THE GAUHATI HIGH COURT

(The High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram & Arunachal Pradesh)

Review Pet. No. 22/2010, WA Nos. 258/08, 264/08, 265/08, 266/08, 268/08, 280/08, 281/08, 370/08, 59/09, 71/09, 171/10 and 313/11

(1) Review Petition No. 22 of 2010

1. The State of Assam,
Represented by the Commissioner & Secy., Home Deptt., Assam, Dispur, Guwahati-6.

2. The Superintendent of Police,
Barpeta, Dist. Barpeta, Assam.

.....Petitioners

- Versus -

1. Moslem Mondal,
S/o Lt. Sadar Mondal.

2. Rupjan Nessa,
W/o Moslem Mondal.

3. Md. Ainul Hoque,
S/o Moslem Mondal.

4. Md. Seheruddin,
S/o Moslem Mondal,

All are residents of Howly Town,
Ward No. 4, P.S. & Dist. Barpeta, Assam.

5. Union of India,
Represented by the Secy. Ministry of Home Affairs,
Govt. of India, New Delhi.

.....Respondent

Advocates for petitioners : Mr. Nagendra Rai, Sr. Adv.,
Mr. A.C. Buragohain, Addl. AG.
Mr. B. Gogoi, Sr. GA, Assam.

Advocates for respondents : Mr. R. Sachar, Sr. Adv.,
Mr. B.C. Das, Sr. Adv,
Mr. D.N. Bhattacharjee,
Mr. J. Mollah,
Mr. S. Islam,
Mr. A. Bhanu,
Mr. N. Dutta,
Mr. S. Shyam,
Mr. R. Sarma, Assistant SG,
Mr. M.U. Mahmud,
Mr. M. Khan,
Mr. A. Saikia,
Mr. A.T. Sarkar,
Mr. S.K. Roy,
Mr. M.I. Hussain, Advocates.

(2) WA No.258/2008

Firoza Khatoon @ Fariza Khatoon

W/o Mazid Ali
Village- Baghmara Char,
P.O. Baghmara Char,
P.S. Baghbar, Dist. Barpeta, Assam.

.....Appellant

-Versus-

1. The State of Assam,
Represented by the Commissioner & Secretary to the Govt. of Assam, Deptt. of Home, Dispur, Guwahati-6.

2. The Superintendent of Police (B),
Barpeta District, P.O. & Dist. Barpeta, Assam.

3. The Union of India,
Represented by the Secretary to the Govt. India, Ministry of Home Affairs, Sastri Bhawan, Telak Marg, New Delhi.

.....Respondents

Advocates for appellant : Mr. M.A. Sheikh,
Ms. A. Begum,
Mr. S.H. Rahman, Advocates.

Advocates for Respondents : Mr. A.C. Buragohain, Addl. AG, Assam,
Mr. R. Sharma, Asstt. S.G.I.

(3) <u>WA No.264/2008</u>

1. Mabesh Ali @ Nabesh Ali,
S/o Late Sukur Mahmud.

2. Musstt. Jarina Begum,
W/o Mabesh Ali @ Nabesh Ali.

3. Md. Jahrul Ali,
S/o Mabesh Ali @ Nabesh Ali.

4. Miss. Johura Begum,
D/o Mabesh Ali @ Nabesh Ali,

Appellants Nos.3 and 4 are minors and they are represented by their father and natural guardian the appellant No.1.
All are residents of Vill. Kumulli Para,
PO- Goraimari Bazar, PS. Barpeta, Dist. Barpeta, Assam.

.....Appellants

-Versus-

1. The State of Assam,
Represented by its Commissioner & Secy., Home Deptt., Dispur, Ghy-6.

2. The Dy. Commissioner,
Barpeta, Assam.

3. The Superintendent of Police,
Barpeta District, Barpeta, Assam.

4. The Officer In-Charge,
Barpeta Police Station, Barpeta, Assam.

5. The Union of India,
Represented by Secretary, Home,
Govt. of India, New Delhi

.....Respondents

Advocates for Appellants : Mr. M.U. Mahmud,
Mr. M. Khan,
Mr. A. Saikia,
Mr. A.T. Sarkar,
Mr. S.K. Roy, Advocates.

Advocates for Respondents : Mr. A.C. Buragohain, Addl. AG, Assam,
Mr. R. Sharma, Asstt. S.G.I.

(4) <u>WA No.265/2008</u>

Mustt. Kulsan Nessa
W/o Mamrej Ali,
D/o Late Abdus Sattar Ali,
Vill. Barmara, PO- Rauli, PS- Sarthebari, Dist. Barpeta, Assam

.....Appellant

-Versus-

1. The Union of India,
Rep. by the Secy. of the Ministry of Home Affairs,
Govt. of India, New Delhi.

2. The State of Assam,
Rep. by the Commissioner & Secy. to the Govt. of Assam, Home Deptt., Guwahati-6

3. The Director General of Police [Admn.]
Assam, Ulubari, Guwahati-7.

4. The Superintendent of Police [B],
Barpeta, PO/Dist. Barpeta

.....Respondents

Advocates for appellant : Mr. R. Ali,
Mr. N.N. Ahmed,
Mr. M.H. Ahmed,
Ms. N. Sultana, Advocates.

Advocates for respondents : Mr. R. Sharma, Asstt. S.G.I.,
Mr. A.C. Buragohain, Addl. AG, Assam.

(5) <u>WA No.266/2008</u>

Hamida Khatun,
D/O Md. Hatem Ali,
W/O Md. Habibar Rahman,
Vill. Baghmara Char, PS- Baghbor,
Dist. Barpeta, Assam.

.....Appellant

-Versus-

1. The State of Assam,
Rep. by the Commissioner & Secy. To the Govt. of Assam, Deptt. of Home, Dispur, Guwahati-6.

2. The Superintendent of Police [B],
Barpeta, PO/Dist. Barpeta, Assam

.....Respondents

Advocates for appellant : Mr. M.A. Sheikh,
Ms. A. Begum,
Mr. K.U. Ahmed,
Mr. M.H. Choudhury,
Mr. M. Hussain, Advocates.

Advocates for respondents : Mr. A.C. Buragohain, Addl. AG, Assam,
Mr. B.J. Talukdar, Sr. GA, Assam.

(6) <u>WA No.268/2008</u>

Supia Khatun
W/O Shajahan Ali,
D/O Abdul Latif,
Vil. Nadiapara, PS. Baghbor,
Dist. Barpeta, Assam.

.....Appellant

- Versus -

1. The State of Assam,
Rep. by the Secy., Home Deptt.,
Dispur, Ghy-6.

2. The Union of India,
Rep. by the Secy., Ministry of Home,
Govt. of India, New Delhi.

3. The Foreigners Registration Officer,
Barpeta, Dist. Barpeta.

4. The Superintendent of Police [B],
Barpeta, Assam.

.....Respondents

Advocates for appellant : Mr. J. Abedin,
Mr. F.U. Borbhuya,
Mr. A. Matin,
Mr. A.H.M.R. Choudhury, Advocates.

Advocates for respondents : Mr. A.C. Buragohain, Addl. AG, Assam,
Mr. R. Sharma, Asstt. S.G.I.,
Mr. C. Baruah, Central Govt. Advocate.

(7) <u>WA No.280/2008</u>

Mustt. Afkhatun Nessa
W/O Md. Yunus Ali,
R/O Vill. No.1 Bordoloni,
PO. Mandia, PS. Baghbar,
Dist. Barpeta, Assam.

.....Appellant

- Versus -

1. The State of Assam,
Rep. by the Secy. to the Govt. of Assam,
Home Deptt., Dispur, Ghy-6.

2. The Union of India,
Rep. by the Secretary, Ministry of Home Affairs,
Govt. of India, New Delhi.

3. The Foreigners Registration Officer,
Barpeta, PS/Dsit. Barpeta, Assam.

4. The Superintendent of Police,
Barpeta, PS/Dist. Barpeta, Assam.

.....Respondents

Advocates for appellant : Mr. A. Choudhury,
Mr. S. Islam,
Mr. F.K.R. Ahmed, Advocates.

Advocates for respondents : Mr. A.C. Buragohain, Addl. AG, Assam,
Mr. R. Sharma, Asstt. S.G.I.

(8) <u>WA No.281/2008</u>

Mustt. Sarbhanu Begum
W/O Md. Thandu Mia,
R/O Vill. No.1 Bordoloni, PO. Mandia,
PS. Baghbar, Dist. Barpeta, Assam.

.....Appellant

- Versus -

1. The State of Assam,
Rep. by the Secy. to the Govt. of Assam, Home Deptt., Dispur, Ghy-6.

2. The Union of India,
Rep. by Secy., Ministry of Home Affairs, Govt. of India, New Delhi.

3. Foreigners Registration Officer,
Barpeta, Assam.

4. The Supdt. of Police (B),
Barpeta, PS/Dist. Barpeta, Assam

.....Respondent

Advocates for appellant : Mr. A. Choudhury,
Mr. S. Islam,
Mr. F.K.R. Ahmed,
Mr. A. Ali, Advocates.

Advocates for respondents : Mr. A.C. Buragohain, Addl. AG, Assam,
Mr. R. Sharma, Asstt. S.G.I.

(9) <u>WA No.370/2008</u>

Md. Abdul Hannan
S/O Lt. Abdus Sukkur,
R/O Uttar Noabil, Ps. Murajhar,
Dist. Nagaon, Assam.

.....Appellant

- Versus -

1. The State of Assam,
Rep. by the Secy. to the Govt. of Assam, Home Deptt., Dispur, Ghy-6.

2. The Union of India.

3. The Superintendent of Police [B],
Nagaon, Dist. Nagaon

.....Respondents

Advocates for appellant : Mr. A.B. Choudhury,
Mr. S.A. Choudhury,
Mr. G. Dutta, Advocates.

Advocates for respondents : Ms. B. Goyal, GA, Assam,
Mr. R. Sharma, Asstt. S.G.I.

(10) <u>WA No.59/2009</u>

Dalimon Nessa,
D/O-Halim Mia,
W/O-Pahar Khan,
Vill. Balarpathar,
P.S. Baghbor,
Dist-Barpeta, Assam.

.....Appellant

- Versus -

1. The Union of India,
Through Secretary, Ministry of Home Affairs, Government of India, New Delhi.

2. The State of Assam,
Represented by the Commissioner & Secretary, Home Department, Government of Assam, Dispur, Guwahati-6.

3. The Superintendent of Police (B), Barpeta, Assam.

.....Respondent

Advocates for appellant : Mr. A. Matin,
Mr. F.U. Borbhuya,
Mr. S. Islam, Advocates.

Advocates for respondents : Mr. R. Sharma, Assistant SG,
Mr. C. Baruah Central Govt. Advocate,
Mr. B. Goyel Sarma, GA, Assam.

(11) <u>WA No.71/2009</u>

Mukshed Ali @ Makshed Ali
S/O Md. Taizuddin @ Taijuddin @ Tajimuddin @ Tajim Uddin @ Ijuddin,
R/O Vill. Batamari @ Batamara,
PO/PS. Mukalmua, Dist. Nalbari, Assam.

.....Appellant

- Versus -

1. The State of Assam,
Rep. by the Commissioner & Secy.,
Home Deptt., Govt. of Assam,
Dispur, Ghy-6.

2. IM[D]T Foreigners Tribunal,
Nalbari, PO/PS. Nalbari, Assam.

3. IM[D]T Foreigners Registration Officer,
Nalbari, Assam.

4. The Dy. Commissioner,
Nalbari, Assam.

5. The Superintendent of Police [SP],
[Border], Nalbari, Assam.

6. The Police In-Charge [Officer],
Mukalmua, Dist. Nalbari, Assam

.....Respondents

Advocates for the appellant : Mr. B. Islam,
Mr. A. Haque,
Mr. A. Hussain,
Mr. M.U. Mahmud,
Mr. B. Islam,
Mr. S.A. Mondal,
Mr. S. Hoque, Advocates.

Advocates for respondents : Mr. A.C. Buragohain, Addl. AG, Assam,

(12) WA No.171/2010

Shonabhanu @ Shonabhanu @ Shonabhan @ Shona Khatun.

.....Appellant

- Versus -

The Union of India & Ors.

.....Respondents

Advocates for the appellant : Mr. M.U. Mahmud,
Mr. A.T. Sarkar,
Mr. S.K. Roy,
Mr. M.I. Hussain,
Mr. S. Hoque, Advocates.

Advocates for respondents : Mr. R. Sharma, Asstt. S.G.I.
Mr. B. Goyal, GA, Assam.

(13) WA No.313/2011

Sahabul Hussain
S/O Late Mojimuddin Ahmed,
R/O Vill. Bahati, P.S. Dudhnoi,
Dist. Goalpara, Assam.

.....Appellant

- Versus -

1. The Union of India,
Represented by the Secy. of Ministry of Home Affairs, Govt. of India, New Delhi-1

2. The State of Assam,
Represented by the Commissioner & Secy. to the Govt. of Assam, Home Deptt., Dispur, Guwahati-6.

3. The Superintendent of Police (B),
Goalpara, Assam-783101.

4. The Foreigners Tribunal,
Goalpara, Assam-783101.

5. The Election Officer,
Goalpara, Assam, Pin-783101.

.....Respondents

Advocates for the appellant : Mr. M.U. Mahmud,
Mr. A.T. Sarkar,
Mr. M.I. Hussain,
Mr. S. Hoque,
Mr. H.R. Choudhury,
Mr. G.P. Bhowmik,
Mr. R. Hazarika, Advocates.

Advocates for respondents : Mr. R. Sharma, Asstt. S.G.I.
Mr. B. Goyal, GA, Assam.

BEFORE
THE HON'BLE MR. JUSTICE B.P. KATAKEY
THE HON'BLE MR. JUSTICE A.K. GOSWAMI
THE HON'BLE MR. JUSTICE UJJAL BHUYAN

Dates of Hearing : 18.09.2012, 19.09.2012, 20.09.2012, 21.09.2012, 24.09.2012, 26.09.2012, 27.09.2012 & 28.09.2012

Date of Judgment & Order : ***3rd January, 2013***

JUDGMENT AND ORDER

[***Katakey, J.***]

The State of Assam, represented by the Commissioner & Secretary, Home Department, as well as the Superintendent of Police, Barpeta, have filed the Review Petition No.22/2010 seeking review of the judgment and order dated 01.02.2010 passed by a Division Bench

of this Court in Writ Appeal No.238/2008 (***Moslem Mondal & ors. Vs. Union of India & ors.*** reported in ***2010(2) GLT 1***), on the grounds set forth in the review petition. On 28.04.2010 when the review petition was taken up for consideration by a Division Bench, a prayer was made by the learned counsel appearing for the appellants in WA No.238/2008 to hear all the learned counsel appearing for the parties in the appeal including amicus curiae assisting the Court and to hear the review petition along with other matters, which was accepted by the Court. Vide order dated 17.05.2010, while issuing notice in the review petition, the aforesaid Division Bench consisting of the Hon'ble the then Chief Justice and the Hon'ble Judge, who was one of the members of the Division Bench which decided the WA No.238/2008, referred the matter to a Full Bench considering the "*importance of the issue involved in the matter and that there are number of judgments, which if are not taking contrary view but are taking different view*" than the view taken by the Division Bench in the aforesaid judgment dated 01.02.2010 passed in WA No.238/2008. Accordingly the review petition along with other connected matters, relevant facts of which are discussed below, relating to detection and deportation of foreigners under the provisions of Foreigners Act, 1946 (in short 1946 Act) read with Foreigners (Tribunals) Order, 1964 (in short the 1964 Order), have been placed before this Full Bench for hearing.

Relevant facts in Review Petition No.22/2010

2. This review petition arises out of the judgment and order dated 01.02.2010 passed by a Division Bench of this Court in Writ

Appeal No.238/2008, which was filed by Moslem Mondal and 17 others, who were the petitioners in WP(C) Nos.1355/2008, 1358/2008, 1359/2008 and 1364/2008, challenging the common judgment and order dated 25.07.2008 passed in WP(C) No.1094/2008 and batch, including the aforesaid writ petitions.

3. The Division Bench vide order dated 14.08.2008 while admitting the appeal for hearing, passed an interim direction to re-examine the cases of each one of the appellants by the Tribunal after giving an appropriate opportunity to them as well as to the State to produce such evidence as each of the parties deem fit in the circumstances. The Tribunal was directed to conduct fresh enquiry and to record appropriate conclusion based on the evidence that may be produced by either parties and to place the same before the Division Bench. Accordingly, the Tribunal submitted 6(six) reports, 4(four) pertaining to WA No.238/2008 and one each in connection with WA Nos.264/2008 and 265/2008. Copies of the said reports were also furnished to the learned counsel appearing for the parties. The Division Bench in its order dated 02.12.2008 passed in WA Nos.238/2008, 264/2008 and 265/2008 discussed the aforesaid reports. The petitioners in WP(C) Nos.1355/2008 and 1359/2008 were found to be Indian citizens. One of the petitioners in WP(C) No.1358/2008, namely, Shri Iman Ali and his 4(four) children were found to be Indian citizens. The wife, however, was concluded to be a foreigner. In WP(C) No.1364/2008, while the husband was found to be not an Indian citizen along with the children, his wife was found to be an Indian citizen. The

appellants in WA No.264/2008 were found to be foreigners and the sole appellant in WA No.265/2008 an Indian citizen.

4. The Division Bench thereafter decided only the WA No.238/2008, filed by 18 appellants, vide judgment and order dated 01.02.2010 interfering with the decision of the learned Single Judge in WP(C) No.1355/2008, where 4 out of 18 appellants were the petitioners, setting aside the same, apart from setting aside the order dated 31.12.2007 passed in F.T. Case No.124/2007, by upholding the finding recorded by the Tribunal and its opinion expressed in its report dated 15.10.2008, to the extent the same are consistent with the finding recorded in the aforesaid judgment passed by the Division Bench. The Division Bench, however, by the said judgment and order did not decide WA No.238/2008 in so far as it concerns the other appellants, who were the writ petitioners in WP(C) Nos.1358/2008, 1359/2008 and 1364/2008, apart from WA Nos.264/2008 and 265/2008.

5. In paragraph 43 of the aforesaid judgment and order dated 01.02.2010 the Division Bench formulated the following questions of law for decision:-

> "**(i) When proceedings under the Foreigners Act are initiated before the Tribunal constituted under the Foreigners Order, 1964 on whom does the burden of proof lie?**
>
> **(ii) Whether the State is required to prima facie satisfy the Tribunal before a person, against whom proceedings are initiated, is called upon to discharge the burden under Section 9 of the Foreigners Act?**
>
> **(iii) Whether the documents prepared under the Census Act and the Electoral Rolls prepared for the purpose of elections under the Representation of the People Act are admissible piece of**

evidence and if they are admissible what is the evidentiary value of such documents?

(iv) What is the standard of proof in such proceedings?

(v) What is the role of the Tribunal in such proceedings?"

6. The first question was answered by the Division Bench to the effect that in view of the expression 'onus of proof' occurring in Section 9 of the 1946 Act, which reflects what Section 106 of the Evidence Act envisages, and does not replace Section 101 of the Evidence Act completely, the initial burden lies on the State to establish, to the satisfaction of the Tribunal, that the grounds on which it claims the proceedee to be foreigner, are true, which will be confined to the grounds on which the State rests its case and it will, however, have no responsibility to prove, other than the grounds which State must prove, that the proceedee is not an Indian citizen. It has further been held that the proceedee, thereafter, has to discharge his burden of proof that he is an Indian citizen as the State is not expected to prove a negative fact, namely, that the proceedee is not an Indian citizen.

7. The Division Bench, however, while answering the second question, placing reliance on the decision of the Apex Court in ***Sarbananda Sonowal(II) Vs. Union of India*** reported in ***(2007)1 SCC 174***, took the view that the Tribunal is not required to arrive at a prima facie satisfaction before initiating a proceeding against an individual under the Foreigners Act.

8. In answering the 3rd question it has been held that the documents prepared under the Census Act are not admissible in evidence, in view of Section 15 of the said Act. It has, however, been

held that the voters list is certainly a relevant piece of evidence in the enquiry of nationality of a person and the entries in the voters list are admissible in evidence.

9. The standard of proof in a proceeding before the Tribunal under the 1946 Act, which is the fourth question, is held to be the same as that in a civil suit i.e. preponderance of probabilities.

Relevant facts in the Writ Appeals

WA No.258/2008

10. The Superintendent of Police, Barpeta, suspecting the appellant as illegal migrant, within the meaning of the Illegal Migrants (Determination by Tribunals) Act, 1983, (in short the 1983 Act), made a reference under Section 8(1) of the said Act read with Rule 9(A) of the Rules framed thereunder, on the basis of which Case No.1311/2003 was registered before the IM(D)T, Barpeta, which proceeding was subsequently transferred to the Foreigners Tribunal and accordingly F.T. Case No.243/2006 was registered. The said proceeding proceeded ex-parte against the appellant as she did not contest the same despite service of notice. The Tribunal on the basis of the evidence adduced by the State passed the order dated 03.10.2007 declaring the appellant to be a foreigner entering into Assam from the specified territory after 25.03.1971. The said order was put to challenge by the appellant in WP(C) No.6560/2007, which was dismissed by the learned Single Judge vide order dated 25.07.2008, giving rise to the present appeal. Like few other appeals, a Division Bench of this Court on 19.09.2008, while

admitting the appeal for hearing, passed an interim order to the effect that the appellant would be entitled to the same interim relief as passed on 14.08.2008 in WA No.238/2008, meaning thereby giving a further opportunity to the parties to adduce evidence before the Tribunal with a further direction to the Tribunal to pass necessary order and to remit the records to the writ appellate court. The said order was passed on the basis of the case as projected by the appellant that she did not get a reasonable opportunity of being heard before the Tribunal for which she could not produce the relevant documents to demonstrate that she is an Indian citizen and not a foreigner.

Pursuant to the said order passed by the writ appellate court, the appellant appeared before the Tribunal and examined three witnesses including herself and proved 5(five) documents, which are marked as Exts.-A to F. The State also examined the Local Verification Officer. The witnesses were cross-examined by the respective parties. The Tribunal upon appreciation of the evidence on record as adduced by the parties, passed the order dated 02.03.2009 opining that the appellant could prove that she is an Indian citizen and as such is not a foreigner within the meaning of 1946 Act.

WA No.264/2008

10.1. Reference Case No.438/2008 was registered against the appellant No.1 only, namely, Md. Nabesh Ali, in the IM(D)T, Barpeta on the basis of the reference dated 01.08.2002 made by SP (B) Barpeta, under Section 8(1) of the 1983 Act alleging that the appellant No.1, Nabesh Ali, entered into India after 25.03.1971. The said proceeding, however, was transferred to the Foreigners Tribunal (I), Barpeta, in

view of the judgment passed by the Apex Court in ***Sarbananda Sonowal (I) Vs. Union of India & anr.*** reported in ***(2005)5 SCC 665***. F.T. Case No.103/2007 was then registered against the appellant No.1 only. Both the appellant No. 1 along with the appellant No.2 (though there was no reference against the appellant No.2) filed their written statement on 19.07.2007 contending inter alia that they are Indian nationals. In the said proceeding the State examined one witness in support of the reference who was duly cross examined by the appellants. The appellants, however, did not adduce any evidence and after cross examination of the witness examined by the State they in fact did not appear in the proceeding. The Tribunal thereafter passed the order on 29.12.2007 opining that the appellant Nabesh Ali and "family members" are foreigners who have entered into Assam after 25.03.1971 as alleged in the reference. It has also been opined that the children of the appellants, though born in Assam, will follow the nationality of their parents. The appellants along with the children being aggrieved preferred WP(C) No.546/2008, which having been dismissed by the learned Single Judge vide common judgment and order dated 25.07.2008, preferred the present writ appeal, wherein a Division Bench of this Court while admitting the appeal passed an interim order as was passed in WA No.238/2008 thereby giving the opportunity to the parties including the appellants to adduce evidence with a further direction to the Tribunal to submit its opinion based on the evidence to be adduced by the parties to the writ appeal. Accordingly the evidence were led by the parties and a number of documents were also proved by them. The learned Member, Foreigners Tribunal vide order dated 18.10.2010 upon consideration of the evidence adduced by the parties,

both oral and documentary, has opined that the appellant Nos.1 and 2 have failed to prove that they have been living in Assam since before 25.03.1971 and as such they cannot be declared as Indian citizens.

