
(2018) 09 GAU CK 0054
In the Gauhati High Court
Case No : Civil Writ Petition No. 4146 of 2018

Amena Khatun

APPELLANT

Vs

State Of Assam And 5 Ors

RESPONDENT

Date of Decision : 27-09-2018

Acts Referred:

Foreigners Act, 1946 — Section 3
Constitution of India, 1950 — Article 258, 258(1)

Citation : (2018) 09 GAU CK 0054

Hon'ble Judges : Arup Kumar Goswami, J; Manash Ranjan Pathak, J

Bench : Division Bench

Advocate : M Dev, A Kalita, G Sarma, A I Ali, A Verma

Final Decision : Disposed Off

Judgement

(M.R. Pathak, J)

1) Heard Ms. M Dev, learned counsel for the petitioner and Mr. A Kalita, learned Special Standing Counsel, Foreigners Tribunal for the respondent

Nos. 1, 3 and 4. Also heard, Ms. G Sarma, learned CGC for the respondent No. 2, Mr. A I Ali, learned Standing counsel, Election Commission of

India, respondent No. 5 and Ms. A Verma, learned Standing counsel, NRC for the respondent No. 6.

2) On a reference being made alleging the petitioner to be a foreign national, the F.T. Case No. 445/2007 was registered before the Foreigners

Tribunal, Darrang, Mangaldoi against her.

3) Petitioner herein has filed this writ petition on 20.06.2018 challenging the ex parte order dated 24.04.2008, passed by the learned Member,

Foreigners Tribunal, Darrang, Mangaldoi in said F.T. Case disposing off the reference ex parte against the petitioner and in favour of the State.

- 4) Following the said order of the Tribunal dated 24.04.2008, the petitioner was taken into custody on 08.05.2018 and since then, she is detained in the detention camp at Tezpur Jail.
- 5) This Court, while issuing notice to the respondents on 22.06.2018, in the interim, ordered that the petitioner shall not be deported from India.
- 6) Petitioner stated that notice of the case was not served upon her and it is only when police took her in custody on 08.05.2018, she could come to know about the impugned ex parte order of the Tribunal dated 24.04.2008.
- 7) Petitioner also stated that as reflected in the certified copy of the impugned ex parte order dated 24.04.2008, annexed to the petition, she is not the wife of Sattar Ali, but of Sultan Ali.
- 8) Ms. Dev, learned counsel submits that the petitioner did not evade the process of law and unless an opportunity is granted to her to contest the proceeding, she will suffer irreparable loss and injury.
- 9) Perused the records of the Tribunal.
- 10) From the perusal of the records, it is seen that the Tribunal issued notice in the case to Smti. Amena Khatun, wife of Sultan of Village - Khetachar under Dalgaon Police Station. From the report of the process server dated 25.05.2007, it is seen that he went to the Khetachar village and met the addressee in her house as mentioned in the notice, served her the notice, informed her about the case, asked her to appear before the Tribunal on the date fixed, served her the second copy of the notice, by obtaining her signature (thumb impression) on the first copy of the notice and returned the same to the Tribunal and the notice of the case seems to have been served on the petitioner by obtaining the impression of right thumb in presence of witnesses.
- 11) From the record, it is also seen that report of the process server contains signature of two constables, including the process servers Manin Das and Hari Prasad Upadhaya and it did not contain signature of any independent and/or local witness identifying the addressee.
- 12) Order sheet of the case reflects that on 12.03.2008, the Tribunal observed that the summon did not return after service and as such, the Tribunal passed the order to re-issue summon to the process server, fixing 01.04.2008 for ex parte hearing.

13) On 01.04.2008, the Tribunal observed that summon did not return after service and fixed the matter on 24.04.2008 for ex parte hearing.

14) On 24.04.2008, one of the process server Hari Prasad Upadhaya, appeared before the Tribunal and stated that while he was posted at Kharupetia

outpost, he, on 25.05.2007, went to the residence of the petitioner and served notice upon her in presence of the witnesses by obtaining her thumb

impression and submitted the report along with the signature of the witness Manik Das, the other constable. On examining the said process server, the

Tribunal by the impugned order dated 24.04.2008, disposed of the said reference by the impugned ex parte order dated 24.04.2008 against the

petitioner and in favour of the State.

