
(2021) 08 GAU CK 0066

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 6940 Of 2019

Taher Ali

APPELLANT

Vs

Union Of India And 6 Ors

RESPONDENT

Date of Decision : 19-08-2021

Acts Referred:

Citation : (2021) 08 GAU CK 0066

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

Bench : Division Bench

Advocate : M U Mahmud

Final Decision : Disposed Of

Judgement

1. Heard Mr. M.U. Mahmud, learned counsel for the petitioner. Also heard Ms. L. Devi, learned counsel appearing on behalf of Mr. R.K. Dev

Choudhury, learned Asstt. Solicitor General of India, for respondent No.1 as well as appearing as standing counsel, NRC, for respondent No.4; Mr. A.

Kalita, learned Special Counsel, FT, appearing for respondent Nos.3, 5, 6 and 7 and Ms. B. Das, learned standing counsel, ECI, appearing for

respondent No.2.

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. In this petition, the petitioner has challenged the ex-parte order dated 28.04.2017 passed in F.T. Case No.199/2015 by the Foreigners' Tribunal-4th,

Goalpara, Assam, whereby the petitioner was declared as foreigner of post 1971 stream. The grievance of the petitioner is that the petitioner was

proceeded ex-parte without properly serving notice upon him though he was very

much available in the village and he did not go out contrary to what has been mentioned in the report of the process server.

4. Learned counsel for the petitioner submits that the petitioner otherwise has all the necessary documents to prove that he is an Indian citizen.

However, as he had been proceeded ex-parte vide order dated 28.04.2017 passed by the Foreigners Tribunal No.4th, Goalpara, Assam, in F.T. Case

No.199/2015 in the aforesaid manner, he did not have the opportunity to prove himself as Indian and accordingly, he has been greatly prejudiced.

5. 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 he had been declared a foreigner in the last part of June, 2019 when some police personnel came to his house to arrest him in terms of the opinion

rendered by the Tribunal. From the ex-parte order, it is clearly mentioned that the notice was affixed at one conspicuous part of a house of the village

Dhumbandha. Thus, the notice was not served personally to the petitioner but was affixed in a conspicuous place of a house of that village as

mentioned in the police report dated 21.04.2017. The manner of service of notice when the proceedee is not available, as provided under Order 3(5) of

the Foreigners' (Tribunals) Order, 1964, reads as follows:-

3. Procedure for disposal of questions -

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(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 Foreigners Tribunal;

(e) if the proceedee or an available adult member of his or 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 do, 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 inâ"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 with such directions as

it thinks fit to the competent authority for tracing out the proceedee and produce before the said Tribunal.â??

6. From the above, it is ascertainable that if the proceedee is not found in the address at the time of service of notice, it can be served upon any other

adult member of the family and if the adult member of the family of the proceedee refuses to put a signature or the thumb-impression, the process

server shall report the same to the Foreigners Tribunal. If the proceedee or an available adult family member of the proceedee refuses to accept the

notice, to that effect the process server shall give a report to the Foreigners Tribunal 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. In the event the proceedee has changed the place of residence or place of work, without intimation to the

investigating agency, there is provision for affixing 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. In the event 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.

It has been further provided under Order 3(5)(i) that 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 certificate or verification to that effect, which shall be sufficient proof of such non-

availability, unwillingness and refusal.

Order 3(5)(j) further provides that on receipt of the signed certificate or verification referred to in clause (i), the Foreigners Tribunal shall return such

reference with such directions as it thinks fit to the competent authority for tracing out the proceedee and produce before the said Tribunal.

From the above, it is seen that Order 3(5)(a), (b), (c), (d), (f), (g) contemplate existence of residence though the proceedee may not be available or if available refuses to acknowledge the receipt of notice.

Order 3(5)(h) deals with a situation where the proceedee shifts his residence or resides in another district. Such a situation, where the residence of the proceedee is not at all found or could not be identified can be taken care of only under Order 3(5)(i) read with 3(5)(j) which contemplates returning the reference by the Foreigners Tribunal to the competent authority for tracing out the proceedee for producing him before the Foreigners Tribunal.

7. It can thus, be seen that while Order 3(5)(a) provides for service of notice in the changed address, the subsequent Orders 3(5)(b),(c), (d), (e), (g) deal with situation where the proceedee or an adult member of the family is not available, a copy of the notice may be pasted on a conspicuous place of the residence.

