

(2021) 09 GAU CK 0043

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 3842 Of 2021

Raghu Nath Sarkar

APPELLANT

Vs

Union Of India And 6 Ors

RESPONDENT

Date of Decision : 16-09-2021

Acts Referred:

Citation : (2021) 09 GAU CK 0043

Hon'ble Judges : N. Kotiswar Singh, J; Manish Choudhury, J

Bench : Division Bench

Judgement

1. Heard Mr. A. Paul, learned counsel for the petitioner. Also heard Ms. L. Devi, learned Standing Counsel, NRC appearing on behalf of Mr. R.K. Deb Choudhury, learned CGC; Mr. A. Verma, learned Standing Counsel, FT; and Mr. A. Bhuyan, learned Standing Counsel, ECI.

2. This is the case where the petitioner has approached this Court being aggrieved by the order dated 06.09.2018, passed in FT case no. 1758/2012 by the learned Foreigners Tribunal 2nd, Morigaon, Assam arising out of Police Reference F.T. Case no. 02/2009 dated 09.01.2009, which according to the petitioner is the third reference and opinion, inspite of being declared an Indian on the first occasion.

3. By this order dated 06.09.2018, the petitioner Sri Raghu Nath Sarkar, son of Late Madan Sarkar, Village - No. 2 Batalimari, P.S. Bhuragaon, District - Morigaon, Assam was declared to be a foreigner of post 1971 stream having entered into India the specified territory of Bangladesh on or after 25.03.1971.

4. Petitioner submits that the petitioner and his wife Smt. Saindha Rani Sarkar and their children were proceeded for the first time before the Foreigners Tribunal 2nd, Morigaon in FT Case no. 2099/2012 arising out of Police Reference no. IM(D)T Act Case no. 185/2011 which was disposed of on 20.12.2016 in favour of the proceedees. By the said reference, the learned Tribunal considering the materials, gave the opinion that the proceedees, namely, (i) Smt. Saindha

Rani Sarkar w/o Sri Raghu Nath Sarkar, (ii) Sri Raghu Nath Sarkar, (iii) Sri Ruhidas Sarkar, (iv) Sri Gusai Sarkar of village No. 2 Batalimari, P.S. Bhuragaon, District - Morigaon, Assam, are citizens of India under the provisions of the Indian Citizenship Act, 1955 as amended in 2008. Accordingly, it has been submitted that since the petitioner along with his family members had been declared to be Indians by the said Foreigners Tribunal 2nd, Morigaon in FT Case no. 2099/2012, the subsequent proceeding initiated against him in FT Case no. 1758/2012 (disposed of on 06.09.2018) will be hit by the principle of res judicata.

5. Learned counsel for the petitioner submits that in fact, the petitioner along with his wife were subsequently proceeded again in two separate proceedings after the first opinion dated 20.12.2016 was rendered by the learned Foreigners Tribunal 2nd, Morigaon in FT Case no. 2099/2012.

In respect of his wife, Smt. Saindha Rani Sarkar, the second proceeding was initiated in FT Case no. 1759/2012 in connection with which an opinion was given on 15.12.2018 against her. Similarly, the second proceeding initiated against the present petitioner in FT Case no. 2134/2012 which was disposed of by opinion dated 03.07.2018 against him.

In both the said two subsequent proceedings in FT Case no. 1759/2012 and the FT Case no. 2134/2012 initiated against the petitioner's wife and the petitioner, by separate opinions dated 15.12.2018 and 03.07.2018, both the petitioner and his wife were declared foreigners. These two opinions were challenged before this Court in W.P.(C) no. 7785/2019 (filed by the wife of the present petitioner, Smt. Saindha Rani Sarkar) and W.P.(C) no. 8895/2018 (filed by the present petitioner Raghu Nath Sarkar). The aforesaid two writ petitions were heard and disposed of by a common order dated 26.07.2021 by this Court.

6. In both the aforesaid second proceedings before the Tribunal the present petitioner Raghu Nath Sarkar as well as his wife had taken the plea that they had already been declared Indians by an earlier opinion of the Foreigners Tribunal in FT Case no. 2099/2012 vide opinion dated 20.12.2016. However, the learned Tribunal in both the proceedings declined to accept the said plea on the ground that the principle of res judicata is not applicable in a proceeding before the Foreigners Tribunal on the basis of the decision of this Court in W.P.(C) no. 7339/2015 [Mustt. Amina Khatoon Vs. Union of India] and proceeded to decide the matter on merit and declared both the petitioner and his wife in the said two separate proceedings as foreigners.

