
(2021) 07 GAU CK 0080
In the Gauhati High Court
Case No : Writ Petition (Civil) No. 637 Of 2020

Jahanara Khatun

APPELLANT

Vs

Union Of India And 7 Ors

RESPONDENT

Date of Decision : 15-07-2021

Acts Referred:

Foreigners (Tribunals) Order, 1964 — Order 3(5) Rule I, Order 3(5) Rule f

Citation : (2021) 07 GAU CK 0080

Hon'ble Judges : N. Kotiswar Singh, J;Soumitra Saikia, J

Bench : Division Bench

Advocate : D Ghosh

Final Decision : Allowed

Judgement

1. Heard Ms. D. Ghosh, learned counsel for the petitioner. Also heard Mr. R. Devi, learned CGC appearing for respondent No.1; Ms. A. Verma, learned Special Counsel, F.T. for respondent Nos.2, 5, 6, 7 & 8, Mr. A. Bhuyan, learned Standing Counsel, ECI, appearing for respondent No.3 and Ms. L. Devi, learned Standing Counsel, NRC for respondent no.4.
2. Considering the nature of the case, we are of the opinion that the present petition can be disposed of at this stage without issuing any formal notice to the respondents as they are duly represented.
3. The present petition has been filed by the petitioner being aggrieved by the ex parte order dated 19.07.2018 passed by the learned Foreigners Tribunal (4th), Morigaon, Assam, in F.T.(D) Case No.109/S/2017 [Reference D/N Case No.3440/1997] by which the petitioner was declared a foreigner. In the impugned order dated 19.07.2018 it has been clearly mentioned that though notice was issued to the Opposite Party (the petitioner

herein) to appear and file written statement, the Opposite Party remained absent on all the fixed dates i.e. 08.05.2018, 23.05.2018, 11.06.2018, 22.06.2018 and 06.07.2018.

4. Learned counsel for the petitioner submits that the petitioner was never served any notice from the Tribunal. In fact, the petitioner came to know that she had been declared a foreigner subsequently from the records of the Tribunal. Learned counsel for the petitioner submits that in the certified copy of the process server's report, which is annexed as Annexure-3, it has been clearly mentioned that as the person, named in the FT notice, could not be found and as none of the persons in the aforesaid area could tell the whereabouts of the said person as her house was washed away due to flood, the process server put up a copy of the notice on the wall of the office of Gaon Panchayat (Puakati), which was witnessed by the Gaon Burah and another respected person of the village and returned the original copy of the notice to the Foreigners Tribunal (4th), Morigaon. Thus, from the above, it is clear that notice was not served personally to the petitioner but was put up in a public place as mentioned in the report.

5. As far as the service of notice to a person is concerned, the same is provided under Order 3 (5) of the Foreigners (Tribunals) Order, 1964. Order 3

(5) reads as follows:

3. Procedure for disposal of questions:-

(5)(a) The notice shall be served at the address where the proceedee last resided or reportedly resides or works for gain, and in case of

change of place of residence, which has been duly intimated in writing to the investigating agency by the alleged person, it shall be served

at such changed address by the Foreigners' Tribunal:

(b) if the proceedee is not found at the address at the time of service of notice, the notice may be served on any adult member of the family

of the proceedee and it shall be deemed to be served on the proceedee;

(c) Where the notice is served on the adult member of the family of the proceedee, the process server shall obtain the signature or thumb

impression of the adult member on the duplicate of the notice as a token of proof of the service.

(d) if the adult member of the family of the proceedee refuses to put a signature or the thumb impression, as the case may be, the process

server shall report the same to the Foreignersâ?? Tribunal;

(e) If the proceedee or an available adult member of his or her family refuses to accept the notice, the process server shall give a report to

the Foreigners Tribunal in that regard along with the name and address of a person of the locality, who was present at the time of making

such an effort to get the notices served, provided such person is available and willing to be a witness to such service and the process server

shall obtain the signature or thumb impression of such witness, if he or she is present and willing to sign or put his or her thumb-impression,

as the case may be;

(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 so, and the name and address of the person (if any) by whom the house was identified and in whose

presence the copy was affixed.

(g) Where the proceedee or any adult member of his or her family or her is not found at the residence, a copy of the notice shall be pasted

in a conspicuous place of his or her residence, witnessed by one respectable person of the locality, subject to his or her availability and

willingness to be a witness in that regard and the process server shall obtain the signature or the thumb impression of that person in the

manner in which such service is affected.

(h) where the proceedee resides outside the jurisdiction of the Foreigners Tribunal, the notice shall be sent for service to the officer in-

charge of the police station within whose jurisdiction the proceedee resides or last resided or is last known to have resided or worked for

gain and the process server shall then cause the service of notice in the manner as provided hereinabove;

(i) if no person is available or willing to be the witness of service of notice or

refuses to put his or her signature or thumb-impression, the process server shall file a signed certificate or verification to that effect, which shall be sufficient proof of such non-availability, unwillingness and refusal;

(j) on receipt of the signed certificate or verification referred to in clause (i) the Foreigners Tribunal shall return such reference authority

for tracing out the proceedee and produce before the said Tribunal.â??