15) The records of the Tribunal also reveal that on 10.05.2018, the counsel for the petitioner submitted an application before the Foreigners Tribunal

No. 1, Darrang, Mangaldoi stating that the petitioner has a minor child of two years old and that her residence is at Khetechar under Kharupetia

Police Station and, as such, she comes under the jurisdiction of the Foreigners Tribunal No. 3 and therefore, the said F.T. Case should be transferred

to the Foreigners Tribunal No. 3 and to re-hear the said matter.

16) On 15.05.2018, the father of the petitioner filed another petition before the Member, Foreigners Tribunal No. 1, Darrang, Mangaldoi stating that

the petitioner was arrested by Kharupetia Police on 09.05.2018 in connection with the said Case and prayed to transfer it to the Foreigners Tribunal

No. 3, Darrang, Mangaldoi for speedy trial.

17) Before those two petitions are considered by the Foreigners Tribunal No. 1, Darrang, Mangaldoi; the petitioner approached this Court by

preferring this writ petition.

18) Records of the case reveals that on 12.03.2008, the Tribunal observed that the summon on the petitioner did not return after service and as such,

directed for re-issuance of summon to the process server, fixing 01.04.2008 for ex parte hearing.

19) The Court observed that notice of the said F.T. Case No. 445/2007 was issued to the petitioner alleging that she is a foreigner under the

Foreigners Act, 1946 and Foreigners (Tribunal) Order, 1966, who has entered Assam between 01.01.1966 and 25.03.1971 and she was asked to show

cause by appearing before the said Tribunal on 04.06.2007.

20) We have also perused the report of the Local Verification Officer (LVO) dated 08.08.2005, submitted before the Electoral Registration Officer

(ERO) of No. 68 Dalgaon Legislative Assembly Constituency that while making necessary verification the petitioner, wife of Sultan Ali of Khetechar

could not produce any documentary evidence regarding her citizenship. On the said report of the LVO dated 08.05.2005, the concerned ERO of No.

68 Dalgaon LAC expressed his doubt about the citizenship of the petitioner. The said ERO vide No. DC(E) 40/Pt./041 dated 30.08.2005, along with

the report of the LVO as well as the notice issued by him, referred the matter to the Foreigners Tribunal, Darrang, Mangaldoi, the competent authority

under the Foreigners Act, 1946 and Rules made thereunder to decide the question as to whether petitioner is a citizen of India or not. The reference

so forwarded by the ERO dated 30.08.2005 was accordingly registered as F.T. Case No. 445/2007 against the petitioner before the Foreigners

Tribunal, Darrang, Mangaldoi, wherein the impugned ex parte order dated 24.04.2008 was passed.

21) In the year 1964, the Central Government in exercise of the powers conferred by Section 3 of the Foreigners Act, 1946 had made the Foreigners

(Tribunals) Order, 1964. Clause 2 of said 1964 Order deals with constitution of Tribunals. Clause 2 (1) of said 1964 Order provides that the Central

Government may by order refer the question as to whether a person is or is not a foreigner within the meaning of the Foreigners Act, 1946 to a

Tribunal to be constituted for the purpose, for its opinion.

22) A Division Bench of this Court by its common Order dated 19.04.2018 passed in WP(C) No. 7339/2015 in the case of Mustt Amina Khatun -Vs-

Union of India and Others and other connected cases had held as follows:

â??37. Ministry of Home Affairs, Government of India had issued a notification dated 19.04.1958 which was extracted in the case of Anwar Vs.

State of J&K, (1971) 3 SCC 104. The said notification was issued by the Central Government in exercise of the powers conferred by Clause (1) of

Article 258 of the Constitution whereby the President with the consent of the State Government concerned entrusted to the Governments of each of

the States mentioned therein, including the State of Assam, the functions of the Central Government in making orders of the nature specified in

Section 3 (2) (c), (cc), (d), (e) and (f) of the Foreigners Act, 1946 and under the

Foreigners (Orders), 1948. While extracting this notification, Supreme Court held that this notification was a complete answer to the objection raised that it was the Central Government alone which could make a lawful deportation order under Section 3 (2)(c) of the Foreigners Act, 1946.