7. Being aggrieved, both the petitioner as well as his wife filed separate writ petitions as referred to above, challenging the said aforesaid opinion dated 03.07.2018 passed in FT Case no. 2134/2012 in respect of the present petitioner i.e. Raghu Nath Sarkar and opinion dated 15.12.2018 passed in FT Case no. 1759/2012 in respect of the wife of the petitioner i.e. Smt. Saindha Rani Sarkar. This Court, by holding that the principle of res judicata is applicable in the proceedings before the Foreigners Tribunal in the light of the decision rendered

by Hon'ble Supreme Court in Abdul Kuddus vs. Union of India (supra) allowed both the writ petitions setting aside the aforesaid two opinions dated 03.07.2018 passed in FT Case no. 2134/2012 in respect of the present petitioner i.e. Raghu Nath Sarkar and 15.12.2018 passed in FT Case no. 1759/2012 in respect of the wife of the petitioner i.e. Smt. Saindha Rani Sarkar.

In this regard, it may be appropriate to reproduce the relevant observations and the decision of this Court by a common order dated 26.07.2021 in the aforesaid two writ petitions, W.P. (C) no. 7785/2019 and W.P.(C) no. 8895/2018, as follows :

"12. On a perusal of the original records, it is seen that the particulars of the proceedees in FT Case No.2099/2012 are clearly mentioned which includes the name of Saindha Rani Sarkar, shown as the wife of Raghu Nath Sarkar, and Raghu Nath Sarkar, who are all shown as residents of Village-2 No. Batalimari, PS. Bhuragaon, Dist-Morigaon, Assam. In the description of the proceedee in FT Case No.1759/2012, the proceedee, Chandarani Sarkar, has been described as the wife of Raghu Nath Sarkar, resident of village No.2, Batalimari, PS. Bhuragaon, Dist. Morigaon, Assam. In the other proceeding, namely, FT Case No.2134/2012, the proceedee has been described as Raghu Nath Sarkar, son of Late Madan Sarkar, Village No.2 Batalimari, PS. Bhuragaon, Dist. Morigaon, Assam.

13. In FT Case No.2134/2012, in the evidence, the said Raghu Nath Sarkar had described his father as Madan Kumar Biswas and as a resident of village No.2 Batalimari. In FT Case No.1759/2012, the name of the husband of the proceedee has been described as Raghu Nath Sarkar, resident of Village No.2, Batalimari, PS. Bhuragaon, District-Morigaon, Assam.

As such, we are satisfied that the two petitioners Chandarani Sarkar and Raghunath Sarkar are the wife and husband and are same persons who were proceeded in FT Case No.2099/2012 in whose favour the opinion was given earlier on 20.12.2016 declaring them to be Indian citizens.

14. It is also noticed that in the proceedings before the Foreigners Tribunal in the aforesaid FT Case Nos.1759/2012 and 2134/2012, pendency of FT Case No.2099/2012 was mentioned by both the proceedees and the Tribunal also acknowledged pendency of the said FT Case No.2099/2012. However, though the said FT Case No.2099/2012 was pending and records were available before the same Tribunal, the Tribunal made no attempt to requisition the records in the two proceedings challenged here. Be that as it may, the fact remains that the Tribunal in both the impugned proceedings was in the knowledge of the said FT Case No.2099/2012. Though the final opinion was given on 20.12.2016, it was brought to the notice of the Tribunal in both the proceedings in FT Case No.1759/2012 and 2134/2012 by exhibiting it as Ext.I. However, the Tribunal observed that the principle of res judicata is not attracted in a proceeding under the Foreigners Act in view of the decision of the Division Bench of this Court in

WP(C) No.7339/2015 (Mustt. Amina Khatoon Vs. Union of India). However, since the law has changed in view of the decision in Abdul Kuddus (supra), the aforesaid view taken by the Tribunal cannot be sustained as the principle of res judicata will be applicable in a proceeding under the Foreigners Act as held by the Hon'ble Supreme Court.

15. In that view of the matter, the impugned opinions dated 03.07.2018 passed in FT Case No.2134/2012 and 15.12.2018 passed in FT Case No.1759/2012 cannot be sustained being barred by the principle of res judicata.

16. Both the petitions are, accordingly, allowed by setting aside the aforesaid impugned opinions dated 03.07.2018 passed in FT Case No.2134/2012 and 15.12.2018 passed in FT Case No.1759/2012. The two proceedees, namely, Chandarani Sarkar @ Saindha Rani Sarkar as well as Raghu Nath Sarkar consequently, are hereby declared as Indians in terms of the opinion of the Foreigners Tribunal in FT Case No.2099 of 2012.

17. It has been brought to our notice by the learned counsel for the petitioners that by another third opinion dated 06.09.2018 passed by the Foreigners Tribunal-2nd, Morigaon in FT Case No.1758/2012, Raghu Nath Sarkar, son of Late Madan Sarkar has been declared as a foreigner. According to learned counsel for the petitioners, though he has not filed any petition challenging this opinion dated 06.09.2018, since it is the same person in whose favour the Foreigners Tribunal-2nd, Morigaon had earlier passed an opinion in FT Case No.2099/2012 on 20.12.2016, an appropriate order may be passed with reference to FT Case No.1758/2012.

