

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

WP(C) 256/2013

Md. Bahaluddin Sheikh,
S/O. Late Sarubuddin Sheikh,
Vill- Bherbari (Bamune Panikhowa),
P.O.- Jira, P.S.- Krishnai,
Dist.- Goalpara (Assam).

.....*Petitioner*

-Vs-

1. The Union of India, represented by the Secretary of the Govt. of India, Ministry of Home Affairs, Shastri Bhawan, Tilak Marg, New Delhi.
2. The State of Assam, represented by the Commissioner & Secretary to the Govt. of Assam, Home Department, Dispur, Guwahati-781006.
3. The Election Commissioner, Election Department, 4th Floor, Block-'C', Assam Secretariat, Dispur, Guwahati-781006.
4. The District Election Officer, Goalpara, P.O.- Baladmari, PS & Dist- Goalpara, Assam, PIN-783121.
5. The Superintendent of Police (B), Goalpara, P.O.- Baladmari, Dist - Goalpara (Assam), Pin-783121.
6. The Foreigners Tribunal, Goalpara, PO & Dist - Goalpara (Assam), Pin-7831221.

.....*Respondents.*

BEFORE

THE HON'BLE MR. JUSTICE B.K. SHARMA

For the petitioner : Mr. A.R. Sikdar, Adv.
Mr. M.H. Talukdar, Adv.

For the respondents : Mr. K.N. Choudhury, Addl. Sr. AAG.
Ms. A. Deka, Adv.
Mr. K.P. Pathak, Amicus Curiae
& ASGI.
Mr. M. Bhagawati, CGC.
Mr. M.U. Mahmud, SE, SEC.

Date of hearing : 21.02.2013.
Date of judgement : 11.04.2013.

JUDGEMENT AND ORDER (CAV)

The petitioner, who has been identified as 'D' (*Doubtful*) voter, has filed this writ petition, challenging the proceeding that has been initiated against him by the Foreigners Tribunal, Goalpara vide *FT Case No. 5368/G/12* arising out of *district Case No. 793/2010*. Apart from claiming that initiation of such proceeding is uncalled for in view of the fact that the petitioner is an Indian citizen, the said proceeding has also been questioned on the ground of pendency of a suit being *Title Suit No. 95/2012* in the Court of the learned Munsif No.1, Goalpara, by which the petitioner as the plaintiff has prayed for a declaration that he is an Indian citizen as defined in the *Citizenship Act* and that the alphabet "D" shown against his name in the electoral roll be removed entitling him to cast votes in elections.

2. Having regard to the importance of the issue involved, which is, as to whether in view of the existing special law for determination of citizenship issue, a civil suit is maintainable towards determination of one's citizenship, Mr. K.P. Pathak, learned ASGI was requested to assist the Court as Amicus Curiae, more particularly when the Union of India is also party respondent in the writ petition. Similarly, Mr. K.N. Choudhury, learned Sr. AAG, Assam was also requested to assist the Court. Both of them readily agreed to do so.

3. The writ petition was first entertained on 24.1.2013 and thereafter adjourned to 28.1.2013. On that day, Mr. A.R. Sikdar, learned counsel for the petitioner prayed for a week's time and suggested the next date as 13.2.2013. Accordingly, the matter was adjourned and could be taken up for final hearing on 21.2.2013, on which date Mr. Sikdar, learned counsel for the petitioner, at the first instance, wanted to withdraw the writ petition to which Mr. Pathak, learned ASGI, acting as Amicus Curiae, raised objection having regard

to the importance of the issue involved. Eventually, the learned counsel for the petitioner agreed for final adjudication of the matter and made his submissions. In addition to his oral submission, he also submitted a written argument.

4. Mr. Sikdar, learned counsel for the petitioner during the course of his argument submitted that irrespective of filing the suit by the petitioner, he has already responded to the proceeding before the Tribunal. However, on being asked as to what will be the consequence of two simultaneous proceedings, he submitted that it is the judgement and decree in the civil Court proceeding which will prevail over the opinion rendered by the Foreigners Tribunal. Referring to the notice dated 13.12.2012 served on the petitioner including his other family members, Mr. Sikdar, learned counsel for the petitioner submitted that the said notice having not contained the grounds on which they are alleged to be foreigners, it is difficult on the part of the petitioner to effectively respond to the said notice.

5. Both Mr. K. P. Pathak, learned Amicus Curiae and ASGI and Mr. K.N. Choudhury, learned Sr. AAG, Assam, opposing the said submission submitted that the civil suit filed by the petitioner is not maintainable in view of the existing special provisions in the form of *Citizenship Act, 1955 ; Foreigners Act, 1946 and Foreigners (tribunal) Order, 1964*. In addition, they also referred to the constitutional provisions relating to citizenship.

6. Mr. A.R. Sikdar, learned counsel for the petitioner in reference to the written argument submitted by him, submitted that the petitioner is a citizen of India, his grand parents' names having appeared in the NRC of 1951 and voter list of 1966. It was also submitted that his father's name was in the voter list of 1966 onwards upto 1989. It was also submitted that his father expired in 1996 and that the petitioner's name along with the other family members appeared in the voter lists from 1989 onwards. However, in April, 2011, the petitioner was prevented from casting his votes by

the Presiding Officer in the General Assembly Election on the ground of there being 'D' inserted against his name in the voter list. His request for correction of the same having not been entertained, he filed Title Suit No. 95/2012 on 27.8.2012.

7. It was further submitted by Mr. A.R. Sikdar, learned counsel for the petitioner that although the defendants in the suit who are Union of India ; Chief Election Commissioner of India ; State of Assam ; Election Commission ; the District Election Officer and Superintendent of Police, initially appeared in the said Title Suit proceeding but in view of their subsequent absence, the learned Munsiff No. 1 has passed an order for ex parte hearing. But in the mean time, the petitioner was served with the impugned notice dated 13.12.2012 issued by the Foreigners Tribunal, Goalpara requiring his and his family members presence. By the said notice, they have been asked to appear before the Tribunal along with the supporting documents including the voter list of 1966 in response to the proceeding that has been initiated under the **Foreigners Act**.

