

IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM: NAGALAND: MIZORAM & ARUNACHAL PRADESH)

WRIT PETITION (CIVIL) NO. 1043 OF 2013

1. Md. Anowar Ali,
Son of late Musabbir Ali,
Resident of village: Lankajan,
P.O-Hojai, P.S- Hojai,
District-Nagaon (Assam),
Pin-782001
2. Mustt. Misma Khatoon,
Wife of Md. Anwar Ali,
(Daughter of Munshi Abdul Jabbar)
Resident of village- Lankajan,
P.O-Hojai, P.S- Hojai,
District-Nagaon (Assam),
Pin-782001
3. Md.Abdus Salam,
Son of Md. Anwar Ali,
Resident of village- Lankajan,
P.O-Hojai, P.S- Hojai,
District-Nagaon (Assam),
Pin-782001
4. Md.Abdul Kalam,
Son of Md. Anwar Ali,
Resident of village- Lankajan,
P.O-Hojai, P.S- Hojai,
District-Nagaon (Assam),
Pin-782001

...Petitioners

-VERSUS-

1. The State of Assam,
Represented by the Secretary to the
Government of Assam, Department of Home
Dispur, Guwahati-6, Pin-781006.
2. The Union of India,
Represented by the Secretary,
Ministry of Home Affairs,
Shastri Bhawan, New Delhi
Pin-110001.
3. The Superintendent of Police (Border),
Nagaon, District-Nagaon, Assam
Pin-782001.

...Respondents

BEFORE

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

For the petitioners : Mr. A.K.Purkayastha, Advocate.
For Respondent Nos. 1 & 3 : Mr. A.C.Buragohain, Addl. Advocate General,
Assam.
For Respondent No. 2 : Mr. M.Bhagawati, Advocate.
Central Government Counsel.
Date of Hearing : 22.5.2014
Date of Judgment :

JUDGEMENT & ORDER

A.K.Goswami, J:

Heard Mr.A.K.Purkayastha, learned counsel for the petitioner. Also heard Mr.A.C.Buragohain, learned Additional Advocate General, Assam, appearing for the respondents No.1 and 3 as well as Mr. M. Bhagawati, learned Central Government Counsel, appearing for the respondent No.2.

2. The writ petition has been placed before the Full Bench consequent upon an order passed by the Hon'ble the Chief Justice following an order dated 5.3.2013 passed by a learned Single Judge of this court. The question which requires answer by the Full Bench is:-

Whether the orders passed by the IMDT ceased to exist after declaration of Illegal Migrants (Determination by Tribunals) Act, 1983 as unconstitutional by the Apex Court in Sarbananda Sonowal vs Union of India, reported in AIR 2005 SC 2920? In other words, whether such proceedings, which had already been decided by the IMDT prior to such declaration, have to be decided by the Foreigners Tribunal afresh?

3. At the outset, it will be relevant, nay necessary, to briefly indicate the factual matrix leading to filing of the present writ petition by the four writ petitioners who are

all members of the same family. Petitioner No.1 is the husband of the petitioner No.2 and father of petitioner Nos. 3 and 4.

4. A reference was made under section 8(1) of the Illegal Migrants (Determination by Tribunals) Act, 1983, for short, IMDT Act, to the Illegal Migrants (D) Tribunal, Hojai, Sankardev Nagar, for a decision as to whether the petitioner No.1 along with his family members are illegal migrants who entered into India after 25.3.1971. The reference was contested by filing written statement. The State had examined one witness. On behalf of the petitioners also, petitioner No.1 examined himself and submitted some documents. Upon consideration of materials on record, the Tribunal answered the reference in the affirmative holding the petitioners to be illegal migrants, within the meaning of IMDT Act, who are liable to be deported from India vide judgment and order dated 17.6.2005.

5. Before the narration is completed by adverting to what transpired subsequent to the rendering of the aforesaid judgment and order dated 17.6.2005, we need to pause here and mention briefly at this stage a very significant development that had taken place, which is the bed-rock of the reference that has been placed before the Full Bench. The Apex Court by a judgment and order dated 12.7.2005 in the case of *Sarbananda Sonowal vs Union of India and another*, reported in *(2005) 5 SCC 665 = AIR 2005 SC 2920*, declared the provisions of IMDT Act and the Illegal Migrants (Determination by Tribunals) Rules, 1984, for short, IMDT Rules to be ultra vires the Constitution and struck them down. Some other directions were also given, which will be considered at a more appropriate place.