WA No.265/2008

10.2. On the basis of the reference made by the Superintendent of Police (B) Barpeta, Assam, Case No.1283/2003 was initially registered against the appellant in the IM(D)T, Barpeta, wherein notice was issued to the appellant. The said proceeding, however, proceeded ex parte against the appellant because of his non-appearance. The said proceeding was subsequently transferred to the Foreigners Tribunal in view of the judgment passed by the Apex Court in ***Sarbananda Sonowal (I)*** and renumbered as Case No.24(III)/2007 in the Foreigners Tribunal (III), Barpeta. Though notice was again issued by the Tribunal, as the appellant did not appear, the proceeding proceeded ex parte. In the said proceeding the Tribunal recorded the evidence of witness examined by the State. The Tribunal thereafter vide order dated 31.10.2007 opined the appellant to be foreigner coming to Assam after 25.03.1971. The said order was put to challenge by the appellant in WP(C) No.118/2008, which having been dismissed, the appellant preferred this appeal. A Division Bench vide order dated 08.09.2008 admitted the appeal and passed the same interim directions, which has been passed on 14.08.2008 in WA No.238/2008 allowing the parties to adduce fresh evidence before the Tribunal with a further direction to the Tribunal to decide the proceeding afresh and to remit the record to the writ appellate court, after recording its opinion based on evidence. The appellant was also allowed to go on bail. Pursuant to the aforesaid

interim direction issued by a Division Bench the appellant and the respondents appeared before the Tribunal and adduced both oral and documentary evidence. The witnesses examined were duly cross examined by the respective parties. The Member, Foreigners Tribunal III, Barpeta, on marshalling the evidence adduced by the parties, both oral and documentary, vide order dated 20.10.2008 has opined that the appellant is an Indian National.

WA No.266/2008

10.3. On the basis of the reference made by the Superintendent of Police, Barpeta under Section 8(1) of the 1983 Act read with Rule 9(A) of the Rules framed thereunder, Case No.1312/2003 was registered before the IM(D)T, Barpeta, which proceeding was subsequently transferred to the Foreigners Tribunal, in view of the judgment passed by the Apex court in ***Sarbananda Sonowal(I)***. F.T. Case No.302/2006(B) was thereafter registered against the appellant. The said proceeding proceeded ex-parte against the appellant as despite service of notice she did not contest. In the said proceeding the Local Verification Officer was examined by the State. The Tribunal upon appreciation of the evidence adduced passed the order dated 03.10.2007 declaring the appellant to be a foreigner entering into Assam from the specified territory after 25.03.1971. Being aggrieved the appellant preferred WP(C) No.6564/2007, which has been dismissed by the learned Single Judge vide common judgment and order dated 25.07.2008. The appellant thereafter preferred the present appeal, wherein an interim order, as passed on 14.08.2008 in WA No.238/2008 was also passed, thereby directing the Tribunal to decide the

proceeding afresh after giving reasonable opportunity to the parties to adduce evidence, in view of the allegation made by the appellant of denial of reasonable opportunity of hearing by the Tribunal. The appellant accordingly appeared before the Tribunal and adduced evidence, both oral and documentary. Three witnesses including the appellant herself were examined in the proceeding, apart from proving 6(six) documents, which are marked as Exts.-A to F. The State also examined the Local Verification Officer as witness and proved the report submitted by him to the effect that the appellant entered into Assam from the specified territory after 25.03.1971. The Tribunal upon appreciation of the evidence on record as adduced by the parties passed the order dated 18.02.2009 opining that the appellant could prove that she is an Indian citizen and not a foreigner within the meaning of 1946 Act. The said order along with the evidence as adduced were transmitted to the writ appellate court, pursuant to the interim direction issued.

WA No.268/2008

10.4. The Superintendent of Police, Barpeta made a reference under Section 8(1) of 1983 Act read with Rule 9(A) of the Rules framed thereunder to the IM(D)T, Barpeta, suspecting the appellant to be an illegal migrant within the meaning of 1983 Act, on the basis of which Case No.2289/2003(B) was registered in the IM(D) Tribunal. The said proceeding was subsequently transferred to the Foreigners Tribunal, Barpeta, in view of the judgment passed by the Apex Court in ***Sarbananda Sonowal(I)*** and consequently F.T. (2nd) Case No.215/2006(B) was registered and numbered. The said proceeding,

however, proceeded ex-parte against the appellant as she did not contest the same despite service. The Tribunal thereafter on the basis of the evidence adduced by the State passed the order dated 29.11.2007 declaring the appellant to be a foreigner entering into Assam from the specified territory after 25.03.1971, thereby answering the reference against the appellant. Being aggrieved the appellant preferred WP(C) No.1039/2008, which was dismissed vide common judgment and order dated 25.07.2008 passed in a batch of writ petitions. Hence the appellant preferred the present writ appeal. A Division Bench of this Court vide order dated 19.09.2008 while admitting the appeal, passed an interim order, as has been passed in WA No.238/2008, thereby allowing the parties to adduce evidence before the Tribunal, with a further direction to the Tribunal to pass necessary order and to transmit the record. The said order was passed basically on the contention of the appellant that she was denied the reasonable opportunity of being heard by the Tribunal for which she could not adduce evidence to demonstrate that she is not a foreigner. The parties accordingly appeared before the Tribunal and adduced evidence. The Tribunal on the basis of the evidence adduced, both oral and documentary, passed the order dated 18.02.2009 opining that the appellant is a foreigner as she could not discharge her burden of proof that she is an Indian citizen.

WA No.280/2008

10.5. F.T. Case No.32/2006(B) was registered in the Foreigners Tribunal, Barpeta on the basis of the reference made by the Superintendent of Police, Barpeta suspecting the appellant to be a

foreigner coming into Assam from the specified territory after 25.03.1971. The appellant on receipt of the notice entered appearance and filed the written statement and also photocopies of certain documents in support of her claim that she is not a foreigner but an Indian citizen. The appellant though appeared before the Tribunal on the subsequent dates through the learned counsel, she, however, did not appear on 17.08.2007, when one witness was examined by the State. The appellant was thereafter vide order dated 29.09.2007 given a further opportunity to adduce evidence. Despite the opportunity granted, no evidence was led. The Tribunal on the basis of the evidence on record passed the order dated 29.11.2007 opining that the appellant is a foreigner entering into Assam from the specified territory after 25.03.1971, thereby answering the reference in affirmative and against the appellant.

Being aggrieved the appellant preferred WP(C) No.12/2008, which has been dismissed by the learned Single Judge vide common judgment and order dated 25.07.2008 passed in a batch of writ petitions including WP(C) No.12/2008. The appellant then preferred the present appeal, wherein a Division Bench of this Court vide order dated 24.09.2008 while admitting the appeal for hearing passed the similar interim order, as passed on 14.08.2008 in WA No.238/2008, thereby giving a further opportunity to the appellant to adduce the evidence to prove that she is an Indian citizen. Consequently the parties including the appellant appeared before the Tribunal and adduced evidence. While the appellant examined three witnesses including herself and proved 9(nine) documents, the State examined one witness and proved the report submitted by the Inquiry Officer. The Tribunal upon

appreciation of the evidence adduced passed the order dated 07.02.2009 opining that the appellant has failed to prove that her family members have been living in Assam prior to 25.03.1971 and thus failed to prove that she is an Indian citizen, thereby concurring with its earlier ex-parte order dated 29.11.2007. The entire record of the said proceeding including the aforesaid order dated 07.02.2009 has been transmitted to the Registry of this Court pursuant to the aforesaid interim order passed by the writ appellate court.

WA No.281/2008

10.6. The Superintendent of Police, Barpeta made a reference under the provisions of 1964 Order suspecting the appellant as foreigner coming to Assam from the specified territory after 25.03.1971, on the basis of which F.T. Case No.33/2006(B) was registered in the Foreigners Tribunal, Barpeta. In due course of time the notice was issued to the appellant, on receipt of which she appeared through the learned counsel. The appellant also filed the written statement denying that she is a foreigner and contending inter alia that her father Saheb Ali was a voter in respect of No.51 Jania LAC, whose name appeared in the electoral rolls of 1966 as well as 1970 and after her marriage to Jhandu Mia of village No.1 Bardalani, she became the resident of that village and her name appeared in the electoral roll of 1997 in respect of Baghbar LAC. The appellant also annexed copies of the aforesaid electoral rolls, apart from few certificates issued by the village Headman and others, to the written statement. In the said proceeding the State adduced evidence first by examining the Local Verification Officer, who proved his report. Though the said witness was

cross-examined by the appellant, she, however, did not adduce any evidence despite the opportunity given. The Tribunal vide order dated 22.11.2007 opined that the appellant is a foreigner coming to Assam from the specified territory after 25.03.1971. The said order was put to challenge by the appellant in WP(C) No.8/2008, which was dismissed by the learned Single Judge vide common judgment and order dated 25.07.2008. The appellant then preferred the present appeal, wherein the similar interim order as was passed on 14.08.2008 in WA No.238/2008 was passed. Consequently the appellant appeared before the Tribunal and adduced her evidence. The Tribunal upon appreciation of the evidence on record, as adduced by the parties, passed the order dated 07.02.2009 that the appellant is not a foreigner within the meaning of 1946 Act. The said order along with the entire proceeding have been sent to the Registry as directed vide the aforesaid interim order passed by the writ appellate court.

WA No.370/2008

10.7. This appeal arises out of the judgment and order dated 30.09.2008 passed by the learned Single Judge in WP(C) No.5393/2002, dismissing the writ petition filed by the appellants, wherein the orders passed by the IM(D) Tribunal and the IM(D) Appellate Tribunal were put to challenge. Reference was made by the Superintendent of Police, Nagaon under Section 8(1) of the 1983 Act to the IM(D) Tribunal, Hojai, Nagaon, for deciding as to whether the appellant No.1 Md. Abdul Hannan is or is not an illegal migrant coming to India after 25.03.1971. On the basis of the said reference IM(D)T Case No.8/1995 was registered and notice was issued to the appellant

No.1. The record does not reveal issuance of any notice to other appellants. The appellant No.1, however, filed the written statement on behalf of all the appellants, namely, appellant Nos.2, 3 and 4, who are the children of the appellant No.1, contending inter alia that they are Indian national and his father's name was also recorded in the electoral roll of 1966 and his name was recorded in the electoral roll of 1970 in respect of No.93 Hojai Legislative Assembly Constituency. The appellants also adduced evidence, both oral and documentary in support of their pleadings. The IM(D) Tribunal answered the reference in affirmative and in favour of the State declaring the appellant No.1 Md. Abdul Hannan as an illegal migrant within the meaning of 1983 Act, vide order dated 28.02.2002. The appeal being Appeal Case No.6/2002 preferred by the appellants was dismissed by the Appellate Tribunal vide order dated 18.07.2002. WP(C) No.5393/2002 was thereafter filed challenging both the aforesaid orders, which was dismissed by the learned Single Judge vide judgment and order dated 30.09.2008. Being aggrieved the appellants preferred the present appeal.

A Division Bench of this Court on 03.12.2008 passed an order to the effect that the appellants are entitled to similar interim direction as has been passed in WA No.238/2008 (***Moslem Mandal***'s case), whereby and whereunder the Tribunal was directed to allow both the parties a further opportunity to adduce evidence in support of their claims. Accordingly Case No.F.T./H/1/09 was registered in the Foreigners Tribunal, Hojai, Sankardev Nagar. The appellants led fresh evidence in the said proceeding. The Tribunal upon appreciation of the evidence on record as adduced passed the order dated 30.04.2009 to

the effect that the appellants are foreigners as they migrated illegally to India from Bangladesh after 25.03.1971.

WA No.59/2009

10.8. This appeal is against the judgment and order dated 30.09.2008 passed by the learned Single Judge in WP(C) No.1535/2008, whereby and whereunder the writ petition filed by the appellant challenging the order dated 28.11.2007 passed by the Foreigners Tribunal in F.T. Case No.283/2006 has been dismissed. On the basis of the reference made by the Superintendent of Police(B), Barpeta to the IM(D)T, Barpeta under Section 8(1) of the 1983 Act doubting the appellant to be an illegal migrant, Case No.IMDT 2384/03 was registered. Notice was accordingly issued to the appellant, on receipt of which the appellant appeared and filed the application seeking time to file the written statement. The appellant, however, for the reasons best known to her did not appear on the subsequent dates and as such an order was passed on 10.12.2003 to proceed ex-parte. The said proceeding was transferred to the Foreigners Tribunal, in view of the judgment passed by the Apex Court in ***Sarbananda Sonowal(I)*** and accordingly F.T.(2nd) Case No.269/06 was registered. Fresh notice was thereafter issued by the Foreigners Tribunal on 26.07.2006 to the appellant asking her to show-cause as to why she should not be declared as foreigner within the meaning of 1946 Act and 1964 Order. The record of the Tribunal does not reveal sending of a copy of the main grounds on which the appellant is alleged to be a foreigner, as required under the 1964 Order, except issuance of the said notice. The appellant, who appears to be an illiterate person, on receipt of the

notice entered appearance through the learned counsel and filed application for allowing time to file the written statement. The appellant, however, did not contest the proceeding thereafter. The Tribunal, therefore, proceeded ex-parte and after recording the evidence of the witness examined by the State passed the order dated 28.11.2007 answering the reference in the affirmative and in favour of the State by opining that the appellant came to Assam from the specified territory after 25.03.1971. The said order was put to challenge in the aforesaid writ petition, which has been dismissed, as noticed above.

WA No.71/2009

10.9. This appeal is directed against the judgment and order dated 23.01.2009 passed by the learned Single Judge in WP(C) No.2798/2004, dismissing the writ petition by affirming the order dated 03.02.2004 passed by the appellate Tribunal, in Appeal Case No.50/2003, affirming the order dated 11.04.2003 passed by the IM(D)T in Case No.3531/2000. On the basis of the reference made under Section 8(1) of the 1983 Act, Case No.3531/2000 was registered in the IM(D)T Nalbari, wherein the appellant on receipt of the notice entered appearance and filed the written statement denying that he is an illegal migrant within the meaning of the 1983 Act and also contended that he is an Indian national by birth. While the State examined three witnesses in support of the reference made, the appellant, however, did not adduce any oral evidence. The IM(D)T having marshalled the evidence on record, passed the order dated 11.04.2003 answering the reference in favour of the State and against

the appellant holding him to be an illegal migrant within the meaning of the 1983 Act.

Being aggrieved the appellant preferred Appeal No.50/2003 before the appellate Tribunal which has also been dismissed vide order dated 03.02.2004. The appellant, therefore, preferred the aforesaid writ petition and on its dismissal the aforesaid writ appeal. A Division Bench of this Court having regard to the contention of the appellant that he could not adduce evidence before the Tribunal, for no fault of his, while admitting the appeal, passed an interim order on 16.03.2009 directing the Foreigners Tribunal, Nalbari to allow the parties to adduce evidence and to pass appropriate order in the light of materials to be produced. Accordingly the F.T. Case (NAL) No.1/2009 was registered. The appellant in support of the contention that he is an Indian national examined three witnesses namely, the appellant himself, Smti. Damayanti Baishya, the Gaon Bura and Md. Mustaffa Ali, a retired L.P. school teacher. The appellant has also proved six documents, being the school certificate certifying that the appellant read up to Class II (Ext.-1); electoral roll 1966 and 1971 containing the name of his father Taizuddin in Chhaprapara village under No.61 LAC (Exts.-2 and 3); the annual patta issued for the year 1954-55 in the name of Taizuddin and others (Ext.-4); family identity card (ration card) (Ext.-5) and certificate issued by the village headman (Ext.-6).

The Tribunal on the basis of the fresh evidence adduced in the aforesaid proceeding, and pursuant to the aforesaid order dated 16.03.2009 passed by the Division Bench in the present appeal, passed the order dated 19.09.2009 answering the reference in favour of the State by opining that the appellant is a Foreigner who entered into

Assam from Bangladesh after 1982. A copy of the said order was also furnished to the learned counsel for the appellant.

Challenging the finding recorded in the said order dated 19.09.2009 the appellant filed an affidavit basically contending inter alia that though the appellant's father was present before the Tribunal on 08.07.2009 for recording his evidence, the Tribunal did not record his evidence. It has also been contended that Md. Taizuddin, Tajimuddin, Md. Tajimuddin is one and the same person, who is the father of the appellant and whose name is reflected in various documents proved by the appellant before the Tribunal. The appellant has also challenged the finding recorded by the Tribunal that his father is not alive.

WA No.171/2010

10.10. Reference was made by the Superintendent of Police, Goalpara on 26.06.1998 under Section 8(1) of the 1983 Act and Rule 9(A) of the Rules framed thereunder, doubting the appellant as illegal migrant, on the basis of which a proceeding was registered in IM(D) Tribunal, Goalpara, which was subsequently transferred to the Foreigners Tribunal, Goalpara, in view of the judgment passed by the Apex Court in ***Sarbananda Sonowal(I)***. F.T. Case No.1152/G/06 was then registered in the Tribunal at Goalpara. The appellant on receipt of the notice appeared and filed application seeking adjournment on 06.08.2008 for filing written statement and list of witnesses and accordingly time was granted. The case was again taken up on 20.08.2008 and 17.09.2008, when also the prayer for adjournment was made, which, however, was rejected on 17.09.2008 fixing 03.11.2008 for ex-parte hearing. The case was then taken up on 07.11.2008 for ex-

parte hearing and the Tribunal vide order passed on that date opined that the appellant is a foreigner. The said order was put to challenge in WP(C) No.4758/2009, which writ petition was also dismissed on 04.06.2010, giving rise to the present appeal.

WA No.313/2011

10.11. This appeal is directed against the order dated 4th May, 2011 passed by the learned Single Judge, dismissing WP(C) No.1959/2011, wherein the order dated 4th October, 2010 passed by the learned Member, Foreigners Tribunal, Goalpara in F.T. Case No.197/G/2006, declaring the appellant as foreigner, was put to challenge. The aforesaid proceeding was registered in the Tribunal, on the basis of the reference made by the Superintendent of Police. Though the appellant on receipt of the notice entered appearance, he, however, did not contest the proceeding subsequently. The appellant took at least eight adjournments for filing the written statement and affidavit including on 31st August, 2010, on which date, a further last chance was given to the appellant to file his written statement fixing 13th September, 2010. The prayer for adjournment was again made on that date by the appellant and the case was accordingly deferred to 4th October, 2010. Because of the conduct of the appellant, the engaged learned counsel had also withdrawn from the case. The appellant though was given sufficient opportunities to file his written statement and also the documents in order to prove that he is not a foreigner but an Indian national, he, however, did not avail such opportunity and delayed the proceeding by taking adjournments. A Division Bench of this Court vide order dated 14.11.2011 referred this appeal to the Full

Bench for decision and accordingly the appeal has come up for hearing before this bench.

11. We have heard Mr. Nagendra Rai, learned Sr. counsel appearing for the review petitioners as well as for the State of Assam in the writ appeals; Mr. R. Sachar, learned Sr. counsel appearing for the respondents in the review petition; Mr. B.C. Das, learned Sr. counsel appearing for the respondent No.6 in the review petition; Mr. M.U. Mahmud, Mr. G.P. Bhowmik, Mr. T.J. Mahanta, Mr. S.K. Ghosh, Mr. A.R. Sikdar, Mr. I. Uddin, Mr. H.R.A. Choudhury, Mr. M.A. Sheikh, Mr. D. Sur, Mr. P.B. Mazumdar, Mr. A.B. Siddique, Mr. M.H. Choudhury, Dr. B. Ahmed, Mr. N.N. Upadhyay, learned advocates; Mr. H.R.A. Choudhury, Mr. A.B. Choudhury, Mr. D.P. Chaliha, learned Sr. counsel and Mr. Suman Shyam learned counsel appearing for the parties. We have also heard Mr. R. Sharma, learned A.S.G.I. and Mr. A.C. Buragohain, learned Addl. Advocate General, Assam.

Submissions of the learned counsel for the parties in Review Petition and Writ Appeals

12. Mr. Sachar, learned Sr. counsel, appearing for the respondents in the Review Petition, who were the appellants in WA No.238/2008, raised a preliminary objection relating to the maintainability of the reference of the Review Petition to the Full Bench for hearing, contending that such reference is not maintainable in view of the provisions of Gauhati High Court Rules. Referring to Rule 5 of Chapter-X of the Gauhati High Court Rules, which provides for presentation of the application seeking review by way of motion in open

Court to the Division Court of whose judgment a review is sought, or, if the Judge of such Division Court be not sitting together, to the senior of such Judges who may be then attached to the Court and present, has submitted that the reference of the review petition by a Division Bench of this Court vide order dated 17.05.2010 for decision to the Full Bench is not maintainable, the same being contrary to the aforesaid provisions of Gauhati High Court Rules. It has also been submitted that the review petition is to be heard by the bench, whose judgment is sought to be reviewed or by a bench consisting of at least one of the Judges constituting the earlier Division Bench, in case the other member of the earlier Division Bench is not present.

13. Mr. Nagendra Rai, learned Sr. counsel, appearing for the review petitioners as well as for the State of Assam in the writ appeals, in reply to the preliminary objection raised, referring to the order dated 17.05.2010 passed by a Division Bench of this Court consisting of the then Hon'ble Chief Justice and the Hon'ble Judge, who was one of the members of the Division Bench, which disposed of WA No.238/2008, has submitted that the Division Bench was within its competence to refer the cases to Full Bench having regard to the importance of the question of law involved in the review petition as well as other connected writ appeals, arising out of the decision given by the Tribunal constituted under the provisions of 1964 Order, as well as the views taken by other Division Benches contrary to the view taken by the Division Bench in the judgment dated 01.02.2010 passed in WA No.238/2008, in view of Rule 1 of the Chapter-VII of the Gauhati High Court Rules, which provides that whenever one Division Court differs

from any other Division Court upon a point of law or usage having the force of law, the case shall be referred for decision by a Full Bench. Referring to Rule 1(iii) of Chapter-II of the Gauhati High Court Rules, it has also been submitted by the learned Sr. counsel that the Hon'ble Chief Justice, whenever he thinks fit or on the requisition of any Division Court, may constitute a special Division Court consisting of three Judges, for hearing of any particular appeal, or any particular question of law arising in an appeal, or of any other matter and hence no illegality can be found in directing hearing of the review petition along with other writ appeals by a three Judges Bench, more so when the case involves a substantial question of law of general importance having regard to the foreigners issue, effecting the sovereignty and integrity of the country. The learned Sr. counsel submits that though in the order dated 17.05.2010 passed by a Division Bench referring the cases to a Full Bench, the cases in which the views contrary to the view taken by the Division Bench in WA No.238/2008 have not been mentioned, the said order was passed having regard to the pleadings in the review petition filed by the State of Assam wherein the cases in which the contrary view was taken has been pleaded. Referring to the decision in ***State of Rajasthan Vs. Prakash Chand & ors.*** reported in ***(1998)1 SCC 1***, it has also been submitted by the learned Sr. counsel that in any case the Hon'ble Chief Justice being the master of roster can withdraw any proceeding, even a part heard proceeding, from any Court and direct hearing of the same by any other Court including by a larger bench.