8. Placing reliance on the decisions reported in *(1) AIR 1961 SC 1526 (The Union of India Vs. Ghaus Mohammad) ; 2010(2)GLT01 (Moslem Mondal and others Vs. Union of India and others) ; Review Judgement (RA 22/2010) dated 3.1.2013 passed in Moslem Mandal (Supra) ; (2003) 6 SCC 151 (Sahebgouda and others Vs. Ogeppa and others) ; AIR 1969 SC 439 and 560 (Musamia Imam Haider Bax Razvi Vs. Rabari Govindbhai Ratnabhai and others and State of UP and others Vs. Shah Mohammad and others) ; AIR 1966 SC 1718 (Abdul Waheed Khan Vs. Bhawani and others) ; (2003) 6 SCC 220 (Dwarka Prasad Agarwal and another Vs. Ramesh Chander Agarwal and others) ; AIR 1965 SC 1942 (Kamala Mills Ltd. Vs. State of Bombay) ; (1997) 5 SCC 460 (Vankamamidi Venkata Subba Rao Vs. Chatlapalli Seetharamaratna Ranganayakamma) ; AIR 1948 (PATNA) 49(Luthra Uraon Vs. Samua Uraon and others) and AIR 1952 (MADRAS) 106 (Gadhavajhala Satyanarayanamurthi Vs. Rao aahed Y. Narayanamurthi and others)*, Mr. Sikdar, learned counsel for the

petitioner in his elaborate and detailed argument, submitted that there cannot be any bar of jurisdiction of Civil court to determine the citizenship of a person. According to him, the **Citizenship Act** and the **Foreigners Act** having not excluded the jurisdiction of the civil Court, the Title Suit filed by the petitioner is very much maintainable and the declaration thereof would prevail over the opinion rendered by the Foreigners Tribunal. Mr. A.R. Sikdar, learned counsel for the petitioner also submitted that the issue being no longer *resintegra* in view of the judgement in *Moslem Mandal (Supra)*, this Court is not entitled to adjudicate the same issue once again.

9. Opposing the aforesaid submission, Mr. K.P. Pathak, learned ASGI, acting as Amicus Curiae in the matter with the assistance of Mr. M. Bhagawati, learned CGC submitted that having regard to the special law as envisaged in the **Citizenship Act** and the **Foreigners Act**, there is implied ouster of jurisdiction of the civil court in the matter of determination of one's citizenship. Referring to the *Moslem Mandal's case (Supra)*, he submitted that while deciding the said case, the issue as has been raised in the present proceeding was not the issue and thus the observations made therein, cannot be said to be determination of the issue in question. He submitted that the rights and liabilities associated with citizenship can only be constitutional or statutory but can never be a right under common law so as to agitate or assert the same by way of a civil suit as in the case of land Dispute, etc.

10. Referring to **Articles 5 to 11 of the Constitution of India under Part-II (Citizenship)**, he submitted that the Parliament having enacted the **Citizenship Act, 1955** for acquisition and termination of Indian citizenship, as provided for under Article 11 of the Constitution of India, there is automatic ouster of jurisdiction of civil Court in the matter of determination of citizenship. Referring to the provisions of **Foreigners Act, 1946**, he also submitted that the said act having specifically been enacted towards exercising certain powers in respect of foreigners, there is no question of entitlement

to initiate simultaneous proceeding by way of filing a suit for determination of the same issue. As regards the power of the Foreigners tribunal by way of rendering 'Opinion' as to whether a person is not a foreigner within the meaning of Foreigners Act, 1946, referring to the dictionary meaning, he submitted that "Opinion" being a statement by a Judge or Court of the decision reached in regard to a case tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgement is based, it cannot be argued that such opinion is inferior than the declaration made by the Civil Court. In this connection, he has specifically referred to the observations made in *Moslem Mandal (Supra)* in which the expression "Opinion" in reference to Civil Court jurisdiction was held thus :-

"37. We deem it necessary to point out that under the scheme of the Foreigners Act, 1946, read with Foreigners (Tribunal) Order, 1964 (in short '1964 order'), the Tribunal, constituted under the 1964 Order, is required to give, on the 'reference' made to it, only an 'opinion' whether the person, proceeded against, is or is not a 'foreigner'. For the purpose of rendering such an opinion, the Tribunal has to necessarily determine the question as to whether the person, against whom a 'reference' is made, is or is not an Indian citizen. The question as to whether a person is or is not an Indian citizen can also be decided by a civil Court at the option of the person, who is alleged to be a foreigner or held to be a foreigner by the Tribunal constituted under the 1964 Order, inasmuch as a civil court is entitled to pass a decree declaring the status of a person as an Indian citizen. By enacting the Foreigners Act and / or the 1964 Order, the power of the civil courts, to determine the status of a person as an Indian citizen, has not been taken away.

39. It is, thus, clear that on the basis of the pleadings of the parties in a writ proceeding and/or, on the basis of the documents placed on record in a writ proceeding, a Court cannot determine the question as to whether a person is or is not a foreigner. The determination of the question, as to whether a person is or is not a foreigner, falls, when a 'reference' is made to a Tribunal under the provisions of the Foreigners Act read with the 1964 Order, within the ambit of the powers of the Tribunal and, in other cases, by a civil court of

competent jurisdiction. We may hasten to point out that so far as the Tribunal is concerned, it only renders an 'opinion' with regard to the question as to whether the person alleged to be a foreigner is or is not a foreigner and, then, it is for the Central Government or the authorities, otherwise empowered, to decide as to whether such a foreigner needs to be deported from the territory of India or not. Thus, the procedure, adopted, in the writ proceeding, in the present case of determining, on the basis of the pleadings made in the writ proceeding and the documents annexed thereto, whether the writ petitioners were or were not foreigners, cannot be said to be a legally permissible procedure.

*106. There is yet another reason, which leads us to hold that the standard of proof in a proceeding before the Tribunal, constituted under the 1964 Order, is same as that of the civil court and the reason is that a civil court is entitled, under Section 9 of the Code of Civil Procedure, to declare the status of a person as an Indian citizen. This position is recognized even in *Union of India Vs. Gaus Mohammed*; AIR 1961 SC 1526, which the respondents have relied upon. When the civil court's declaration, made under Section 9, is binding on the Government, it logically follows that the Tribunal cannot adopt a higher standard than the one, which is applied by the ordinary civil courts for the purpose of making a declaratory decree of the fact as to whether a suitor is or is not a foreigner."*

11. Elaborating his argument, Mr. Pathak, learned ASGI and Amicus Curiae submitted that in view of the special law towards determination of citizenship, there is bar of jurisdiction of civil Court. He has also referred to certain decisions which are (1) 2010 (2) GLT 1 (*Moslem Mondal and others Vs. Union of India and others*) ; the Full Bench decision dated 03.01.2013 in RA No. 22/2010 and other related writ appeals arising out of *Moslem Mondal (Supra)* ; AIR 2011 SC 3056 (*Arun Kumar Agarwal Vs. State of Madhya Pradesh*) ; (2008) 10 SCC 01 (*Official Liquidator Vs. Dayanand and others*) ; (1976) 1 SCC 496 (*The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and others*) ; (2008) 5 SCC 542 (*Rajasthan State Road Transport*

Corporation and others Vs. Mohar Singh) and (2005) 5 SCC 665 (Sarbananda Sonowal Vs. Union of India and another).

