

(2021) 03 GAU CK 0005
In the Gauhati High Court
Case No : Writ Petition (C) No. 3402 Of 2020

Jahir Ali

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 03-03-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Section 11
Foreigners Act, 1946 — Section 9
Citizenship Act, 1955 — Section 6A

Citation : (2021) 03 GAU CK 0005

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

Bench : Division Bench

Advocate : A.R. Sikdar, Md. A. Ali, K.K. Parasar, A. Kalita, B. Das, L. Devi

Final Decision : Disposed Off

Judgement

N. Kotiswar Singh, J

1. Heard Mr. A.R. Sikdar, learned counsel for the petitioner. Also heard Mr. K.K. Parasar, learned CGC appearing for respondent No.1; Mr. A. Kalita, learned special standing counsel appearing for the State respondent Nos.2, 3 and 4; Ms. B. Das, learned standing counsel, ECI, appearing for respondent No.5 and Ms. L. Devi, learned standing counsel, NRC, appearing for respondent No.6.

2. Considering the nature of the case and having perused the materials on record and also having heard the learned counsel for the appearing parties, we are of the opinion that the matter can be disposed of at this stage without issuing any formal notice to the respondents.

3. In this petition, the petitioner has challenged the opinion/order dated 22.11.2018 rendered by the learned Member, Foreigners' Tribunal (1st), Mangaldai, Darrang, Assam, in F.T. Case No.860/2007 (corresponding to Ref. Case No.991/98), by which the petitioner has been declared as foreigner/illegal migrant who had entered India (Assam) on or after 25.03.1971. The petitioner

on receipt of the notice had entered appearance before the learned Tribunal and filed written statement explaining his legacy tracing out to his father, namely, Nesar Ali, S/O Gendela and his grandfather, namely, Gendela Bepari, S/O Uli, as reflected in the voters' list of 1966. Other documents were also referred to in support of his claim that he is not a foreigner but an Indian citizen.

4. The petitioner also annexed a copy of the certified copy of the judgment/opinion of the Foreigners' Tribunal (1st), Darrang, Mangaldai, dated 15.07.2015 passed in F.T. Case No.771/2012, wherein the same petitioner was proceeded against and the learned Foreigners' Tribunal after hearing the parties and the evidences adduced, gave an opinion in favour of the petitioner by holding that Md. Jahir Ali, S/O Late Mesar alias Nesar Ali, Vill-Mangaldai, Ward No.6, PS-Mangaldai, Dist.-Darrang, Assam, is found to be an Indian national and not a foreigner/'D' voter as alleged.

5. According to the petitioner, in spite of relying on the said earlier opinion of the Foreigners' Tribunal given on earlier occasion, referred to above, the learned Tribunal proceeded to consider his case based on other documents and evidences relied on by the petitioner. The Foreigners' Tribunal, referring to the various documents relied on by the petitioner in support of his claim that he is an Indian citizen, did not find favour with the petitioner. As regards the earlier opinion rendered by the Foreigners' Tribunal in F.T. Case No.771/2012 on 15.07.2015, the Foreigners' Tribunal took the view that principle of res judicata embodied on Section 11 of the CPC will not be attracted in a proceeding under the Foreigners' Act, 1946. Further, the Tribunal in the impugned order also made the observation that on perusal of the records of the F.T. Case No.771/2012, it was found that the opposite party had failed to file/adduce evidence-in-chief and the opposite party had failed to give his witness as DW-1 and without taking any evidence-in-chief of the opposite party as well as deposition of the opposite party, the predecessor of this Tribunal passed a final order on 15.07.2015 in favour of the opposite party and as such the said final order dated 15.07.2015 in F.T. Case No.771/2012 cannot be relief upon. Thus, the Tribunal was re-examining the legality of the finding rendered by the earlier Foreigners' Tribunal. For better appreciation, paragraphs 10 and 11 of the impugned order dated 22.11.2018 are reproduced hereinbelow:-

