

GAHC010041732017



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

Case No. WP (C) 5931 / 2017

Md. Sohar @ Shahar Ali
Son of late Jiyarad Mia@Jiyorat Ali
Resident of Village - Matraghola,
P.S. - Abhayapuri,
District - Bongaigaon, Assam.

..... **Petitioner**

-Versus-

1. The Union of India,
represented by the Secretary,
Government of India,
Ministry of Home Affairs,
New Delhi - 110001.
2. The State of Assam,
represented by
the Commissioner and Secretary,
Government of Assam,
Home Department,
Dispur, Guwahati-6.
3. The Deputy Commissioner,
District-Bongaigaon, Assam.

4. The Superintendent of Police (Border),
District-Bongaigaon, Assam.

..... **Respondents**

Advocate for the Petitioner : Mr. M. Rana.

Advocates for the Respondents : 1. Ms. P. Swargiary, on behalf of
Mr. H. Gupta, CGC.
2. Ms. A. Verma, SC, Home Department.
3. Mr. P. Sarma, Sr. GA, Assam.

Date of Hearing and Judgment : 13.06.2024

BEFORE
HON'BLE MR. JUSTICE MANASH RANJAN PATHAK
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

JUDGMENT & ORDER

(Mridul Kumar Kalita, J)

1. Heard Mr. M. Rana, learned counsel appearing for the petitioner. Also heard Ms. P. Swargiary, learned counsel appearing on behalf of Mr. H. Gupta, learned Central Government counsel for the respondent No. 1, Ms. A. Verma, learned Standing Counsel, Home Department, Assam appearing for the respondent Nos. 2 and 4 and Mr. P. Sarma, learned Additional Senior Government Advocate, Assam for the respondent No. 3.

2. This writ petition has been filed by the petitioner, namely, Md. Sohar @ Shahar Ali impugning the *ex parte* opinion/order, dated 17.08.2016, passed by the learned Foreigners Tribunal No. 2, Abhayapuri, District-Bongaigaon in the Case No. BNGN/FT/2093/2007, whereby he was declared as a foreigner, under the Foreigners Act, 1946 who had illegally entered into India (Assam) on or after 25.03.1971.

3. The petitioner has also impugned the order dated 29.11.2016, passed by the learned Foreigners Tribunal No. 2, Abhayapuri in the Misc. Case No. 23/2016, arising out of Case No. BNGN/FT/2093/2007, whereby the learned Tribunal had dismissed the application filed by the petitioner for setting aside the *ex parte* opinion/order, dated 17.08.2016, passed by the learned Foreigners Tribunal No. 2, Abhayapuri in the Case No. BNGN/FT/2093/2007.

4. Notice in this case was issued on 21.09.2017 and the case record, in original, of the Case No. BNGN/FT/2093/2007, was called for from the learned Foreigners Tribunal No. 2, Abhayapuri, Bongaigaon and the petitioner was granted interim protection and interim bail which is still in force. The record of the aforesaid F.T. Case has been received by this Court.

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

i) Suspecting the petitioner, namely Md. Sohar @ Shahar Ali, son of late Jiyarad Mia @ Jiyorat Ali, resident of village Matraghola under Abhayapuri police

station to be a Foreigner, an inquiry was conducted as regards his nationality.

- ii)** On the basis of inquiry report dated 28.03.2007 submitted by the Inquiry Officer, wherein the petitioner was suspected to be a foreigner, a reference was made by the Superintendent of Police (Border), Bongaigaon to the learned Foreigners Tribunal, Bongaigaon under the provisions of the Foreigners (Tribunals) Order, 1964 for determining his nationality as per the provisions of Foreigners Act, 1946.
- iii)** On receipt of the aforesaid reference from the Superintendent of Police (Border), Bongaigaon, the learned Foreigners Tribunal, Bongaigaon registered the Case No. BNGN/FT/2093/2007, and on 12.03.2013, issued notice to the petitioner fixing 11.06.2013 for his appearance. It appears from record that on 11.06.2013, the Tribunal issued notice to the petitioner, which was returned after due service and the petitioner accordingly appeared before the said Tribunal through his counsel and filed an application praying for time for filing written statement.
- iv)** Said prayer of the petitioner was allowed and next date was fixed on 05.09.2013 for filing written statement and documents by him. On the next day,

i.e., on 05.09.2013, also, the petitioner had filed an application through his engaged counsel and prayed further time for filing written statement and documents which was allowed and the next date was fixed on 10.12.2013 for filing the written statement.

- v)** On 10.12.2013, the petitioner remained absent without taking any steps. However, the learned Tribunal again fixed the case on 12.03.2014 for filing written statement and documents by the petitioner.
- vi)** Thereafter, on two consecutive dates, that is, on 12.03.2014 as well as on 12.06.2014, the petitioner remained absent before the Tribunal without steps.
- vii)** However, on 12.06.2014, the learned Foreigners' Tribunal, Bongaigaon, had issued fresh notice to the petitioner fixing 10.09.2014 for appearance. On 10.09.2014, the petitioner appeared personally before the Tribunal and again prayed for time for filing written statement, which was allowed and the next date was fixed on 19.12.2014. Thereafter, on three consecutive dates, i.e., on 19.12.2014, 24.03.2015 and 25.06.2015, the petitioner remained absent without steps. However, on 25.06.2015, the learned Foreigners' Tribunal, Bongaigaon, directed issuance of another fresh notice to the opposite party fixing 28.09.2015 for appearance.