12. Mr. K.N. Choudhury, learned Sr. AAG, Assam, assisted by Ms. A. Deka, learned counsel representing the State respondents submitted that when there is special law covering a particular area then the general law is excluded. Referring to the decision reported in *Ghaus Mohammad (Supra)*, he submitted that the same was altogether in a different context and cannot help the case of the petitioner. Exclusively referring to the provisions of *Foreigners Act, 1946* and the *Citizenship Act, 1955*, he submitted that there cannot be any second opinion that the civil court jurisdiction is ousted. He submitted that it was never the intention of the Central Govt. or the Parliament to confer jurisdiction to the Civil Court. As regards the aforesaid observation of the Division Bench in *Moslem Mondal (Supra)* case, referring to the decision of the Apex Court reported in *(1991) 4 SCC 139 (State of UP and another Vs. Synthetics and Chemicals Ltd. and another)*, he submitted that when the said issue was not before the Division Bench, any observation made in the context of an issue for determination cannot be said to have laid down the law on the issue involved in this proceeding. He also submitted that in view of the Full Bench decision arising out *Moslem Mondal (supra)* and non-determination of the issue in question, when the said issue is directly involved in this proceeding, the same is required to be resolved by this Court. Referring to the case of *Sarbananda Sonowal (Supra)*, he also submitted that after the said decision whatever doubt on the issue even if, was there, stands removed and it cannot be argued that the civil Court jurisdiction is not ousted in view of the special law holding the field.

13. I have very carefully considered the submissions made by the learned counsel for the parties and have also perused the entire materials on record. Before proceeding any further towards determination of the main issue involved in this proceeding, let me first deal with the argument advanced by the learned counsel for the

petitioner that in view of the Division Bench judgement and *Moslem Mondal (Supra)*, the said issue cannot be taken up once again for determination as the same conclusively stood answered in the said judgement.

14. *Moslem Mondal (Supra)* case had arisen out of a judgement dated 25.7.2008 dismissing the writ petition being *WP(C) No. 1355/2008*, by which the opinion rendered by the Tribunal declaring the petitioners to be foreigners had been upheld. While answering the appeal against the said judgement, the Division Bench identified certain questions of law which according to the Division Bench arose for consideration towards deciding the appeals. The said questions identified by the Division Bench are incorporated in paragraph 43 of the judgement. For a ready reference, the said paragraph is reproduced below :-

“43. Certain common questions of law arise in all these appeals. Therefore, we thought it fit to request the learned counsel, appearing for the various parties, in this batch of appeals, to identify the questions of law, which arise for consideration of this court for deciding this batch of appeals and make their submissions. The learned Court for all the parties have accordingly made their submissions on the commonly identified questions of law. The following questions of law are identified :-

- 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?"*

15. On a bare perusal of the said questions which the Division Bench had identified for determination would go to show that the same did not include the question as to whether in view of the special law towards determination of citizenship, the civil court jurisdiction is ousted. One of the the questions that was formulated by the Full Bench in Review Petition No 22/2010 arising out of the judgement in *Moslem Mondal (Supra)* along with some writ appeals being WA nos. 258/08, 264/08, 265/08, 266/08, 268/08, 280/08, 281/08, 370/08, 59/09, 71/09, 171/2010, 313/2011 was as follows :-

" i) Whether the civil court has jurisdiction to entertain a suit for declaration that the plaintiff is not a foreigner ?"

16. As pointed out by the learned counsel representing the respondents including the Amicus Curiae, the said question was not answered by the Full Bench with the following observation :-

"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."

17. It is in the above context coupled with the argument that the issue was not before the Division Bench in *Moslem Mondal's* case, the issue cannot be said to have been conclusively determined precluding this Court from answering the issue. In *Moslem Mondal (Supra)*, the above quoted observations were in the context of

examination of the documents annexed to the writ petitions. It was held that on the basis of such examination of documents annexed to the writ petition by the Single Judge on the basis of pleadings of the parties in a writ proceeding and / or on the basis of the documents placed on record in a writ proceeding, the Court cannot determine as to whether a persons is or is not a foreigner.

18. It will be pertinent to mention here the background fact of the aforesaid review petition and the writ appeals placed for determination by Full Bench. Against the Division Bench judgement in *Moslem Mondal (Supra)*, the State of Assam had filed a review petition being *RP No. 22/2010*. As recorded in the Full Bench judgement 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 *WP(C) No. 238/2008*, to hear all the learned counsel appearing for the parties in the appeal including the Amicus Curiae assisting the Court and to hear the review petition along with other matters, which was accepted by the Court by order dated 17.5.2010. The matter was referred to a Full Bench considering the "importance of the issue involved in the matter and that there are number of judgements, which if are not taking contrary view but are taking different view" other than the view taken by the Division Bench in the judgment in *Moslem Mondal (Supra)*. It was pursuant to the said order, the review petition along with other connected matters relating to detection and deportation of foreigners under the provisions of the **Foreigners Act, 1946** read **Foreigners (Tribunal) Order, 1964** had been placed before the Full Bench for hearing.

19. One of the questions formulated by the Full Bench was the one quoted above. However, the said issue, although was not answered by the Full Bench but at the same time will have to be borne in mind that the Division Bench judgement in *Moslem Mondal (Supra)* stood merged with the Full Bench decision, in which the other issues raised therein have been answered. However, the particular issue with which this proceeding is concerned having not been answered by the

Full Bench for the reasons stated therein, in my considered view, there cannot be any bar for determination of the said issue in this proceeding.

20. Above apart, as has been rightly submitted by both Mr. Pathak, learned ASGI and Mr. K.N. Choudhury, learned Sr. AAG, Assam, the issue relating to civil court jurisdiction was not even an issue before the Division Bench. As to what were the issues has been noted above. It has also been noted above that the particular observation in respect of jurisdiction of civil court was in reference to the jurisdiction exercised by the writ court towards examining the documents annexed to the writ petition.

21. In *Arun Kr. Aggarwala (Supra)*, it has been observed by the Apex Court that obiter dictum is a mere observation or remark made by the Court by way of aid while deciding the actual issue before it. The mere casual statement or observation which is not relevant, pertinent or essential to decide the issue in hand does not form the part of the judgement of the court and have no authoritative value. In paragraph 29, 30 and 31 of the said judgement, the Apex Court has reproduced its earlier views in certain decisions and has also held thus :-

“29. In State of Haryana v. Ranbir, (2006) 5 SCC 167, this Court has discussed the concept of the obiter dictum thus:

“A decision, it is well settled, is an authority for what it decides and not what can logically be deduced therefrom. The distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect. See ADM, Jabalpur v. Shivakant Shukla (AIR 1976 SC 1207). It is also well settled that the statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative. (See Divisional Controller, KSRTC v. Mahadeva Shetty)(AIR 2003 SC 4172).”