14. On the merit, criticizing the judgment passed by the Division Bench in ***Moslem Mondal***'s case, which is the subject matter in the review petition, it has been submitted by Mr. Rai, learned Sr. counsel that the view taken by the Division Bench relating to the burden of proof being contrary to various pronouncements of the Apex Court as well as the provisions of Section 9 of the 1946 Act, the same amounts to an error apparent on the face of the record and hence such error can be corrected in exercise of the review jurisdiction by the High Court, the same being *per incuriam*. The learned Sr. counsel, however, has submitted that the scope of the review of the said judgment would be limited to the question of law decided by the Division Bench and would not extend to the finding of fact recorded in ***Moslem Mondal***'s case and as such the State of Assam has not sought for the review of the finding recorded by the Division Bench relating to the citizenship of the concerned appellants in WA No.238/2008.

15. Referring to the provisions in clause 3 of the 1964 Order, the learned Sr. counsel submits that what the State is required to furnish to the Tribunal, while making the reference, is the main grounds on which the proceedee is alleged to be a foreigner with the supporting materials and nothing more. It has also been submitted that the Tribunal, having regard to the grounds taken in the reference by the State, has to issue notice on the proceedee, whose burden is to prove that he is not a foreigner, in view of the provisions contained in Section 9 of the 1946 Act. Mr. Rai further submits that Section 9 of the 1946 Act being in accordance with the underlying policy of Section 106 of the Evidence Act, which provides that any fact which is especially within the

knowledge of any person, the burden of proving that fact is upon him, and in Section 9 it having specifically been mentioned that the burden would be on the proceedee to prove that he is not a foreigner, notwithstanding anything contained in the Evidence Act, Section 101 of the Evidence Act has no application in a proceeding instituted under the provisions of 1946 Act read with 1964 Order. According to the learned Sr. counsel in a proceeding before the Tribunal, which proceeded ex-parte, the State is also not required to adduce evidence first in support of the grounds on the basis of which the reference has been made and the Tribunal has to form an opinion on the basis of the grounds furnished as well as the other material particulars placed before it by the State. Likewise, in a contested proceeding the State is also not first required to adduce evidence in support of the grounds, before the proceedee adduces evidence to demonstrate that he is not a foreigner as required under Section 9 of the 1946 Act, as the burden is on the proceedee to prove that he is not a foreigner and if the said burden is discharged, then the onus will shift to the State to prove that the proceedee is a foreigner, by adducing the rebuttal evidence.

16. The learned Sr. counsel in support of his contention has placed reliance on the decision of the Apex Court in ***The Union of India & ors. Vs. Ghaus Mohammad*** reported in ***AIR 1961 SC 1526***, wherein it has been held that by reason of Section 9 of the 1946 Act, wherever a question arises whether a person is or is not a foreigner, the onus of proving that he is not a foreigner lies upon him and hence the burden is upon the proceedee to establish that he is a citizen of India in the manner claimed by him and not a foreigner. Referring to another

decision of the Apex Court in ***Fateh Mohd., son of Nathu Vs. Delhi Administration*** reported in ***AIR 1963 SC 1035***, the learned Sr. counsel further submits that the Apex Court placing reliance on ***Ghaus Mohammad***'s case has taken the same view by holding that the burden lies on the proceedee to prove that he is not a foreigner, in view of Section 9 of the 1946 Act. The learned Sr. counsel in support of his contention has also placed reliance on the decision of the Apex Court in ***Masud Khan Vs. State of Uttar Pradesh*** reported in ***(1974)3 SCC 469***, wherein also the same view has been taken.

17. Mr. Rai has further submitted that the Apex Court in ***Sarbananda Sonowal(I) (supra)*** in clear terms has held that there is good and sound reason for placing the burden of proof upon the person concerned, who asserts to be a citizen of a particular country, which is in accordance with the underlying policy of Section 106 of the Evidence Act and an exception to the general rule that the burden of proof is on the person, who desires any Court to give judgment as to any legal right or liability depending on existence of facts, which he asserts, as stipulated in Section 101 of the Evidence Act. The learned Sr. counsel, therefore, submits that the view taken by the Division Bench in ***Moslem Mondal***'s case that the provision of Section 9 of the 1946 Act is not an exception to Section 101 of the Evidence Act is contrary to the provisions of the 1946 Act and also the law laid down by the Apex Court.

18. Referring to the decision in ***Sarbananda Sonowal(II) (supra)***, the learned Sr. counsel further submits that the Apex Court

has declared the Foreigners (Tribunals for Assam) Order, 2006 (for short 2006 Order) as invalid and unconstitutional as by the said Order the burden was placed on the State to first establish the existence of the grounds given in the reference, before the proceedee is called upon to discharge his burden as required under Section 9 of the 1946 Act and hence the Division Bench in ***Moslem Mondal***'s case ought not to have held that the initial burden is on the State to prima facie prove the existence of the grounds on which the reference is made. Mr. Rai has also submitted that in ***Sarbananda Sonowal(II) (supra)*** the Apex Court has reiterated its earlier view that the burden is upon the proceedee to prove that he is not a foreigner but a citizen of India and what the State is required to do is to set out the main grounds in making the reference and once the Tribunal satisfied itself about the existence of the grounds, the burden of proof would be upon the proceedee, which does not, however, mean that the State is required to adduce evidence first to demonstrate the existence of the grounds in making the reference.

19. Mr. Rai, referring to clauses 3 and 4 of the 1964 Order, further submits that the Tribunal, however, must ensure proper service of notice on the proceedee before rendering its opinion on the reference made by the State under the provisions of the Foreigners Act. According to the learned Sr. counsel the provisions of the Civil Procedure Code relating to the service of summons on the defendants have to be followed, in the absence of any other mode of service provided by any law or in the absence of any Rule framed by the Tribunal regulating its own procedure, as indicated in clause 4(a) of the said Order, wherein it

has been stipulated that the Tribunal shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure in respect of summoning and enforcing the attendance of any person and examining him on oath. The learned Sr. counsel submits that the Tribunal, which is empowered to regulate its own procedure, has to adopt a just and fair procedure in the matter of service of summons on the proceedee as required under clause 3 of the 1964 Order and the procedure stipulated in the Code of Civil Procedure in that regard being a just, proper and fair procedure, the same has to be followed by the Tribunal, the proceeding before it being of civil nature.

20. It has also been submitted that in a proceeding which has proceeded ex-parte, the Tribunal being the creature of Statute is invested with the power to recall an ex-parte order, even in the absence of any express provision in that regard in the 1946 Act or 1964 Order, as the Tribunal is considered to be endowed with such ancillary or incidental power as are necessary for the purpose of doing justice between the parties. The learned Sr. counsel submits that in a given case if the Tribunal is satisfied that the notice was not properly served, it can recall an ex-parte opinion and give the proceedee the opportunity to discharge his burden of proving that he is not a foreigner, as such power is to be exercised by the Tribunal for doing justice between the parties, wherever necessary. The learned Sr. counsel in support of his contention has placed reliance on the decision of the Apex Court in ***Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal & ors.*** reported in ***1980 (Supp.) SCC 420*** equal to ***AIR 1981 SC 606***

and ***Satnam Verma Vs. Union of India*** reported in ***AIR 1985 SC 294***.

21. Referring to the provisions contained in Section 6A(3) of the Citizenship Act, 1955 (in short the 1955 Act), it has been submitted by the learned Sr. counsel that a person who has been detected to be a foreigner coming to Assam on or after 1st day of January, 1966 but before 25th day of March, 1971, from the specified territory, and has since the date of his entry into Assam, been ordinarily resident in Assam, has to register himself in accordance with Rules made by the Central Government in this behalf under Section 18 of the said Act, with such authority as may be specified in such Rules. It has been submitted that in the event of failure to get the name registered, such foreigner would be liable to be deported. The learned Sr. counsel, however, submits that though Rule 19 of the Citizenship Rules, 2009 (in short the 2009 Rules) provides the initial time limit of filing such application for registration, which is 30 days from the date of detection and extendable by another 60 days by the registering authority, such time limit can be extended by the writ court in a writ proceeding filed by such person if existence of an extraordinary situation/circumstances preventing such person from filing the application within the time allowed under Rule 19 of the said Rules could be demonstrated, as otherwise grave injustice would be caused to such person.

22. Mr. Sachar, the learned Sr. counsel appearing for the respondents in the review petition submits that even if the reference to the Full Bench is held to be maintainable, the judgment passed by the

Division Bench in ***Moslem Mondal (supra)***, cannot be disturbed in exercise of the review jurisdiction as there is no error apparent on the face of the judgment. It has also been submitted that the review petition cannot be treated as an appeal to correct each and every error, even if occurred in the judgment, and if decision is erroneous, it is open to the Appellate Court only to correct such error and not by the review Court. According to the learned Sr. counsel, the error apparent on the face of the records is such, which can be noticed on the bare perusal of the judgment and for which no lengthy argument is necessary. It has also been submitted that a judgment passed cannot be reviewed even on the ground that two views were possible and not even on the ground that the view taken by the Division Bench has subsequently been held to be not valid in another case, even by the Apex Court, on the underlying principle of maintaining the certainty of the judgment passed. The learned Sr. counsel, however, submits that the State or any other party can raise the issue of legality of the judgment passed in ***Moslem Mondal***'s case in another writ appeal or writ petition but not in the review petition filed seeking review of the judgment passed therein. The learned Sr. counsel in support of his contention has placed reliance on the decisions of the Apex Court in ***Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury*** reported in ***(1995)1 SCC 170***, ***Parsion Devi & ors. Vs. Sumitri Devi & ors.*** reported in ***(1997)8 SCC 715*** and ***Nand Kishore Ahirwar & anr. Vs. Haridas Parsedia & ors.*** reported in ***(2001)9 SCC 325***.

23. The learned Sr. counsel has also submitted that even on merit the decision of the Division Bench cannot held to be erroneous as

the State is to lead prima facie evidence in support of the main grounds on which the reference rests, so as to afford reasonable opportunity to the proceedee to meet the grounds. It has also been submitted that a person can also institute a suit for declaration of his right as citizen, when there is no proceeding initiated under the 1946 Act or 1964 Order against him, as he cannot be remediless if his civil right is violated.

24. Questioning the maintainability of the review petition filed by the State of Assam, Mr. Mahmud, learned counsel appearing for the petitioners in WP(C) No.1355/2008, who are also some of the appellants in WA No.238/2008, apart from the appellants in some other writ appeals listed before this Full Bench, has submitted that since the scope of review of the judgment passed by a Court of law is very limited, which can be entertained only on existence of any of the grounds enumerated in Order XLVII Rule 1 of the Code of Civil Procedure, the present review petition filed by the State of Assam is not maintainable, as the review petitioner has sought rehearing of WA No.238/2008, which is not permissible in exercise of the review jurisdiction. It has been submitted that the present review petition is, in fact, an appeal in disguise, as the State of Assam wants rehearing on the issues formulated by the Division Bench in the aforesaid writ appeal. On facts it has been submitted that the Tribunal, in its subsequent report submitted to the Division Bench, has found the writ petitioners in WP(C) No.1355/2008 as not foreigners, which decision has also been accepted by the Division Bench, which in any case cannot be the subject matter of the review. The learned counsel has placed reliance on the decision of the Apex Court in ***Aribam Tuleshwar***

Sharma Vs. Aribam Pishak Sharma & ors. reported in ***AIR 1979 SC 1047***, ***Smt. Meera Bhanja (supra)***, ***Parsion Devi (supra)***, ***Delhi Administration Vs. Gurdip Singh Uban & ors.*** reported in ***(2000)7 SCC 296***, ***Kewal Chand Mimani (D) by LRS. Vs. S.K. Sen & ors.*** reported in ***(2001)6 SCC 512*** and ***Nand Kishore Ahirwar (supra)*** to support his argument on the question of maintainability of the review petition.

25. Mr. Mahmud has, however, submitted that though the review petition is not maintainable, he has no objection to the other writ appeals being decided by the Full Bench. Referring to various provisions of the 1955 Act relating to the acquisition of citizenship, including Section 6A therein, and also Section 9 of the 1946 Act, apart from clause 3 of the 1964 Order, issued by the Govt. of India in exercise of the power conferred by the 1946 Act, Mr. Mahmud has submitted that the Tribunal constituted under the 1964 Order would assume jurisdiction to render its opinion as to whether the proceedee is a foreigner or not only if there is a reference made by the Govt. of India or by the authority empowered to do so and before rendering such opinion the Tribunal must ensure proper service of notice on the proceedees and furnish the main grounds on which the reference is made so that the proceedee is given the reasonable opportunity to demonstrate that he is an Indian citizen. The reasonable opportunity which is required to be given to a proceedee, according to the learned counsel, means and includes the prima facie establishment of the grounds by the authority making the reference, so that the proceedee can effectively counter the same and demonstrate that he is an Indian

national, as required under Section 9 of the 1946 Act. The learned counsel further submits that as Section 9 of the 1946 Act speaks about the ‘onus of proof’ and not the ‘burden of proof’, the provisions of Section 101 of the Evidence Act relating to the burden of proof, does not entirely get replaced by Section 9 of the 1946 Act. The learned counsel, therefore, submits that the Division Bench of this Court in ***Moslem Mondal***’s case has rightly held that the State has to first adduce evidence, confined to the grounds on which its case rests, and thereafter the onus of proof would be on the proceedee to substantiate that he is an Indian national, in view of Section 9 of the 1946 Act, as the State is not expected to prove a negative fact.

26. To buttress the argument, the learned counsel has referred to the decision of the Apex Court in ***Sarbananda Sonowal(II) (supra)***, more particularly paragraph 60 thereof, wherein the Apex Court has opined that having regard to the fact that the Tribunal, in the notice to be sent to the proceedee, is required to set out the main grounds, the primary onus in relation thereto would be on the State and once the Tribunal satisfied itself about the existence of the grounds, the burden of proof would be upon the proceedee. The learned counsel, therefore, submits that the State is to adduce the prima facie evidence in support of the main grounds on which the proceedee is alleged to be a foreigner so that the Tribunal can record its satisfaction about the existence of the grounds before issuance of notice to the proceedee and as soon as such satisfaction is recorded, the burden of proof that the proceedee is an Indian citizen would be upon the proceedee. The learned counsel further submits that in a good number of cases though

the State has adduced initial evidence in support of the grounds, it has examined only the Investigating Officer and not the persons from whom such Investigating Officer has gathered the information and hence the Tribunal ought not to have issued the notice on the proceedee on such reference cases, in the absence of adequate evidence before it for recording the satisfaction about the existence of the grounds. The learned counsel submits that the Division Bench in ***Moslem Mondal***'s case has, therefore, rightly held that the initial burden is on the State to demonstrate the existence of the grounds for recording the satisfaction by the Tribunal before issuance of notice to the proceedee.

27. The learned counsel in support of his contention that the initial burden of proof lies on the State, has placed reliance on the decisions of the Apex Court in ***Shambhu Nath Mehra Vs. The State of Ajmer*** reported in ***AIR 1956 SC 404***, ***Collector of Customs, Madras & ors. Vs. D. Bhoormul*** reported in ***(1974)2 SCC 544***, ***Narayan Govind Gavate & ors. Vs. State of Maharashtra & ors.*** reported in ***(1977)1 SCC 133***, ***Sita Ram Bhau Patil Vs. Ramchandra Nago Patil (Dead) by L. Rs. & anr.*** reported in ***(1977)2 SCC 49***, ***Sucha Singh Vs. State of Punjab*** reported in ***(2001)4 SCC 375*** and ***Vikramjit Singh alias Vicky Vs. State of Punjab*** reported in ***(2006)12 SCC 306***.

28. Mr. Mahmud, learned counsel further submits that, as held by the Apex Court, the burden of proof looses its importance whenever both the parties adduced evidence as in that case the Tribunal is to decide the reference on the basis of the evidence adduced and not

giving any emphasis on whom the burden of proof lies. Referring to the decision of the Division Bench in ***Moslem Mondal***'s case, it has been submitted by Mr. Mahmud that since both the parties have adduced evidence and the Tribunal has recorded the opinion that the appellants are not foreigners but citizens of India, the question as to on whom the burden of proof lies is not required to be gone into at all.

29. It has also been submitted by the learned counsel that though sub-section (2) of Section 8 of the 1946 Act provides that the determination of the nationality by the Tribunal shall be final and shall not be called upon in any Court, a person, against whom the opinion has been rendered by the Tribunal that he is a foreigner, still can approach the Civil Court having jurisdiction over the matter, for declaration of his right as citizen of India in a properly instituted suit, there being no express or implied bar of Civil Court's jurisdiction in the 1946 Act or 1964 Order or in any other law. The learned counsel submits that under Section 9 of the Civil Procedure Code the Civil Courts shall have jurisdiction to try all suits of a civil nature unless of course cognizance of such suits is either expressly or impliedly barred. The learned counsel in support of his contention has placed reliance on the decision of the Apex Court in ***Ghaus Mohammad (supra)*** and ***Akbar Khan Alam Khan & anr. Vs. Union of India & ors.*** reported in ***AIR 1962 SC 70***.

30. Referring to clause 3 of 1964 Order which requires service of the main grounds of reference, it has been submitted by the learned counsel that since the proceeding before the Tribunal is of civil nature,

in the absence of any procedure laid down by the Tribunal relating to the service, the spirit of the provisions of the Civil Procedure Code is to be followed in the matter of service of summons on the proceedee. It has also been submitted that in most of the cases, the Tribunal has decided to proceed ex-parte against the proceedee even without proper service of notice as required under the Civil Procedure Code. The learned counsel further submits that though clause 3 of 1964 Order also mandatorily requires the service of the main grounds, on which the proceedee is suspected to be a foreigner, in a large number of cases those grounds were never served on the proceedees, without which it was not possible on the part of the proceedees to defend themselves, which in turn amounts to denial of the reasonable opportunity to the proceedees and consequently violation of clause 3 of the 1964 Order.

31. The learned counsel further submits that though fair investigation is one of the basic human rights of a person against whom an investigation is conducted, the State authority has conducted the investigation, before making the reference to the Tribunal, not in a fair manner, and such investigations were conducted even without issuing any notice to the person concerned and taking into account their statements. The investigation which is the basis for making the reference, according to the learned counsel, therefore, must be fair, otherwise it would amount to violation of the human rights of the person, against whom such investigation is conducted. Hence, according to the learned counsel, directions may be issued to the State to conduct fair investigation and to make such investigation only in presence of the village headman (Gaon Bura) or prominent/respectable persons of the

village and also to get the signature or the thumb impression of the person against whom such investigation has been initiated, so that the person concerned can produce the documents in his possession to demonstrate that such investigation against him is not required to be conducted at all.

32. It has also been submitted that the Tribunal while deciding a reference proceeding, has to conduct a fair trial, which is one of the fundamental rights guaranteed under Article 21 of the Constitution of India. The learned counsel submits that though the proceedees are alleged to be foreigners, they have the fundamental right of fair trial, which has been denied to them by the Tribunal, as no fair trial has been conducted by the Tribunal, while rendering its opinion on the reference made by the State. The learned counsel also submits that role of the Tribunal should be proactive and it should not treat itself as a mere recording machine. Mr. Mahmud, learned counsel has also submitted that in certain proceedings the ex-parte opinions were rendered by the Tribunal even without recording the evidence of the State and also the proper service of notice. It has also been submitted that there are instances of frequent shifting of the residence by a person, against whom the reference is made, either for search of livelihood or because of erosion due to heavy flood experienced in the State of Assam, which is a regular phenomenon. According to the learned counsel, in such cases, the State, without making any effort to find out the person and to serve notice, gives report of purported substituted manner of service, which is accepted by the Tribunal and accordingly, the opinions were rendered ex-parte, thereby denying reasonable opportunity to the

proceedee. The learned counsel, therefore, submits that the directions may be issued to the Tribunal not to proceed ex-parte against the proceedees unless proper notice, as required under the Civil Procedure Code, is served. The further grievance of the learned counsel is that though by the 2012 Amendment of Foreigners (Tribunals) Order, 1964, the time limit for disposal of the reference proceeding is set, there are instances where the proceedee was unable to contest the reference proceeding effectively because of non-supply of the copies of the documents like the voters list etc. which are most relevant and necessary for the purpose of demonstrating by the proceedee that he is not a foreigner but an Indian national, by the State or its instrumentalities, when applied for.

33. The learned counsel in support of his contention has placed reliance on the decisions of the Apex Court in ***Dwarka Prasad Agarwal (D) by LRS. & anr. Vs. B.D. Agarwal & ors.*** reported in ***(2003)6 SCC 230***, ***Zahira Habibulla H. Sheikh & anr. Vs. State of Gujarat & ors.*** reported in ***(2004)4 SCC 158***, ***Zahira Habibullah Sheikh (5) & anr. Vs. State of Gujarat & ors.*** reported in ***(2006)3 SCC 374***, ***Samadhan Dhudaka Koli Vs. State of Maharashtra*** reported in ***(2008)16 SCC 705***, ***National Human Rights Commission Vs. State of Gujarat & ors.*** reported in ***(2009)6 SCC 767*** and ***Himanshu Singh Sabharwal Vs. State of M.P. & ors.*** reported in ***AIR 2008 SC 1943***.

34. Mr. Mahmud further submits that certain observations of the Apex Court in ***Sarbananda Sonowal(I) (supra)***, though are obiter

dicta, were treated as the binding precedent by the learned Single Judge while deciding some writ petitions. It has been submitted that since the question before the Apex Court in ***Sarbananda Sonowal(I) (supra)*** was as to whether the 1983 Act was constitutionally valid, the other observations not related to the said question have no binding effect on other Courts, the same being obiter dicta.

35. Mr. B.C. Das, learned Sr. counsel appearing for the respondent No.6 in review petition, referring to the order dated 17.05.2010 making the reference to the Full Bench submits that since Rule 1 of Chapter-VII of the Gauhati High Court Rules authorizes a Division Court to refer a case for decision by a Full Bench only when a Division Court differs from any other Division Court upon a point of law or usage having the force of law, the reference made vide order dated 17.05.2010 for decision to a Full Bench is contrary to the said provisions, as in the said order nothing has been indicated about any view taken by the Division Court which is contrary to the view taken by the Division Court in ***Moslem Mondal***'s case. The learned Sr. counsel, therefore, submits that the reference to the Full Bench for decision is not maintainable. It has also been submitted that there being no order passed by the Hon'ble Chief Justice on the administrative side as required under Rule 1(iii) of Chapter-II of the Gauhati High Court Rules, the Full Bench cannot hear the review petition, which is to be heard by the same bench and in the absence of any of the members of the Division Bench, at least by a bench of which the other available Hon'ble Judge is a member. The learned Sr. counsel further submits that even no question of law has been formulated while making the reference.