6. We pick up the thread of the narration of events from the judgment of the Tribunal dated 17.6.2005. The petitioners, after more than five years, challenged the said judgment and order dated 17.6.2005 by filing a writ petition under Article 226 of the Constitution of India before this Court which was registered as WP(C) No.242/2011. By a judgment and order dated 21.4.2011, a learned Single Judge of this Court dismissed the writ petition and issued certain directions including directions to ensure immediate deletion of the names of the petitioners from the voters list and to ensure

immediate detention of the petitioners in detention camp for their eventual deportation to Bangladesh. Having noticed that the proceeding spanned over almost 14 years from 20.3.1991 to 17.6.2005 covering 76 sittings, the learned Single Judge lamented that if such a serious issue is to be decided in such a manner, the very purpose of establishing the Tribunals will get frustrated.

7. The petitioners put to challenge the said order dated 21.4.2011 by filing an appeal registered as Writ Appeal No.148/2011. During hearing of the said writ appeal, in view of the fact that in a number of cases, proceedings were remitted to the Tribunal constituted under the Foreigners (Tribunal) Order, 1964, for short, Order of 1964, the learned counsel for the parties suggested remitting of the said case also to the said Tribunal and accordingly, the Writ Appellate Court remitted the matter to the Foreigners Tribunal, Hojai, Sankardev Nagar by a judgment and order dated 15.9.2011. It was also observed that the Tribunal would not be bound by the findings already recorded but will take into account the evidence on record and that the Tribunal may decide the matter expeditiously. It was further observed that the parties may appear through their counsel before the Tribunal for further proceedings on 19.10.2011.

8. Pursuant to the aforesaid judgment and order of this court dated 15.9.2011, the petitioners, through their engaged advocates, appeared before the Foreigners Tribunal, Hojai, Sankardev Nagar on 19.10.2011 and filed a Petition being No.386/2011 praying, as stated in paragraph 28 of the writ petition, for their release from detention camp. The said petition was rejected by the learned Tribunal by an order dated 19.10.2011.

9. The aforesaid order dated 19.10.2011 is the subject matter of challenge in the instant writ petition. Some other prayers including release of the petitioners from the detention camp to take part in the proceedings before the Tribunal are also made.

10. During the course of the instant writ proceeding, by an order dated 5.2.2013, the learned Single Judge posed the question as to whether all the orders passed under the IMDT Act, consequent upon decision in *Sarbananda Sonowal* (supra) will cease to exist and become inoperative and the cases would again have to be re-opened and

referred to the Foreigners Tribunals and directed the Registry to place the matter before the Hon'ble Chief Justice for his Lordship's consideration as to whether the issue is required to be referred to a larger Bench having regard to its importance. The Hon'ble the Chief Justice, thereafter, constituted this Full Bench and referred the question which has already been noted.

11. The Full Bench, by an order dated 29.7.2013, directed the learned Tribunal to proceed with the proceedings but restrained it from rendering its opinion unless otherwise directed. It appears from the order dated 8.5.2014 passed by the Tribunal, copy of which was placed before the court, that hearing of argument in the proceeding, though is completed, the Tribunal is awaiting further direction from this Court.

12. At one point of time, the learned counsel for the petitioners had raised the question of maintainability of reference, which was recorded in the order dated 29.7.2013. However, the learned counsel for the parties submitted that they would not raise the plea of maintainability of the reference to the Full Bench when the case was heard on 13.5.2014. On 29.7.2013, while considering the present petition, finding that the issue relating to implementation of the directions in the judgment and order dated 3.1.2013 passed in *Moslem Mondal and others vs State of Assam and others*, reported in *2013 (1) GLT (FB) 809* had cropped up, the learned counsel for the respondents were directed to apprise the court about implementation of the directions contained in the aforesaid judgment. In response, the State through its Chief Secretary and the Union of India through the Under Secretary in the Ministry of Home Affairs had filed their respective affidavits. It will be appropriate, while on the subject, to briefly allude to *Moslem Mondal* (supra).