30. In Girnar Traders v. State of Maharashtra, (2007) 7 SCC 555, this Court has held:

“Thus, observations of the Court did not relate to any of the legal questions arising in the case and, accordingly, cannot be considered as the part of ratio decidendi. Hence, in light of the aforementioned judicial pronouncements, which have well settled the proposition that only the ratio decidendi can act as the binding or authoritative precedent, it is clear that the reliance placed on mere general observations or casual expressions of the Court, is not of much avail to the respondents.”

31. In view of above, it is well settled that obiter dictum is a mere observation or remark made by the court by way of aside while deciding the actual issue before it. The mere casual statement or observation which is not relevant, pertinent or essential to decide the issue in hand does not form the part of the judgment of the Court and have no authoritative value. The expression of the personal view or opinion of the Judge is just a casual remark made whilst deviating from answering the actual issues pending before the Court. These casual remarks are considered or treated as beyond the ambit of the authoritative or operative part of the judgment.”

22. In *Dayanand (Supra)*, the Apex Court discussing on binding affects of judgement of Supreme Court and the cardinal principles involved in judicial discipline, observed thus :-

“92. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judge Bench in U.P. SEB V. Pooran Chandra Pandey {(2007) 11 SCC 92 } should be read as obiter and the same should neither be treated as binding by the High Courts, tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench.”

23. In *Synthetics and Chemicals Ltd (Supra)*, the Apex Court made the following significant observation :-

“41. Does this principle extend and apply to a conclusion of law, Which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have

carved out an exception to the rule of precedents. It has been explained as rule of *sub-silentio*. 'A decision passes *sub-silentio*, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind.' (Salmond on jurisprudence 12th Edition, P.153). In *Lancaster Motor Company (London) Ltd. v. Bremith Ltd.*, [1941] IKB 675, 677 the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in *Municipal Corporation of Delhi v. Gumam Kaur*, [1989] 1 SCC 101. The Bench held that, 'precedents *sub-silentio* and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not *ratio decedendi*. In *D. Shama Rao v. Union Territory of Pondicherry*, AIR 1967 SC 1480 it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

24. In *Delhi Airtech Services Pvt. Ltd. Vs. State of UP* reported in (2011) 9 SCC 354 dealing with the concept of *sub-silentio*, the Apex Court held that when a point does not fall for decision of a Court, it incidentally arises for its consideration and is not necessary to be decided for the ultimate decision of the case, such a decision does not form a part of the ration of the case but the same is treated as a decision passed *sub-silentio*.

"43. The concept of 'sub silentio' has been explained by Salmond on Jurisprudence "12th Edition" as follows:

“A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.”

“44. The aforesaid passage has been quoted with approval by the three Judge Bench in Gurnam Kaur (supra). This Court in Gurnam Kaur (supra), in order to illustrate the aforesaid proposition further relied on the decision of the English Court in Gerard v. Worth of Paris Ltd., reported in 1936 (2) All England Reports 905. In Gerard, the only point argued was on the question of priority of the claimant's debt. The Court found that no consideration was given to the question whether a garnishee order could be passed. Therefore, a point in respect of which no argument was advanced and no citation of authority was made is not binding and would not be followed. This Court held that such decisions, which are treated having been passed sub silentio and without argument, are of no moment. The Court further explained the position by saying that one of the chief reasons behind the doctrine of precedent is that once a matter is fully argued and decided the same should not be reopened and mere casual expression carry no weight.”

45. In Gurnam Kaur (supra) this Court conclusively held that :

“12.Not every passing expression of a Judge, however eminent, can be treated as “ex cathedra statement, having the weight of authority”

46. Similarly, it has also been held by the majority opinion in Constitution Bench of this Court in the case of Madhav Rao Jivaji Rao Scindia v. Union of India, reported in AIR 1971 SC 530 that :

“it is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.”

47. In another Constitution Bench decision of this court in *Padma Sundara Rao (Dead) & Ors., v. State of Tamil Nadu & others* reported in (2002) 3 SCC 533, similar views have been expressed by this Court in para 9, at page 540 of the report wherein the unanimous Constitution Bench of this Court opined:

*“9. Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington V. British Railways Board - (1972) AC 877*. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.”*

25. A “decision” necessarily involves determination of each question of law/issue which arose and decided in a given case. In *Moslem Mandal (Supra)* case, the question / issue involved in the present proceeding did not arise at all. The observation made in the said case, referred to above, cannot be said to constitute any binding precedent. Moreover, the Full Bench, although formulated the question, but having not answered the same due to the reasons stated in the judgement and referred to above, it is very much open for determination. It was also submitted that the observations in *Moslem Mondal (Supra)* was de horse any argument by the parties on the issue.

26. Having regard to the aforesaid position, more particularly, when the issue under consideration of this Court was not the issue before the Division Bench in *Moslem Mondal (Supra)* coupled with the fact that before the Full Bench, the said issue was formulated

but was not answered, I am of the considered opinion that this court is not precluded from answering the said issue. As already noted above, pursuant to the review and writ appeal proceedings before the Full Bench and the judgement delivered therein, the Division Bench judgement also got merged with the said Full Bench judgement, as not only the appeal which was already decided by the Division Bench but also other connected appeals including the review petition have been decided afresh by the said Full Bench.

27. This now leads us to the moot question as to whether one's citizenship can be determined by a declaration in the civil Court irrespective of the special law existing for the purpose. **Section 9 of the Civil Procedure Code** provides that the Courts have jurisdiction to try all suits of a civil nature excepting the suits of which their cognizance is either expressly or impliedly barred. **Order 07 Rule 10 and 11 of the CPC** provides for return of plaints and rejection of plaint respectively. Under **Rule 10**, the plaint shall at any stage of the suit is required to be returned, to be presented to the Court in which the suit should have been instituted. On the other hand, **Rule 11** provides for rejection of plaint *inter alia* on the ground of the suit being barred by law. Thus, if it is held that the plaint submitted by the petitioner on the basis of which the aforesaid suit has been registered in the Court of learned Munsiff No.1, Goalpara is barred by the provisions of *citizenship Act read with Foreigners (Tribunal) Order, 1964* and the *Foreigners Act, 1946*, the same will have to be returned to the petitioner.