36. Relating to the scope of review the learned Sr. counsel submits that since the power of review is very limited and the review Court is not an Appellate Court, it cannot review a judgment merely on the ground that the earlier decision is erroneous or that another view is possible. The learned Sr. counsel submits that the scope of review is limited to the existence of the grounds enumerated in Order XLVII Rule 1 of the CPC as held by the Apex Court in ***Aribam Tuleshwar Sharma (supra)***. The learned Sr. counsel has also placed reliance on the decisions of the Apex Court in ***M/s. Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi*** reported in ***(1980)2 SCC 167***, ***Smt. Meera Bhanja (supra)*** and ***Lily Thomas & ors. Vs. Union of India & ors.*** reported in ***(2000)6 SCC 224*** in support of his contention relating to the scope of review.

37. On merit the learned Sr. counsel submits that the Division Bench in ***Moslem Mondal***'s case has rightly held that the initial burden is on the State to lead evidence to prima facie satisfy the Tribunal about the existence of the grounds in making the reference, as the grounds enumerated in clause (i) and (ii) of sub-section (3) of Section 6A of the 1955 Act are required to be proved by the State before rendering an opinion by the Tribunal on the reference made by the State. According to the learned Sr. counsel, the Tribunal, even in an ex-parte proceeding, has to render its opinion on the reference made and cannot dismiss the said reference on the ground that the proceedee did not contest the same and hence, there must be some evidence on record so as to enable the Tribunal to give its opinion on the reference made.

Hence, according to the learned Sr. counsel, the State has to adduce evidence initially to substantiate the grounds taken in the reference so that the reference Court can answer the reference even in a proceeding which has not been contested by the proceedee. The learned Sr. counsel, however, has submitted that such evidence is not required to be adduced before issuance of notice by the Tribunal to the proceedee, as the Supreme Court has set aside the 2006 Order in ***Sarbananda Sonowal(II) (supra)***, but the State is obliged to adduce evidence in support of the grounds, before the proceedee is called upon to discharge his burden under Section 9 of the 1946 Act.

38. Referring to Section 6A of the 1955 Act and also the Memorandum of Settlement (Assam Accord), which is the basis for incorporation of Section 6A in the 1955 Act, it has been submitted by the learned Sr. counsel that since it is apparent from the statement and object of such enactment that the said provision has been incorporated to give benefit to the person who came to Assam from specified territory between 01.01.1966 and 25.03.1971 and is declared to be a foreigner, he cannot be deported from India even if he does not register himself in accordance with the Rules framed, and in that case he would be like a lawful non-citizen of the country and will have no right whatsoever including the right to vote, except the right under Article 21 of the Constitution of India. The learned Sr. counsel in support of his contention has placed reliance on the decision of the Apex Court in ***National Human Rights Commission Vs. State of Arunachal Pradesh & anr.*** reported in ***(1996)1 SCC 742***.

39. The learned Sr. counsel further submits that the time limit for registration of the said class of foreigners having not been stipulated in the Act but in the Rules, such time limit can even be extended by the registering authority on demonstration of good and sufficient grounds, though Rule 19(5) of the 2009 Rules empowers the registering authority to extend the time by a maximum of 60 days, the said provision being directory. The learned Sr. counsel in support of his contention has placed reliance on the decisions of the Apex Court in ***Zenith Steel Tubes & Industries Ltd. & anr. Vs. SICOM Limited*** reported in ***(2008)1 SCC 533*** and ***Safiya Bee Vs. Mohd. Vajahath Hussain alias Fasi*** reported in ***(2011)2 SCC 94***.

40. Mr. Bhowmik, learned counsel, appearing for the appellants in some of the writ appeals, supporting the arguments advanced by Mr. Mahmud, learned counsel, also submits that the State has to adduce evidence first in support of the main grounds, so as to satisfy the Tribunal relating to existence of such grounds, before issuance of notice to the proceedee. It has also been submitted that the service of notice has to be effected by following the provisions relating to service in the Civil Procedure Code and in a given case the Tribunal has the power to set aside the ex-parte opinion provided the applicant can demonstrate existence of the grounds enumerated in Order IX Rule 13 of the CPC for setting aside ex-parte decree.

41. Mr. T.J. Mahanta, Mr. S.K. Ghosh, Mr. A.R. Sikdar and Mr. I. Uddin, learned counsel have also submitted that since there was no proper service of notice and the proceedees have also not been given

the main grounds, on which they are suspected to be foreigners, the opinions rendered by the Tribunal cannot stand the scrutiny of law and hence required to be interfered with in exercise of the jurisdiction under Article 226 of the Constitution of India, the same being in violation of the mandatory provisions of clause (3) of 1964 Order.

42. Mr. H.R.A. Choudhury, learned Sr. counsel has submitted that the time limit mentioned in Rule 19(2) of the 2009 Rules, which is extendable by further 60 days, as provided under Rule 19(5), would commence from the date of determination of the legal proceeding pending before the Court, including the High Court and hence the proceedee would be entitled to a chance to file necessary application for registration, within the time as prescribed in Rule 19 of 2009 Rules, starting point of which would be the date of decision by the High Court in the pending writ petition or writ appeal. The learned Sr. counsel, however, has submitted that though the registering authority has been given the power to extend the period for filing such application for registration, up to the maximum period of 60 days, the Court, for ends of justice, can extend the period in a given case, having regard to the facts and circumstances involved in each case.

43. Mr. M.A. Sheikh, learned counsel appearing for the appellants in some of the appeals has also submitted that the person entering into Assam from specified territory between 01.01.1966 and 25.03.1971, would be the citizen of India and though on his registration he will be de-franchised for a period of 10 years from the date of detection, but his other rights as citizen would continue. In case of non-

registration even, according to the learned counsel, he will continue to be a citizen of India, without, however, any right except the right under Article 21 of the Constitution of India. The learned counsel also submits that the Division Bench in ***Moslem Mondal***'s case has rightly held that the initial burden is on the State to adduce evidence in support of the main grounds, before calling upon the proceedee to discharge his burden under Section 9 of the 1946 Act.

44. Mr. Sikdar, learned counsel appearing for the appellants submits that even if a person is declared to be a foreigner by the Tribunal constituted under the 1964 Order, he will still have the right to agitate the said question in Civil Court, as jurisdiction of the Civil Court has not been barred either expressly or by necessary implication. The learned counsel in support of his contention has placed reliance on the decision of the Apex Court in ***Ghaus Mohammad (supra)***, ***Abdul Waheed Khan Vs. Bhawani & ors.*** reported in ***AIR 1966 SC 1718*** and ***Dwarka Prasad Agarwal (D) by L. Rs. & anr. Vs. Ramesh Chandra Agarwala & ors.*** reported in ***AIR 2003 SC 2696***.

45. Mr. Sur, learned counsel adopts the arguments advanced by other learned counsel for the appellants. He has further submitted that the orders passed by the Tribunal ex-parte should be interfered with, so as to give a further opportunity to the proceedees to prove that he is not a foreigner but an Indian citizen, as the citizenship right is very valuable and important, which is to be jealously guarded.

46. Mr. P.B. Mazumder, learned counsel submits that in some proceedings the Tribunal has opined that all the appellants are foreigners, though the reference was not against all. It has also been submitted that the Tribunal has refused to look into the documents submitted before it and has given its opinion solely on the basis of the police report, without there being any evidence on record adduced by the State in support of the grounds on which the reference was made.

47. Mr. A.B. Choudhury, learned Sr. counsel, on the other hand, has submitted that the review petitioner cannot at the final stage of hearing raise the question of maintainability of the reference to the Full Bench for decision, the same having not been raised at the initial stage. Drawing the attention of the Court to the order dated 17.05.2010 passed by a Division Bench referring the review petition along with other matters to the Full Bench for decision, it has been submitted by Mr. Choudhury that the learned counsel appearing for the appellants in WA No.238/2008, judgment passed wherein is sought to be reviewed, never objected to such reference and in fact, from the tenor of the submission recorded in the said order it appears that he has agreed to such reference. The learned Sr. counsel, however, has submitted that though the reference is maintainable, the State could not make out any ground for review of the judgment passed by the Division Bench in ***Moslem Mondal***'s case. It has been submitted that the scope of review is very limited and it cannot be an appeal in disguise. The learned Sr. counsel, therefore, submits that the review petition deserves to be dismissed.

48. Mr. Choudhury, learned Sr. counsel referring to clause 3 of the 1964 Order submits that the main grounds which are required to be served on the proceedee must be the grounds related to the issue of foreigner as alleged, which prima facie satisfy the Tribunal about the existence of such grounds for issuance of notice on the proceedee. If the grounds are vague and not germane to the object sought to be achieved, the Tribunal has jurisdiction to reject the reference at the threshold by refusing to issue notice on the proceedee. The learned Sr. counsel also submits that the State is required to adduce prima facie evidence related to the grounds on which a person is suspected to be a foreigner, before calling upon him to discharge his burden under Section 9 of the 1946 Act, otherwise it would amount to denial of reasonable opportunity to the proceedee, as in that case he would not know what allegation he is to meet. It has also been submitted that Section 9 of the 1946 Act which is based on the underlying principle of Section 106 of the evidence Act, does not totally oust the application of the general rule of burden of proof, which requires a person, who asserts the existence of facts, to prove that those facts exist.

49. The learned Sr. counsel, referring to the provisions of Section 6A of the 1955 Act, in so far as it relates to the question of registration by the persons entering into Assam from specified territory between 01.01.1966 and 25.03.1971, has submitted that the benefit of the citizenship of the country would be available to them provided they register themselves as required under the said provisions of law and in the manner prescribed. It has also been submitted that the said provision gives an opportunity to that class of persons to become

citizens of India provided the conditions stipulated in Section 6A is complied with, otherwise they are liable to be deported from the country. It has also been submitted that there is no concept of lawful non-citizen in India and our Constitution also does not recognize such class of persons.

50. Mr. D.P. Chaliha, learned Sr. counsel, supporting the arguments advanced by the other learned counsel relating to the requirement of adducing prima facie evidence by the State in support of the main grounds on which the reference rests, has submitted that the Tribunal in some cases has rendered the opinion without properly appreciating the evidence on record, though the proceedee could prove by adducing evidence that they are not foreigners but Indian citizens. It has been submitted that the Tribunal has refused to place any reliance on the relevant admissible documents, namely, sale deeds, on the ground that there may be hundreds of persons by the same name, even though there is absolutely no evidence even to suggest that the vendees in those sale deeds are not the parents of the proceedee and though there was no rebuttal evidence by the State. The learned Sr. counsel, therefore, submits that the order passed by the Tribunal needs to be set aside.

51. Mr. A.B. Siddique, learned counsel placing reliance on the judgment passed by the Apex Court in ***Sarbananda Sonowal(II) (supra)*** as well as a Division Bench judgment of this Court in ***Prafulla Sarkar Vs. Union of India & ors.*** reported in ***2012(1) GLT 758***, has also submitted that the initial burden is on the State to adduce evidence

in support of the main grounds on which the proceedee is suspected to be a foreigner. It has been submitted that after such evidence is led, the burden would thereafter naturally be on the proceedee to prove that he is not a foreigner, but a citizen of this country. Referring to the provisions of Section 103 of the Evidence Act, it has also been submitted that persuasive burden is upon the State to prima facie satisfy the existence of the grounds to issue notice by the Tribunal.

52. Mr. M.H. Choudhury, Dr. B. Ahmed, Mr. N.N. Upadhyay and other learned counsel appearing for the proceedees have also supported the arguments advanced by the learned counsel appearing for the other proceedees as well as by the learned Sr. counsel appearing for the respondents in the review petition, who were the appellants in WA No.238/2008.

53. Mr. Suman Shyam, learned counsel appearing for the applicant in Misc. Case No.3299/2008 filed in WA No.238/2008, which applicant was also heard by the Division Bench while disposing of the said appeal, has submitted that the view taken by the Division Bench in ***Moslem Mondal***'s case is contrary to the provisions contained in Section 9 of the 1946 Act and also the principles of burden of proof. Referring to ***Phipson's Work on Evidence***, it has been submitted that the phrase 'burden of proof' has three meanings, namely, persuasive burden or onus probandi, evidential burden and the burden of establishing the admissibility of evidence. The learned counsel submits that the exception to the general rule of the persuasive burden i.e. the burden to establish a particular fact, who asserts the same, occurs in

cases where the statutes so provide and by virtue of Section 9 of the 1946 Act, which is based on the principle underlying the provisions of Section 106 of the Evidence Act, the persuasive burden rests on the proceedee and not on the State though the reference is made by the State. Referring to Section 9 of the 1946 Act, it has also been submitted that if the principles underlying the provisions of Section 101 of the Evidence Act is applicable, there would not have been any reason to incorporate the non-obstante clause in Section 9 to the effect that the said provision would be applicable notwithstanding anything contained in the Evidence Act. It has also been submitted that it is apparent from Section 9 of the 1946 Act that the legislature intended to cast the burden on the person who is alleged to be a foreigner to prove that he is not a foreigner, which though has rightly been held so by the Division Bench in ***Moslem Mondal***'s case (paragraph 53 of the said report), the Division Bench, however, in subsequent paragraphs held that the State has to initially lead prima facie evidence on the existence of the grounds, which is not the correct proposition of law.

54. The learned counsel referring to the decision in ***Sarbananda Sonowal(I) (supra)*** has submitted that the Apex Court, after noticing the different provisions of 1946 Act including Section 9 thereof, and also the general rule in the leading democracies of the world that where a person claims to be a citizen of a particular country, the burden is upon him to prove that he is a citizen of that country, has held that there is good and sound reason for enactment of Section 9 of the 1946 Act, placing the burden of proof upon the person concerned who asserts to be a citizen of the country. It has also been submitted

that the Apex Court in clear terms has also held that except providing the grounds why a person is suspected to be a foreigner, there is no requirement of adducing any evidence by the State in support of such grounds, before calling upon such person to prove that he is not a foreigner, as it will not only be difficult but also almost impossible for the State to first lead evidence on the claim that the person is not a citizen, which is in accordance with the underlying policy of Section 106 of the Evidence Act. It has also been submitted that the Apex Court has held that after the burden of proof is discharged by the proceedee that he is not a foreigner, the State authorities can verify the facts and then lead evidence in rebuttal, if necessary. The learned counsel in support of his contention has also placed reliance on the decision of the Apex Court in ***Narayan Govind Gavate (supra)***.

55. Mr. Shyam referring to ***Sarbananda Sonowal(II) (supra)***, in which case the Supreme Court has declared the 2006 Order as illegal being contrary to the provisions of Section 9 of the 1946 Act and hence struck it down, submits that the said Order has been struck down mainly on the ground that the burden of proof was wrongly cast on the State to establish by adducing prima facie evidence relating to the existence of grounds on which a person is alleged to be a foreigner. It has also been submitted that the Apex Court has further held that only because the burden of proof is on the proceedee, the same by itself would not mean that it is ultra vires the provisions of Article 21 of the Constitution of India and such procedure is fair and reasonable. It has also been submitted that the view of the Division Bench in ***Moslem Mondal***'s case that the onus probandi stands placed on the State,

because it is the State which has approached the Tribunal to hold that the person, alleged to be a foreigner, is, in fact, a foreigner, on the ground that the provisions of Section 101 of the Evidence Act is not totally eclipsed by the provisions of Section 9 of the 1946 Act, is not the correct proposition of law. It has also been submitted that the example given by the Division Bench in the said case is not applicable in a reference proceeding made under the 1964 Order as in such proceeding the onus probandi is on the proceedee to prove and in case, where, despite service of notice, the proceedee did not contest and the case proceeded ex-parte, the Tribunal has to record its opinion against the proceedee having regard to the grounds taken by the State in the reference. The learned counsel, however, has submitted that the Division Bench in ***Moslem Mondal***'s case in paragraph 62 has rightly opined that the State would, however, have a right to adduce rebuttal evidence in a contested proceeding. The learned counsel further submits that the Division Bench has proceeded with the assumption that the lis in the reference under the Foreigners Act is a private lis, though the State instituted the reference proceeding as a part of its sovereign function. Mr. Shyam further submits that the Division Bench has wrongly placed the burden of proof on the State and the evidentiary burden on the proceedee, which is not only contrary to the provisions contained in Section 9 of the 1946 Act but also the judgments passed by the Apex Court including in ***Sarbananda Sonowal(I) (supra)*** and ***Sarbananda Sonowal (II) (supra)*** and if the said view is allowed to stand, it will frustrate the scheme of the 1946 Act entirely.

56. Referring to the judgment passed in ***Sarbananda Sonowal(I) (supra)***, it has also been submitted by Mr. Shyam that the State is not required to take recourse to the 1964 Order for the purpose of detection and deportation of foreigner as by virtue of declaration made by the Apex Court that the 1983 Act is ultra vires, the State can expel the foreigners from the State of Assam by taking recourse to the Immigrants (Expulsion from Assam) Act, 1950 (in short the 1950 Act). The learned counsel further submits that if this Court considers it appropriate to issue any guideline to the Tribunal relating to the manner of disposal of the proceedings before it, the same, however, cannot be contrary to the provisions contained in the 1950 Act. Mr. Shyam further submits that the Government of India by amending clause 3 of the 1964 Order by Foreigners (Tribunal) Amendment Order 2012 (in short the Amendment Order, 2012) has laid down the guideline to the Tribunal how and within how much time the proceedings before the Tribunal is to be determined and hence, there may not be any necessity to issue any further guideline.

57. Mr. R. Sharma, learned A.S.G.I. appearing for the Union of India also submits that the Division Bench in ***Moslem Mondal***'s case was not right in holding that the initial burden is on the State to prove the existence of the grounds on which a person is alleged to be a foreigner. It has been submitted that as held by the Apex Court the burden to prove that the proceedee is not a foreigner but is an Indian citizen is entirely on him, in view of Section 9 of the 1946 Act and the said burden cannot be shifted at all. Mr. Sharma, however, submits that in an ex-parte proceeding the State is required to adduce evidence in

support of the grounds, which the State, however, is not required to do in a contested proceeding. Referring to the Amendment Order, 2012, Mr. Sharma further submits that the Government of India has set out the time within which the reference proceeding before the Tribunal is to be disposed of, apart from the manner of disposal of such proceeding. The further submission of the learned A.S.G.I. is that the Tribunal does not become functus officio after it renders its opinion, in so far as it relates to entertainment of an application for setting aside the ex-parte opinion, subject of course to the existence of very exceptional circumstances, which is to be demonstrated by the proceedee seeking setting aside of such ex-parte order.

58. Mr. Buragohain, learned Addl. Advocate General appearing for the State of Assam, referring to Section 6A(3) of the 1955 Act and also the provisions of the 2009 Rules submits that though the time limit prescribed by Rule 19 of the 2009 Rules can be extended, in a given case, subject to having the special circumstances for that purpose, if a person detected to be a foreigner coming to Assam from specified territory between 01.01.1966 and 25.03.1971 does not register his name as required by the said provision, he is liable to be deported from India, he being a foreigner. It has also been submitted that such person would be treated as a citizen of India provided he registers himself as provided by law.

59. To a query made by the Court the learned Addl. Advocate General submits that presently only 36 Tribunals are constituted to deal with more than 2.6 lakh reference proceedings pending and the

Government of Assam, for early disposal of the proceedings, has requested the Government of India to provide fund for constitution of 64 more Tribunals, which, however, has not been made available by the Government of India till date. It has also been submitted that so far neither the Presiding Officers nor the Administrative staff including the process serving agency have been trained how to deal with a proceeding pending before the Tribunal at different stages. Mr. Buragohain also submits that more than 76,000 references are still pending for registration by the Tribunal.

Questions formulated for determination

60. The arguments advanced by the learned counsel for the parties give rise to the following questions for determination:-

a. **(i) Whether the reference of the review petition made to Full Bench vide order dated 17.05.2010 passed by a Division Bench is maintainable?**

   (ii) If so, whether the review petitioners could make out any ground for review of the judgment and order dated 01.02.2010 passed in *Moslem Mondal*'s case?

b. **Whether under Section 9 of the 1946 Act the burden is on a proceedee to prove that he is not a foreigner? If so, whether the Division Bench in *Moslem Mondal*'s case was correct in holding that though the burden under Section 9 of the said Act lies on the proceedee to prove that he is not a foreigner, the State is to first adduce evidence, confined to the grounds on which the reference rests, before the proceedee discharges his burden to prove that he is not a foreigner?**

c. **Whether the Tribunal can entertain an application for setting aside an ex-parte opinion? If so, on what ground(s)?**

d. **In what manner the investigation is to be carried out by the instrumentality of the State before making a reference to the Tribunal under the provisions of the 1964 Order?**

e. **What would be the appropriate procedure relating to the service of notice on the person against whom the reference proceeding has been initiated?**

f. **Whether an application filed by a foreigner under sub-section (3) of Section 6A of the 1955 Act read with Rule 19 of the 2009 Rules, can be entertained beyond the time limit prescribed by Rule 19 of the said Rules for registration? If so, the ground(s) on which such delayed application can be entertained?**

g. **Whether a person, who has been detected to be a foreigner within the meaning of sub-section (3) of Section 6A of the 1955 Act, is liable to be deported from India if he does not register his name as required under the provisions of 1955 Act and 2009 Rules?**

h. **What is the scope of interference with the Tribunal's order in a writ proceeding?**

i. **Whether the Civil Court has jurisdiction to entertain a suit for declaration that the plaintiff is not a foreigner?**

Discussion, decision and reasons therefor

61. The question of maintainability of the reference to the Full Bench has been raised only by the appellants in ***Moslem Mondal***'s case, decision on which is sought to be revised in the review petition. None of the parties in other writ appeals has raised the question of maintainability of the reference of the appeals to the Full Bench. No objection has also been raised for hearing the appeals by the Full Bench. The learned counsel for the writ appellants have in fact submitted that the writ appeals may be heard by the Full Bench.

62. A Division Bench vide order dated 02.06.2010 passed in WA No.238/2008 (***Moslem Mondal***'s case) directed hearing of the writ petitions by the Single Bench, as per roster. Another Division Bench passed an order on 19.07.2012 in WA No.171/2010 directing placing of

all related matters before the Full Bench. Consequently, a number of writ appeals and writ petitions filed challenging the decision of the Tribunals along with the review petition have been listed before this Full Bench. Having regard to the aforesaid orders dated 02.06.2012 and 19.07.2012 passed in the aforesaid writ appeal, the Full Bench is of the view that the writ petitions should be heard and decided by the Single Bench, as per roster, otherwise, the writ petitioners would lose a forum in the form of writ appeal. It also appears from the records of the writ appeals listed before the Full Bench for hearing that except in relation to WA Nos.258/2008, 264/2008, 265/2008, 266/2008, 268/2008, 280/2008, 281/2008. 370/2008, 59/2009, 71/2009, 171/2010 and 313/2011, the relevant records of the Tribunal in connection with the other writ appeals are not available, which, according to the Registry, were sent back after disposal of the connected writ petitions and thereafter have not been requisitioned. This bench, is of the view that perusal of the records of the Tribunal is necessary for disposal of the writ appeals, having regard to the nature of allegations made in the writ petitions as well as in the writ appeals. The Full Bench, therefore, is unable to take up those writ appeals, where Tribunal's records are not available, for disposal. Hence the Registry is directed to requisition the relevant records from the respective Tribunals by special messenger and place the appeals for hearing immediately thereafter.