13. Being aggrieved by the judgment and order dated 1.10.2010 passed by a Division Bench of this Court in Writ Appeal No. 238/2008 (*Moslem Mondal and others Vs. Union of India and others*, reported in *2010(2) GLT 1*), a review petition being Review Petition No. 22/2010 was filed by the State of Assam. The issues in the said case related to detection and deportation of foreigners under the Foreigners Act of 1946, for short, Act of 1946, read with Order of 1964. Because of the importance of the

issues involved in the matter and noting that there are number of judgments, which if are not taking contrary view but are taking different view, the Division Bench referred the review petition along with connected appeals before a Full Bench for hearing. One of the questions formulated by the Full Bench was whether under Section 9 of the Act of 1946 the burden is on a proceedee (meaning the person against whom notice has been issued) to prove that he is not a foreigner and if so, whether the Division Bench in *Moslem Mondal* 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? The Full Bench in *Moslem Mondal* (supra), following *Sarbananda Sonowal* (supra) held that there is no doubt that Section 9 of the Act of 1946 imposes a burden on the proceedee to prove that he is not a foreigner and the Division Bench was not correct that 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. Taking note of the inadequacy of the number of Tribunals and the lack of support staff and infrastructure as well as bearing in mind the constitutional requirement of speedy trial and quality disposal of the proceedings before the Tribunal, the Full Bench gave the following directions to the Government of India as well as 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."

14. The Union of India, in its affidavit, amongst others, has indicated that sanction for creation of additional 64 nos. of Foreigners Tribunal in addition to the existing 36 was conveyed to the State of Assam on 6.6.2013 and 384 nos. of posts have been created and that 536 nos. of supporting staff were also sanctioned. It is further stated that a gazette notification dated 10.12.2013 was issued amending Order of 1964 in

respect of service of notice by the Foreigners Tribunal and providing powers of Judicial Magistrate (First Class) under Code of Criminal Procedure, 1973 in respect of certain matters as indicated therein. In the affidavit filed, the State of Assam has indicated the status of implementation of the aforesaid directions. Further time of 4(four) months is also prayed to complete the whole process as per the said directions. We are inclined to grant 4 (four) months further time as prayed for.

15. Mr. A.K. Purkayastha, learned counsel for the petitioners submits that in view of the directions of the Apex Court in *Sarbananda Sonowal* (supra), the orders passed by the Tribunals constituted under IMDT Act cease to exist and such orders have become non-est in law and therefore, the proceedings would have to be decided by the Foreigners Tribunal afresh. The learned counsel, to support his contention, draws the attention of this court to paragraph 84 of *Sarbananda Sonowal* (supra) as reported in (SCC). He has also relied upon two Division Bench judgments of this court rendered in the case of *Karamat Ali vs State of Assam and others*, reported in *2008 (1) GLT 947* and in the case of *Rejia Khatun vs Union of India and another*, reported in *(2010) 6 GLR 611*.

16. Mr. A.C. Buragohain, learned Additional Advocate General, Assam and Mr. M. Bhagawati, learned Central Government Counsel submit that judgments rendered prior to striking down of the IMDT Act and IMDT Rules, hold the field and are not rendered otiose. No such conclusion is discernible from the operative directions of the Apex Court in *Sarbananda Sonowal* (supra), they submit.

17. The Statement of Objects and Reasons of the IMDT Act reads as under:

“Statement of Objects and Reasons. – The influx of foreigners who illegally migrated into India across the borders of the sensitive Eastern and North-Eastern regions of the country and remained in the country poses a threat to the integrity and security of the said regions. A substantial number of such foreigners who migrated into India after the 25th day of March, 1971, have, by taking advantage of the circumstances of such migration and their ethnic similarities

and other connections with the people of India, illegally remained in India without having in their possession lawful authority so to do. The continuance of these persons in India has given rise to serious problems. The clandestine manner in which these persons have been trying to pass off as citizens of India has rendered their detection difficult. After taking into account the need for their speedy detection, the need for protection of genuine citizens of India and the interests of the general public, the President promulgated, on the 15th October, 1983, the Illegal Migrants (Determination by Tribunals) Ordinance, 1983, to provide for the establishment of Tribunals.”

