Sudhir Roy* (supra) while deciding a question on the citizenship of the petitioners/appellants and his family members, this Court held that where a reference has been made only against a person and not against his family members, then, only a presumption at best can be drawn against the family members of such a proceedee who has been declared a foreigner that his family members are also presumed to be foreigners. But such presumption by itself can not lead to a definite conclusion that the family members of such a proceedee who has been declared to be a foreigner are also to be declared foreigners. The Coordinate Bench held that this ground may be a good ground for causing an enquiry and making a

reference against the family members, but without following the due procedure of law of conducting an enquiry and making a reference and being adjudicated by a Tribunal, the family members cannot be declared to be foreigners. A relevant paragraphs being Paragraph-9 is extracted below:

“9. As regards the declaration of the wife, sons and daughters of the petitioner to be foreigners, we have perused the records and have taken note of that the reference was made only against the petitioner and not against his wife, sons and daughters. Although the law in this respect has been settled by this Court in Aktara Khatun Vs. State of Assam & Ors., reported in 2017(2)GLT 974 that a presumption can also be drawn against the family members of the proceedee who has been declared as foreigner, but at the same time we are also of the view that such presumption would by itself not lead to a conclusion that the family members of a proceedee who has been declared to be a foreigner are also foreigners. The same may be a good cause for initiating an enquiry and making a reference against the family members, but without following the due procedure of law of conducting an enquiry and making a reference and being adjudicated by the Tribunal, the family members cannot be declared to be foreigners.”

19] Coming to the facts of this case as has been discussed above, from the records it is evident that the reference was made only in respect of the appellant No.1, namely, Md. Abul Hussain. It was the competent Foreigners Tribunal who upon initiating the proceedings against the appellant No.1 also proceeded to issue notices on the other family members, who are appellants No. 2 to 7. No individual enquiries or references were made against the Writ Appellants 3 to 7, namely, the family members of Late Md. Abul Hussain by the State Authorities. There was no enquiry conducted against them, questioning their citizenship and no references were made before any Foreigners Tribunal. They were not called upon/required to discharge their burden under Section 9. Under such circumstances, the Foreigners Tribunal could not have proceeded against the family members, namely, the appellants No. 3 to 7 without following the prescribed procedure. The Foreigners Tribunal could not have proceeded against the family members and pass any adverse findings against them without there being first a reference made by the concerned authorities in terms of the

Foreigners (Tribunal) Order, 1964 affording due opportunity as per law. Therefore, the findings of the Foreigners Tribunal (1st), Morigaon that the family members are also illegal migrants being based only on presumption will be contrary to law and the procedure prescribed.

20] Having considered the facts and circumstances urged before this Court and upon careful consideration of the Trial Court records as well as the judgments placed before this Court, this Court is of the considered view that the original proceedee i.e. the appellant No.1, namely, Md. Abul Hussain and his wife i.e. the appellant No.2, namely, Mustt. Amirjan Nessa, who are arrayed as appellants No.1 & 2, having expired in the meantime and their names having been struck off in this order, it will be futile for this Court at this stage to examine the merits of the impugned order dated 11.09.2015 passed by the learned Single Judge in WP(C) No.2128/2010. This Court has held in *State of Assam and Another vs. Moslem Mondal and Others* reported in (2013) 3 GLR 402 that the procedure prescribed under the law for questioning a person's citizenship is to be initiated by making a proper enquiry and thereafter, if the authorities are still not satisfied with the materials available a reference can be made in respect of those persons suspected to be illegal migrants coming from specified territories before the competent Tribunal.

21] As is evident from the Tribunal records as well as upon due consideration of the submissions made, no individual references were made against the appellants No. 3 to 7, it is therefore left to the discretion of the State as well as the Union to decide on the question of whether any references are to be made against the writ appellants No. 3 to 7 questioning their citizenship.

22] Accordingly, we close this Writ Appeal at this stage by directing and

making it clear that the findings of the Tribunal by the order dated 01.02.2010 in Case No. FT (C) 324/2006, which was upheld by the learned Single Judge in the order dated 11.09.2015 passed in WP(C) No.2128/2010 will not operate against the appellants No. 3 to 7 till an enquiry is made by the State Authorities and in the event they are called upon to appear before any competent Tribunal pursuant to any reference that may be made by the State Authorities, the said appellants will be at liberty to file their representations and place all evidences as felt necessary in support of their defense. As such, the findings of the Foreigners Tribunal (1st), Morigaon against the family members will not operate as a bar to discharge their burden under Section 9 of the Foreigners Act, 1946 in the event the State decides to make any reference against them. However, it is directed that the benefit of this order will accrue to the appellants No. 3 to 7 only, if they appear before the Superintendent of Police (Border), Morigaon within a period of 15 (fifteen) days from today and the Superintendent of Police (Border), Morigaon, upon the appearances of the appellants No. 3 to 7 within the period indicated above, will record/obtain the biometrics of their iris of both eyes, the fingerprints of both hands and the photographs of the appellants No. 3 to 7. On their appearances before the Superintendent of Police (Border), Morigaon, as directed above, the said authority shall also obtain necessary information and documentation as required under the Rules from the appellants for securing their presence when necessary.

23] Writ Appeal accordingly stands closed and disposed of. No order as to cost. Trial Court's records be returned forthwith.

Comparing Assistant

JUDGE

JUDGE