Review Petition No.22/2010

Question (a): **(i) Whether the reference of the review petition made to Full Bench vide order dated 17.05.2010 passed by a Division Bench is maintainable?**

(ii) If so, whether the review petitioners could make out any ground for review of the judgment and order dated 01.02.2010 passed in *Moslem Mondal*'s case?

63. Rule 5 of Chapter-X of the Gauhati High Court Rules requires presentation of the application seeking review of the judgment to the Division Court of whose judgment the review is sought for, or, if the Judges of such Division Court is not sitting together, to the senior of such Judges who may be then attached to the Court and present. The review petition was accordingly placed before the Division Court consisting of the then Hon'ble Chief Justice and one of the members of the bench deciding WA No.238/2008, who as noticed above, passed an order on 28.04.2010 directing listing on 17.05.2010, having regard to the submissions advanced by the learned counsel appearing for the appellants in the said appeal that all the parties who addressed the Court in WA No.238/2008 and other matters may also be heard along with the review petition. As discussed above, the said Division Bench vide order dated 17.05.2010 referred the matters to the Full Bench for hearing, reason for which has already been noted above. The appellants in WA No.238/2008 challenged the said order of reference dated 17.05.2010 in SLP (Civil) No.16819/2010 before the Apex Court wherein though initially an interim order was passed, the same, however, was eventually dismissed by the Apex Court vide order dated 10.09.2010, paving the way for deciding the review petition on its own merit by the Full Bench.

64. Though normally the review petition is to be heard by the same bench, whose judgment is sought to be reviewed, or at least by a

bench in which one of the members of the Division Bench is also a member, in case both the members are not present, the Hon'ble Chief Justice, who is the master of the roster, can withdraw any pending proceeding from any bench and allot the same to another bench. Reference in this regard may be made to the decision of the Apex Court in ***Prakash Chand***'s case, wherein it has been held that the Chief Justice has the administrative power relating to the constitution of benches, to provide roster, transfer of cases, including part heard cases from the board of one bench to another bench for disposal, on being satisfied that the case involves constitutional issues. The Hon'ble Chief Justice has passed the order on the administrative side constituting the Full Bench for hearing the matter relating to the foreigners, apart from the aforesaid orders passed in the review petition as well as in WA No.171/2010. Hence it cannot be said that the reference to the Full Bench is not maintainable. That apart, the objections relating to the reference to the Full Bench was not raised at the initial stage, namely, when the order dated 17.05.2010 was passed or immediately thereafter but has been raised only during hearing of the final arguments.

65. In ***Vijaysinh Chandubha Jadeja (supra)***, the Apex Court had passed an order referring the matter to a larger bench, in view of the conflicting decisions rendered by the Court. In ***Uttar Pradesh Gram Panchayat Adhikari Sangh (supra)***, the Apex Court while underlying the requirement of judicial discipline opined that when the decision of a co-ordinate bench of the same High Court is brought to the notice of the bench, it is to be respected and is binding, subject of course, to the right to take a different view or to doubt the correctness

of the decision and the permissible course then is to refer the question or the case to a larger bench. Similar view has also been taken by the Apex Court in ***Zenith Steel Tubes & Industries Ltd.(supra)***. In ***Safiya Bee(supra)*** the Supreme Court has reiterated its earlier view relating to judicial discipline and the requirement of referring the issue to a larger bench, when the decision by a co-ordinate bench of equal strength is not accepted by the bench.

66. It is evident from the order dated 14.09.2009 passed in WA No.280/2009, copy of which is available on records of WA No.238/2008, that a co-ordinate bench of equal strength with that of the Division Bench which passed the judgment and order dated 01.02.2010, had held that the burden of proving that the concerned person is an Indian citizen lies on the person, who is alleged to be a foreigner. Hence, there were at least two contrary views before the Division Bench which had referred the matter to the Full Bench consisting of three Judges - one view expressed in the aforesaid order dated 14.09.2009 passed in **WA No.280/2009** (*Tara Bhanu Vs. Union of India and ors., decided on 14.09.2009*) and the other vide judgment and order dated 01.02.2010 passed in WA No.238/2008 (***Moslem Mondal***'s case). Hence no illegality has been committed in referring the matter to the Full Bench, in view of the contrary views as discussed above, and also having regard to the importance of the matter relating to citizenship of India. In any case, by such reference no prejudice is caused to any of the parties.

67. This leads to the determination of the question as to whether the review petitioners could make out any ground for review of the judgment and order dated 01.02.2010 passed in ***Moslem Mondal***'s case. The scope of review of a judgment is very limited. It is a settled position of law that though there is no specific provision empowering the writ court to entertain a review petition, there is nothing under Article 226 of the Constitution to preclude the High Court from exercising the power of review, which inheres in every Court of plenary jurisdiction, to prevent miscarriage of justice or to correct grave and palpable errors committed by it. There are, however, definitive limits to exercise of such power of review, which can be exercised on discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the person seeking review or could not be produced by him at the time when the order was made. It may also be exercised where some mistake or error apparent on the face of the record is found or on any analogous ground. The power of review cannot be exercised on the ground that the decision was erroneous on merits, which is within the province of the Appellate Court. It is also a settled position of law that the power of review is not to be confused with the appellate power which may enable an Appellate Court to correct all manner of errors.

68. An error apparent on the face of the record is one which is self evident and does not require a process of reasoning and which is also distinct from an erroneous decision. It would also be an error apparent on the face of the record, if of two or more views canvassed on the point it is possible to hold that the controversy can be said to

admit of only one of them. But if the view adopted by the Court in its judgment is a possible view having regard to what the record states, the same would not constitute an error apparent on the face of the record. The review bench while hearing the review petition cannot re-appreciate the evidence and reject findings of earlier bench, which is within the domain of the Appellate Court. The review petition cannot be allowed to be an appeal in disguise. Taking a contrary view than the view taken in the judgment sought to be reviewed, by another bench subsequent to the said judgment, cannot also be a ground for review. Reference in this regard may be made to the decisions of the Apex Court in ***Aribam Tuleshwar Sharma (supra)***, ***M/s. Northern India Caterers (India) Ltd.(supra)***, ***Smt. Meera Bhanja (supra)***, ***Parsion Devi (supra)***, ***Lily Thomas (supra)***, ***Delhi Administration (supra)***, ***Kewal Chand Mimani (supra)*** and ***Nand Kishore Ahirwar (supra)***.

69. The State of Assam and another has filed the Review Petition seeking review of the judgment and order dated 01.02.2010 passed in ***Moslem Mondal***'s case, in so far as it relates to its decision that though the burden of proof, under Section 9 of the 1946 Act, lies on the proceedee to prove that he is not a foreigner, the initial burden is on the State to substantiate the existence of the grounds on which the reference rests. The Division Bench while taking that view has noticed various pronouncements of the Apex Court including the pronouncement in ***Ghaus Mohammad (supra)***, ***D. Bhoormul (supra)***, apart from ***Sarbananda Sonowal(I) (supra)*** and ***Sarbananda Sonowal (II) (supra)***. It is not that the Division Bench

while rendering judgment in ***Moslem Mondal***'s case did not consider either the provisions of Section 9 of the 1946 Act or the various pronouncements of the Apex Court, on the question of burden of proof in a proceeding relating to a foreigner, which are binding in view of Article 141 of the Constitution. The said judgment of the Division Bench, therefore, cannot said to be *per incuriam*. The view taken by the Division Bench in ***Moslem Mondal***'s case, therefore, may be erroneous, which, however, cannot be the ground for review of the judgment passed therein. The learned Sr. counsel appearing for the State of Assam, has also submitted that though according to the State the Division Bench in ***Moslem Mondal***'s case has not laid down the correct law relating to the burden of proof, the State is not seeking the review of the finding relating to the facts of the case i.e. the declaration of appellant Nos.1 to 4 in the said case as Indian citizens. In view of the aforesaid discussion, we are of the view that the review petitioners could not make out any ground to review the judgment and order dated 01.02.2010 passed in ***Moslem Mondal***'s case.

70. Hence the review petition stands dismissed.

WA Nos.258/2008, 264/2008, 265/2008, 266/2008, 268/2008, 280/2008, 281/2008, 370/2008, 59/2009, 71/2009, 171/2010 and 313/2011

71. As discussed above, none of the parties to the aforementioned writ appeals objected to the reference of the writ appeals to the Full Bench for decision and in fact the learned counsel appearing in the writ appeals have submitted that those may be

decided by the Full Bench. That apart, the challenge made to the reference of the review petition to the Full Bench for decision has already been rejected for the reasons set forth above. Hence, the Full Bench in the present writ appeals is not precluded from going into the legality and validity of the view taken by the Division Bench in ***Moslem Mondal***'s case, when the same has not been gone into in the review petition.

Question (b): **Whether under Section 9 of the 1946 Act the burden is on a proceedee to prove that he is not a foreigner? If so, whether the Division Bench in *Moslem Mondal*'s case was correct in holding that though the burden under Section 9 of the said Act lies on the proceedee to prove that he is not a foreigner, the State is to first adduce evidence, confined to the grounds on which the reference rests, before the proceedee discharges his burden to prove that he is not a foreigner?**

72. Article 5 to 9 of the Constitution determines, who are citizens of India at the commencement of the Constitution. The Constitution does not make any provision with respect to the acquisition of citizenship after its commencement or the termination of such citizenship as well as other matters relating to citizenship. Article 11 of the Constitution, however, expressly saves the power of Parliament to make a law to provide for such matters, namely, the acquisition and termination of citizenship and all other matters relating to citizenship. By virtue of such power, the Parliament has enacted the 1955 Act to provide for acquisition of citizenship after the commencement of the Constitution, by birth, descent, registration, naturalization and incorporation of territory and also for termination and deprivation of

citizenship under certain circumstances. The said Act was amended by the Citizenship (Amendment) Act, 1985, to give effect to a political settlement, known as the 'Assam Accord', by insertion of Section 6A. The statement of objects and reasons of such amendment was to give effect to the political settlement i.e. 'Assam Accord' and to grant deemed citizenship to all persons of Indian origin who came to Assam before 01.01.1966, including such of those whose names were included in the electoral roll used for the purpose of general election to the house of people held in 1967 and who have been ordinarily resident in Assam ever since then. The further object of such amendment was to grant the deemed citizenship to those persons of Indian origin who came to Assam on or after 1st day of January, 1966 but before 25th day of March, 1971 from the specified territories and who have been ordinarily residents in Assam ever since and detected to be foreigners in accordance with the provisions of the 1946 Act and the 1964 Order, provided they register their names as required by the law.

73. The 1946 Act, which is a pre-Independence enactment, was enacted with a view to provide for the exercise by the Central Government of certain powers in respect of entry of foreigners into then British India, their presence therein and their departure therefrom. After independence the words "British India" was substituted by the word "India". Section 2(a) defines a 'foreigner' as a person who is not a citizen of India. As discussed above, Section 5 to 9 of the Constitution of India determined, who are citizens of India at the commencement of the Constitution and by the 1955 enactment, which was made by the Parliament in exercise of the power conferred under Article 246(1) read

with entry 17 of list one in the Seventh Schedule and Article 11 of the Constitution, the provisions for acquisition of citizenship, after the commencement of the Constitution, (i) by birth, (ii) by descent, (iii) by registration and (iv) by naturalization apart from incorporation of territory has been made.

74. Sub-section (1) of Section 3 of the 1946 Act empowers the Central Government to make provisions by Order, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein. Clauses (a) to (g) of sub-section (2) of Section 3, enumerates the matters with reference to which the power conferred by sub-section (1) could be exercised by the Central Government, without prejudice to the generality of the said power. The Central Government, therefore, is empowered to make Order in respect of the matters including the matters enumerated in sub-section (2), for the purpose of achieving the objective for which the 1946 Act has been enacted. Section 8 of the 1946 Act lays down the manner in which the nationality of a person, who is recognized as a national by the law of more than one foreign country or where for any reason it is uncertain what nationality, if any, is to be ascribed to a foreigner, is to be determined. Section 9 of the said Act provides that when any question arises with reference to the Act, but not falling under Section 8, or any order made or direction given thereunder, whether any person is or is not a foreigner of a particular class or description, the onus of proving that such person is

not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person. For better appreciation Section 9 of 1946 Act is reproduced below:-

> **9. Burden of proof.-** If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner of a particular class or description, the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person.

75. The Central Government in exercise of the power conferred under Section 3 of the 1946 Act, made the 1964 Order for determination, as to whether a person is or is not a foreigner within the meaning of 1946 Act, by a Tribunal constituted for that purpose. The Tribunal can give its opinion on such question only on a reference made by the competent authority. Section 9 of the 1946 Act, as noticed above, contains a non-obstante clause, namely, "*notwithstanding anything contained in the Indian Evidence Act, 1872*". A non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. It is equivalent to saying that inspite of the provisions or the Act mentioned in the non-obstante clause, the provisions in the enactment where such non-obstante clause is used will have its full operation or that the provision indicated in the non-obstante clause will not be an impediment for the operation of the enactment. Thus the non-obstante clause in Section 9 of the 1946 Act

that "*notwithstanding anything contained in the Indian Evidence Act, 1872*" must mean notwithstanding anything to the contrary contained in the Evidence Act and as such the provisions in Section 9 of the 1946 Act relating to the burden of proof has to be on such person as mentioned therein, despite the provisions contained in the Evidence Act relating to burden of proof, which is contrary to the provisions in Section 9 of the 1946 Act.

76. The 'burden of proof' means a party's duty to prove a disputed assertion or charge. The 'burden of proof' includes both 'burden of persuasion' and the 'burden of production'. The 'burden of persuasion' means the duty imposed on a person to convince the fact finder to view the facts in a way that favours that person. The 'burden of production' is the duty imposed on the person to introduce enough evidence on a issue to have the issue decided by the fact finder, in that person's favour. The party having the 'burden of proof' must introduce some evidence if he wishes to get a certain issue decided in his favour. The 'burden of proof', therefore, denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law (**Black's Law Dictionary, 7th Edition**).

77. According to ***Phipson***, who is considered to be an authority on the Law of Evidence, the phrase, 'burden of proof', has three meanings, namely, (i) the persuasive burden, the burden of proof as a matter of law and pleading the burden of establishing a case, whether by preponderance of evidence or beyond a reasonable doubt; (ii) the

evidential burden, the burden of proof in the sense of adducing evidence; and (iii) the burden of establishing the admissibility of evidence. While persuasive burden i.e. onus probandi never shifts and is always stable, the evidential burden may shift constantly, according as one scale of evidence or other preponderates. Onus probandi rests upon the party, who would fail if no evidence at all is adduced. The general principle of burden of proof that he who invokes the aid of law should be the first to prove his case may be affected by statutory provision, e.g. in a case where the matters within the knowledge of the person against whom a proceeding is initiated, like the proceeding under the provisions of the 1946 Act, as it will not only be difficult but also impossible for the State, at whose instance reference is made to the Tribunal, to first lead evidence on the question as to whether a person against whom such proceeding is initiated is a foreigner or not. The provisions of Section 9 of the 1946 Act is, therefore, in accordance with the underlying policy of Section 106 of the Evidence Act, which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In a proceeding before the Tribunal under the provisions of the 1946 Act, the provisions of Section 101 of the 1946 Act is not at all applicable, an exception having been curved out by Section 9 of the said Act. Even in a proceeding where the provisions of Sections 101 and 106 of the Evidence Act are applicable, the burden of proving any fact which is especially within the knowledge of any person, is upon such person, by virtue of Section 106 of the Evidence Act, which is an exception to Section 101 i.e. the general rule of the burden of proof in such proceeding.

78. In a proceeding under the Foreigners Act, 1946 read with 1964 Order the issue is whether the proceedee is a foreigner. It being a fact especially within the knowledge of the proceedee, the burden of proving that he is a citizen is, therefore, upon him, because of Section 9 of the 1946 Act and it is, therefore, his obligation to provide enough evidence to establish that he is not a foreigner. In an ex-parte proceeding before the Tribunal constituted under the provisions of 1964 Order the said position would not be changed as the burden of proving that the proceedee is not a foreigner continues to be upon the proceedee, which cannot shift and when the proceedee does not adduce any evidence to discharge such burden, the Tribunal has no alternative but to opine the proceedee as a foreigner, having regard to the main grounds on which the reference has been initiated and the notice having been issued to the proceedee. Unlike in a suit in the Civil Court, where the Court may require the plaintiff to adduce evidence to prove his case even in an ex-parte proceeding, as the burden of proof lies on the plaintiff in view of Section 101 of the Evidence Act, in a proceeding before the Tribunal under the provisions of 1946 Act read with 1964 Order, the same is not required, meaning thereby that the State is not required to adduce evidence in an ex-parte proceeding, as the burden lies on the proceedee to prove to the satisfaction of the Tribunal that he is not a foreigner, in view of the provisions contained in Section 9 of the 1946 Act.

79. The Apex Court in ***Ghaus Mohammad (supra)*** while considering the provisions of Section 9 of the 1946 Act has in clear terms held that by the said provision the onus of proving that the

proceedee is not a foreigner is upon him. The Apex Court has reiterated the said principle of law in ***Fateh Mohd.(supra)*** and ***Masud Khan (supra)***, by holding that by reason of Section 9 of the 1946 Act whenever a question arises whether a person is or is not a foreigner, the onus of proving that he is not a foreigner lies upon him and hence the burden is on the proceedee to establish that he is a citizen of India in the manner claimed by him. In ***Sarbananda Sonowal(I) (supra)***, where the question relating to the constitutional validity of the 1983 Act was under consideration, the Apex Court while dealing with various enactments made for dealing with the foreigners including the different provisions of 1946 Act has held that Section 9 of the said Act casts the burden of proving that a person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, on such person and therefore, when an order made under the 1946 Act is challenged and a question arises whether the person against whom the order has been made is a foreigner or not, the burden of proving that he is not a foreigner is upon such a person. The Apex Court while laying down the law relating to the burden of proof has also noticed the general rule in the leading democracies of the world that where a person claims to be a citizen of a particular country, the burden is upon him to prove that he is a citizen of that country. In paragraph 26 of the said report the Apex Court has observed as under:-

> "**26.** There is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Sometimes the place of birth of his grandparents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify

> the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

80. The Central Government, after the aforesaid pronouncement of law by the Apex Court in ***Sarbananda Sonowal(I) (supra)***, had issued the 2006 Order, on 10.02.2006, in exercise of the power conferred by Section 3 of the 1946 Act, laying down the procedure for disposal of question referred to the Tribunal, in clause 3 thereof. Because of making of such Order, the 1964 Order had eclipsed. By virtue of the provision contained in clause 3 of the 2006 Order, the duty was cast on the State to prima facie establish the basic facts to the satisfaction of the Tribunal before issuance of notice to the proceedee. The said Order was put to challenge before the Apex Court in ***Sarbananda Sonowal (II) (supra)***. The Apex Court while reiterating its earlier view expressed in ***Sarbananda Sonowal(I) (supra)***, has held that the provisions contained in Section 9 of the 1946 Act placing the burden on the person concerned to prove that he is not a foreigner is a valid piece of legislation and because of placing such burden on the proceedee, the same by itself would not mean that the procedure is ultra vires the provisions of Article 21 of the Constitution, which guarantees fair and reasonable procedure, as such provision is based on sound principles of law and on the principle underlying the provisions of Section 106 of the Evidence Act. It has also been held that the said provision has to be incorporated as the evidence required for deciding as to whether a person is or is not a foreigner is necessarily within the

personal knowledge of the person concerned. The Apex Court, therefore, has held that the requirement of establishment of the basic facts, by virtue of the 2006 Order, ex-facie is contrary to Section 9 of the 1946 Act and quashed the 2006 Order. Consequent upon quashing of the 2006 Order, the eclipse on the 1964 Order has been removed.

81. The Apex Court in paragraph 60 of the said report has also opined that since the Tribunal in the notice to be sent to the proceedee is required to set out the main grounds, evidently the primary onus in relation thereto would be on the State and once the Tribunal satisfied itself about the existence of the grounds, the burden of proof would be upon the proceedee. In ***Sarbananda Sonowal (II) (supra)*** the Apex Court, therefore, has held that the State is not required to adduce evidence first to prima facie satisfy the Tribunal relating to the existence of the grounds on which the reference is made. What the Apex Court has said in paragraph 60 is that the primary onus in relation to the existence of the grounds to the satisfaction of the Tribunal would be on the State, meaning thereby that the grounds on which a proceedee is suspected to be a foreigner must be reasonable and relevant to the issue of foreigner. For instance, if the ground, taken in a reference proceeding suspecting a person to be a foreigner, is that he wears a particular dress or is having a particular feature, such grounds cannot be said to be reasonable having any nexus to the issue of foreigner and hence the Tribunal naturally would not issue any notice on the basis of such grounds and reject the reference at the threshold. The Apex Court has not said that the State must adduce evidence first to

substantiate the existence of the grounds before issuance of notice to the proceedee; it has in fact held otherwise.

82. In ***Shambhu Nath Mehra (supra)*** the Apex Court has held as under:-

> "Section 106 is an exception to Section 101. The latter with its Illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

83. In ***D. Bhoormul (supra)*** the Apex Court while considering the proceeding initiated under Section 167(8)(c) of the Customs Act for confiscation of contraband or smuggled goods, has opined that though the burden of proving that the goods are smuggled goods, is on the department, for imposing the penalties under Section 167(8), the same being a fundamental rule relating to the proof in all criminal and quasi criminal proceedings, in the absence of any statutory provision to the contrary, the law does not require the prosecution to prove the impossible. It has also been opined that all that is required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in existence of the fact in issue. It has also been opined that the other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered according to the proof which it was in the power of one side to prove, and the power of the other to have contradicted. Since it is exceedingly difficult, if not absolutely impossible

for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden. The Apex Court in ***Narayan Govind Gavate (supra)*** has also opined that the 'onus probandi' is placed upon one party in accordance with the appropriate provisions of law applicable to various situations. It has also been held that the original or stable onus laid down by the provision of law on a party cannot be shifted. The doctrine of onus of proof, however, becomes unimportant when there is sufficient evidence before the Court to enable it to reach a particular conclusion. In ***Sita Ram Bhau Patil (supra)*** the Apex Court has reiterated its earlier view that the burden of proof becomes immaterial once the entire evidence has come before the Court.

84. In ***Sucha Singh (supra)*** the Apex Court while dealing with the judgment of conviction and sentence of life imprisonment passed by a designated Court for the offence committed under Section 302 read with Section 34 of the IPC, has held that the provisions of Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt and the provision of the said section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference. The law laid down in the said case, however, is not applicable in the present cases in hand, having regard to the provisions

contained in Section 9 of the 1946 Act, which has also been discussed in detail above.

85. The Apex Court in ***Vikramjit Singh alias Vicky (supra)*** has reiterated that Section 106 of the Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt and only when the prosecution case has been proved, the burden in regard to such facts, which was within the special knowledge of the accused, may be shifted to the accused for explaining the same. The Apex Court at the same time has opined that of course, there are certain exceptions to the said rule e.g. where burden of proof may be imposed upon the accused by reason of a statute.

Section 9 of the 1946 Act imposes a burden on the proceedee to prove that he is not a foreigner, which provision, as discussed above, has been held by the Apex Court as a valid piece of legislation.