"10. During the course of evidence the O.P. produced Ext.4 the certified copy of final order of F.T. Case No.771/12, order passed on 15-07-2015, the Predecessor, the Ld. Member, Foreigners' Tribunal (1st), Darrang, Mangaldai, where O.P. is declared as a citizen of India. In this regard the O.P.'s engaged advocate also relied judgment & order in W.P.C 7339/2015, Musstt. Amina Khatun - Vs - Union of India & Ors. (D.B.). According to the Hon'ble Gauhati High Court, judgment & order dtd. 19.04.2018 passed in W.P.C 7339/2015, that Musstt. Amina Khatun - Vs - Union of India & Ors. (D.B.) that, Principle of res judicata embodied in Sec. 11 of the Civil Procedure Code would not be attracted to a proceeding under the Foreigners Act, 1946, read with the Foreigners (Tribunal) Order, 1964, the

Principle of res judicata would not be applicable to proceeding under Sec. 9 of the Foreigners Act, 1946. Thus, the Ext.4 cannot be relied upon.

Moreover, after called for the case record of F.T. Case No.771/12 & tact with the present proceeding. After perusal of the F.T. Case No.771/12, it is found that the O.P. had failed to file adduce evidence-in-chief & the O.P. had failed to give his witness as D.W.1. Without taken evidence-in-chief of the O.P. & without taken deposition of the O.P. The very much predecessor in this Tribunal, passed such type of final order on 15.07.2015, in favour of the O.P. Thus, the Ext.4 certified copy of the final order dtd. 15.07.2015, in F.T. Case No.771/12 cannot be relied upon.

11. Annexure-1 & 4 is the copy of voter list of 1971 & computerized photo copy of Legacy Data of voter year 1966. Perusal of the documents, it is found that O.P. not produce the certified copies of aforesaid voter lists & original document of Legacy Data Codes of 1966, in the absence of the original mere marking of the photocopy of the document is not admissible in evidence and is not help the O.P. to prove him Indian citizenship. Thus, mere produce of photocopy of the document carries no evidentiary value without proving its contents by producing the original, hence it cannot be relied upon and is of no help to the O.P. to prove his case that he is not a foreigner."

Accordingly, the learned Foreigners' Tribunal proceeded to give the opinion against the petitioner by holding him to be a foreigner, as mentioned above.

6. Mr. Sikdar, learned counsel for the petitioner submits that the learned Tribunal made an error by holding that the principle of res judicata cannot be applicable. In this connection, learned counsel for the petitioner submits that law has now been settled by the Hon'ble Supreme Court rendered in Abdul Kuddus Vs. Union of India & Ors. (2019) 6 SCC 604 It has been submitted that earlier this Court had held in Musstt. Amina Khatun Vs. Union of India & Ors. in WP(C) No.7339/2015 that as a legal proposition, principle of res judicata embodied in Section 11 of the CPC would not be attracted to a proceeding under the Foreigners Act and the Foreigners (Tribunals) Order. However, the said law is no more good in view of the latest decision of the Hon'ble Supreme Court in Abdul Kuddus (supra). Accordingly, it has been submitted that even if the Tribunal cannot be said to have made any error in following the decision of this Court in Musstt. Amina Khatun (supra), in view of the decision of the Hon'ble Supreme Court in Abdul Kuddus (supra) the said view of the Tribunal cannot be sustained any longer and accordingly, it has been submitted that the matter be remanded to the learned Foreigners' Tribunal for further reconsideration.

7. We have heard the learned counsel for the parties and perused the materials on record. From the record, it is quite evident that the petitioner had relied on the earlier decision dated 15.07.2015 of the Foreigners' Tribunal rendered in F.T. Case No.771/2012, wherein it has been clearly mentioned that one Md. Jahir Ali, S/O Late Mesar alias Nesar Ali of village Mangaldai, Ward No.6, PS-Mangaldai,

District-Darrang, is found to be an Indian national and not a foreigner/'D' voter as alleged. The petitioner also adduced other evidences. However, it may not be necessary for us to refer to the same and examine the same for the reason that the earlier opinion of the Foreigners' Tribunal if not already challenged before the higher forum, would have a binding effect and could not have been ignored by the Foreigners' Tribunal and the reference to it could have been settled on the basis of the earlier opinion of the Foreigners' Tribunal.