Order 3(5)(f) deals with a situation where the proceedee has changed the place of residence or place of work without intimation to the investigating agency, then it is permissible to 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.

Order 3(5)(h) deals with the situation where the proceedee resides outside the jurisdiction of the Foreigners Tribunal, in which case, the notice has to be sent 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.

However, the aforesaid Order is not clear as to the manner of dealing with a proceedee who is not found in the village nor any house or residence traceable or available or identified on which such a notice could be pasted. In other words, it has not been specifically mentioned as to what is to be done in the absence of the proceedee or when the proceedee is not found in the village and the residence also could not be identified where he resided or was last known to have resided.

8. In our opinion, such situation can be dealt only under Order 3(5)(i) read with

3(5)(j) in which case, if the proceedee is not found in any village nor his residence is found, the matter ought to be reported to the Foreigners Tribunal by the process server and thereafter, the Foreigners Tribunal should return such reference with such direction as it thinks fit to the competent authority for tracing out the proceedee and produce before the said Tribunal. Under such circumstances, we are of the view that the option before the Tribunal is to refer the matter back to the competent authority for tracing out and produce him before the Foreigners Tribunal as provided under Order 3(5)(j) after receiving of such report/certificate from the process server.

9. We have gone through the original records. The records revealed that the first notice was issued on 07.10.2015. On the reverse of the said notice, the process server's report indicates that the notice could not be served as the person named in the notice, namely, the petitioner Jaher Ali, is not available in the village. On 14.10.2016, the Tribunal ordered issuance of fresh notice against the petitioner. By order dated 21.04.2017 the Tribunal recorded that the notice was affixed at a conspicuous part of that village in presence of village witnesses. From the records, the process server's report dated 02.11.2015 indicates that the copy of the notice was hung on a wall of the Panchayat House.

10. Thus, as per Order 3(5) of the Foreigners' (Tribunals) Order, 1964, if the proceedee or any adult family members is not available in the village and his whereabouts are also not known nor the house could be identified, a certificate to that effect has to be made by the process server and submitted to the Foreigners Tribunal and that Tribunal shall return such reference with such direction as it thinks fit to the competent authority for tracing out the proceedee and produce before the said Tribunal.

11. In the present case, if the process server did not find the proceedee and his whereabouts were not known as he did not have residence or landed property as mentioned in the report, the matter should have been referred to the Foreigners Tribunal with such a report and thereafter, the Foreigners Tribunal ought to have returned the reference to the competent authority for tracing out the proceedee and produce him before the Tribunal.

12. It appears that no such attempt was made to return the reference with direction to the competent authority for tracing out the proceedee. The Tribunal proceeded ex-parte merely on the report that the proceedee is not

available and could not be traced out in the village.

13. In our view, before proceeding ex-parte, the Foreigners Tribunal ought to have referred to the competent authority for tracing out the proceedee, which does not appear to have been undertaken in the present case.

14. Since the petitioner has approached before this Court with the specific stand that he was very much present in the village and is willing to face the proceeding, we are of the view that the matter can be remanded to the Foreigners Tribunal for consideration of the matter afresh. Accordingly, the present petition is allowed by setting aside the impugned ex-parte order dated 28.04.2017 passed by the Foreigners Tribunal-4th, Goalpara, Assam, in F.T. Case No.199/2015.

15. The matter is remanded to the Foreigners Tribunal-4th, Goalpara, Assam for reconsideration of the claim of the petitioner that he is not a foreigner but an Indian citizen for which he will file necessary written statement and adduce evidence before the Tribunal.

The petitioner will appear before the Foreigners Tribunal-4th, Goalpara, Assam on or before 28.09.2021. Thereafter, the Tribunal will pass appropriate order in accordance with law.

16. Since the petitioner is on bail, he will be allowed to remain on bail on similar terms and conditions till completion of the proceedings by the Foreigners Tribunal.

17. It is, however, made clear that in the event the petitioner fails to appear before the Foreigners Tribunal-4th, Goalpara, Assam on or before 28.09.2021, the impugned ex-parte order dated 28.04.2017 which has been set aside by this Court today, will stand revived and law will take its own course.

18. With the above observation, the present petition stands disposed of.