18. The IMDT Act came into force on 25.12.1983 and the preamble of the Act reads as under:

“An Act to provide for the establishment of Tribunals for the determination, in a fair manner, of the question whether a person is an illegal migrant to enable the Central Government to expel illegal migrants from India and for matters connected therewith or incidental thereto.

WHEREAS a good number of the foreigners who migrated into India across the borders of the eastern and north-eastern regions of the country on and after the 25th day of March, 1971, have, by taking advantage of the circumstances of such migration and their ethnic similarities and other connections with the people of India and without having in their possession any lawful authority so to do, illegally remained in India.

AND WHEREAS the continuance of such foreigners in India is detrimental to the interests of the public of India.

AND WHEREAS on account of the number of such foreigners and the manner in which such foreigners have clandestinely been trying to pass off as citizens of India and all other relevant circumstances, it is necessary for the protection of the citizens of India to make special provisions for the detection of

such foreigners in Assam and also in any other part of India in which such foreigners may be found to have remained illegally.”

19. A perusal of the Statement of Objects and Reasons and the Preamble of IMDT Act goes to show that the influx of foreigners who illegally migrated to India across the borders of the sensitive Eastern and North-Eastern Regions of the Country and remained in the country poses a threat to the integrity and security of the said regions and a substantial number of such foreigners who migrated into India after 25.3.1971, have, by taking advantage of the circumstances of such migration and their ethnic similarity and other connection with the people of India, illegally remained in India without having in their possession lawful authority so to do, giving rise to serious problems. Continuance of such foreigners in India is recognized to be detrimental to the interest of the country.

20. An illegal migrant, in terms of Section 3(1)(c) of the IMDT Act, is a person who is a foreigner and has entered into India on or after 25.3.1971 without being in possession of a valid passport or other travel documents or any other lawful authority in this behalf.

21. Article 355 of the Constitution of India provides that it shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. Having regard to the report of the Governor of Assam dated 8.11.1998 sent to the President of India indicating, amongst others, that the unabated influx of illegal migrants of Bangladesh into Assam has led to a perceptible change in the demographic pattern of the State and their willingness to work at low wages has deprived people of Assam of employment opportunities, thus resulting in insurgency, the Apex Court, taking note of the ground realities, in ***Sarbananda Sonowal*** (supra), opined that there can be no manner of doubt that the State of Assam is facing external aggression and internal disturbance on account of large-scale illegal migration of Bangladeshi nationals requiring the Union of India to take all

measures for protection of the State of Assam from such external aggression and internal disturbance as enjoined in Article 355 of the Constitution of India.

22. The Apex Court in *Sarbananda Sonowal* (supra), after analysis of the provisions of the IMDT Act and the IMDT Rules, held that the provisions thereof are very stringent as compared to the provisions of the Act of 1946 or the Order of 1964 in the matter of detection and deportation of illegal migrants. It was held that it was far easier to secure conviction of a person in a criminal trial where he may be awarded a capital punishment or imprisonment for life than to establish that a person is an illegal migrant on account of extremely difficult, cumbersome and time-consuming procedure laid down in the IMDT Act and the IMDT Rules. The Apex Court noted that there was no corresponding provision like Section 9 of the Act of 1946 which places the burden of proof upon the person concerned who claims to be an Indian citizen, making the task of the law enforcement agencies of the State not only difficult but virtually impossible. The IMDT Act had been so enacted and the Rules made there under had been so made that innumerable and insurmountable difficulties have been created in the matter of identification and deportation of illegal migrants. It was also held that provisions have been purposefully so enacted or made so as to give shelter or protection to illegal migrants who came to Assam from Bangladesh on or after 25.3.1971 rather than to identify and deport them. The Supreme Court came down heavily holding that the one-sided provisions of the IMDT Act were so made to give advantage and benefits to an illegal migrant and not for achieving the avowed objective of the enactment, which is detection and deportation of the Bangladeshi national who has illegally crossed the border on or after 25.3.1971. It was also held that the provisions of the IMDT Act and the IMDT Rules negate the Constitutional mandate contained in Article 355 of the Constitution of India and therefore, the IMDT Act was struck down being wholly unconstitutional.