6. In Order 3 (5) of the Foreigners (Tribunals) Order, 1964, there is no such provision for pasting notice on the wall of any public office. Further, in the

absence of the proceedee at the place of residence, a copy of notice has to be affixed on the outer door or some other conspicuous part of the house

in which the proceedee ordinarily resides.

It is the plea of the petitioner that at the relevant time when the notice was sought to be served in terms of the order of the Foreigners Tribunal, the

house of the petitioner got washed away due to flood which compelled her to shift her family to her parentsâ?? residence. Though, subsequently she

along with her family members came back and settled again in the same village, as the notice was not duly served upon her, she was ignorant about

the ongoing proceeding in the Tribunal. Thus, due to her non-appearance before the Tribunal on various dates, the matter was proceeded ex parte by

the Tribunal. It has been submitted that it is not the case that the petitioner had deliberately avoided any service of notice but non-receipt of notice was

due to the circumstance as narrated above. Accordingly, it has been submitted that the petitioner may be granted another opportunity to appear before

the Tribunal and prove her Indian citizenship.

7. From the copy of the service of notice, which is annexed as Annexure-3, it is clearly seen that the proceedee was earlier living in the same village

but the flood washed away her house. The notice also mentions that since it was not possible to issue notice personally, the notice was pasted on the

wall of the office of the Gaon Panchayat which was witnessed by the Gaon Burah and another respected person of the village. The plea of the

petitioner that the petitioner had to leave the village because of the flood as her house was washed away by flood is thus amply supported by the

aforesaid remarks on the notice by the process server.

We have also noted that the rules in this regard are not very clear as to how a notice is to be served if the house of the noticee is washed away by

flood which regularly occurs in this part of the country due to heavy flood in the mighty river Brahmaputra. Though, there is provision under Order 3

(5) of the Foreigners (Tribunals) Order, 1964 for deemed service of notice of a person who is not found in the respective residence i.e. by way of

pasting a copy of the notice on the door or any conspicuous part of the residence, there is no provision dealing with such contingency where the house of the noticee itself gets washed away.

8. We, however, are of the view that such contingency can be taken care of by the provisions under Order 3 (5) Rule (i) & (f) of the Foreigners

(Tribunals) Order, 1964 as mentioned above. Even if notice could not be served personally on the notice/proceedee if he is not available, the process

server ought to submit a report in terms of the Order 3(5)(i) and thereafter, the Foreigners Tribunal ought to have taken necessary steps as mentioned

in Order 3(5)(j) through the competent authority for tracing out the proceedee and produce the proceedee before the Tribunal.

9. In our opinion the process adopted in the present case by pasting a copy of notice on the wall of the Gaon Panchayat merely because the petitioner

was not available in the village, is not contemplated under the Rules and it cannot be said to be a proper procedure for service of notice upon the

proceedee who is not found in the village on account of the house being washed away as mentioned above.

10. Under the circumstances referred to above, we are inclined to hold that notice cannot be deemed to have been served on the petitioner as per the

rules and as such the ex-parte proceeding could not be sustained.

11. Be that as it may, Ms. A. Verma has fairly submitted before this Court that she has no objection if the case is remanded to the learned Tribunal

for a fresh consideration.

12. Accordingly, we remand the matter to the learned Tribunal for a fresh consideration by setting aside the impugned order dated 19.07.2018 passed

by the Foreigners Tribunal (4th), Morigaon, Assam, in F.T.(D) Case No.109/S/2017 [Reference D/N Case No.3440/1997].

13. For the reasons discussed above, the present petition is allowed.

14. It has been submitted at the Bar that there is strict lockdown being imposed

in the district of Morigaon because of the ongoing COVID pandemic.

Accordingly, the petitioner shall appear before the the Foreigners Tribunal (4th), Morigaon on or before 31.08.2021 and thereafter, the learned

Tribunal will proceed with the matter in accordance with law and shall pass the opinion afresh in the light of the documents and written statement that

may be filed by the petitioner in that regard.

15. It is made clear that since the nationality of the petitioner is already under cloud, she will remain on bail on furnishing a bail bond of Rs. 5,000/-

(Rupees five thousand) with one local surety of the like amount to the satisfaction of the Superintendent of Police (Border), Morigaon during the

pendency of the proceeding before the Tribunal. The concerned Superintendent of Police (Border) shall also take steps for capturing the fingerprints

and biometrics of the iris of the petitioner. The petitioner also shall not leave the jurisdiction of Morigaon district without furnishing the details of the

place of destination and necessary information including contact number to the Superintendent of Police (Border), Morigaon.

16. It is made clear that if the petitioner fails to appear before the Foreigners Tribunal (4th), Morigaon, by 31.08.2021, the earlier order passed by the

learned Foreignersâ?? Tribunal on 19.07.2018 will stand revived and the order of bail passed by this Court today will stand vacated and the petitioner

would be liable to be detained and deported from this country.

17. Copy of this order be furnished to the Superintendent of Police (B), Morigaon for doing the needful.