8. We have noted that this Court in the case of Musstt. Amina Khatun (supra), had clearly held that the principle of res judicata embodied in Section 11 of the CPC would not be attracted to a proceeding under the Foreigners Act and the Foreigners (Tribunals) Order and as such, till such view was prevailing, the Foreigners Tribunal could not be faulted with for proceeding with the matter in spite of such earlier opinion given by the Foreigners' Tribunal. However, the issue relating to res judicata was dealt with by the Hon'ble Supreme Court in Abdul Kuddus (supra). The Hon'ble Supreme Court while dealing with the issue relating to the perceived conflict between sub-para (2) to Para 3 and Para 8 of the Schedule to the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003, went on to consider the various provisions of the Constitution as well as the Foreigners Act and Rules framed thereunder to deal with the foreigners issue, more particularly with reference to the State of Assam. The Hon'ble Supreme Court accordingly, considered the implication of Section 6-A of the Citizenship Act, which is a special provision to deal with the issue relating to foreigners/Indian citizenship in the State of Assam.

9. In that context, the Hon'ble Supreme Court in Abdul Kuddus (supra) noted the striking down of the Illegal Migrants (Determination by Tribunals) Act by the Hon'ble Supreme Court in Sarbananda Sonowal Vs. Union of India(2005) 5 SCC 665 ["Sarbananda Sonowal (I)"] by holding that the said Act did not have a provision similar to Section 9 of the Foreigners Act regarding the burden of proof. Though the said IMDT Act was struck down by the Hon'ble Supreme Court, the Union Government instead of following the normal rules prevailing, framed the Foreigners (Tribunals) Amendment Order, 2006, which did not meet the parameters which were explained in the Sarbananda Sonowar (I) case. Accordingly, the said Foreigners (Tribunals) Amendment Order, 2006 came to be challenged before the Supreme Court in Sarbananda Sonowal (II) Vs. Union of India³ (2007) 1 SCC 174, where it was held that the aforesaid Foreigners (Tribunals) Amendment Order, 2006 was issued as a cover up for non-implementation of the direction of the Court in Sarbananda Sonowar (I) and accordingly, struck it down.

10. In the case of Sarbananda Sonowar (II), the Hon'ble Supreme Court referred to various provisions of the Foreigners (Tribunals) Order, 1964 which provide for procedure for disposal of question relating to citizenship of any person. It was in that context, the Hon'ble Supreme Court in Abdul Kuddus (supra) examined the nature of the proceedings before the Foreigners' Tribunal under the 1964 Order.

The Hon'ble Supreme Court opined that the Foreigners' Tribunals constituted under the 1964 Order is a quasi-judicial body and the opinion rendered by the Foreigners' Tribunals is a quasi-judicial order and not an administrative order as such opinion given by the Tribunal has civil consequences.

11. Since there is no provision for any appellate forum under the Foreigners (Tribunals) Order, 1964, the Hon'ble Supreme Court proceeded to hold that the opinion/order of the Tribunal, or the order passed by the Registering Authority based on the opinion of the Foreigners Tribunal, as the case may be, can be challenged by way of writ proceedings and accordingly, held that it would be incorrect to hold that the opinion of the Foreigners Tribunal and/or the consequential order passed by the Registering Authority would not operate as *res judicata*. The Hon'ble Supreme Court held that since both the opinion of the Tribunal and the order of the Registering Authority result in determination of rights/status under the statute and by an authority after a contest on the merits, it would necessarily operate as a bar to subsequent proceedings before the same authority for redetermination of the same issue/question. Thus, the Hon'ble Supreme Court in Abdul Kuddus (*supra*) made it very clear that the proceeding before a Foreigners' Tribunal is quasi-judicial in nature and such determination by the Tribunal has civil consequences and accordingly, would operate as *res judicata*.