28. **Articles 5 to 10** of the Constitution deal with citizenship like citizenship at the commencement of the constitution ; rights of citizenship of certain migrants to Pakistan, rights of citizenship of certain persons of Indian origin residing outside India ; persons voluntarily acquired citizenship of a foreign country, continuance of the rights of citizenship, etc. Apart from the said provision **Article 11** empowers the Parliament to regulate the rights of citizenship by law, in terms of which nothing in the provisions contain in Article 1 to 10, shall derogate from the powers of Parliament to make any provision

with respect of the acquisition and termination of citizenship and all other matters relating to citizenship.

29. The Citizenship Act, 1955 was enacted to provide for acquisition and termination of Indian citizenship. The statement of objects and reasons pertaining to the said Act, *inter alia* read as follows :-

“Statement of Objects and Reasons.- Articles 5 to 9 of the Constitution determine who are Indian citizens at the commencement of the Constitution and article 10 provides for their continuance as such citizens subject to the provisions of any law that may be made by Parliament. The Constitution does not, however, make any provision with respect to the acquisition of citizenship after its commencement or the termination of citizenship or other matters relating to citizenship. Under article 11 of the Constitution expressly saves the power of Parliament to make a law to provide for such matters. It is obviously necessary to make such a law to supplement the provisions of the Constitution and this Bill seeks to achieve this object.

This Bill provides for the acquisition of citizenship, after the commencement of the Constitution, by birth, descent, registration, naturalization and incorporation of territory. It also makes necessary provisions for the termination and deprivation of citizenship under certain circumstances. The Bill also seeks to formally recognize Commonwealth citizenship and permit the Central Government to extend on a reciprocal basis such rights of an Indian citizen as may be agreed upon to the citizens of other Commonwealth countries and the Republic of Ireland.”

30. By an amendment Act 65 of 1985, it was further provided as follows :-

“Amendment Act 65 of 1985 - Statement of Objects and Reasons - The core of the Memorandum of Settlement (Assam Accord) relates to the foreigners' issue, since the agitation launched by the A.A.S.U. arose out of their apprehensions regarding the continuing influx of foreign nationals into Assam and the fear about adverse effects upon the political, social cultural and economic life of the State.

(2) Assam Accord being a political settlement, legislation is required to give effect to the relevant clauses of the Assam Accord relating to the foreigners' issue.

(3) It is intended that all persons of Indian origin who came to Assam before the 1st January, 1966 (including such of those whose names were included in the electoral rolls used for the purpose of General Election to the House of the People held in 1967) and who have been ordinarily resident in Assam ever since shall be deemed to be citizens of India as from the 1st day of January, 1966. Further, every person of Indian origin who came on or after the 1st January, 1966 but before the 25th March, 1971 from territories presently included in Bangladesh and who has been ordinarily resident in Assam ever since and who has been detected in accordance with the provisions of the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964, shall, upon registration, be deemed to be a citizen for all purposes as from the date of expiry of a period of ten years from the date of detection as a foreigner. It is also intended that in the intervening period of 10 years, these persons should not suffer from any other disability vis-à-vis citizens, excepting the right to vote and that proper record shall be maintained of such persons. To inspire confidence, judicial element should be associated to determine eligibility in each and every case under this category. ”

31. By further Amendment Act 6/04 and Amendment Act 32/05, further amendments to the Citizenship Acts were brought about in respect of Acquisition of Indian Citizenship by Registration, Prevention of Illegal Migrants from Becoming eligible for Indian Citizenship, etc.

32. Foreigners Act, 1946 is an Act to confer upon the Central Government certain powers in respect of foreigners. The statement of objects and reasons including the amendment Act 42 of 1962 are reproduced below :-

“Statement of Objects and Reasons - At present the only permanent measures governing foreigners specifically are the Registration of Foreigners Act of 1939 and the Foreigners Act, 1864. The Act of 1939 provides for the making of rules to regulate registration of foreigners and formalities connected therewith, their movement in, or

departure from, India. The Act of 1864 provides for the expulsion of foreigners and their apprehension and detention pending removal and for a ban on their entry into India after removal ; the rest of the Act which provides for report on arrival, travel under a license and certain incidental measures can be enforced only on the declaration of an emergency. The powers under this Act have been found to be ineffective and inadequate both during normal times and during an emergency.

The needs of the war emergency were met by the enactment of a Foreigners Ordinance in 1939 and the promulgation under it of the Foreigners Order and the Enemy Foreigners Order. Even at that time the need for more satisfactory permanent legislation was recognized but it was decided to postpone consideration of such a measure until after the war. The Ordinance was, therefore, replaced by the Foreigners Act, 1940, the life of which was to expire on the 30th September, 1946, but has recently been extended by the Foreigners (Amendment) Ordinance, 1946, upto the 25th March, 1947.

Meanwhile the question of permanent legislation, more or less on the lines of the Act of 1940 has been examined, in consultation with the Provincial Government. All Provincial Governments agree that such permanent legislation in repeal of the Act of 1864, is necessary. The Bill in the main reproduces the provisions of the Foreigners Act of 1940.

Amendment Act 42 of 1962 - Statement of Objects and Reasons - In view of the present emergency, it is necessary that powers should be available to deal with any person not of Indian origin who was at birth a citizen or subject of any country at war with, or committing external aggression against, India or of any other country assisting the country at war with or committing such aggression against India but who may have subsequently acquired Indian citizenship in the same manner as a foreigner. It is also necessary to take powers to arrest and detain and confine these persons and the nationals of all such countries under the Foreigners Act, 1946, should such need arise.

2. Since the Parliament was not in session and immediate action had to be taken in the interest of national security an Ordinance called the Foreigners Law (Application and Amendment)

Ordinance, 1962, was promulgated on 30th October, 1962, to take the above powers. The object of the Bill is to convert this Ordinance into an Act of the Parliament."

33. There is provision in the Act for determination of nationality (Section 8), Burden of Proof (Section 9), Power to exempt from application of the Act (Section 10), power to give effect to orders / directions etc (Section 11) etc.

34. Under the **Foreigners (Tribunal) Order, 1964** issued by the Govt. of India, Ministry of Home Affairs, the Central Government may be order refer the question as to whether a person is not a foreigner within the meaning of the **Foreigners Act, 1946** to a Tribunal to be constituted for the purpose for its opinion. The procedure envisaged for disposal of questions under **Order No.3** is to the effect that the Tribunal shall serve on the person, to whom the question relates, a copy of the main grounds on which he is alleged to be a foreigner and give him a reasonable opportunity of making a representation and producing evidence in support of his case and if considered such evidence as may be produced and after hearing such persons as may desired to be heard, the Tribunal shall submits its opinion to the officer or authority specified in this behalf in the order of reference. Power of Tribunal under 4 is as follows :-

"4. Power of Tribunals ;-

The Tribunal shall have the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 in respect of the following matters, namely :-

- (a) *summoning and enforcing the attendance of any person and examining him on oath ;*
- (b) *requiring the discovery and production of any document ;*
- (c) *issuing commissions for the examination of any witness."*

35. **Citizenship Act, 1955** deals with citizenship by birth, by descent, by registration, by naturalization. By **Amendment act 65 of 1985, Section 6(A)** has been inserted as special provisions as to citizenship of persons covered by the **Assam Accord**. The Act also deals with the situations arising out of renunciation of citizenship, termination of citizenship, deprivation of citizenship, etc. **Section 18** of the Act makes provisions for making rules by the Central Government.