- viii)** Thereafter on, 06.08.2015, the Case No. BNGN/FT/2093/-07 was transferred from the Foreigners Tribunal, Bongaigaon, to the newly created Foreigners Tribunal No. 2, Bongaigaon, at Abhayapuri, for disposal and 28.09.2015 was fixed for appearance. The petitioner did not appear before the Foreigners' Tribunal No. 2, Bongaigaon, at Abhayapuri on four consecutive dates, i.e., on 28.09.2015, 27.10.2015, 11.12.2015 and 29.01.2016. The next date of the case was fixed on 03.03.2016 and on the said date, due to non-appearance of the petitioner, the said Tribunal fixed the aforesaid case for *ex parte* order.
- ix)** Finally, on 17.08.2016, the learned Foreigners' Tribunal, Bongaigaon No. 2, Abhayapuri, disposed of the reference, i.e., the Case No. BNGN/FT/2093-07 *ex-parte*, declaring the petitioner as a foreigner under the Foreigners Act, 1946, who had entered into India (Assam) on or after 25-03-1971.
- x)** Thereafter, on 08.11.2016, one Rabi Khan had filed an application for setting aside the *ex parte* order dated 17.08.2016 and on the basis of the said application the Misc. Case No. 23/2016 was registered. However, by order dated 29.11.2016, by holding that the petitioner has not been able to demonstrate any special/exceptional circumstance for

remaining absent when the aforesaid F.T. Case was fixed for hearing, the said Misc. Case No. 23/2016 was dismissed by the Foreigners Tribunal No. 2, Bongaigaon at Abhayapuri.

6. Learned counsel for the petitioner has submitted that the petitioner is a citizen of India by birth. It is also submitted that his father, namely late Jiyarad Mia @ Jiyorat Ali, was a permanent resident of village Matraghola under Abhayapuri Police Station in the district of Bongaigaon and was enrolled as a voter in the voter list of 1966 at Serial No. 14 against House No.5 of village- (351) Matraghola in the erstwhile Goalpara District.

7. Learned counsel for the petitioner has also submitted that though he received the notice from learned Foreigners Tribunal, Bongaigaon and also appeared through his counsel before the said Tribunal and sought adjournment on two occasions i.e. on 11.06.2013 and 05.09.2013, however, thereafter, due to abject poverty and under compelling circumstances, he had to leave his native place, in search of livelihood, to Delhi and thereafter, to Kerala, therefore, he defaulted to appear before the learned Foreigners Tribunal in Case No. BNGN/FT/2093/07.

8. It is also submitted by the learned counsel for the petitioner that in the month of August 2016, the petitioner returned back to his village. However, he suffered from Chronic Obstructive Pulmonary Disease (COPD) and due to his ailment, he could not appear before the learned Foreigners Tribunal and in the

meanwhile, he came to know that an *ex parte* opinion has been passed by the learned Foreigner's Tribunal No. 2, Bongaigaon, at Abhayapuri, by order dated 17.08.2016.

9. It is also submitted that due to his ailment, he could not even approach the learned Foreigners Tribunal for setting aside the *ex parte* order and he requested one of his relatives, namely Rabi Khan, to file an application for setting aside the *ex parte* order dated 17.08.2016, which was dismissed by the learned Foreigner's Tribunal, by its order dated 29.11.2016.

10. It is submitted by the learned counsel for the petitioner that the petitioner would be highly prejudiced if he is not given an opportunity to prove his nationality before the learned Foreigners Tribunal, Bongaigaon No. 2 at Abhayapuri and therefore, he has prayed for setting aside the *ex parte* order dated 17.08.2016 as well as the order dated 29.11.2016 passed in Misc. Case No. 23/2016.

11. On the other hand, Ms. A. Verma, learned Standing Council, Home Department, Assam has submitted that though the petitioner appeared before the learned Foreigner's Tribunal Bongaigaon No. 2 , Abhayapuri on two occasions and sought time for filing written statement, which were granted by the learned Foreigners Tribunal, he neglected to appear before the said Tribunal thereafter, and without any valid cause defaulted to appear before the learned Tribunal in Case No. BNNGN/FT/2093/07.

12. Learned Standing Counsel, Home Department has submitted that the conduct of the present petitioner in defaulting to appear before the learned Foreigner's Tribunal even after having knowledge of the pendency of a reference against him in the said Tribunal and even after, he was allowed time to file written statement on two occasions does not entitle his case to be dealt with any leniency and the learned Foreigner's Tribunal Bongaigaon No. 2, Abhayapuri was right in proceeding against the above-named petitioner *ex parte*. Accordingly, she has submitted that the impugned order dated 17.08.2016, passed in Case No. BNGN/FT/2093/07 as well as order dated 29.11.2016 passed in Misc. Case No. 23/2016 do not warrant any interference by this Court and accordingly has prayed for dismissing the instant writ petition.