23. In paragraph 83 of *Sarbananda Sonowal* (supra), the Apex Court observed:

"83. To sum up our conclusions, the provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 are ultra vires the Constitution and are

accordingly struck down. The Illegal Migrants (Determination by Tribunals) Rules, 1984 are also ultra vires and are struck down. As a result, the Tribunals and the Appellate Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall cease to function. The Passport (Entry into India) Act, 1920, the Foreigners Act, 1946, the Immigrants (Expulsion from Assam) Act, 1950 and the Passport Act, 1967 shall apply to the State of Assam. All cases pending before the Tribunals under the Illegal Migrants (Determination by Tribunal) Act, 1983 shall stand transferred to the Tribunals constituted under the Foreigners (Tribunals) Order, 1964 and shall be decided in the manner provided in the Foreigners Act, the Rules made thereunder and the procedure prescribed under the Foreigners (Tribunals) Order, 1964. In view of the finding that the competent authority and the Screening Committee had no authority or jurisdiction to reject any proceedings initiated against any alleged illegal migrant, the orders of rejection passed by such authorities are declared to be void and non est in the eye of law. It will be open to the authorities of the Central Government or the State Government to initiate fresh proceedings under the Foreigners Act against all such persons whose cases were not referred to the Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 by the competent authority whether on account of the recommendation of the Screening Committee or any other reason whatsoever. The appeals pending before the Appellate Tribunals shall be deemed to have abated."

24. Paragraph 84 of **Sarbananda Sonowal** (supra), contains the directions of the Apex Court, which is most material for the purpose of this case and therefore, paragraph 84 is quoted herein below:

"84. In view of the discussion made above, the writ petition succeeds and is allowed with the following directions:

(1) *The provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 and the Illegal Migrants (Determination by Tribunals) Rules, 1984 are declared to be ultra vires the Constitution and are struck down.*

(2) The Tribunals and the Appellate Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall cease to function.

(3) All cases pending before the Tribunals under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall stand transferred to the Tribunals constituted under the Foreigners (Tribunals) Order, 1964 and shall be decided in the manner provided in the Foreigners Act, the Rules made thereunder and the procedure prescribed under the Foreigners (Tribunals) Order, 1964.

(4) It will be open to the authorities to initiate fresh proceedings under the Foreigners Act against all such persons whose cases were not referred to the Tribunals by the competent authority whether on account of the recommendation of the Screening Committee or any other reason whatsoever.

(5) All appeals pending before the Appellate Tribunal shall be deemed to have abated.

(6) The respondents are directed to constitute sufficient number of Tribunals under the Foreigners (Tribunals) Order, 1964 to effectively deal with cases of foreigners, who have illegally come from Bangladesh or are illegally residing in Assam."

25. Thus, with the striking down of the IMDT Act and the IMDT Rules, the Tribunals and the Appellate Tribunals constituted under the IMDT Act ceased to function and all cases pending before the Tribunals under IMDT Act stood transferred to the Tribunals constituted under Order of 1964. All appeals pending before the Appellate Tribunals were also deemed to have been abated.

26. While the directions noted above take into account pending cases before the IMDT Tribunals and the pending appeals before the Appellate Tribunals, there are no directions in paragraph 84 with regard to judgments already pronounced by the Tribunals constituted under the IMDT Act. What will be the fate of those judgments is the essence of the reference before this Full Bench.