86. In ***Moslem Mondal***'s case the Division Bench, in paragraph 53, though has rightly opined that the burden of proof under Section 9 of the 1946 Act is not on the State but on the person, whose nationality is in question, is well recognized in this country and in paragraph 62 that it cannot be reasonably expected to have divested the State of the opportunity to adduce evidence in rebuttal, it has, however, having regard to an ex-parte proceeding, in paragraph 86, held that the Tribunal cannot render an opinion that the proceedee is a foreigner merely because he did not respond to the notice and as the Tribunal, even in an ex-parte proceeding is required to render its opinion, the

State cannot be absolved of its burden to prove the truth of the grounds on which they claim the proceedee to be a foreigner. It has further been held that if the State establishes by bringing such materials, which would establish the truth of the assertion made in the reference, the Tribunal would be free to give its opinion if it finds that the grounds are sufficient to hold the proceedee a foreigner. It has also been opined that the evidence to be given by the State would however confine to the ground on which the State rests its case and it will have no responsibility to prove, apart from the grounds which the State must prove, that the proceedee is not an Indian citizen. The Division Bench at the same time has opined that when it is stated that the 'burden of proof' is on a foreigner to prove that he is an Indian citizen, what it means is that if the proceedee claims to be an Indian citizen, he has the burden to establish his claim of being an Indian citizen, because the State is not expected to prove a negative fact, namely, that the proceedee is not an Indian citizen.

87. A Division Bench of this Court in ***Prafulla Sarkar (supra)*** has held that the Tribunal, in the absence of any oral evidence by the complainant in support of the allegation that the petitioner was a foreigner, was not justified in relying upon Section 9 of the 1946 Act to record the finding that the petitioner could not discharge his burden and therefore, he could safely be declared as foreign national.

88. The aforesaid view taken by the Division Bench in ***Moslem Mondal***'s case, more particularly in paragraph 86 thereof, as well as in ***Prafulla Sarkar (supra)*** is contrary to the law laid down by the Apex

Court, as discussed above, including in ***Sarbananda Sonowal(I)*** and ***Sarbananda Sonowal (II) (supra)***, as well as the legal provisions noticed above, particularly Section 9 of the 1946 Act, and hence is not the correct proposition of law. The decision in the ***Moslem Mondal***'s case and ***Prafulla Sarkar (supra)***, therefore, would be confined to those cases only.

Question (c): **Whether the Tribunal can entertain an application for setting aside an ex-parte opinion? If so, on what ground(s)?**

89. The Tribunal gets the jurisdiction to give an opinion on the question whether a person is foreigner or not only when a reference is made by the authorities mentioned in clause 2 of the 1964 Order. The Tribunal, thereafter, has to cause service, on the person to whom the reference relates, a copy of the main grounds on which he is alleged to be a foreigner. The Tribunal is also required to give a reasonable opportunity of making a representation, producing evidence in support of his case and after considering such evidence as may be produced as well as after hearing such persons as may deserved to be heard, it has to submit its opinion to the authority specified in that behalf in the order of reference. The Tribunal, however, is empowered to regulate its own procedure. Clause 4 of 1964 Order confers on the Tribunal the power of a Civil Court while trying a suit under the Code of Civil Procedure, in respect of (a) summoning and enforcing the attendance of any person and his examination on oath; (b) requiring the discovery and production of any document; and (c) issuing commissions for the examination of any witness. The procedure laid down in the Code of

Civil Procedure as such is not applicable in a proceeding before the Tribunal, except in relation to the matter stipulated in clause 4 of the said Order. As noticed above, the Tribunal is empowered to regulate its own procedure while deciding a reference proceeding pending before it.

90. Though strictly speaking as soon as the Tribunal renders its opinion it becomes functus officio as no proceeding thereafter is pending, it cannot be said that the Tribunal has no jurisdiction to pass an order, even after the disposal of the proceeding, in the interest of justice. The Courts and the Tribunals exist to do justice. It cannot refuse to entertain an application, even after the proceeding before it is over, on the ground that there is no specific provision in law laying down the procedure for entertaining such application, if such application is required to be entertained to do justice between the parties, otherwise the very existence of the Court or the Tribunal would be meaningless, if in a given case where such an order is required to be passed, the Court or the Tribunal refuses to pass such order on the plea of technicalities. The procedures are handmaid of justice and must be regarded as something designed to facilitate justice and further its ends and not a thing designed to trip people up (***Sangram Singh Vs. Election Tribunal, Kotah***, reported in ***AIR 1955 SC 425***). Moreover, by the nature of the quasi-judicial proceeding before the Tribunal they have the trappings of the Civil Court. Neither the 1946 Act nor the 1964 Order or any procedure formulated by the Tribunal prohibits acceptance of any application after rendering the opinion by the Tribunal, if the entertainment of the same is required for ends of justice.

91. The Apex Court in ***Grindlays Bank Ltd.(supra)*** while dealing with the power of the Labour Court, constituted under the Industrial Disputes Act, to entertain an application to set aside its ex-parte award, has held that there being no statutory prohibition to entertain such an application, the Tribunal has the power to entertain the same in the interest of justice. It has also been held that though there is no express provision in the Industrial Disputes Act or the Rules framed thereunder giving the Tribunal jurisdiction to entertain such application, the Tribunal should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. It has also been held that the power given to the Tribunal under Section 11(1) of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 to follow such procedure as the Arbitrator or other authority concerned may think fit, are of widest amplitude and confer ample power upon the Tribunal and other authorities to devise its procedure as the justice of the case demands. The Apex Court further opined that the object of giving such wide power being to mitigate the rigour of the technicalities of the law for achieving the object of effective investigation and settlement of the disputes, the Tribunal can entertain an application for setting aside an ex-parte award. The Tribunal, however, is required to exercise its discretion relating to the entertainment of such application, in a judicial manner, without caprice and according to the general principle of law and rules of natural justice. The same view has also been reiterated by the Apex Court in ***Satnam Verma (supra)***.

92. As discussed above, the Tribunals constituted under the Foreigners Act read with the 1964 Order have to regulate their own procedure and they have also the quasi-judicial function to discharge and hence in a given case the Tribunal has jurisdiction to entertain and pass necessary order on an application to set aside an ex-parte opinion, provided it is proved to the satisfaction of the Tribunal that the proceedee was not served with the notice in the reference proceeding or that he was prevented by sufficient cause from appearing in the proceeding, reason for which was beyond his control. Such application, however, should not be entertained in a routine manner. The Tribunal can entertain such application provided the proceedee could demonstrate the existence of the special/exceptional circumstances to entertain the same by way of pleadings in the application filed for setting aside the ex-parte opinion, otherwise the very purpose of enacting the 1946 Act and the 1964 Order would be frustrated. The Tribunal, therefore, would have the jurisdiction to reject such application at the threshold, if no ground is made out.

Question (d): **In what manner the investigation is to be carried out by the instrumentality of the State before making a reference to the Tribunal under the provisions of the 1964 Order?**

93. The right to get a fair trial is a basic fundamental and human right. Any procedure which comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution. Fair trial also includes a fair investigation. The concept of fair investigation and fair trial assumes much importance in the matter of detection and deportation of foreigners under the provisions of the

Foreigners Act, 1964 Order as well as the 2012 Amendment Order, because of the nature of proceeding as well as the burden cast on the person who is suspected to be a foreigner to prove that he is not a foreigner, by Section 9 of the 1946 Act. The citizenship right is to be jealously protected. The right under Article 21 of the Constitution is available to all persons to protect his life and personal liberty and hence even the right of a non-citizen to have fair investigation, trial as well fair procedure to be adopted by the Tribunal is guaranteed by Article 21 of the Constitution.

94. The Apex Court in ***Dwarka Prasad Agarwal (supra)*** has opined that the right to get a fair trial is a basic fundamental/human right and denial of fair trial violates Article 14 of the Constitution. In ***Zahira Habibulla H. Sheikh (supra)***, commonly known as "Best Bakery Case", the Apex Court giving emphasis on the principle of fair trial, has opined that the just application of its principles in substance is to find out the truth and prevent miscarriage of justice. It has also been opined that the concept of fair trial entails the familiar triangulation of interests of the accused, the victim and society, and it is the community that acts through the State and prosecuting agencies. It has also been opined that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Public interest in the proper administration of justice must be given as much importance, if not more, as the interests of the individual accused. While dealing with the role of the Court, the

Apex Court observed that the courts have a vital role to play. Its role is to discover, vindicate and establish the truth and hence the trial should be a search for the truth and not a bout over technicalities. The Apex Court further observed that the Presiding Judge must cease to be a spectator and a mere recording machine and he must have active interest and elicit all relevant materials necessary for reaching the correct conclusion to find out the truth and administer justice with fairness and impartiality both to the parties and to the community.

95. In ***Zahira Habibulla H. Sheikh(5) (supra)*** the Apex Court opined that every State has a constitutional obligation and duty to protect the life and liberty of its citizens, which is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology. The Apex Court further opined that the fair trial consists not only in technical observance of frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice. In ***Samadhan Dhudaka Koli (supra)*** the Apex Court has reiterated its view that the prosecution must also be fair to the accused. Fairness in investigation as also trial is a human right of an accused. In ***Himanshu Singh Sabharwal (supra)*** the Apex Court reiterating the earlier view, has further opined that the fair trial is inherent in the concept of due process of law and the fair hearing requires an opportunity to preserve the process. In ***Nirmal Singh Kahlon Vs. State of Punjab and ors.*** reported in ***AIR 2009 SC 984***, the Apex Court has reiterated that fair investigation and fair trial are concomitant

to observance of fundamental right of an accused under Article 21 of the Constitution and hence though the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society, a victim of a crime, thus, is equally entitled to a fair investigation. In ***National Human Rights Commission (supra)*** commonly known as ***Godhra Riot Case***, the Apex Court has reiterated the requirement of having fair investigation and the trial.

96. One of the contentions of the proceedees is that though the referral authority is required to make the reference to the Tribunal after making a fair investigation, no such proper and fair investigation is conducted and the police at their own whims and caprice gives a report, in some cases even without visiting the place where such proceedee resides and also without giving any opportunity to produce the relevant documents to substantiate that the proceedee is not a foreigner, and such report is accepted by the referral authority and accordingly the reference is made to the Tribunal, on the basis of which the reference is registered against such person.

97. Fair investigation and fair trial being the basic fundamental/human right of a person, which are concomitant to preservation of the fundamental right of a person under Article 21 of the Constitution, there has to be a fair and proper investigation by the investigating agency before making a reference to the Tribunal. In such investigation the attempt has to be made to find out the person against whom the investigation is made, so that the person concerned is given the opportunity to demonstrate at that stage itself that he is not a

foreigner. In case the person concerned could not be found out in the village where he is reported to reside or in the place where he ordinarily resides or works for gain, the investigating agency has to record the same in presence of the village elder or the village headman or any respectable person of the locality, which in turn would ensure visit of the investigating officer to the place where such person ordinarily resides or reported to reside or works for gain and making of an effort to find him out for the purpose of giving him the opportunity to produce the documents etc., if any, to demonstrate that he is not a foreigner. The investigating officer, as far as practicable, shall also obtain the signature or thumb impression of the person against whom such investigation is initiated, after recording his statement, if any, provided he makes himself available for that purpose. There are also instances where the person against whom such investigation is initiated, changes his place of residence, may be in search of livelihood or may be to avoid detection. To ensure proper investigation and also having regard to integrity and sovereignty of the nation, once investigation relating to the nationality status of a person starts he must inform the investigating agency in writing about the change of residence, if any, thereafter. In case such person has failed to intimate the investigating agency in writing the subsequent change of his place of residence, the investigating agency has to mention the same in his report with his opinion relating to the status of such person on the basis of materials collected at the place where he earlier resided. That will ensure a fair investigation and submission of a proper report on such investigation to the authority. Needless to say, such investigation need not be a detailed or an exhaustive one keeping in view the nature of the proceeding

before the Tribunal and the object sought to be achieved. Hence it need not be equaled with an investigation conducted in criminal cases.

98. The reference by the referral authority also cannot be mechanical. The referral authority has to apply his mind on the materials collected by the investigating officer during investigation and make the reference on being satisfied that there are grounds for making such reference. The referral authority, however, need not pass a detailed order recording his satisfaction. An order agreeing with the investigation would suffice. The referral authority also, while making the reference, shall produce all the materials collected during investigation before the Tribunal, as the Tribunal is required prima facie to satisfy itself about the existence of the main grounds before issuing the notice to the proceedee.

99. Fair trial and reasonable opportunity required to be afforded to a proceedee also includes supply of the certified copy of any public document, including the copy of the relevant electoral rolls which has also been recognized by sub-section (2) of Section 6A of the 1955 Act as relevant document for the purpose of establishment of the citizenship, to the proceedee, whenever asked for, which may be necessary for the purpose of demonstrating by the proceedee that he is not a foreigner. Certified copies of such documents, if applied for, must be supplied promptly, otherwise, it may result in delay in disposal of the reference proceeding, as the proceedee in that case may ask for time, till such documents are made available to him. The same may also amount to denial of reasonable opportunity to the proceedee, as he

may not be able to discharge his burden of proof that he is an Indian national, in the absence of such documents. Such delay in disposal of the proceeding would also be against national interest. The interest of justice, therefore, requires supply of the certified copies of such documents, that too promptly, whenever asked for.

Question (e): **What would be the appropriate procedure relating to the service of notice on the person against whom the reference proceeding has been initiated?**

100. Clause 3 of the 1964 Order, as amended by the 2012 Order, has laid down the procedure for disposal of the question as to whether a person is a foreigner or an Indian citizen. The reference proceeding before the Tribunal has to pass through various important stages before its culmination in an opinion. Every such stage is very important, having regard to the burden cast on the person who is suspected to be a foreigner to prove that he is not a foreigner, under Section 9 of the 1946 Act. One of the most important stages is, apart from serving the main grounds on which the proceedee is alleged to be a foreigner, just and proper service of notice. The 1964 Order also envisage giving a reasonable opportunity to the proceedee to demonstrate that he is not a foreigner. Unless the Tribunal ensures just and proper service of notice, the requirement of giving reasonable opportunity would be defeated. The same would also then be in violation of the basic principles of natural justice.

101. Though the Tribunals under the 1964 Order, as amended by the 2012 Order, can regulate its own procedure for disposal of the

reference proceeding, it is seen from various cases that no uniform procedure is adopted by the Tribunals in the matter of service of notice. Unless there is proper service of notice it cannot be said that the person against whom such notice is issued is treated fairly and he has been given a fair trial. There are instances where the Tribunal has accepted the service of notice only on the basis of the report of the process server, which in the reference proceeding is the police, that the proceedee is not found in his place of residence and hence the notices served by a substituted manner i.e. pasting a copy of the said notice on the place where the proceedee last resided and also in a conspicuous place, however, without any witness to such service. There are also instances where the Tribunal accepts the service of notice on the basis of the report submitted by the process server that the proceedee refused to accept the notice, without getting the signature of any witness to such refusal.

102. The question, therefore, is what would be the just, proper and reasonable procedure for the purpose of service of a notice on the person who is suspected to be a foreigner? The proceeding before the Tribunal being quasi-judicial and in the nature of civil proceeding, in our considered opinion, the procedure for service of notice has to be evolved in the light of the procedure laid down in the Code of Civil Procedure for service of summons on the defendants in a civil suit. The proper service of notice also assumes importance as the Tribunal has to render its opinion also in an ex-parte proceeding, on the question referred to it, even in the absence of any evidence on record and solely on the basis of materials initially submitted by the referral authority

before the Tribunal and at the time of making the reference, as the referral authority is not required to adduce any evidence to substantiate that the proceedee is not a foreigner, which burden, in view of Section 9 of the 1946 Act, lies on the proceedee.

103. Having regard to the aforesaid discussion, we are of the view that, in the absence of any uniform laid down procedure, the following procedure is henceforth required to be adopted, in the matter of service of notice by the Tribunals on the proceedee. The procedure laid down herein below shall be applicable to all the proceedings pending before the Tribunal where the notices are either yet to be issued or issued but not yet served:

i. **The proceedee shall be served with the notice, together with the main grounds on which he is suspected to be a foreigner, as far as practicable, personally, whose signature/thumb impression, as proof of service, is to be obtained.**

ii. **Such notice shall be issued in the address where the proceedee last resided or reportedly resides or works for gain. In case of change of place of residence, which has been duly intimated in writing to the investigating agency by the proceedee, the Tribunal shall issue notice in such changed address.**

iii. **The notice shall be issued by the Tribunal in the official language of the State also indicating that the burden is on the proceedee to prove that he is an Indian citizen and not a foreigner.**

iv. **The service of notice on any adult member of the family of the proceedee, in case he is found to be not present at the**

time of service, shall constitute the service on the proceedee. In token of such service the name and signature/thumb impression of such adult member shall be obtained. In case such adult member refuses to put the signature or thumb impression, a report in that regard shall be submitted.

v. If the proceedee or any available adult member of his family refuses to accept the notice, the process server has to give a report 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. The signature/thumb impression of such witness, if present and willing, must be obtained.

vi. In case the proceedee has changed the place of residence or place of work, without intimation to the investigating agency, a report in that regard shall be submitted by the process server. A copy of the notice shall then be affixed in a conspicuous place where the proceedee last resided or reportedly resided or worked for gain, containing the name and address of a respectable person of the locality, if available and willing to be a witness for that purpose. The signature/thumb impression of such person, in that case, shall also be obtained in the said report.

vii. Where the proceedee or any adult member of his family are not found in the residence, a copy of the notice shall be pasted in a conspicuous place of his residence, witnessed by 1(one) respectable person of the locality, subject to his availability and willingness to be a witness in that regard. In that case the signature or thumb impression of that person shall also be obtained in proof of the manner in which such service is effected.

viii. **Where the proceedee resides outside the jurisdiction of the Tribunal, the notice has to be sent for service to the officer-in-charge of the police station within whose jurisdiction the proceedee resides or last resided or last known to have been resided or works for gain. The process server shall then cause the service of notice in the manner as provided herein above.**

ix. **In case no person is available or willing to be the witness of service of notice, as mentioned above, or refused to put his signature or thumb impression, a signed certificate/verification is to be filed by the process server to that effect, which shall be sufficient proof of such non-availability, unwillingness and refusal.**

Questions (f): **Whether an application filed by a foreigner under sub-section (3) of Section 6A of the 1955 Act read with Rule 19 of the 2009 Rules, can be entertained beyond the time limit prescribed by Rule 19 of the said Rules for registration? If so, the ground(s) on which such delayed application can be entertained?**

AND

Questions (g): **Whether a person, who has been detected to be a foreigner within the meaning of sub-section (3) of Section 6A of the 1955 Act, is liable to be deported from India if he does not register his name as required under the provisions of 1955 Act and 2009 Rules?**

104. Sub-section (1) of Section 6A of the 1955 Act contains the definition clauses. Sub-section (2) provides that subject to the provisions of sub-sections (6) and (7), all persons of Indian origin, who came before 01.01.1966 to Assam from the specified territory, including such of those whose names were included in the electoral roll used for the purposes of the General Election to the house of the people held in

1967, and who have been ordinarily resident in Assam since the dates of their entry into Assam shall be deemed to be citizens of India as from the 1st day of January, 1966.

105. Sub-section (3) of Section 6A of the 1955 Act, subject to the provisions of sub-sections (6) and (7), requires a person of Indian origin, who has come to Assam on or after 1st day of January, 1966 but before 25th day of March, 1971 from the specified territory and has, since the date of his entry into Assam been ordinarily resident in Assam and has been detected to be a foreigner, to register himself in accordance with the Rules made by the Central Government in that behalf under Section 18 of the said Act, with such authority, as may be specified in such Rules. It has also been provided that his name, if included in any electoral roll for any Assembly or Parliamentary constituency, in force on the date of such detection, shall be deleted therefrom. The 'specified territory' has been defined in clause (c) of sub-section (1) of Section 6A as the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985. Explanation to sub-section (3) stipulates that the opinion of the Tribunal constituted under the 1964 Order, shall be the sufficient proof of his being a foreigner and if any question arises as to whether such person complies with any other requirement of sub-section (3), meaning thereby the requirements stipulated in clauses (a) and (b) thereof, the Registering Authority shall either decide the question in conformity with the finding recorded by the Tribunal, if the opinion of the Tribunal contains a finding with that respect or refer the question to a Tribunal constituted under the 1964 Order, if the opinion of the

Tribunal does not contain a finding with respect to such other requirement.

106. Sub-section (4) of Section 6A stipulates that the person so registered under sub-section (3) shall be de-franchised for a period of 10 years with effect from the date when he is detected to be a foreigner, but he shall enjoy the same rights and obligations as a citizen of India, including the right to obtain a passport under the Passports Act, 1967 and the obligations connected therewith. Sub-section (5) provides that a person registered under sub-section (3) shall be deemed to be a citizen of India for all purposes as from the date of expiry of the period of 10 years from the date on which he has been detected to be a foreigner. For better appreciation, sub-sections (3), (4) and (5) of Section 6A of the 1955 Act are reproduced below:-

> "(3) Subject to the provisions of sub-sections (6) and (7), every person of Indian origin who –
>
> (a) came to Assam on or after the 1st day of January, 1966 but before the 25th day of March, 1971 from the specified territory; and
>
> (b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and
>
> (c) has been detected to be a foreigner,
>
> shall register himself in accordance with the rules made by the Central Government in this behalf under section 18 with such authority (hereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll for any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom.
>
> *Explanation.*- In the case of every person seeking registration under this sub-section, the opinion of the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 holding such person to be a foreigner, shall be deemed to be sufficient proof of the requirement under clause (c) of this sub-section and if any question arises as to whether such person complies with any other requirement under this sub-section, the registering authority shall, -
>
> *(i)* if such opinion contains a finding with respect to such other requirement, decide the question in conformity with such finding;
>
> *(ii)* if such opinion does not contain a finding with respect to such other requirement, refer the question to a Tribunal constituted under the said Order having jurisdiction in accordance with such rules as the Central

> Government may make in this behalf under section 18 and decide the question in conformity with the opinion received on such reference.
> (4) A person registered under sub-section (3) shall have, as from the date on which he has been detected to be a foreigner and till the expiry of a period of ten years from that date, the same rights and obligations as a citizen of India (including the right to obtain a passport under the Passports Act, 1967 (15 of 1967) and the obligations connected therewith), but shall not be entitled to have his name included in any electoral roll for any Assembly or Parliamentary constituency at any time before the expiry of the said period of ten years.
> (5) A person registered under sub-section (3) shall be deemed to be a citizen of India for all purposes as from the date of expiry of a period of ten years from the date on which he has been detected to be a foreigner."

107. Sub-section (6) of Section 6A of the 1955 Act stipulates that (a) if any person referred to in sub-section (2) submits the application within 60 days from the date of commencement of the Citizenship (Amendment) Act, 1985 along with a declaration that he does not wish to be a citizen of India, such person shall not be deemed to have become a citizen by virtue of the provisions contained in sub-section (2) of Section 6A; (b) if any person referred to in sub-section (3) files the application in the prescribed form and to the prescribed authority within 60 days from the date of commencement of the Citizenship (Amendment) Act, 1985 together with a declaration, from the date on which he has been detected to be a foreigner, whichever is later, a declaration that he does not wish to be governed by the provisions of that sub-section and sub-sections (4) and (5), it shall not be necessary for such person to register himself under sub-section (3). The provisions of sub-section (2) to (6), in view of the provisions contained in sub-section (7), shall not be applicable to any person, who is a citizen of India immediately before commencement of the Citizenship (Amendment) Act, 1985 and also to the person who was expelled from India before the commencement of the said Amendment Act, for the

year under the 1946 Act. Sub-section (2) provides that the provisions of Section 6A shall have the overriding effect on the other law for the time being in force.

