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ABUL HUSSAIN @ ABUL HOSEN V. UNION OF INDIA, WP(C) NO. 44/2019

AUTHORED BY - ADARSH A S

Court: Gauhati High Court

Bench: Division Bench.

Judges: Justice Achintya Malla Bujor Barua, Justice Ajit Borthakur

Date: 23 January 2019.

Key statutes: Rule 3(5)(f) Foreigners (Tribunals) Order 1964

Facts

The petitioner, Abul Hussain, also known as Abul Hosen, who was suspected of being a non-citizen and was referred to a Foreigners' Tribunal under the Foreigners Act, 1946 by the Superintendent of Police, Border of Jorhat. The petitioner was not at his residence when the Tribunal served show cause notice to his last known address. Therefore, the petitioner was declared foreigner by the tribunal ex parte. The petitioner then filed a writ before the Gauhati High Court. On perusal of the report of the process server it was found that the duplicate copy of the notice was "hanged" and signature was taken on the primary copy. The point to be noted here is that neither the location of the notice's affixing nor the identity of the person who signed the primary copy were mentioned in the report. The petitioner contended that notice was not served properly i.e it violated the essentials laid down by Rule 3(5)(f) of the Foreigners (Tribunals) Order, 1964 thereby infringing principles of natural justice.

Issues

Whether the substituted service complied with Rule 3(5)(f) of the Foreigners (Tribunals) Order, 1964?

Decision

The High Court overturned the Tribunal's decision declaring the notice served on the petitioner had not fulfilled the conditions under Rule 3(5)(f). It underlined that careful adherence to the procedure for substituted service is required by Rule 3(5)(f) of the 1964 Order. According to this rule, the notice must be posted clearly in front of the last resided address of the person

accused to be “foreigner”. If the person is not available and the notice cannot be given to an adult member of the family then the same should be affixed in a conspicuous place in the presence of a witness, whose signature must be sought. In the present matter the process servers report did not identify neither the location of the hanged duplicate copy nor the details of the witness whose signature was taken in the original copy.

The court ruled that the service was illegal because this omission contravened the conditions of Rule 3(5)(f). As a result, the high court ruled that the ex parte Tribunal order was invalid. Therefore, the court gave 60 days’ time period for the petitioner to present his case before the tribunal based on requisite orders were to be passed.

Analysis and Significance

The Court unambiguously reaffirmed the broad rule established earlier in the State of Assam v. Moslem Mondal case, which stipulates that the Foreigners' Tribunal cannot assume jurisdiction unless notice is properly served. Even though the case of Abul Hussain did not directly rule on the petitioner's citizenship, the ruling reaffirms that adherence to procedural safeguards is not merely a technical formality but rather a requirement to be fulfilled before putting the burden of proof on the proceedee to prove that he is not a foreigner.

The Gauhati High Court ruled in Moslem Mondal that one of the most important phases of a foreigners' tribunal action is the correct serve of notice. The Court noted that the 1964 order's Rule 3(1) provision of providing the proceedee with a reasonable opportunity is undermined in the absence of adequate service, which violates fundamental natural justice principles. Using the Code of Civil Procedure as a reference, the Full Bench established guidelines for notice service after noting the lack of consistency in tribunal practice. The Foreigners (Tribunals) Order, 1964's paragraph 3(5) was amended in 2013 to incorporate these rules into the statutory framework.

Using this approach, the Court determined that the process-server's report in Abul Hussain did not comply with Rule 3(5)(f). The report does not state whether any local witnesses were present, where the notice was posted, or who signed it. As a result, the Court ruled that the Tribunal's finding could not be upheld since such ambiguous and insufficient service could not be regarded as legitimate service under the law.

The ruling in Abul Hussain adds on to the rulings from the Gauhati High Court. The Court overturned a Tribunal ruling in Abdus Salam v. Union of India because the service report failed to specify the location of the notice's posting. Similar rulings were made in Malekjan Bibi v. Union of India and Monir Uddin v. Union of India where it was decided that merely "hanging"

a notice without adequate documentation was unlawful.

To the contrary, a distinction was made in the case of Farida Begum v. Union of India in which the Court affirmed that as per the amended 1964 Order, a service of notice to adult family members, including brothers and husbands can be considered as proper notice. This shows that the law permits flexibility in the form of service but that cannot be used to make the service of notice a mere facade.

The Foreigners Act, 1946's Section 9, which lays the burden of proof on the proceedee to prove they are not a foreigner, is also indirectly impacted by this ruling. Although the burden of proving he is not a foreigner is on proceedee is well-established, the Court made it clear that it can only occur upon a legitimate notice. The proceedee is not given the chance to present and fulfil this obligation if notice is not properly served. It would be unreasonable to apply Section 9 automatically in these situations. This strategy aligns with the Supreme Court's rationale in Mohammad Ayub Khan v. Commissioner of Police, where the Court acknowledged that decisions pertaining to citizenship must take into account the right to a hearing. The judgement of Abul Hussain extends this principle to the concept of notice procedure under Rule 3.

Also, even if Article 21 was not specifically mentioned in the ruling the Court's rationale is based on procedural fairness principles, which are part of right to life and liberty. It is essential that principles of natural justice principles must be followed in proceedings that could lead to severe repercussions including detention or deportation. A proceedee cannot be considered to have had a fair hearing if sufficient notice is not served, as stressed in Moslem Mondal. Therefore, even if the constitutional clause is not specifically mentioned, non-compliance with Rule 3(5)(f) raises more general issues about arbitrariness and unfair procedure.

The Abul Hussain case indirectly influence by adding on to the plethora of cases which infuse the principle that notice should fulfil conditions given in 3(5)(f) which is essential to deter from the regular pattern ex parte declarations by Foreigners' Tribunals of persons being foreigners. This protects people, many of whom are economically and socially vulnerable from being labelled foreigners without having a meaningful chance to be heard.

But the ruling also draws attention to procedural review's limitations. Strict enforcement of service requirements corrects individual injustices, but it ignores deeper structural problems like the Foreigners Act regime's severe imbalance between state power and individual capacity, the lack of uniform evidentiary standards, and the lack of authority of referral authorities such as the Superintendent of Police, the state government or the central government. This results in repeated inappropriate declaration of persons as foreigners, questioning their fair right to statehood.

The ruling in *Abul Hussain v. Union of India* unequivocally states that proceedings before the Foreigners' Tribunal cannot continue due to improper or unverified notice serving. The Gauhati High Court reinforced procedural safeguards in determination of citizenship processes by rigidly applying Rule 3(5)(f), which was formed by *State of Assam v. Moslem Mondal*. In addition, the ruling highlights the necessity of more extensive legal and administrative changes to guarantee that procedural justice functions as a significant protection rather than a recurrent remedy.

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