

GAHC010282862018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/139/2019

Md. Abul Kalam, aged about 46 years,
Son of Late Asmat Ali,
Resident of Borbori, P.S. Dharamtul,
District- Morigaon, Assam,
PIN- 782105.

..... **Petitioner**

-Versus-

1. Union of India,
through the Secretary of the Ministry of Home Affairs,
New Delhi-1.
2. The State of Assam,
through the Commissioner & Secretary to the Govt. of Assam,
Home Department,
Dispur, Guwahati-6.
3. The Election Commission of India,
represented by the District Election Officer,
Morigaon, Assam
PIN-782105.
4. The State Co-Ordinator, NRC,
Achyut Plaza, Bhangagarh,
Guwahati-5.
5. The Addll. Director of General of Police (Border),
Bhangagarh, Guwahati-5.
6. The Deputy Commissioner, Morigaon,
Assam, PIN- 782105.
7. The Superintendent of Police (Border),

Morigaon, Assam. PIN-782105.

.....Respondents

:: BEFORE::

**HON'BLE MR. JUSTICE N. KOTISWAR SINGH
HON'BLE MR. JUSTICE MANISH CHOUDHURY**

Advocates

For the Petitioner : Mr. J. Sarmah, Advocate.
For the Respondent No.1 : Ms. M. Barman, Advocate.
Mr. S.K. Medhi, CGC.
For the Respondent Nos.2, 5,6 &7 : Mr. A. Kalita, Special Counsel, FT.
For the Respondent No.3 : Mr. A. Bhuya, Standing Counsel, ECI.
For the Respondent No.4 : Ms. L. Devi, Standing Counsel, NRC.
Date of Hearing & Judgment : **27.09.2021**

JUDGMENT & ORDER (ORAL)

(N. Kotiswar Singh, J)

Heard Mr. J. Sarmah, learned counsel for the petitioner. Also heard Ms. M. Barman, learned counsel on behalf of Mr. S.K. Medhi, learned CGC; Mr. A. Bhuyan, learned Standing Counsel, ECI; Mr. A. Kalita, learned Special Counsel, FT and Ms. L. Devi, learned Standing Counsel, NRC.

2. The present petition has been filed being aggrieved by the opinion dated 20.06.2018 passed by the Member of the Foreigners' Tribunal No.1, Morigaon, in F.T.(C) Case No.461/2008 declaring the petitioner to be a foreigner, having illegally entered into India (Assam) after 25.03.1971.

3. Though on perusal of the impugned opinion dated 20.06.2018 it appears that the judgment was rendered after hearing the arguments and on perusal of the records, as reflected in the judgment, it has been submitted by the learned counsel for the petitioner that in fact the learned Tribunal did not hear the parties before the said opinion was rendered. The said opinion was based only on the opinion prepared by her predecessor

and as such the said opinion is void.

In this regard, we have perused the original records requisitioned from the Foreigners' Tribunal.

4. On perusal of the records we have also noted that on 02.06.2017 the learned Tribunal passed the following order:

“Though the case was fixed today for delivering the judgment/final order, but the same cannot be delivered today for want of time.

Now, the matter of delivering the judgment is kept reserved.”

Subsequently the matter was put up again on 12.04.2018 with the following order passed by the Foreigners' Tribunal :-

“Though the matter was kept reserved for judgment, the same could not be delivered due to shortage of time as well as dearth of a typist in this Tribunal.

Matter is accordingly released from being reserved as permanent Member have already joined.”

5. The matter was thereafter put up on 20.06.2018. What we have noted from the records is that when the new Member of the Tribunal, Smt. Navanita Baruah took over the charge of the Foreigners' Tribunal, the following order was passed on 20.06.2018 :

“The case record is put up today for delivering the Final Order which is written in 6 (six) separate pages signed and sealed and kept with the record.

After summing up the materials on record and perusal of the evidence of the O.Ps., I am of the opinion that the OP1, namely Abu Kalam; OP3, Sahidul Islam; OP4, Asadul Islam and OP5, Kulsum Bibi, of village – Borbari/Ahatpam under P./S-Dharamtul in the district of Morigaon, Assam are Foreigners/illegal Migrants who had entered India (Assam) after 25-03-1971 from the specified territory without any valid documents.

However, after examining the Ext-H (the death certificate), it is observed that since the OP2 has expired during pendency of the instant F.T. Case, the name of the OP2, Sahida Begum has been strike out by this Court.

Hence, the reference is answered in affirmative and in favour of the Union of India.

The detailed order will follow in a separate sheet comprising of six pages.

Inform the Superintendent of Police (Border), Morigaon, Deputy Commissioner, Morigaon and the Election Officer, Morigaon for taking necessary action.”