108. Rule 16F of the Citizenship Rules, 1956, as amended in 2005, provides the time limit for registration of a foreigner within the meaning of Section 6A(3), which is 30 days from the date of detection as a foreigner, which period is extendable by another 60 days by the registering authority for the reasons to be recorded in writing. Rule 16D of the said Rules also empowers the registering authority to make a reference to the Tribunal if any question arises as to whether such person complies with any requirement contained in Section 6A(3) of the 1955 Act, which is required to be decided by the Tribunal under Rule 16E of the said Rules. The 2009 Rules, which has repealed the 1956 Rules, also contains *pari materia* provisions. From the aforesaid provisions, it, therefore, appears that the 1955 Act confers the deeming citizenship on the persons of Indian origin who came to Assam from the specified territory before 01.01.1966 and who have been ordinarily resident in Assam since the date of their entry into Assam. The other class of persons, namely, the persons who came to Assam from the specified territory on or after 1st day of January, 1966 but before 25th day of March, 1971, would not become citizens of India automatically and they would continue to be foreigners, unless of course they are registered in accordance with the provisions contained in sub-section (3) of Section 6A of the 1955 Act read with Rule 19 of the 2009 Rules.

109. Prescription of time for filing such application seeking registration has a purpose. Such persons, who are detected to be a foreigner of the stream between 01.01.1966 and 25.03.1971, cannot enjoy the right under sub-section (4) of Section 6A for an indefinite period of time, without registering their names as required by law. They being recognized as the foreigners by sub-section (3) of Section 6A, they will be treated as foreigners for all purposes, unless they register their names within the time limit prescribed. The limited rights and obligations as a citizen of India, however, has been conferred on those persons, by virtue of sub-section (4) of Section 6A, so that they are not deprived of the basic rights as a citizen during the time limit prescribed for filing the application and till the order is passed by the registering authority registering their names. By virtue of the provisions contained in sub-section (4) of Section 6A, it cannot be said that the persons who are detected to be foreigners of the stream between 01.01.1966 and 25.03.1971 would continue to be the citizens of India and as such cannot be deported from India, even if they do not file their applications for registration at all, as required by law. The time limit prescribed by the aforesaid provisions of law would, however, commence from the date of rendering the opinion by the Tribunal.

110. Section 6A of the 1955 Act does not provide the time limit within which the application seeking registration under sub-section (3) is to be filed, except providing that such person shall have to register himself in accordance with the rules made by the Central Government in that behalf under Section 18 of the said Act. Section 18 is the rule making power of the Central Government. The time limit, however, has

been prescribed by Rule 19 of the 2009 Rules. The Apex Court in ***Sales Tax Officer Vs. K.I. Abraham*** reported in ***AIR 1967 SC 1823*** while dealing with the provisions of the Central Sales Tax Act, 1956 and the third proviso to Rule 6(1) of the Central Sales Tax (Kerala) Rules, 1957, which prescribed a time limit within which the declaration is to be filed by the registered dealer, has opined that in the absence of the time limit prescribed in the Act, there cannot be any prescription of time limit in the Rules. The Apex Court, therefore, opined that the assessee was not bound to furnish the declaration within the time limit as prescribed by the third proviso of the aforesaid Rules and such declaration can be filed within a reasonable time before the order of assessment was made. In ***Topline Shoes Ltd. Vs. Corporation Bank*** reported in ***(2002)6 SCC 33*** the Apex Court, while dealing with provisions of Section 13(2)(a) of the Consumer Protection Act, 1986, has held that the time limit prescribed for filing the opposite party's version is directory and not mandatory and the Forum/Commission has the discretion to extend the said time. In ***Kailash Vs. Nanhku & ors.*** reported in ***(2005)4 SCC 480*** the Apex Court while dealing with the provisions of Order VIII Rule 1 of the CPC, as amended, has also held that the time limit prescribed for filing the written statement is directory in nature and not mandatory.

111. 1956 Rules as well as 2009 Rules, as noticed above, provide the initial time limit for filing application for registration, i.e. 1(one) month, which is extendable by another 60 days by the registering authority. Though there is no time limit prescribed in Section 6A of the 1955 Act for filing such application, having regard to the purpose for

which Section 6A of the 1955 Act has been enacted, it also cannot be said that the fixation of time limit for filing the application has no bearing on the purpose sought to be achieved by such enactment. However, such time limit can be extended by the registering authority, only under very exceptional circumstances preventing the applicant from filing the application due to reasons beyond his control, for which the reasons have to be recorded by the registering authority. But such extension of time cannot also be for an indefinite period of time, having regard to the object of the enactment of Section 6A of the 1955 Act. A person who does not register within the time limit fixed or within the time limit that may be extended by the registering authority, is liable to be deported from India as he is admittedly a foreigner and he has not acquired the right of a citizen of India as has been acquired by a person of Indian origin who came to Assam from the specified territory prior to 01.01.1966, by virtue of the deeming provision in sub-section (2) of Section 6A of the 1955 Act. The decision of the Apex Court in ***National Human Rights Commission (supra)*** on which Mr. Das, learned Sr. counsel has placed reliance, does not support the contention that a person of Indian origin who came to Assam from specified territory between 01.01.1966 to 25.06.1971 would continue to be the citizen of India despite non-filing of application for registration. In the said case, the Apex Court had interfered with the quit notices and ultimatum issued by a Student organization, on the ground that they do not have the authority to issue the same and it tantamounts to threat to the life and liberty of each and every person of Chakma tribe. The Apex Court had also directed not to evict or remove the Chakmas from their occupation on the ground that he is not a citizen of India until the

competent authority takes a decision on the application filed by them for registration under the provisions of the 1955 Act.

Question (h): What is the scope of interference with the Tribunal's order in a writ proceeding?

112. Article 226 of the Constitution confers on the High Court power to issue appropriate writ to any person or authority within its territorial jurisdiction. The Tribunal constituted under the 1946 Act read with the 1964 Order, as noticed above, is required to discharge the quasi-judicial function. The High Court, therefore, has the power under Article 226 of the Constitution to issue writ of certiorari quashing the decision of the Tribunal in an appropriate case. The scope of interference with the Tribunal's order, in exercise of the jurisdiction under Article 226, however, is limited. The writ of certiorari can be issued for correcting errors of jurisdiction, as and when the inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it or if such Court or Tribunal acts illegally in exercise of its undoubted jurisdiction, or when it decides without giving an opportunity to the parties to be heard or violates the principles of natural justice. The certiorari jurisdiction of the writ Court being supervisory and not appellate jurisdiction, the Court cannot review the findings of facts reached by the inferior Court or Tribunal. There is, however, an exception to the said general proposition, in as much as, the writ of certiorari can be issued and the decision of a Tribunal on a finding of fact can be interfered with, if in recording such a finding the Tribunal has acted on evidence which is legally inadmissible or has refused to

admit admissible evidence or if the finding is not supported by any evidence at all, because in such cases such error would amount to an error of law apparent on the face of the record. The other errors of fact, however grave it may be, cannot be corrected by a writ court. As noticed above, the judicial review of the order passed by the inferior Court or the Tribunal, in exercise of the jurisdiction under Article 226 of the Constitution, is limited to correction of errors apparent on the face of the record, which also takes within its fold a case where a statutory authority exercising its discretionary jurisdiction did not take into consideration a relevant fact or renders its decision on wholly irrelevant factors. Hence, the failure of taking into account the relevant facts or consideration of irrelevant factors, which has a bearing on the decision of the inferior court or the Tribunal, can be a ground for interference of the Court or Tribunal's decision in exercise of the writ jurisdiction by the High Court.

113. The Apex Court in ***Sant Lal Gupta Vs. Modern Coop. Group Housing Society Ltd.*** reported in ***(2010)13 SCC 336***, reiterating the grounds on which a writ of certiorari can be issued, has opined that such a writ can be issued only when there is a failure of justice and cannot be issued merely because it may be legally permissible to do so. It is obligatory on the part of the petitioners to show that a jurisdictional error has been committed by the statutory authority. There must be an error apparent on the face of the record, as the High Court acts merely in a supervisory capacity and not as the appellate authority. An error apparent on the face of the records means an error which strikes one on mere looking and does not need long

drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matters to show its incorrectness. Such error may include giving reasons that are bad in law or inconsistent, unintelligible or inadequate. It may also include the application of a wrong legal test to the facts found, taking irrelevant consideration into account and failing to take relevant consideration into account, and wrongful admission or exclusion of evidence as well as arriving at a conclusion without any supporting evidence. Such a writ can also be issued when there is an error in jurisdiction or authority whose order is to be reviewed has acted without jurisdiction or in excess of its jurisdiction or has failed to exercise the jurisdiction vested in him by law.

Question (i): **Whether the Civil Court has jurisdiction to entertain a suit for declaration that the plaintiff is not a foreigner?**

114. The contention raised by the learned counsel for the parties as to whether the Civil Court has the jurisdiction to entertain a suit for declaration of his status as the citizen of India has not been gone into in the present appeals as the said question does not arise for consideration in these appeals. Hence, the decisions cited by the learned counsel appearing for the parties in that regard are not discussed.

Decisions in individual writ appeals

115. Having laid down the law, we shall now proceed to deal with the individual appeals.

116. **WA No.258/2008**

116.1. As discussed above, pursuant to the order dated 19.09.2008 passed by the Writ Appellate Court in this appeal the parties have adduced evidence before the Tribunal. A report has also been submitted by the Tribunal as directed. The evidence adduced by the appellant as well as the report submitted by the Tribunal reveal that the appellant could prove that her grand-father and grand-mother's names appeared in the electoral rolls of 1966 and 1970, which were exhibited as Exts.-B and C, respectively. The appellant could also prove that her father and mother's names appeared in the electoral rolls of 1971 and 1997 (Exts.-D and E). The birth of the appellant in village Dighirpar could also be proved by examining Shri Ajmat Ali (witness No.2). Shri Usman Gani Akand (witness No.3), the village Headman, also proved the certificate issued by him certifying that the appellant is a resident of the village. There is no cross-examination by the State on the lineage proved by the appellant. The Tribunal though initially passed the ex-parte order declaring the appellant to be a foreigner coming to India from the specified territory after 25.03.1971, in the further chance given to the appellant by the aforesaid order passed in the writ appeal, the appellant could prove that she is an Indian citizen and not a foreigner as alleged. Such cogent and reliable evidence as adduced by the appellant could not be dislodged by the State by adducing any rebuttal evidence. The Local Verification Officer, who was examined as witness by the State did not say anything except that he has submitted the report (Ext.-1) to the effect that the appellant is doubted to be an illegal migrant.

116.2. Having regard to the evidence which have been adduced by the appellant as well as by the State before the Tribunal, it is, therefore, evident that the appellant could discharge the burden of proof that she is an Indian citizen and not a foreigner. The subsequent order passed by the Tribunal on 02.03.2009 opining the appellant to be an Indian citizen, has to be accepted even though the Tribunal in its earlier ex-parte order dated 03.10.2007 opined the appellant to be a foreigner, the same being an ex-parte order, where the appellant could not adduce any evidence.

116.3. In view of the above, the earlier order passed by the Tribunal dated 03.10.2007 passed in F.T. Case No.243/2006 as well as the common judgment and order dated 25.07.2008 in so far as it relates to WP(C) No.6560/2007, are set aside. If the appellant is in custody, she is directed to be released forthwith. The writ appeal stands allowed.

117. **WA No.264/2008**

117.1. The learned Member, Foreigners Tribunal, pursuant to the interim order passed in the writ appeal submitted the report dated 18.10.2010, with the finding that the appellants have failed to prove that they are Indian citizens. The relevant portion of the said report (paragraph 18), is quoted below:-

> "**18. considering the entire facts and circumstances and in view of the above discussion, I am of the opinion that both the opposite party/appellant Nos.1 and 2 have failed to prove that their family have been living in Assam since before 25.03.1971. Therefore, both of them cannot be declared as Indian citizens. Other opposite parties/appellants being the children of opposite party/appellant Nos.1 and 2 will follow the nationality of their parents.**"

117.2. The learned Member while recording his opinion has discussed the oral as well as the documentary evidence adduced by the parties. The appellants have examined four witnesses, namely, Dr. Babulal Pathak (witness No.1), Sri Golam Rabbani (witness No.2), Sri Mobbesh Ali @ Md. Nabesh Ali (witness No.3, who is appellant No.1) and Smt. Jarina Begum (witness No.4, who is appellant No.2). The appellants have also exhibited 19 documents which were marked as Ext.A to Ext.S. The evidence of Dr. Babulal Pathak (witness No.1) is not relevant in the matter of recording the opinion as to whether the appellant Nos.1 and 2 are foreigners within the meaning of the 1946 Act, as this witness has proved the birth certificate issued to appellant Nos.3 and 4 (Ext.A and B), who are children of the appellant Nos.1 and 2. It is, however, evident from the evidence adduced by the parties that the factum of the birth of appellant Nos.3 and 4 in Indian soil is not in dispute. Sri Golam Rabbani (witness No.2) is the Kazi, who proved the performance of marriage between the appellant No.1 and 2 on execution of the Kabilnama on 05.02.1998 (Ext.-C). There is also no dispute relating to the marriage between the appellant Nos.1 and 2.

117.3. For the purpose of recording the opinion as to whether the appellant No.1 is a foreigner within the meaning of the 1946 Act, the evidence of the appellant No.1 himself (witness No.3) and of his wife, namely, appellant No.2 (witness No.4) is relevant. The appellant in his deposition has stated on oath that in the relevant electoral roll of 1966 his father's name appeared at serial No.16 against holding No.6 Part No.15 of village Kumulipara under No.50 Barpeta LAC. The said

electoral roll has been proved and marked as Ext.S. The appellant has also deposed that his mother's name also appeared in the said electoral roll (Ext.S). That apart the appellant No.1 has also proved the copy of the National Registration Certificate (NRC) 1951 as Ext.E, containing the name of his father Sukur Mahmud, whose name appeared in Ext.F electoral roll of 1966 and Ext.G electoral roll of 1970. The NRC of 1951 reflects the name of the appellant No.2's father Abdul Gaffur issued by the competent authority and marked as Ext.N. The relevant electoral rolls of 1970 containing the name of Abdul Gaffur who according to the appellants is the father of the appellant No.2 has also been proved and marked as Ext.O. The State did not challenge the aforesaid version of the appellant Nos.1 and 2, during their cross examination. The said version of the appellants, therefore, remains unrebutted.

117.4. From the aforesaid discussions of the evidence on record, as adduced by the appellants, it is, therefore, evident that the appellant Nos.1 and 2s' fathers names appeared in the NRC of 1951 and their names also appeared in the relevant electoral rolls of 1966 and 1970. As discussed above, the appellants also could prove that the appellant Nos.3 and 4 are the children of appellant Nos.1 and 2 and born in India, which in fact has not been challenged by the State at all. The appellants by adducing evidence could prove that the appellant No.1 is also known as Mobbesh Ali. The said positive statement of the appellants has not been challenged by the State during cross examination and as such remains unrebutted.

117.5. The learned Member vide its order dated 10.8.2008, by rejecting the evidence adduced by them mainly on the ground that the appellant No.1's name is Nabesh Ali and not Mobbesh Ali, has opined that the appellant Nos.1 and 2 came to India after 25.03.1971 and as such are foreigners, ignoring the unrebutted statement of the appellant No.1 that the appellant No.1 is also known as Mobbesh Ali. The learned Tribunal did not appreciate the evidence on record in its proper perspective, thereby refusing to take into consideration the relevant piece of evidence. The learned Member has also failed to notice that the reference was made by the Superintendent of Police alleging only the appellant No.1 as a foreigner. There was no reference against the other appellants, namely, the appellant Nos.2, 3 and 4 and despite that the Tribunal in its initial order as well as the subsequent order dated 29.12.2007 and 18.10.2010, respectively, has opined that all the appellants are foreigners.

117.6. In view of what has been discussed above, we are of the considered opinion that both the aforesaid orders dated 29.12.2007 and 18.10.2010 passed by the learned Member, Foreigner Tribunal (I) at Barpeta cannot be sustained in law and hence are set aside. Consequently the common judgment and order passed by the learned Single Judge on 25.07.2008 in so far as it relates to WP(C) No.546/2008 is also set aside. The writ appeal stands allowed.

118. **WA No.265/2008**

118.1. It appears from the order dated 20.10.2008 passed by the Tribunal that the opinion is based on documentary evidence i.e. the

electoral rolls since the year 1965 which are proved as Exts.'C', 'D', 'F' and 'G' apart from the title deed in respect of the land purchased by the father of the appellant on 06.12.1960 which has been marked as Ext.'H'. That apart the appellant could also prove three other sale deeds executed in favour of her father, being Exts.'J', 'K' and 'L', which are registered instruments of sale executed prior to 25.03.1971. The report of the Tribunal reveals that the appellant could discharge her burden to prove that she is an Indian national and not a foreigner coming to India from the specified territory after 05.03.1971 as alleged in the reference. Such finding of fact based on the oral and documentary evidence, as discussed above, cannot be interfered with by the Writ Court in exercise of its certiorari jurisdiction. Hence the judgment passed by the learned Single Judge, in view of the subsequent report submitted by the Member, Foreigners Tribunal III dated 20.10.2008 on the basis of the interim order dated 08.09.2008 passed in writ appeal, is set aside by upholding the opinion of the Tribunal dated 20.10.2008. The writ appeal stands allowed.

119. **WA No.266/2008**

119.1. It appears from the evidence adduced by the appellant, which are discussed in detail by the learned Member of the Tribunal that the appellant could prove that she was born and brought up at village Bhakhuradia and her father's name appeared in the electoral roll of 1966 in respect of No.55 Boko LAC, apart from the electoral roll of 1970. Those electoral rolls were proved as Exts.-A and B. The appellant also could prove the certificate issued by the Secretary of the Gaon Panchayat (Ext.-D). The Gaon Bura of the village, who was examined as

witness No.2, has deposed that the appellant is the daughter of Hatem Ali, whose name appears in the voters lists of 1966 and 1970. The said witness has also proved the certificate of residence issued to the appellant i.e. Ext.-F. Though the Local Verification Officer was examined as witness by the State, apart from proving Ext.-1 report submitted by him, the State could not demolish the evidence of the appellant that Hatem Ali is the appellant's father, whose name appeared in the voters lists of 1966 and 1970 and the appellant born and brought up in the village Bhakhuradia.

119.2. That being the position, the Tribunal has rightly passed the order dated 18.02.2009, which has the effect of setting aside its earlier ex-parte order dated 03.10.2007 declaring the appellant as a foreigner coming to India from the specified territory after 25.03.1971.

119.3. In view of the above, the earlier order passed by the Tribunal on 03.10.2007 as well as the common judgment and order passed by the learned Single Judge on 25.07.2008, in so far as it relates to WP(C) No.6564/2007, are set aside. The appellant, if in custody, is directed to be released forthwith. The writ appeal is accordingly allowed.

120. **WA No.268/2008**

120.1. The record of the Tribunal reveals that on the basis of the opportunity given by the writ appellate court vide the aforesaid order passed, the appellant examined three witnesses including herself and proved 6(six) documents, which are marked as Exts.-A to F. The Local

Verification Officer was also examined by the State for the purpose of demonstrating that the appellant is a foreigner. The witnesses were cross-examined by the respective parties. The appellant in order to discharge her burden of proof that she is not a foreigner but an Indian citizen has produced the electoral roll of 1966 of Abhayapuri LAC (Ext.-A), wherein the name of one Jalil Mandal, stated to be the appellant's grand-father, appears. The appellant has also proved the electoral roll of 1985 in respect of Abhayapuri North LAC in order to prove that her father's name appeared in the electoral roll of 1985. The said document is marked as Ext.-B. That apart, the appellant also proved the electoral roll of 1997 of the same LAC in order to prove that her parents' name appeared in the electoral roll of 1997. A sale deed dated 13.01.1962 executed in favour of her grand-father along with one Mukshed Ali Sheikh was also proved and marked as Ext.-D. The certificate issued by the Secretary of the Gaon Panchayat in respect of the appellant's residence has been proved and marked as Ext.-E. Ext.-F is an affidavit sworn by one Abdul Latif, declaring that his father is Jalil Box (Mandal), who died before 1970 and his name appeared in the electoral roll of 1966 in respect of Abhayapuri LAC and that the appellant is the daughter of Abdul Latif. It appears from the Exts.-A, B and C i.e. the electoral rolls that the name of one Jalil Mandal, S/O Abed Mandal appears in the electoral roll of 1966, the name of Abdul Latif appears in the electoral rolls of 1985 and 1997. The appellant in her deposition has stated that his grand-father's name is Jalil Mandal and in some documents his name is also shown as Jalil Box Sheikh, who along with Mukshed Ali Sheikh purchased a plot of land by a registered instrument dated 13.01.1962 (Ext.-D). Such positive statement of the appellant

has not been controverted by the State during cross-examination. The witness No.2 Abdul Latif, father of the appellant has also in clear terms stated that his father's actual name is Jalil Box Mandal and in some documents his name is also reflected as Jalil Box Sheikh. An affidavit sworn by him in that regard has also been proved as Ext.-F. The sale deed (Ext.-D) which has been proved by the appellant in original reflects the purchase of a plot of land by Jalil Box Sheikh and another by a registered instrument dated 13.01.1962. As discussed above, the appellant could prove that Jalil Box Sheikh and Jalil Mandal is one and the same person, who is the grand-father of the appellant. The Tribunal, however, has rejected the evidence of the appellant on the ground that the appellant could not prove that Jalil Box Sheikh, Jalil Mandal and Jalil Box Mandal are one and the same person, which finding is in our considered opinion contrary to the evidence on record as discussed above. The Tribunal, therefore, has misread the evidence and did not take into consideration the evidence in its proper perspective. The order of the Tribunal dated 18.02.2009 needs interference in exercise of the certiorari jurisdiction by the writ court. As noticed above, in the ex-parte order passed by the Tribunal on 29.11.2007 it was also opined that the appellant was a foreigner. The said ex-parte order, however, has merged with the subsequent order passed by the Tribunal on 18.02.2009, after giving opportunity to the parties to adduce evidence. The learned Single Judge had passed the common judgment and order dated 25.07.2008 in so far as it relates to WP(C) No.1039/2008, based on the aforesaid ex-parte order passed by the Tribunal on 29.11.2007.

120.2. In view of the aforesaid discussion, we are of the view that the appellant could prove that she is an Indian citizen and not a foreigner within the meaning of 1946 Act. Hence the orders dated 29.11.2007 and 18.02.2009 passed by the Tribunal in F.T. Case No.215/2006 are set aside. The common judgment and order dated 25.07.2008 passed by the learned Single Judge in so far as it relates to WP(C) No.1039/2008 is also set aside. The appellant is directed to be set at liberty if she is in custody. The writ appeal is accordingly allowed.