36. It is under the said provision, the **Citizenship Rules** has been framed laying down the procedure for registration as provided for under the Act. Under **Part-IV of the Citizenship Rules**, there is provision as to citizenship of India for persons covered by **Assam Accord**. **Rule 19** prescribes the Registering Authority and the form of registration. Significantly, **Rule 20** provides for reference to Tribunals. Whether in case of a person seeking registered under **Sub-section 3 of Section 6(A)** in question arises as to whether such person fulfills any requirement contained in the said sub-section or the opinion of the Tribunal constituted under **Foreigners (Tribunal) Order, 1964** in relation to such person does not contain a findings with respect to any requirement contained in the said sub-section other than the question that he is a foreigner, than the Registering authority shall, within a period of 15 days of receipt of the application under **Sub-Rule 2 of Rule 19** make a reference to the Tribunal in this regard. **Sub-Section 3 of Section 6(A)** deals with the person of Indian origin who came to Assam on or after the **first date of January, 1966 but before 25th day of March, 1971**.

37. **Rule 21 of the Citizenship Rules** determines the jurisdiction of Tribunal as follows :-

"21. Jurisdiction of Tribunal. - The Tribunal constituted under the Foreigners (Tribunals) Order, 1964 having jurisdiction over a district or part thereof in the State of Assam shall have jurisdiction to decide references, received from the registering authority of that district or part thereof in relation

to all references made under sub-section (3) of section 6-A."

38. There are other provisions regarding the form in which declaration relating to citizenship is to be made in certain circumstances, renunciation and deprivation of citizenship of India, etc. There is no manner of doubt that the provisions contained in the **Citizenship Act, 1955** and the **Foreigners Act, 1946** are all inbuilt provision and in case of requiring any determination relating to citizenship of a person, it is only by the Central Government and / or by the Foreigners Tribunal made applicable to the State of Assam, have jurisdiction over the same and by necessary implication, the jurisdiction of the civil Court stands ousted.

39. Let me now deal with the cases cited by the learned counsel for the parties in support of their respective cases. In **Ghaus Mohammad (Supra)**, it was held that a proceeding under Article 226 of the Constitution was not appropriate for a decision on the question as to whether the respondents therein was a foreigner. It was held that the question would stand best decided by a suit on which neither party had any serious objection. Unlike the present case, in the said case, there was no provision for determination of such issue by the Foreigners Tribunal. The determination was made by the Chief Commissioner of Delhi when he directed that the respondent should not remain in India after the expiry of 3 (three) days from the date on which the particular notice was served on him. The respondent instead of complying with the said order moved the High Court for a writ to quash the notice. It was in that context, the Apex Court granted liberty to the respondent therein to pursue his remedy by filing a suit instead of initiating a proceeding under Article 226 of the Constitution of India. Apart from the fact that the issue before the Court was not as to whether the civil suit would be maintainable or not, that was also not a case of ousting the jurisdiction of the Foreigners tribunals inasmuch as admittedly the forum of Foreigners Tribunal was not available in that case, unlike the instant case. Thus, in my considered opinion, the said case is of no help to the case of the petitioner.

40. As regards the Division Bench decision in *Moslem Mondal (Supra)*, the same has been dealt with in detail in earlier part of this judgement. The said decision is also of no help to the case of the petitioner for the reasons stated hereinabove. In *Sahebgouda (Supra)*, the Apex Court had the occasion to answer the question whether the suit filed by the appellants was barred by the provisions of Section 80 of the Bombay Public Trust Act, 1950. It was held that the jurisdiction of Civil court under Section 9 of the CPC is not to be lightly interfered. However, noticing the said provision, it was also observed that such exclusion of jurisdiction of the civil Court could be either of express terms or by the use of such terms as would necessarily lead to the inference of such exclusion. In the instant case as has been discussed above, the jurisdiction of civil Court is excluded by necessary implication. The question of citizenship cannot be determined by application of common law but will have to be decided in reference to the special law framed for the purpose i.e. the Citizen Act and the Foreigners Act.

The Division Bench decision in *Moslem Mondal's* case is not applicable to the issue raised in this writ petition. In this connection para 14 of the decision of the Apex Court reported in (2011) 7 SCC 397 (*Union of India and others Vs. Arulmozhi Iniarasu and others*) is quoted below :-

"14. Before examining the first limb of the question, formulated above, it would be instructive to note, as a preface, the well settled principle of law in the matter of applying precedents that the Court should not place reliance on decisions without discussing as to how the fact situation of the case before it fits in with the fact situation of the decision on which reliance is placed. The observations of the courts are neither to be read as Euclid's theorems nor as provisions of statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Disposal of cases by blindly placing reliance on a decision is not proper because one additional or different fact may make a world of difference between conclusions in two cases.(Ref. Bharat Petroleum Corpn. Ltd. Vs. N.R. Vairamani reported in (2004) 8 SCC 579....."

41. In *Dwarka Prasad Agarwal (Supra)* also the Apex Court observed that bar of jurisdiction of civil court is not to be readily inferred. In that case, the dispute between the parties was eminently a civil dispute and not a dispute under the provisions of the Companies Act. Unlike the said case, in the instant case, apart from the fact that the jurisdiction of civil court stands ousted in view of the provisions of the **Citizenship Act** and the **Foreigners Act**, the question for determination is eminently a question to be answered by the Foreigners tribunal as per the provisions of the said two Acts.

42. In *Musamia Imam Haider Bax Rajvi (Supra)*, the Apex Court was concerned with the provisions of Bombay Tenancy and Agricultural Land Act. It was held that the provisions thereof did not bar the jurisdiction of the civil Court to examine and decide the question whether the defendants had acquired the title of statutory owners to the disputed land under the Act. In *Ganpatlal (Supra)*, the Apex Court noticing that there was no ouster of civil court jurisdiction by the **Berar Regulation of Agricultural Leases Act**, either expressly or by necessary implications, held that the suit was maintainable.