27. A perusal of the judgments rendered in *Karamat Ali* (supra) and *Rejia Khatun* (supra), goes to show that both the cases relied upon a common judgment rendered by a Single Judge while hearing a batch of writ petitions including *Santi Ranjan Dey and others Vs. State of Assam and others*, reported in *2006 (4) GLT 716*. In *Santi Ranjan Dey* (supra), the Court posed a question as to how to deal with the writ petition without the existence of the Act itself. The learned Single Judge accepted the submission of the State that it would be in the interest of justice that all the cases pending before this Court be transferred to the Foreigners Tribunals for fresh hearing, thus allowing the writ petitioners to get a reasonable opportunity to defend their respective cases. It was noted as follows:

“Reason for this argument is that, if the Appellate Tribunal's order under challenge is upheld by this Court, the person concerned shall have no option subject to interference by the highest Court but only is to be deported under Act when the same itself is not in force and hence such act will be highly prejudicial to him infringing the fundamental rights guaranteed under Articles 14 and 21 of the constitution of India which are promised not only to a citizen but also to a non-citizen. On the other hand, if the appellate judgment and order is set aside and remanded, the petitioner/petitioners shall be devoid of any legal forum due to abatement of the Appellate Tribunals.”

The Court noticed that in the said bunch of writ petitions, almost in all cases there was an allegation of violation of principles of natural justice calling for a fresh trial by affording reasonable opportunity of hearing to the parties. Accordingly, the writ petitions were remanded to the Foreigners Tribunal for their disposal by fresh trial in accordance with law.

28. We are of the opinion that there has to be a fine balance in approaching the issue. On the one hand, the State of Assam is facing external aggression and internal disturbance on account of large scale influx and illegal migration of Bangladeshi

nationals. On the other hand, citizenship of a person is a most valuable right which cannot simply be wished away.

29. That the provisions of the IMDT Act and the IMDT Rules were made to give shelter and protection to illegal migrants who came to Assam from Bangladesh on or after 25.3.1971 has already been noticed. The IMDT Act was conspicuously silent about burden of proof unlike Section 9 of the Act of 1946 which places the burden of proof upon the person concerned who claims to be an Indian citizen. In such circumstances, a very heavy burden was cast upon the authority of the State or the applicant to establish that a person is an illegal migrant as defined in Section 3(1)(c) of the IMDT Act and is liable for deportation. In spite of such odds, if the Tribunals constituted under IMDT Act, on the basis of the materials on record, had held that a person is an illegal migrant and liable for deportation, will it be correct and justified to hold that the case has to proceed against him afresh in the Tribunal constituted under Order of 1964 and that such person cannot be deported unless a fresh determination is made by such Tribunal? We are of the opinion that to hold so would be self-defeating and will run counter to the very objective of detection and deportation of illegal migrants. Final orders of the Tribunals constituted under the IMDT Act are conclusive so far as IMDT Act is concerned, though it subsequently came to be struck down. However, such orders of the Tribunals are open to challenge in a writ petition filed under Article 226 of the Constitution. If a person is declared to be an illegal migrant, he is liable for deportation and such order is binding upon him. Such orders are not obliterated only because IMDT Act had been struck down.

30. Let us visualize a scenario where a particular judgment was delivered by a Tribunal constituted under IMDT Act on 1.7.2005. The Tribunals and the Appellant Tribunals constituted under the IMDT Act ceased to function with effect from 12.7.2005 i.e. the date of judgment in *Sarbananda Sonowal* (supra). Let us also take note of the appeals preferred before the Appellate Tribunal by persons who were declared illegal migrants by the Tribunals, which stood abated with effect from 12.7.2005. Can such persons be without a remedy? The answer is obviously in the negative as no

person can be left without a remedy in our constitutional scheme. We are of the opinion that only because Appellate Tribunals ceased to exist and function, it cannot be said that such a person would be left without a remedy. Remedy is always available under Article 226 of the Constitution of India. It is for the Writ Court to decide whether in a given case order of the Tribunal is valid and legally sustainable. If the Writ Court finds that the order of the Tribunal constituted under the IMDT Act requires interference in exercise of the certiorari jurisdiction under Article 226 of the Constitution, the proceeding has to be remanded to the Foreigners Tribunal constituted under Order of 1964 for adjudication in accordance with law, the Tribunals constituted under the IMDT Act having ceased to exist in view of the judgment of the Apex Court in *Sarbananda Sonowal* (supra), as the question whether such person is a foreigner or not must be answered for the purpose of removal of the needle of suspicion on such person and if it is held that he is a foreigner, then to deport him from India. In such proceeding, on remand, the burden of proof that he is not a foreigner but an Indian citizen would be on him, in view of the provision contained in Section 9 of the Act of 1946.