18. However, since the order dated 06.09.2018 was passed in FT Case No.1758/2012 is not yet challenged before this Court and the relevant records are not before us, it may not be appropriate to make any observation in this proceeding. However, the petitioner will be at liberty to challenge the order dated 06.09.2018 passed in FT Case No.1758/2012 in terms of the order passed today, as it is for him to establish that it is the same proceedee, namely, Raghu Nath Sarkar, regarding whom an opinion had been made on 20.12.2016 in FT Case No.2099/2016 and this will be hit by the principle of res judicata."

8. As mentioned above, when the aforesaid two writ petitions were disposed of on 26.07.2021, it was submitted on behalf of Raghu Nath Sarkar that there was another (third) proceeding initiated before the Foreigners Tribunal 2nd, Morigaon in FT Case no. 1758/2012 against him in which the third opinion was given on 06.09.2018 to the effect that he is a foreigner not an Indian by not considering the plea of Raghu Nath Sarkar that he had already been declared Indian by an opinion dated 20.12.2016 in FT Case no. 2099/2012. However, this Court observed that since the said opinion dated 06.09.2012 passed in FT Case no. 1758/2012 was not challenged, it was up to the petitioner to challenge the same and it is for him to establish that it was the same proceedee i.e. Raghu Nath Sarkar who was proceeded against in FT Case no. 1758/2012.

In this petition, Raghu Nath Sarkar has challenged the findings rendered in FT Case no. 1758/2012 on 06.09.2012 primarily on the plea of res judicata.

9. The plea of res judicata can be raised only when the present petitioner can establish before the Tribunal that he is the same person who was proceeded in the earlier proceeding i.e. F.T. Case no. 2099/2012 in which event ,the opinion rendered in the earlier Foreigners Tribunal proceeding on 20.12.2016 would be binding on subsequent proceedings.

10. Accordingly, we remand the matter to the Foreigners Tribunal 2nd, Morigaon in FT Case no. 1758/2012 to examine whether the present petitioner namely, Raghu Nath Sarkar son of Late Madan Sarkar, Village - No. 2 Batalimari, P.S. Bhuragaon, District - Morigaon, Assam, is the same person who was proceeded in the FT Case no. 2099/2012 wherein the proceedees were declared an Indian including one Raghu Nath Sarkar, resident of Village No. 2 Batalimari, P.S. Bhuragaon, District - Morigaon, vide opinion dated 20.12.2016.

11. In the records that have been requisitioned by us, we have noticed that there are materials to show that the present petitioner Raghu Nath Sarkar appears to be the same person, Raghu Nath Sarkar who was the proceede in the aforesaid FT Case no. 2099/2012. However, we are of the opinion that it could be best considered by the Tribunal as it amounts to ascertainment of a fact, that is, the identity of the present petitioner, for which the petitioner would have all the liberty to adduce such documents to show that he is the same person who was proceeded in FT Case no. 2099/2012. This is a purely question of fact, which in our opinion, can be best ascertained by the Tribunal by considering the evidences that may be adduced.

12. We also make it clear that the Tribunal will not consider any other issue before deciding this issue, and once the Tribunal is satisfied on the basis of the materials and evidence that may be adduced by the petitioner, that he is the same person who was proceeded earlier in FT Case no. 2099/2012, the Tribunal will not proceed any further and recall its order dated 06.09.2018 passed in FT Case no. 1758/2012 and declare the petitioner to be an Indian and not a foreigner. If the Tribunal, however, finds on the contrary that he is a different person and is not the said Raghu Nath Sarkar in whose favour the opinion was given, the impugned order will remain and the petitioner would be at liberty to approach this Court again challenging the said finding about the identity of the proceedee as well as the order dated 06.09.2018 passed by the learned Foreigners Tribunal 2nd, Morigaon.

13. Since the preliminary issue to be decided by the Foreigners Tribunal is to the identity of the present petitioner as to whether he is the same person who was proceeded in the earlier proceeding in FT Case no. 2099/2012, the petitioner would be at liberty to adduce additional evidences to that effect i.e. only for the purpose of establishing his identity.

14. For the reasons discussed above, the impugned order dated 06.09.2018

passed in FT Case no. 1758/2012 is kept in abeyance till appropriate order is passed by the learned Foreigners Tribunal 2nd, Morigaon as regards the identity of the proceedee as per our direction given above.

15. The petitioner will accordingly, appear before the learned Foreigners Tribunal 2nd, Morigaon on or before 25.10.2021 and shall be allowed to remain on bail on furnishing a bail bond of Rs. 5,000/- (rupees five thousand) with a surety of like amount to the satisfaction of the Superintendent of Police (Border), Morigaon.

16. The Superintendent of Police (Border), Morigaon shall also take steps for capturing the finger prints and biometrics of the iris of the petitioner, if so advised.