121. **WA No.280/2008**

121.1. The Tribunal has rendered its said opinion rejecting the evidence adduced by the appellant, on the ground that the appellant could not prove that her family members have been living in Assam prior to 25.03.1971. The Tribunal has also held that in the Exts.-B and C i.e. the electoral rolls of 1966 and 1970, the name of one Imtaj Ali, S/O Abdul Ali appears but in the NRC of 1951 (Ext.-G) the father's name of Imtaj Ali is shown as Abdul Sheikh. The Tribunal also found the discrepancy in the age of Imtaj Ali as mentioned in Exts.-B and G. The Tribunal, however, overlooked the evidence of the appellant that she was born and brought up at village Pattikuchi under Barpeta police station and she was a student of Medhirtary High School. The appellant has also proved the Ext.-A, the school certificate issued by the Headmaster, which was not disbelieved by the Tribunal. Such positive statement of the appellant has not been challenged by the State during cross-examination. There is nothing on record to demonstrate that any proceeding either before the IM(D)T or Foreigners Tribunal were initiated against the appellant and they are declared as foreigners. In

the absence of any such material on record and the rebuttal evidence by the State, the Tribunal ought not to have opined, vide order dated 07.02.2009, that the appellant is not an Indian citizen as she has failed to prove that her family members have been living in Assam prior to 25.03.1971. There being evidence on record that the appellant is born and brought up in the State of Assam and there being no evidence, not even an allegation that the appellant's parents are foreigners, the Tribunal ought not to have opined that the appellant is a foreigner on the ground that the appellant failed to prove that her family members have been living in Assam prior to 25.03.1971.

121.2. That being the position, both the orders i.e. ex-parte order dated 29.11.2007 and the subsequent inter party order dated 07.02.2009 passed in F.T. Case No.32/2006 as well as the common judgment and order dated 25.07.2008 passed by the learned Single Judge in so far as it relates to WP(C) No.12/2008, are set aside. The appellant is discharged from bail bond. The appeal is accordingly allowed.

122. **WA No.281/2008**

122.1. The appellant in order to prove that she is an Indian citizen and not a foreigner examined two witnesses, namely, the appellant herself as well as the village Headman of village Kapoha. The appellant also proved 10(ten) documents, which are marked as Exts.-A to J. The appellant by proving the electoral rolls (Exts.-B, C and D) could prove the names of her father and mother appeared in such rolls of 1966 and 1970 in respect of Jania LAC and thereafter her name appeared in the

electoral roll of 1989 in respect of Baghbar LAC. The appellant also could prove the certificate issued by the village Headman (Ext.-F) certifying that the appellant is the daughter of Saheb Ali. The appellant, therefore, proved that her father's name is Saheb Ali, whose name appeared in the electoral rolls of 1966 and 1970, which are relevant for the purpose of answering the reference made under the provisions of 1946 Act and the 1964 Order. Though the State has cross-examined the witnesses, there was absolutely no cross-examination relating to the claim of the appellant that Saheb Ali is her father, whose name appeared in the electoral rolls of 1966 and 1970 in respect of Jania LAC. In the evidence adduced by the State i.e. the deposition of the S.I. of Police (Enquiry Officer) apart from examining the Ext.-1 report, no rebuttal evidence also could be led by the State to demonstrate that Saheb Ali is not the father of the appellant, whose name appeared in the aforesaid electoral rolls.

122.2. That being the position, the Tribunal has rightly passed the order dated 07.02.2009 opining the appellant not to be a foreigner within the meaning of 1946 Act. The said order passed by the Tribunal has to be accepted in view of the opportunity already granted by the writ appellate court by the aforesaid order to adduce evidence with a further direction to the Tribunal to pass necessary order, based on the evidence adduced by the parties. The writ appeal is, therefore, allowed.

123. **WA No.370/2008**

123.1. As discussed earlier, the initial reference made under Section 8(1) of 1983 Act was against the appellant No.1 only. The

IM(D) Tribunal also issued notice to the appellant No.1 only. In the reference there was no allegation that the appellant Nos.2, 3 and 4 are either illegal migrants or foreigners within the meaning of 1983 Act or 1946 Act, respectively. That being the position, though the appellant Nos.2, 3 and 4 are the children of the appellant No.1, in the proceeding registered on the basis of the aforesaid reference, no opinion could be recorded against the appellant Nos.2, 3 and 4 i.e. holding that they are foreigners. The said aspect of the matter has been overlooked by the Tribunal as well as by the learned Single Judge. The Tribunal's order as well as the judgment passed by the learned Single Judge in WP(C)5393/2002 as regards the appellant Nos.2, 3 and 4, therefore, cannot be sustained in law and hence set aside.

123.2. This leads to the question as to whether the IM(D) Tribunal as well as the Foreigners Tribunal were justified in declaring the appellant No.1 as foreigner coming to Assam from the specified territory after 25.03.1971. The IM(D)T in its order dated 28.02.2002, the Appellate Tribunal in its order dated 18.07.2002 and the Foreigners Tribunal in its order dated 30.04.2009, which was passed pursuant to the aforesaid interim direction issued in the present appeal, have discussed the entire evidence on record while recording the opinion that the appellant No.1 is a foreigner coming to Assam from the specified territory after 25.03.1971. The opinion expressed by the IM(D)T and the Appellate Tribunal has also been accepted by the learned Single Judge. Perusal of the evidence adduced by the appellant No.1 before the IM(D)T and also the Foreigners Tribunal reveals that the appellant No.1 could not prove that he is an Indian national and not a foreigner.

Such finding recorded by the Tribunals as well as the learned Single Judge do not merit interference in exercise of the certiorari jurisdiction under Article 226 of the Constitution of India. Hence the appeal preferred by the appellant No.1 stands dismissed.

123.3. In view of the above, the writ appeal in so far as the appellant No.1 is dismissed. The same, however, in respect of the appellant Nos.2 to 4 are allowed. If the appellant Nos.2 to 4 are in custody, they shall be released forthwith.

124. **WA No.59/2009**

124.1. As has already been held above, the proceedee must be served with a copy of the main grounds on which he or she is alleged to be a foreigner. As noticed above, the records of the Tribunal do not reveal issuance and service of the main grounds on which the appellant is suspected to be a foreigner. Non-service of such main grounds, though mandatorily required, amounts to denial of reasonable opportunity to the appellant to defend herself, thereby violating the basic principles of natural justice. The said aspect of the matter has not been considered by the learned Single Judge.

124.2. That being the position, the order passed by the Tribunal on 28.11.2007 as well as the judgment and order dated 30.09.2008 passed by the learned Single Judge are set aside. The proceeding is remitted to the Foreigners Tribunal-1, Barpeta for recording fresh opinion after service of the main grounds on which the appellant is suspected to be a foreigner, as required by clause 3(1) of the 1964

Order and allowing the appellant to file the written statement, to adduce evidence and also the State to adduce rebuttal evidence, if it so desired. The appellant shall appear before the Tribunal on ***4th February, 2013***. The Tribunal is, therefore, not required to issue a fresh notice. If the appellant does not appear on the date fixed, the Tribunal shall proceed to answer the reference in terms of the law laid down in this judgment.

124.3. The appeal is accordingly allowed to the extent as indicated above. The appellant shall be set at liberty, if she is in custody. She shall, however, appear before the Officer-in-charge of the jurisdictional police station once in a week and shall not leave the jurisdiction of the Foreigners Tribunal-1, Barpeta without the written permission, till the proceeding is decided by the Tribunal afresh, as directed.

125. **WA No.71/2009**

125.1. As discussed above, pursuant to the interim order passed, the appellant examined 3(three) witnesses apart from proving 6(six) documents (Exts.-1 to 6). The Tribunal, considering the evidence adduced by the parties, answered the reference in favour of the State by refusing to place reliance on the documents proved by the appellant on the grounds stated in the order passed by it. Ext.-1 i.e. the school certificate has not been believed on the ground that the same was issued on 06.04.2004 without the counter signature or the authentication by the school authority and no serial number has also been found in the said certificate. The Tribunal has also found that the retired headmaster of the school, who has been examined to prove the

Ext.-1, did not bring the school register, which was also not called for by the appellant.

125.2. Nothing, however, has been said by the Tribunal why electoral roll of 1966 and 1971 (Exts.-2 and 3) claiming to contain the name of the petitioner's father have not been believed. No reliance has been placed by the Tribunal on Ext. 4 i.e. the annual kheraj patta on the ground of not having the name of the father of the appellant in the said document. The learned Tribunal refused to place reliance on Ext.-5, the family identity card (ration card) as the name of the appellant was inserted at the bottom of the other members of the family with different ink and marking of Nos.5 to 6 was done by overwriting and no explanation has been given by the appellant in that regard. Ext.-6 certificate issued by the village headman has also not been accepted by the Tribunal as the village headman who has proved the said document in her deposition has stated that she does not know anything about him before 2002 and it was not known to her from when the appellant is in Batamari village of which she is the headman. The affidavit filed by the person stated to be the father of the appellant was also refused to be taken into consideration by the Tribunal while passing the aforesaid order dated 19.09.2009. The Tribunal has refused to accept the said affidavit on the ground that the appellant himself in the written statement filed on 12.04.2002 clearly stated that he is the son of late Taizuddin alias Tajimuddin. The learned Tribunal also found that in the vakalatnama filed by the appellant, his father was indicated as late Taizuddin. The Tribunal has also found that the appellant never at any

point of time filed any application seeking amendment to the effect that his father is alive.

125.3. To appreciate the contention of the appellant as well as the grounds on which the Tribunal has refused to place reliance on the evidence adduced by the appellant, we have perused the evidence on record as adduced by the parties.

125.4. The appellant (witness No.1) in his deposition has stated that his father's name appeared in the electoral roll of 1966 and 1971 (Exts.-2 and 3) and also in the annual kheraj patta for the year 1954-55 (Ext.-4), which was issued in the name of his father along with others by the Revenue Department of the Govt. of Assam. In the said deposition he has never stated that his father is dead. Though the witness was cross-examined by the State, not even a suggestion has been put to effect that his father is not alive. During cross-examination the appellant has stated that his father Taizuddin is also called as Tajimuddin. The appellant has denied the suggestion put by the State during cross-examination that the annual kheraj patta which was proved as Ext.-4 does not contain his father's name. Smt. Damayanti Baishya (witness No.2) has proved the residency certificate issued by her. During cross-examination she has stated that she became the Gaonbura (Village Headman) in the year 2002 and before that her husband was the Gaonbura and as such she knows the facts after 2002. The school teacher who issued the school certificate certifying that the appellant was a student of Natun Chaprapara L.P. School in the year 1985 has stated that the appellant was a student of the said school.

Since the certificate issued by the Gaonbura as well as the school certificate pertains to the period after 25.03.1971, those are not of much relevance in the present case. The documents, namely, the electoral roll of 1966 and 1971 (Exts.-2 and 3) and the annual patta (Ext.-4) being prior to 25.03.1971, those have relevance on the issue at hand.

125.5. As noticed above, the Tribunal has not given any reason as to why the Exts-2 and 3, the electoral rolls should not be believed. No reliance has been placed by the Tribunal on Ext.-4 i.e. the annual kheraj patta on the ground that the appellant's father name does not appear in the said document. The said finding has been recorded on the basis of the suggestion put by the State during cross-examination of the appellant (witness No.1), which was taken by the Tribunal as positive statement, though the appellant denied the suggestion that the name which appears in the said patta is not the name of his father. The Tribunal has also recorded the finding that there is no evidence that Taizuddin and Tajimuddin is the one and the same person, though the appellant during cross-examination has made a positive statement that Taizuddin and Tajimuddin is one and the same person. Exts.-2 and 3, the electoral rolls of 1966 and 1971, respectively, contain the name of Taizuddin. Similarly, in Ext.-4 annual kheraj patta for the year 1954-55 the name of Taizuddin appears at Sl. No.3.

125.6. As discussed above, the appellant during his cross-examination has made a positive statement that Tajimuddin and Taizuddin is one and the same person. The Tribunal, therefore, did not

take into consideration relevant evidence and also misread the evidence while coming to the finding that the appellant could not prove that he is an Indian national. Much stress cannot be put on the Vokalatnama wherein the appellant's father was indicated as dead, the same having not been written by the appellant himself. In the written statement filed, we did not find that the appellant has described his father as dead.

125.7. In view of the overwhelming evidence on record as adduced by the appellant, we are of the view that the appellant could discharge his burden of proving that he is an Indian national. Hence the earlier order dated 03.02.2004 as well as the subsequent order dated 16.03.2009, both passed by the Tribunal, apart from the judgment and order dated 23.01.2009 passed by the learned Single Judge in WP(C) No.2798/2004 are set aside. The writ appeal stands allowed.

126. **WA No.171/2010**

126.1. It appears from the record of the Tribunal in the aforesaid proceeding that the appellant was issued with the notice dated 10.07.2008 suspecting her to be a foreigner coming to Assam from the specified territory between 01.01.1966 and 25.03.1971 and as such is a foreigner within the meaning of 1946 Act. It was not the allegation against the appellant that she came to Assam from the specified territory, namely, erstwhile East Pakistan (now Bangladesh) on or after 25.03.1971. The Tribunal, however, in the ex-parte order dated 07.11.2008 opined that in the absence of any proof of coming of the appellant into Assam between 01.01.1966 and 25.03.1971, she has to

be regarded as foreigner coming to Assam after 25.03.1971. Such finding recorded by the Tribunal is, on the face of the reference made as well as the aforesaid notice issued to the appellant on 10.07.2008, illegal and contrary to the stand taken by the State in the proceeding. The said aspect of the matter has not been considered by the learned Single Judge while dismissing the writ petition filed by the appellant vide judgment and order dated 04.06.2010.

126.2. In view of the aforesaid discussion, the opinion of the Tribunal dated 07.11.2008 and the judgment passed by the learned Single Judge on 04.06.2010 in WP(C) No.4758/2009, cannot be sustained in law and hence are set aside. Since the appellant has been detected to be foreigner coming to Assam from the specified territory between 01.01.1966 and 25.03.1971, in view of the law laid down in this judgment, the appellant is given an opportunity to file necessary application for registration of her name under the provisions of 1946 Act and the Rules framed thereunder, with the registering authority, within 1(one) month from the date of the judgment. The appellant, if she is in custody shall forthwith be released. In the event the appellant does not register her name with the registering authority as required by law, within the time allowed, she will be again taken into custody and will be deported from India. The writ appeal is accordingly allowed to the extent indicated above.

127. **WA No.313/2011**

127.1. It appears from the judgment passed by the learned Single Judge that there is no explanation in the writ petition filed by the

appellant that why he did not file the written statement and documents despite the opportunity given, except stating that he was endeavouring to obtain the documents. The appellant in support of his contention has enclosed a copy of the application dated 17th December, 2009 seeking copy of the electoral role, which application, however, was not filed by the appellant but by one Naziruddin Ahmed. As held above, the burden under Section 9 of the 1946 Act is on the proceedee to prove that he is not a foreigner but an Indian national, which burden the appellant has failed to discharge. The Tribunal, because of non participation by the appellant in the subsequent stages of the proceeding, had no alternative but to proceed against him and had opined the appellant as foreigner. In the absence of any justification to set aside the ex-parte order passed by the Tribunal and to remit the case for fresh trial, the writ Court would definitely not interfere with such an order passed by the Tribunal, when admittedly sufficient opportunities were given to the appellant to discharge his burden of proving that he is not a foreigner. The documents, which the appellant has annexed to the writ petition, cannot also be looked into by the writ Court, those having not been proved before the Tribunal, despite being given the opportunity for doing so.

127.2. In view of the above, we do not find any justification for interference of the judgment passed by the learned Single Judge dismissing the writ petition filed by the appellant. The writ appeal thus is dismissed.

128. Hence, the Review Petition No.22/2010 and WA No.313/2011 are dismissed. WA No.370/2008 is partly dismissed in so far as it relates to appellant No.1 and partly allowed in so far as it relates to appellant Nos.2, 3 and 4. WA No.59/2009 is allowed with direction to the Tribunal to answer the reference afresh. WA Nos.258/2008, 264/2008, 265/2008, 266/2008, 268/2008, 280/2008, 281/2008, 71/2009 and 171/2010 are allowed.

129. Having rendered our opinion on the questions formulated as well as in the individual writ appeals, we shall now proceed to discuss certain other related aspects which had surfaced during the course of hearing.

Present status of the Tribunals in Assam constituted under 1964 Order

130. It appears from the statistics furnished by the learned Addl. Advocate General, Assam that there are 2,37,631 reference proceedings, as on 30th June, 2012, pending in 36 Tribunals constituted under the provisions of 1964 Order. This Court has also been informed that the average yearly disposal by a Tribunal is about 3000 reference proceedings. The learned Addl. Advocate General has also apprised this Court that though the State Government has requested the Government of India vide communication dated 11.09.2012 for constitution of 64 new Tribunals, no such new Tribunals have, however, been constituted so far.

Out of 2,37,631 reference proceedings, 51,307, 11,167 and 10 nos. of proceedings are pending for 5 – 9 years, 10 – 19 years and 20 years and more, respectively.

It also appears from the data furnished by the Govt. of Assam that as on 30.06.2012, 76,795 references are pending before different Tribunals for registration, which is largely because of lack of sufficient staff and/or proper training. The Tribunal-wise pendency of unregistered reference cases is given below:-

District	Name of the Tribunal	No of unregistered proceedings
Nagaon	F.T. Nagaon 1st	2720
	F.T. Hojai	4801
Sonitpur	F.T. Tezpur 1st	14728
	F.T. Tezpur 2nd	8966
	F.T. Tezpur 3rd	120
Barpeta	F.T. Barpeta 1st	11851
	F.T. Barpeta 2nd	15372
	F.T. Barpeta 3rd	8688
Morigaon	F.T. Morigaon 2nd	4949
Karimganj	F.T. Karimganj 1st	2192
	F.T. Karimganj 2nd	2408
	Total-	**76795**

131. As discussed above, speedy trial is a fundamental right, which is guaranteed under Article 21 of the Constitution. While there can be no denying of the fact that in the name of detection and deportation of foreigners, Indian citizens should not be harassed, it is equally true that the reference proceedings must also be disposed of at the earliest so that foreigners can be deported from India immediately, as otherwise it would be against national interest. The persons against whom proceedings under the 1946 Act have been initiated are also entitled to speedy trial and early disposal of the reference proceedings pending before the Tribunal. Having regard to the number of registered

and unregistered proceedings pending before the Tribunals, as indicated above, the constitution of adequate numbers of Tribunals is required. The constitution of 64 more Tribunals, in addition to 36 existing Tribunals, as suggested by the State Government, having regard to the rate of disposal as well as the huge pendency, may also not be adequate. Unless adequate numbers of Tribunals are constituted, keeping in mind the pendency position, as noticed above, the time limit set by the Govt. of India in the 2012 Amendment Order for disposal of the proceedings may not be possible to be adhered to. It also appears that adequate numbers of supporting staff have not been provided to the Tribunals. The Presiding Officers of the Tribunals as well as existing staff have also not at all been trained. There is no separate process serving staff attached to the Tribunals. The notices are served through the police, who are also not at all trained relating to the manner in which the notices are required to be served.

132. This Court has been informed by the learned Addl. Advocate General, Assam, that pursuant to the terms and conditions laid down by the Ministry of Home Affairs, Govt. of India, for appointment of members in the Foreigners Tribunals, an Office Memorandum has been issued by the Govt. of Assam, Political (B) Department, on 25.05.2011, laying down the terms and conditions of appointment. As per the said Office Memorandum an officer who is either a serving or retired District and Sessions Judge or Addl. District and Sessions Judge, is eligible for appointment as member of the Foreigners Tribunal. We have also been informed that though there are few in-service Judicial Officers presently working as members in the Foreigners Tribunal, in recent times only the

retired Judicial Officers, who had either been serving as District and Sessions Judge or as Addl. District and Sessions Judge have been appointed. No selection has also been conducted before appointing any retired Judicial Officers as member of the Foreigners Tribunal, as the number of Judicial Officers who apply for appointment as members is less than the vacancies. It has also been brought to the notice of this Court that few Judicial Officers, who have not been found fit to continue in judicial service by the High Court, have also been appointed by the State Government as members of the Foreigners Tribunal. Having regard to the requirement of appointing the Members in the Foreigners Tribunal, vis-à-vis non-availability of adequate number of qualified Judicial Officers, we are of the view that the Govt. of Assam and the Govt. of India may consider recruitment of persons, who have acquired qualification laid down in Article 233 of the Constitution for being considered for appointment as District Judge, as Member of Foreigners Tribunal temporarily.

133. Object of speedy trial as well as dispensation of quality justice would suffer if efficient and competent persons are not appointed as members of the Foreigners Tribunals. It may also be against national interest of deportation of the foreigners from India. As noticed above, the State Government is appointing retired Judicial Officers as members of the Foreigners Tribunal without undertaking any selection process, mainly because of non-availability of adequate numbers of retired Judicial Officers. Since adequate numbers of Foreigners Tribunal are required to be constituted to deal with 2,37,631 registered pending reference proceedings and 76,795 unregistered

reference proceedings, the Govt. of Assam as well as the Govt. of India may consider appointment of persons, who have acquired the qualification laid down in Article 233 of the Constitution of India for being considered for appointment as District Judge, as members of the Foreigners Tribunal temporarily, in view of non-availability of adequate numbers of qualified retired Judicial Officers. It will also not be possible to appoint an efficient and competent person as member of the Foreigners Tribunal, who is required to decide the question of nationality of a proceedee, unless the present system of appointment, that is, whoever approaches the State Government, is not discontinued and appointment is made based on selection by a duly constituted Selection Committee. Presently no such Selection Committee exists. Having regard to the nature of duties and responsibilities of the members of the Foreigners' Tribunals, we are of the view that such a Selection Committee should be headed by a retired High Court Judge with the Commissioner & Secretary to the Govt. of Assam, Department of Home and the Legal Remembrancer-cum-Secretary Law, Govt. of Assam, as members.

134. In view of the aforesaid discussion and having regard to the constitutional requirement of speedy trial and quality disposal of the proceedings before the Tribunal, this Court directs the Government of India as well as the Government of Assam to:-

(i) constitute adequate numbers of Tribunals within 4(four) months from today for disposal of the pending proceedings within the time frame set in the 1964 Order as amended by 2012 Amendment Order;

(ii) **appoint persons as members of Foreigners Tribunals by issuing appropriate advertisement and on being selected by a selection committee;**

(iii) **notify the selection committee consisting of a retired Judge of this High Court, to be nominated by the Hon'ble Chief Justice, as Chairman; the Commissioner & Secretary to the Govt. of Assam, Department of Home and the Legal Remembrancer-cum-Secretary Law, Govt. of Assam, as members, to select the persons to be appointed as the Presiding Officers of the Tribunals;**

(iv) **provide adequate additional supporting staff to the Tribunals where unregistered reference proceedings are pending, within 2(two) months from today, so that such proceedings can be registered and notices could be issued, as required by law;**

(v) **formulate the training modules, within 1(one) month from today, to train the Presiding Officers as well as the staff of the Tribunals, so as to adequately train them in the manner in which the proceedings before it are to be initiated, conducted and concluded;**

(vi) **constitute a separate cell of Assam police personnel, for each of the Tribunals, within 1(one) month from today, who shall be entrusted with the job of service of notice only. They shall be placed at the disposal and control of the Presiding Officers of the respective Tribunals;**

(vii) **formulate the training module, within 1(one) month from today, to train the police personnel entrusted with the job of service of notice, relating to the manner in which proper service of notice is to be effected;**

(viii) **deport the persons from India within 2(two) months from the date of their detection as foreigners, within the meaning of 1946 Act.**

(ix) **The persons detected to be foreigners shall be taken into custody immediately and kept in detention camp(s) till they are deported from India within the aforesaid time-frame.**

JUDGE **JUDGE** **JUDGE**

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