6. We have also noted that between 12.04.2018 and 20.06.2018, there was no proceeding before the Tribunal.

7. Thus what can be gathered from record is that though the learned Member of the Foreigners' Tribunal No.1, Morigaon, Smti. Navanita Baruah passed the opinion dated 20.06.2018, and though it has been mentioned in paragraph-8 of the said opinion that the arguments had been heard and records of the case has been perused, the records indicates otherwise. In fact, what the record clearly shows is that the matter perhaps was heard by her predecessor and was kept in a sealed cover and though the matter was reserved for judgment by the earlier Member, the same could not be delivered due to shortage of time and also because of non-availability of a typist and the matter was accordingly released from being reserved as mentioned in the order dated 12.04.2018.

When the matter was next taken on 20.06.2018 there is no recording by the learned Tribunal that the parties were heard. As mentioned above, the order dated 20.06.2018 merely mentions that the case records have been put up for delivering the final order which is written in 6 (six) separate pages signed and sealed and kept with the record.

Further, towards the end of the opinion, it is mentioned that the reference is made in the affirmative and in favour of the Union of India and that detailed order will follow in a separate sheet comprising of said pages. Thus, the first part of the opinion and the end part of the opinion do not somehow converge, for if the order was already signed and sealed kept on record, there is no reason to mention that detail order will follow.

It has been not also indicated in the said order dated 20.06.2018 as to when the new Member had heard the matter before delivering the judgment.

It is not a case of pronouncement of a judgment by a judge of a judgment already written, but not pronounced, by his predecessor as provided under Order XX Rule 2

C.P.C.

8. Though it may happen that before concluding hearing of evidence the Judge may demit office or may be transferred in which event, the new incumbent Judge would continue with the hearing of evidence and as such, such change of Judge may not have any effect as far as the proceeding of the case is concerned. However, if the recording of evidence is concluded and the matter is fixed for argument for delivery of judgment and after the hearing of the submission of the parties is concluded if the Judge is transferred or demits office, in that event, the new incumbent Judge ought to re-hear the oral submission of the parties before delivery of judgment.

9. As mentioned above, between 12.04.2018 and 20.06.2018, that is, during the intervening period of the matter being released after it was kept reserved for judgment by the earlier member of the Tribunal and taking over the matter by the new incumbent, there is nothing on record to show that the new incumbent had heard the parties before announcing the opinion on 20.06.2018.

10. In this regard, one may note the provisions of Order XVIII Rule (2) of the CPC. Order XVIII Rule (2)(1) provides that on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. Order XVIII Rule (2)(2) further provides that the other party shall then state his case and produce his evidence, if any, and may then address the Court generally on the whole case. Order XVIII Rule (2)(3) also provides that the party beginning may then reply generally on the whole case. As per the newly inserted Rule 3A of Order XVIII, any party may address 'oral arguments in a case, and shall, before he concludes the oral arguments, if any, submit if the Court so permits concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record. Rule 3D of Order XVIII also provides that the Court shall fix such time-limits for the oral arguments by either of the parties in a case, as it thinks fit.

It may be noted that the provisions of the CPC are not strictly applicable in the proceeding before the Foreigners' Tribunal, nevertheless the principles permeating these

provisions would be applicable in a proceeding before the Foreigners' Tribunal as the Foreigners' Tribunal are expected to render their opinion by conforming to the basic norms of justice and fair play.

Thus from the above provisions of CPC it is clear that oral hearing is an important ingredient of the justice delivery system. The importance of oral arguments by the parties have been thus statutorily recognized by providing specific provisions under Order XVIII of the CPC as referred above.

11. It is trite, though of great significance that if any oral argument is advanced, only the Judge who had heard can appreciate the nuances of the case, the evidence adduced, based on oral arguments submitted by the parties or through the counsel. Naturally if hearing was conducted by a Judge who for any reason could not deliver the judgment, the new Judge who succeeds him would be deprived of the benefits of the oral arguments submitted by the party/through counsel and as this practice also in tune with the principle of fair play and justice, if for any reason the Judge demits office or is transferred before delivering judgment, when the new Judge takes over, the new Judge ought to hear again the parties or through the counsel before delivery of judgment.

12. Oral arguments are important ingredients of the justice delivery system in our jurisprudence. The party or the counsel at the time of making oral submission can explain the various facets of the evidence which have been adduced and clarify any doubt that may arise on account of the objection raised by the opposite party or by the Court as the case may be, and thus enables a party to put one's case succinctly, clearly on the basis of evidence so adduced.

13. The importance of "oral argument" was discussed and highlighted by the Hon'ble Supreme Court in ***Mohd. Arif @ Ashfaq Vs. The Registrar, Supreme Court of India and Ors., (2014) 9 SCC 737.***

It was observed by the Constitutional Bench in the aforesaid case of ***Mohammad Arif*** (supra), though in a different context relating to review petition regarding the death sentence, that oral submission by skilled advocate can effectively draw the attention of the court to the most relevant factors, mitigating factors which might possibly be

overlooked if Judges are only required to consider written arguments/pleadings.