31. In the event the Writ Court finds that the finding recorded by the Tribunal that the proceedee is an illegal migrant is sustainable and upholds the decision of the Tribunal, the finding has to be taken to a logical conclusion, namely, deportation of such an illegal migrant, subject, of course, to interference with such finding by the superior Court. If a person, who was declared as an illegal migrant, say in the year 1985, but has not been deported and he has continued to remain illegally in India, files a writ petition now, without challenging the said finding all these years, naturally, the question of delay, etc. will come into play, which has to be considered with reference to the cause(s) shown. In other words, each application under Article 226 of the Constitution of India has to be considered individually in accordance with underlying principles governing exercise of powers under Article 226 of the Constitution of India. Fresh trial under the Order of 1964 by the Foreigners Tribunal cannot be asked for as a matter of right but such an order for a fresh consideration by the Foreigners Tribunal will arise only if merit of the case so demands.

32. Let us also consider another possibility. Suppose, the Writ Court accepts a challenge made by a person who was declared as illegal migrant and sets aside the order of the Tribunal constituted under IMDT Act. In such an eventuality, there will be no occasion for the Writ Court to remand the matter to the Foreigners Tribunal for a fresh consideration. We have already discussed how the provisions of IMDT Act and the IMDT Rules were heavily tilted towards giving shelter and protection to an illegal migrant. Burden of proof upon the person concerned who claims to be an Indian citizen, unlike Section 9 of the Act of 1946, which is absolutely essential in relation to the nature of inquiry being conducted regarding determination of a person's citizenship where the facts on the basis of which an opinion is to be formed and a decision is taken are entirely within the knowledge of the said person, was conspicuously absent in IMDT Act. Therefore, even if the finding is recorded in a writ petition in favour of a person who was declared an illegal migrant by the Tribunal under the IMDT Act, the State will not be precluded from proceeding afresh against such a person under the provisions of the Act of 1946 and Order of 1964.

33. Similar would be the position in respect of those cases where the Tribunals constituted under the IMDT Act had dismissed the references seeking declaration of the noticees as illegal migrants. Since those references were decided by the Tribunals on the basis of the provisions of the IMDT Act and the IMDT Rules which have been observed by the Apex Court to have shielded the illegal migrants rather than facilitating their detection and deportation and thus declared unconstitutional, it will be open to the State in all such cases to proceed against those persons afresh under the provisions of the Act of 1946 and the Order of 1964.

34. In view of the aforesaid discussion and findings, we answer the reference by holding that the orders already passed by the Tribunals constituted under the IMDT Act do not cease to exist with the striking down of the IMDT Act by the Apex Court as unconstitutional. Consequently, it does not necessarily follow that all cases already decided by the Tribunals constituted under the IMDT Act prior to such declaration have to be decided afresh by the Foreigners Tribunal. Orders passed by the Tribunals

constituted under the IMDT Act can be assailed by way of a writ petition and each writ petition has to be considered on its own merits in accordance with principles governing exercise of powers under Article 226 of the Constitution of India. If on consideration of the materials on record, the writ Court finds that the matter requires to be remanded for a fresh consideration, in that event, case will be remanded to the Foreigners Tribunal for disposal in accordance with law, i.e. the Act of 1946 and Order of 1964. In the event of dismissal of the writ petition filed by a person who was declared to be an illegal migrant, in absence of any further challenge, he will be liable to be deported. Further, the State will not be denuded of its power to proceed under the provisions of the Act of 1946 and Order of 1964 and to make a reference to the Foreigners Tribunal for adjudication in respect of a person whose writ petition, challenging the finding of the Tribunals constituted under the IMDT Act that he was an illegal migrant, is allowed by setting aside the order of the Tribunal. Likewise, the State will be at liberty to make a reference to the Foreigners Tribunal in respect of those persons, who were not declared as illegal migrants by Tribunals constituted under the IMDT Act.

35. The question having been answered as above, the Registry shall now place the writ petition before the appropriate Single Bench for consideration.

JUDGE

JUDGE

JUDGE

Nilakshi