43. None of the aforesaid two decisions can render any help to the case of the petitioner, inasmuch as, while in the first case, it was a dispute relating to title in respect of the disputed land, in the second case, there was no exclusion of jurisdiction of civil court either by express provision or by necessary implication. Unlike the said cases, the question involved in this proceeding is as to whether any right of citizenship can be decided by the civil court irrespective of empowerment of such determination by the Foreigners Tribunal constituted under the provisions of the aforesaid two Acts along with the **Foreigners (Tribunal) Order, 1964**.

44. The decision in *Abdul Waheed Khan (Supra)* is also of no help to the case of the petitioner inasmuch as it was found that Section 71 of the **Bhopal State Land Revenue Act** did not comprehend decision

on question of title. Accordingly, it was held that a suit in civil court for declaration of title and possession against trespassers is not barred. The other decision referred to by the learned counsel for the petitioner, namely, *Dwarka Prasad Agarwal (Supra)* is also of no help to the case of the petitioner, which are more or less on the principles towards maintainability of the civil suit in absence of any express or implied bar.

45. **Section 2(a)** of the *Foreigners act, 1946* defines "Foreigner" as a person who is not a citizen of India. As to whether a person is a foreigner or not and / or whether he is an Indian citizen or not is a question necessarily to be determined as per the provision of the *Citizenship Act, 1955* and the *Foreigners Act, 1946* with the aid of the *Foreigners (Tribunal) Order, 1964*. Under the said order, the Central Government, may by order, refer the question as to whether a person is not a foreigner within the meaning of *Foreigners act, 1946* to a Tribunal to be constituted for the purpose, for its opinion.

46. In *AIR 1969 SC 78 (Dhulabhai and others Vs. State of Madhya Pradesh and others)*, dealing with the principles regard exclusion of jurisdiction of civil court, the Apex Court held thus :-

"Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

47. In *State of UP Vs. Shah Mohammad* reported in AIR 1969 SC 1234, the Apex Court dealing with the provision of Section 9 of the Citizenship Act read with Rule 30 of the Citizenship Rules, 1956, held that pending suit involving questions falling within the said Sections and Rules was not maintainable and that civil court jurisdictions stood ousted by the provisions of the said Section and Rules. In that case, the plaintiff had gone to Pakistan after 26.1.1950 and before commencement of the Citizenship Act, 1955, returned to India on a Visa issued by the Indian High Commission in Pakistan. He instituted a suit before the commencement of the Act for a declaration that in the circumstances of the case his nationality never changed even though he had gone to Pakistan and that he continued to remain citizen of India. It was contended by the Govt. that a civil Court had no jurisdiction to decide the question arising in the suit in view of Section 9 of the Citizenship Act. The High Court rejected the objection and framed issue on the question whether the plaintiff had or had not acquired the citizenship of Pakistan during his stay there and remitted the case to the lower appellate court for a finding on that basis. Allowing the appeal, it was held that under Article 11 of the Constitution of India, the Parliament has the power to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. The Parliament could thus regulate the right of citizenship by law. It was held that if a question arises as to whether, when or how an Indian citizen has acquired the citizenship of another country, that has to be determined by the Central Government by virtue of provision of Sub-Section 2 of Section 9 read with Rule 30 of the Citizenship Rules. In paragraph 7 and 8 of the judgement, it has been observed thus :-

7. *It has next been contended that retrospective operation should not be given to Sec. 9 of the Act because loss of Citizenship is a serious and grave matter and it involves loss of personal liberty. Under Article 21 no person can be deprived of his life or personal liberty except according to procedure established by law. The procedure established by law before the commencement of the Act was the ordinary procedure of determination by civil courts*

whenever a question arose about loss of Indian citizenship by acquisition of citizenship of a foreign country or State. It is suggested by learned counsel for respondent No. 1 that by giving retrospective operation to Sec. 9 so as to make it applicable to pending proceedings the provisions of Article 21 will be contravened or violated. This would render Sec. 9 of the Act unconstitutional. It is somewhat difficult to appreciate the argument, much less to accede to it. If the Parliament was competent under Article 11, which is a constitutional provision read with the relevant Entry in List 1, to legislate about cases of persons belonging to categories 2 and 3 referred to at a previous stage it could certainly enact a legislation in exercise of its sovereign power which laid down procedure different from the one which obtained before. The new procedure would itself become the "procedure established by law" within the meaning of Article 21 of the Constitution. Therefore even on the assumption that loss of Indian citizenship with consequent deportation may involve loss of personal liberty within the meaning of Article 21, it is not possible to hold that by applying Sec. 9 of the Act and Rule 30 of the Rules to a case in which a suit had been instituted prior to the commencement of the Act there would be any contravention or violation of that Article.

8. In conclusion it may be mentioned that this Court, in several cases, has consistently held that questions falling within Sec. 9(2) have to be determined to the extent indicated therein by the Central Government and not by the Courts. Such matters as are not covered by that provision have, however, to be determined by the courts; (see *Akbar Khan Alam Khan Vs. Union of India* reported in 1962(1)SCR 779 and *The Government of Andhra Pradesh Vs. Syed Mohd. Khan* reported in (1962) Supp (3) SCR 288.)

48. In the said case, the particular determination fell on the Central Government ousting the jurisdiction of the civil Court. In the instant case and for that matter in all cases pertaining to citizenship and as to whether a person is a foreigner or not fall within the jurisdiction of the Foreigners tribunal as per the provisions of the Citizenship Act and the Foreigners Act aided by the Foreigners (Tribunal) Order, 1964 and cannot be determined by the civil Court.

49. In *The Premier Automobiles (supra)*, dealing with Section 9 of the CPC and the question of ouster of civil court's jurisdiction, the Apex Court held thus :-

"23. To sum up, the principles applicable to the jurisdiction of the Civil Court in relation to an industrial dispute may be stated thus :

(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil court.

(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the Civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.

(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.

(4) If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for its enforcement is either section 33C or the raising of an industrial dispute, as the case may be.

24. We may, however, in relation to principle 2 stated above hasten to add that there will hardly be a dispute which will be an industrial dispute within the meaning of section 2(k) of the Act and yet will be one arising out of a right or liability under the general or common law only and not under the Act. Such a contingency, for example, may arise in regard to the dismissal of an unsponsored workman which in view of the provision of law contained in Section 2A of the Act will be an industrial dispute even though it may otherwise be an individual dispute. Civil Courts, therefore, will have hardly an occasion to deal with the type of cases falling under principle 2. Cases of industrial disputes by and large, almost invariably, are bound to be covered by principle 3 stated above."

50. In *Rajasthan State Road Transport Corporation (Supra)* also the Apex Court had the occasion to deal with the jurisdiction of civil court in Labour Disputes. Referring to the law laid down in *Premier Automobile Ltd. (Supra)* case held that the civil Court jurisdiction is barred when a right is claimed. The question which arose before the Apex Court was as to whether the provisions of the **Industrial Disputes Act 1947** bar the jurisdiction of the civil Court by necessary implication, it was held that the principles laid down in *Premier Automobile Ltd. (Supra)* should be complied.