The inimitable expression of Justice Krishna Iyer, J. in ***P. N. Eswara Iyer Vs. The Registrar, Supreme Court Of India, (1980) 4 SCC 680*** in para 23 thereof, have been quoted in the aforesaid decision in ***Mohammad Arif*** (supra), as ,

“23. The magic of the spoken word, the power of the Socratic process and the instant clarity of the bar-Bench dialogue are too precious to be parted with.....”

14. In this regard, one may also note a recent observation made by the Hon'ble Supreme Court in ***Chief Election Commissioner of India Vs. M.R. Vijayabhaskar and Ors., 2021 SCC OnLine SC 364***, wherein Hon'ble Supreme Court observed in para No. 20 thereof that oral arguments are postulate on an open exchange of ideas and it is through such an exchange that legal arguments are tested and analysed. It was further observed that arguments addressed before the court, the response of opposing counsel and issues raised by the court are matters on which citizens have a legitimate right to be informed.

Though the aforesaid observation was made in the context of open court proceeding and rights of citizen to have access to court proceedings, as part of the transparent judicial process, the aforesaid observation would be of relevance in a proceeding before the Foreigners Tribunal also, as it is through the oral arguments that the Tribunal can appreciate evidence properly before making its opinion.

Relevant portions of the Para No.20 of the aforesaid case in ***Chief Election Commissioner of India Vs. M.R. Vijayabhaskar and Ors.*** (supra) are reproduced hereinbelow.

“20. Courts must be open both in the physical and metaphorical sense. Save and except for in-camera proceedings in an exceptional category of cases, such as cases involving child sexual abuse or matrimonial proceedings bearing on matters of marital privacy, our legal system is founded on the principle that open access to courts is essential to safeguard valuable constitutional freedoms. The concept of an open court requires that information relating to a court proceeding must be available in the public domain. Citizens have a right to know about what transpires in the course of judicial proceedings. The dialogue in a court

indicates the manner in which a judicial proceeding is structured. Oral arguments are postulated on an open exchange of ideas. It is through such an exchange that legal arguments are tested and analyzed. Arguments addressed before the court, the response of opposing counsel and issues raised by the court are matters on which citizens have a legitimate right to be informed. An open court proceeding ensures that the judicial process is subject to public scrutiny. Public scrutiny is crucial to maintaining transparency and accountability. Transparency in the functioning of democratic institutions is crucial to establish the public's faith in them.....”

(emphasis added)

15. Thus, this important facet of justice delivery system would be reduced to naught if the successor Judge who takes over a case before delivery of judgment is not afforded the opportunity to hear the oral submissions of the parties, as judgment is a personal assessment by the Judge of the evidence and application of law on the facts and evidence that may have been brought on record for deciding a case. It is for this reason that if the new Judge who takes over the case delivers judgment without hearing the oral submission, it could cause serious prejudice to either of the parties.

In the present case, as discussed above, there is nothing on record to indicate that the Ld. Member of the Tribunal who had passed the opinion had the advantage of hearing the oral submissions of the parties including the petitioner in the present case.

16. Citizenship is one of the important rights of a person. By virtue of citizenship, one becomes a member of a sovereign country and becomes entitled to various rights and privileges granted by law in the country and, as such, if any question arises about citizenship of a person, in our opinion, the same should be adjudicated as far as possible on the basis of merit and on hearing the person concerned, which would also include “oral hearing”.

17. It may be also noted that Order (11) of the Foreigners (Tribunals) Order, 1964 provides that the Foreigners Tribunal shall hear such person, as in its opinion is required to be heard. Further, Order (15) provides that after the case has been heard, the Foreigners Tribunal shall submit its opinion as soon thereafter as may be practicable, to

the officer or the authority specified in this behalf in the order of reference.

Thus, the aforesaid provisions make it clear that the Tribunal has to hear the matter though it is not specifically mentioned in the Order that he has to entertain oral hearing.

In our view, oral hearing is inseparable part of hearing in the proceeding before the Foreigner Tribunal as it involves a very important right of a person i.e. citizenship, with other attending fundamental and legal rights. Further, it has been the practice in the Tribunal to afford oral hearing to the proceedees.

The opinion of the Foreigners Tribunal will decide the fate of a person, as to whether he will be an Indian citizen or a foreigner.

18. Considering the above, we are of the view that as the opinion was rendered on 20.06.2018 without hearing the oral submission of the parties, it cannot be said to have been rendered by proper application of mind.

Accordingly, the impugned order dated 20.06.2018 passed in F.T.(C) Case No.461/2008 is set aside and we remand the matter to the Tribunal for a fresh hearing and for passing an appropriate opinion.

We accordingly, direct the petitioner to appear before the Foreigners' Tribunal No.1, Morigaon on 28.10.2021.

19. Since the citizenship of the petitioner is under cloud, he will continue to remain on bail in terms of the earlier order passed by this Court on 29.05.2019 till conclusion of the proceeding before the Foreigners' Tribunal No.1st, Morigaon.

20. Remit the case records to the Tribunal forthwith.

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

JUDGE

JUDGE

Comparing Assistant