38. Government of India, Ministry of Home Affairs in exercise of the powers conferred by Article 258(1) of the Constitution issued a notification dated 17.02.1976 entrusting Superintendents of Police and Deputy Commissioners (in-charge of Police) under the Government of Assam functions of the Central Government in making orders of the natures specified in clauses (a), (b), (c) and (cc), (e) and (f) of Sub-Section (2) of Section 3 of the Foreigners Act within their respective jurisdiction subject to conditions mentioned therein which included the condition that exercise of such functions would be in respect of nationals of Bangladesh and that while exercising such functions, Superintendents of Police and Deputy Commissioners (in-charge of Police) shall comply with such general or special directions as the Government of Assam or Central Government may issue from time to time.

41. Thus, we have two Central Government notifications, one dated 19.04.1958 and the other dated 17.02.1976, entrusting the Government of Assam, Superintendents of Police and Deputy Commissioners (In-charge of Police) to make orders of the nature specified in Sections 3(2)(a), (b), (c) and (cc), (e) and (f) after obtaining opinion from the Foreigners Tribunals by making reference under Paragraph 2(1) of the Foreigners (Tribunals) Orders 1964.

42. Paragraph 3 of the Foreigners (Tribunals) Order lays down the procedure for disposal of questions referred to the Foreigners Tribunals by the referral authority i.e., by the Superintendents of Police, since redesignated as Superintendents of Police (Border), authorized by the Central Government.

57. An illegal migrant entering into the State of Assam from Bangladesh after 25.03.1971 would have to be declared to be so by a competent Foreigners Tribunal upon a reference made to it by the jurisdictional Superintendent of Police (Border) by following the principles of natural justice and fairness as contained in paragraph 3 of the Foreigners (Tribunals) Order.

23) As provided in the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964, the Central Government by its notifications noted above,

authorised the jurisdictional Superintendents of Police (Border) as the referral authority to the concerned Foreigners Tribunals in the State of Assam to

determine as to whether a person is or is not a foreigner within the meaning of the Foreigners Act, 1946.

24) In the case in hand, it is the Electoral Registration Officer of No. 68 Dalgaoon Legislative Assembly Constituency, without being authorised and

empowered by the Central Government, referred the matter to the Foreigners Tribunal, Darrang, Mangaldoi to decide the question as to whether the

petitioner is a citizen of India or not and the said Tribunal registered the said reference as F.T. Case No. 445/2007 against the petitioner and also

passed the impugned ex parte order dated 24.04.2008 against her.

25) We are, therefore, of the opinion that the entire proceeding of said F.T. Case No. 445/2007 before the Foreigners Tribunal, Darrang, Mangaldoi is

vitiated as it was not referred by the authorised and empowered officer of the Central Government. As such, the consequential impugned ex parte

order dated 24.04.2008, passed in the said Case being bad in law also cannot sustain.

26) Accordingly, we set aside the proceeding of F.T. Case No. 445/2007 including the impugned ex parte order dated 24.04.2008 passed in the said

case referred to the learned Foreigners Tribunal, Darrang, Mangaldoi by the Electoral Registration Officer of No. 68 Dalgaoon Legislative Assembly

Constituency, which was processed against the petitioner.

27) The petitioner who is detained in connection with said F.T. Case No. 445/2007 shall be released from detention forthwith.

28) Regardless of the above, the Electoral Registration Officer of No. 68 Dalgaoon Legislative Assembly Constituency may submit fresh report with

regard to the petitioner. In the event of any such report and dispute as to whether the petitioner is a foreigner or not, the jurisdictional Superintendent

of Police (Border), District?" Darrang, Mangaldoi after necessary consideration may refer the matter to the concerned Foreigners Tribunal, Darrang,

Mangaldoi for his opinion under the Foreigners Act, 1946.

29) Writ petition is, accordingly, disposed of with the aforesaid observation and directions.

30) Registry shall return the records to the Foreigners Tribunal, Darrang, Mangaldoi forthwith.