12. Thus, in view of the aforesaid Abdul Kuddus (*supra*), if a decision or determination has been already made by the Foreigners' Tribunal in respect of a particular person regarding his citizenship, that decision would act as a bar to any subsequent proceeding against the same person as regards the issue of citizenship of that person by applying the principle of *res judicata*.

13. Accordingly, we hold that in view of the decision of the Hon'ble Supreme Court in Abdul Kuddus (*supra*), the decision of the Foreigners' Tribunal as reflected in paragraph 10 thereof that the principle of *res judicata* embodied in Section 11 of the CPC would not be attracted in the proceeding cannot be said to be correct.

14. We also have noted that otherwise also, the Foreigners' Tribunal proceeded to re-examine the correctness of the view taken by the Foreigners' Tribunal on earlier occasion by holding that in the earlier proceeding the opposite party had failed to adduce evidence-in-chief and also to give his witness as DW-1. It may be noted that there was no challenge to the finding/opinion by the Foreigners' Tribunal in the aforesaid F.T. Case No.771/2012 that the proceedee was an Indian and as such, the Foreigners' Tribunal could not have reconsidered the matter on merit as it was not exercising the appellate or review jurisdiction.

15. Be that as it may, since we have already held that the principle of *res judicata* will apply in view of the decision in Abdul Kuddus (*supra*), the Foreigners' Tribunal in the present instant proceeding cannot re-examine the legality or otherwise of the opinion rendered earlier by the Foreigners' Tribunal,

except to ascertain as to whether the petitioner was the same person against whom the Foreigners' Tribunal in F.T. Case No.771/2012 had given its opinion. If it is found on consideration of the materials on record and after hearing the parties that the present petitioner was indeed the same person against whom the Foreigners' Tribunal had given its opinion in the earlier proceeding in F.T. Case No.771/2012, the present proceeding will be barred by application of principle of res judicata.

16. Accordingly, for the reasons recorded above, we allow this petition by remanding the matter to the concerned learned Tribunal to consider the case of the petitioner afresh by giving him an opportunity to prove that the present petitioner, namely, Jahir Ali, aged about 52 years, S/O Nesar Ali @ Mesar Ali, R/O Ward No.6, PO & PS-Mangaldai, District-Darrang, Assam, is one and the same person in whose favour an opinion was earlier given by the same Tribunal on 15.07.2015 in F.T. Case No.771/2012 that he was not a foreigner. Accordingly, the opinion rendered on 22.11.2018 passed by the learned Foreigners' Tribunal(1st), Mangaldai, Darrang, in F.T. Case No.860/2007 is set aside.

17. If it is found that the present petitioner is the same person who was proceeded against in the said F.T. Case No.771/2012, the present proceeding in F.T. Case No.860/2007 corresponding to Reference Case No.991/98 shall be dropped.

18. Since the present petitioner is under detention in terms of the opinion dated 22.11.2018 by the learned Foreigners' Tribunal (1st), Mangaldai, Darrang, passed in F.T. Case No.860/2007. Since we have set aside the opinion of the learned Tribunal, the petitioner will be set at liberty forthwith and he shall appear before the Foreigners' Tribunal on 30.03.2021. However, to ensure his presence before the learned Tribunal, the petitioner will report to the Superintendent of Police (Border), Darrang, who shall take steps for capturing the fingerprints and biometrics of the iris of the petitioner, if so advised. The petitioner also shall not leave the jurisdiction of Darrang district without furnishing the details of the place of destination and necessary information including contact number to the Superintendent of Police (Border), Darrang.

19. Upon finding by the Foreigners' Tribunal after reconsideration that the present petitioner is the same person against whom the learned Tribunal had proceeded against and gave the opinion on 15.07.2015 in F.T. Case No.771/2012 that the petitioner is an Indian, the conditions imposed will cease to operate and the petitioner will be set at liberty without any condition.

20. With the above observation and direction, the present petition stands disposed of.