
(2011) 09 GAU CK 0062
In the Gauhati High Court

Ganesh Karmakar

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 02-09-2011

Acts Referred:

Citation : (2011) 09 GAU CK 0062

Hon'ble Judges : B.P.Katakey, J

Bench : Single Bench

Advocate : Advocates for the petitioners : Mr. B. Banerjee, Ms. M. Deb, Mr. J. Laskar, Advocates. , Advocates for the respondents : Mrs. V.L. Sinha, Government Advocate, Assam, Ms. Babita Das, Central Government Advocate., Advocates appearing for Parties

Judgement

1. Heard Mr. B. Banerjee, learned counsel for the petitioner, Mrs. V.L. Sinha, learned State Counsel appearing for the respondent Nos.1 to 4 and Ms. Babita Das, learned Central Government Counsel appearing for the respondent No.5.

[2] The petitioner, Sri Ganesh Karmakar, by the present petition has challenged the order dated 19th October, 2010 passed by the learned Member, Foreigner's Tribunal, Dibrugarh in Case No.FT 282/2007 (P.E. No.194/2002), whereby and whereunder the petitioner has been declared as foreigner coming to India after 25th March, 1971. The ground on which the said order is put to challenge is that no notice in the said proceeding has been served on the petitioner, thereby depriving him from contesting the proceeding and to demonstrate that the petitioner is an Indian national.

[3] Mr. Banerjee, learned counsel for the petitioner referring to the copy of the notice available on the record of FT Case No.282/2007 has submitted that it is evident therefrom that proper service of notice has not been affected on the petitioner, as it has not been mentioned where and how the notice has been served by adopting the substituted manner of service. It has been submitted that paragraph 3 of the Foreigners (Tribunals for Assam) Order, 2006 (in short, ?2006 Order?) made in exercise of the power conferred by Section 3 of the Foreigners

Act, 1946 (in short 'the Act') requires service of a notice on the person, against whom the question relates to the citizenship arises, giving him a reasonable opportunity of making a representation and producing evidence in support of his case, which provision has been violated in the instant case, as the petitioner has been denied the reasonable opportunity of being heard because of non service of notice. The learned counsel, therefore, submits that the order dated 19th October, 2010 passed by the learned Member, Foreigners Tribunal may be set aside and the proceeding may be remitted to the learned Tribunal for deciding the same afresh.

[4] Mrs. Sinha, learned State Counsel as well as Ms. Das, learned Central Government Counsel appearing for the respondents supporting the order dated 19th October, 2010 have submitted that the petitioner has been declared as foreigner coming to India after 25th March, 1971 after due service of notice and as such, the writ petition filed by the petitioner may be dismissed.

[5] The question, which arises for consideration, therefore, is whether the petitioner has been served with the notice before passing the impugned order dated 19th October, 2010. Paragraph 2 of the 2006 Order empowers the Central Government or any authority specified in this regard to refer the question, by order, as to whether a person is or is not a foreigner within the meaning of the Act, to a Tribunal to be constituted for the purpose, for its opinion. Subparagraph (1) of paragraph 3 of the said Order provides that the Tribunal, upon receipt of a reference shall consider whether there is sufficient ground for proceeding and if the Tribunal is satisfied that basic facts are prima facie established, it 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 give him a reasonable opportunity of making a representation and producing evidence in support of his case. The Tribunal thereafter, is required to submit its opinion to the officer or authority specified in this behalf in the order of reference, after considering such evidence as may be produced and after hearing such persons as may be desired to be heard.

[6] The records maintained by the learned Tribunal in the aforesaid case reveal issuance of the notice dated 21st September, 2010 by the learned Member addressed to the petitioner and forwarding the same to the Superintendent of Police, Tinsukia to cause service of the same and also to submit a report before the date fixed. The date of appearance was fixed as 19th October, 2010. It appears from the report of the process server on the reverse page of the said notice that the notice could not be served on the petitioner, he having not been found in the address mentioned. It also appears from that report that the process server stated to have served the notice by affixing a copy of the same without, however, mentioning where copy of such notice was affixed, in whose residence and also whether in the residence of the petitioner's or not, against whom there is an allegation that he is not an Indian national, even if such service by substituted manner is permissible. Before directing service of notice in

substituted manner, i.e. by affixing a copy thereof in some conspicuous place in the Tribunal's office and also upon some conspicuous part of the house, if any, in which the noticee is known to have last resided or carried on business or personally worked for gain or in such other manner as the Tribunal thinks fit, the Tribunal is required to pass an order recording its satisfaction that there is reason to believe that the noticee is keeping out of the way for the purpose of avoiding service, or that for any other reason the notice cannot be served in the ordinary way. The Tribunal in a given case can also direct service of notice by an advertisement in a newspaper. In the instant case, as noticed above, the process server adopted the substitute manner of service of notice without any order from the Tribunal to that effect that too without mentioning in the report whether the copy of the notice was affixed in the house of the noticee, where he is known to have last resided or carried on business or personally worked for gain. The notice, therefore, cannot said to have been properly served on the petitioner, so as to enable him to contest the proceeding, as required by paragraph 3 of the Order.

[7] As noticed above, no opinion can be expressed by the learned Tribunal without serving the copy of the notice together with the main grounds on which he is alleged to be a foreigner, which is the requirement of Subparagraph (1) of Paragraph 3 of the 2006 Order. The petitioner has been declared as foreigner without giving the reasonable opportunity of being heard and to demonstrate that he is not a foreign national but an Indian national.

[8] That being the position, the order dated 19th October, 2010 passed by the learned Member, Foreigners Tribunal, Dibrugarh in Case No.FT 282/2007 (P.E. No.194/2002) is set aside. The matter is remitted to the learned Member, Foreigners Tribunal, Dibrugarh for deciding the said proceeding afresh. The parties are directed to appear before the learned Tribunal on 10th October, 2011 for taking further order from the said Court. The learned Tribunal shall decide the proceeding within 2 (two) months from the date of appearance of the petitioner as fixed by this order. It is needless to say that no further notice is required to be issued by the learned Tribunal, as the petitioner is directed to appear before the learned Tribunal by this order and he knows the ground on which the proceeding has been initiated.

[9] It has been submitted by the learned counsel that the petitioner has been taken into custody on 2nd June, 2011 and presently in the detention camp at Goalpara. The Superintendent of Police, Tinsukia as well as the Officer in Charge of the detention camp, Goalpara are, therefore, directed to release the petitioner from custody forthwith, who, however, during pendency of the proceeding before the learned Tribunal shall not leave the State of Assam without the written permission from the learned Member, Foreigners Tribunal at Dibrugarh.

[10] The writ petition is accordingly allowed to the extent as indicated above. No costs.

[11] The Registry is directed to send down the records to the learned Tribunal forthwith, so as to reach the office of the learned Tribunal on or before 26th September, 2011.