13. We have considered the submissions made by learned counsel for both the sides and have also perused the materials available on record carefully, including the case record of Case No. BNGN/FT/2093/07, which was called for from the learned Foreigners Tribunal Bongaigaon No.2, Abhayapuri in connection with this case.

14. It appears from record that earlier the Case No. BNGN/FT/2093/07 was pending before the learned Foreigners Tribunal, Bongaigaon and the petitioner had appeared before the said Tribunal through his engaged counsel on two occasions, i.e. on 11.06.2013 and 15.09.2013 and thereafter, he defaulted to appear before the said Tribunal. It also appears that after his

default the fresh notice was again issued to him and the petitioner appeared again for the third time on 10.09.2014 before the learned Foreigners Tribunal at Bongaigaon and prayed time for filing written statement, which was allowed.

15. But, thereafter the petitioner again defaulted to appear before the said Tribunal at Bongaigaon on three consecutive dates.

16. It appears from record that though the learned Foreigners Tribunal, Bongaigaon, by order dated 25.06.2015, had directed the issuance of fresh notice to the petitioner, however, no such notice was issued to the petitioner after 25.06.2015. It also appears that thereafter on 06.08.2015, the Case No. BNGN/FT/2093/07 was transferred from the learned Foreigners Tribunal, Bongaigaon to the learned Foreigners Tribunal, Bongaigaon No. 2, which is situated at Abhayapuri.

17. From the record it is seen that after receipt of the record of Case No. BNGN/FT/2093/2007, on transfer, by the learned Foreigners Tribunal, Bongaigaon No. 2, Abhayapuri, no fresh notice was issued to the petitioner by the said Tribunal. Hence, it may not be presumed that the petitioner was aware about the transfer of the said case to the learned Foreigners Tribunal Bongaigaon No. 2 at Abhayapuri and about its pendency before the said Tribunal.

18. Under the above circumstances, we are of the considered opinion that though there was laxity on the part of the petitioner also in not appearing before the learned Foreigners Tribunal at

Bongaigaon, when the said reference was pending before the said Tribunal, since no fresh notice was issued to him, when the aforesaid case was transferred to the learned Foreigners Tribunal Bongaigaon No.2 at Abhayapuri, it may be presumed that he was not aware about the pendency of Case No. BNGN/FT/2093/2007 before the said Tribunal.

19. Accordingly, we are of the considered opinion that the aforesaid petitioner is entitled for a reasonable opportunity of showing that he is not a foreigner. However, as discussed herein before, there was laxity on the part of the petitioner also, in not appearing before the learned Foreigners Tribunal, Bongaigaon when the said reference was pending before it as the petitioner was fully aware about such pendency before its transfer to the learned Foreigners Tribunal Bongaigaon No.2, Abhayapuri, we propose to impose a cost of Rs. 10,000/- (Rupees Ten Thousand only) on the petitioner.

20. We for the reasons above, set aside the impugned order/opinion dated 17.08.2016 passed in Case No. BNGN/FT/2093/2007 by the learned Foreigners Tribunal Bongaigaon No.2, Abhayapuri, as well as its order dated 29.11.2006 passed in the Misc. Case No. 23/2016, arising out of the said F.T. case, subject to payment of cost of Rs. 10,000/- by the petitioner to the District Legal Services Authority, Bongaigaon.

21. Accordingly, we remand the Case No. BNGN/FT/2093/2007 to the learned Foreigners Tribunal, Bongaigaon No. 2, at

Abhayapuri for rendering a fresh opinion from the stage of filing of written statement and evidence by the petitioner.

22. The above-named petitioner shall appear before the Secretary, District Legal Services Authority, Bongaigaon on or before 19th July, 2024 and shall deposit the cost of Rs. 10,000/- in the cost fund account of the said authority and shall obtain a written receipt of such payment. Thereafter on 22nd July, 2024 the petitioner shall appear before the learned Foreigners Tribunal, Bongaigaon No. 2 at Abhayapuri in Case No. BNGN/FT/2093/2007 along with a certified copy of this order and the receipt in original issued by Secretary, District Legal Services Authority, Bongaigaon regarding payment of the cost as directed by this Court.

23. On the said date itself, i.e., on 22.07.2024 the petitioner shall submit his written statement along with his written evidence on affidavit with all documents which he intends to rely in support of the claim of his nationality, without fail.

24. However, it is hereby made clear that on failure on the part of the petitioner to pay the cost as directed herein above and to appear before learned Foreigners Tribunal, Bongaigaon No. 2 at Abhayapuri, on the aforementioned date i.e. on 22.07.2024 as directed above and thereafter on the date fixed by the said Tribunal, it shall be at liberty to proceed against the petitioner in Case No. BNGN/FT/2093/2007 as per the provision of law.

25. The Registry shall return the records of Case No. BNGN/FT/2093/2007 to the learned Foreigners Tribunal,

Bongaigaon No. 2, Abhayapuri, forthwith along with a copy of this order.

26. With above observations and directions, this writ petition is accordingly allowed to the extent as indicated above.

JUDGE

JUDGE

Comparing Assistant