

(2019) 01 GAU CK 0040
In the Gauhati High Court
Case No : Writ Petition (C) No. 8723 Of 2018

Parul Sarkar And 3 Ors

APPELLANT

Vs

Union Of India And 7 Ors

RESPONDENT

Date of Decision : 21-01-2019

Acts Referred:

Citation : (2019) 01 GAU CK 0040

Hon'ble Judges : Achintya Malla Bujor Barua, J;Ajit Borthakur, J

Bench : Division Bench

Advocate : D Ghosh

Final Decision : Allowed

Judgement

Achintya Malla Bujor Barua, J

1. Heard Ms. D Ghosh, learned counsel for the petitioners and Mr. J Payeng, learned counsel, State of Assam appearing for the Foreigners Tribunal and Border Areas.

2. The husband/ father of the petitioners was referred by Superintendent of Police (Border) of the erstwhile Nagaon district for an adjudication as to whether he was a foreigner who had entered the territory of India after 25.03.1971 which resulted in IM(D)T Case No. 308 of 1999 in the Illegal Migrants Determination Tribunal, Nagaon. Upon the IM(D)T Act of 1983 being declared ultra vires, the reference made against the husband/father of the petitioners was transferred to the Foreigners Tribunal No.1, Morigaon and was re-numbered as FT (C) Case No.869 of 2006.

3. By the order dated 25.10.2011 in FT (C) Case No.869 of 2006, the husband of the petitioner, Joy Kumar Das as well as the present petitioners were all declared to be foreigners who had entered the territory of India in the State of Assam from the specified territory after 25.03.1971. The said order of 25.10.2011 was passed ex-parte.

4. Being aggrieved, a writ petition was preferred which was numbered as WP (C) No.1607 of 2013. The said writ petition was given a final consideration by the order dated 02.04.2013 by providing that the petitioners may submit application for setting aside the ex-parte order in terms of the provisions of paragraph-92 of the pronouncement of the Full Bench in State of Assam -vs- Muslim Mondal & Ors reported in (2013) 1 GLT 809.

5. Paragraph-92 of the Muslim Mondal (supra) inter-alia provides that upon such application being made, Tribunal should not entertain the application in a routine manner and must require the proceedee to demonstrate the existence of special/ exceptional circumstances for entertaining the same.

6. Upon the matter being remanded back, the petitioners preferred Misc. Case No.05 of 2013 for setting the ex-parte order. By the order dated 24.07.2013 of the Tribunal, the said application was rejected on the ground that although the petitioners had demonstrated certain medical problems of their husband/ father for justifying as to why he had not appeared before the Tribunal but the documents relied upon were unacceptable and the same pertains to a period subsequent to the date of ex-parte order. From the said point of view, we do not find any infirmity in the order dated 24.07.2013 of the Tribunal.

7. But however, a rejection of the application for vacating the ex-parte order would also tantamount to upholding the earlier ex-parte order. In the ex-parte order of 25.10.2011, the present petitioners were also declared to be foreigners alongwith their husband / father although on facts, no other reference was made against them. We have verified the Form-1 submitted by the Superintendent of Police (Border), based upon which the reference was made and the same shows that the reference was initiated only against Joy Kumar Das, being the husband/ father of the present petitioners and no reference was made against the petitioners.

8. The law in this respect has been settled in paragraph 9 of the Judgment and Order dated 04.01.2019 in Sudhir Roy and Ors. -vs- Union of India & Ors in WP (C) No. 6790 of 2018, wherein it was held that although a presumption can be drawn against the family members of a proceedee who has been declared as foreigner, but at the same time, such presumption would by itself not lead to a conclusion that the family members of the proceedee who has been declared to be a foreigner are also foreigners.

9. By following the aforesaid proposition of law, we are of the view that the declaration of the present petitioners to be foreigners by the order dated 25.10.2011 of the Foreigners' Tribunal No.1, Morigaon in FT (C)Case No. 869 of 2006 on the basis of the reference made against their husband/ father, is unsustainable. Accordingly, the order dated 25.10.2011 is set aside.

10. It is directed that the Superintendent of Police (Border), Morigaon shall take a decision as to whether a reference is required to be made against the present petitioners. Such decision shall be taken within a period of 30 days from the date

of this order. In the event, a decision is taken in favour of a reference and the reference is made, the Tribunal shall decide the same within a period of 60 days from the date of appearance of the petitioners.

11. Writ petition stands allowed to the extent indicated above.

12. A copy of the order be provided to Mr. J Payeng, learned counsel, State of Assam appearing for the Foreigners Tribunal and Border Area.