51. In *Rajasthan SRTC Vs. Krishnakant* reported in (1995) 5 SCC 75, it was held by the Apex Court that where a dispute involves recognition, observance and enforcement of rights and obligations created under the Industrial Disputes Act and / or its sister enactments, such as Industrial Employment (Standing Orders) Act, the civil court will have no jurisdiction. In *Premier Automobile Ltd. (Supra)* was explained in the said case with the following observations :-

"25. It is the Principle No. 2, and particularly the qualifying statements in para 24, that has given rise to good amount of controversy. According to Principle No. 2, if the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Industrial Disputes Act, the jurisdiction of the civil court is alternative and it is left to the person concerned either to approach the civil court or to have recourse to the machinery provided by Industrial Disputes Act. But Principle No. 2 does not stand alone; it is qualified by para 24. Now what does para 24 say? It says (i) in view of the definition of "industrial dispute" in the Industrial Disputes Act, there will hardly be an industrial dispute arising exclusively out of a right or liability under the general or common law. Most of the industrial disputes will be disputes arising out of a right or liability under the Act. (ii) Dismissal of an unsponsored workman is an individual dispute and not an industrial dispute (unless of course, it is espoused by the union of workmen or a body of workmen) but Section 2-A has made it an industrial dispute. Because of this 'civil courts will have hardly an occasion to deal with the type of cases falling

under Principle No. 2'. By and large, industrial disputes are bound to be covered by Principle No. 3. (Principle No. 3 says that where the dispute relates to the enforcement of a right or obligation created by the Act, the only remedy available is to get an adjudication under the Act.)"

52. In *Rajeev Kumar and another Vs. Hemraj Singh Chauhan and others* reported in (2010) 4 SCC 554, the Apex Court noticing that the Division Bench of the High Court allowed the appeals to treat the High Court as a Court of first instance in respect of the service disputes raised by the appellants for adjudication, of which the Central Administrative Tribunal (CAT) has been constituted, held that the High Court clearly fell into an error in entertaining the matter as if it was the Court of first instance. As has been held in *L. Chandra Kumar Vs. Union of India* reported in (1997) 3 SCC 261, the Central Administrative Tribunal is the Court of first instance in service related matters and it is only there after the aggrieved party can approach the High Court for adjudication by a Division Bench. This aspect of the matter is mentioned to take note of the situation in which a special Tribunal is constituted for adjudication of certain matters.

53. In *V. Kishan Rao Vs. Nikhil Super Speciality Hospital* reported in (2010) 5 SCC 513, the Apex Court holding the particular directions issued in *Martin F. D'Souza Vs. Mohd. Ishfaq* reported in (2009) 3 SCC 1 was contrary to the consumer Protection Act, 1986 also reminded the background in which the act was enacted. It was held that the Act was enacted to provide for greater protection of the interest of the consumers by providing Fora for quick and speedy disposal of the grievances of the consumers. In the instant case also, Foreigners Tribunals have been constituted as per the provisions of the aforesaid two acts and the direction of the Apex Court in *Sarbananda Sonowal-1 Vs. Union of India and others* reported in AIR2005SC 2920 which cannot be frustrated by taking recourse to civil suit proceeding.

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54. In *Dayaram Vs. Sudhir Batham and others* reported in (2012) 1 SCC 333, referring to the *Madhuri Patil's* case reported in (1994) 6 SCC 241 and the directions contained therein, the Apex Court was also concerned with the ouster of jurisdiction under Section 9 of the Civil Procedure Code, it has been held that the jurisdiction of the Civil Court to entertain any suit can be excluded when cognizance is expressly or impliedly barred by the statute. In the said case, the Apex Court was concerned with the functioning of the particular Scrutiny Committee that was constituted for the particular purpose. It was argued that the procedure and functioning of the Scrutiny Committee cannot oust the jurisdiction of the civil Court. It has been held by the Apex Court that if a suit is to be filed in a Civil Court in regard to the decision of the Scrutiny Committee, the cause of action for such suit would not arise under any statute, the same may frustrate the very purpose for which the committee was constituted. In para 24 of the said judgement, the Apex Court explained the scope of Section 9 thus :-

“15.When a legal right is infringed, a suit would lie unless there is a bar against entertainment of such civil suit and the civil Court would take cognizance of it. Therefore, the normal rule of law is that Civil Courts have jurisdiction to try all suits of civil nature except those of which cognizance is either expressly or by necessary implication excluded.....Courts generally construe the provisions strictly when jurisdiction of the civil courts is claimed to be excluded. However, in the development of civil adjudication of civil disputes, due to pendency of adjudication and abnormal delay at hierarchical stages, statutes intervene and provide alternative mode of resolution of disputes with less expensive but expeditious disposal.....It is also an equally settled legal position that where a statute gives finality to the orders of the special tribunal, the civil court's jurisdiction must be held to be excluded, if there is adequate remedy to do what the civil court would normally do in a suit. Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary that the statute creates a special right or liability and provides procedure for the determination of the right or liability and

further lays down that all questions about the said right or liability shall be determined by the Tribunal so constituted and whether remedies is normally associated with the action in civil Courts or prescribed by the statutes or not. Therefore, each case requires examination whether the statute provides right and remedies and whether the scheme of the Act is that the procedure provided will be conclusive and thereby excludes the jurisdiction of the civil Court in respect thereof.

(emphasis supplied)

55. In the said case of *Dayaram* the Apex Court taking note of the principle underlined in *Section 9 of the CPC* and the scheme formulated in *Madhuri Patil (Supra)* held that the said scheme would take the place of the statute, so as to exclude the jurisdiction of the Civil Court either expressly or impliedly.

56. The principle expressed in the Maxim *generalia specialibus non derogant* means that if a special provision has been made on a certain matter, that matter is excluded from the general provision. Following my above discussions that there is ouster of jurisdiction of civil Courts in the matter of determination of Indian citizenship in view of the special Laws / provisions noted and discussed above.

57. Finally, in my considered opinion, after the judgement in *Sarbananda Sonowal (Supra)*, there cannot be any manner of doubt in the matter. In the said case, the *Illegal Migrant (Determination by Tribunal) Act, 1983* was put to challenge on the ground of negating the constitutional mandate contained in Article 355. Striking down the said Act after holding it to be wholly unconstitutional, the Apex Court issued the following directions :-

“(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."

58. In paragraph 83 of the judgement, summing up the conclusion and striking down the IM(D)T Act, 1983 as ultra-vires the Constitution, it has been held thus :-

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

59. In terms of the observations and directions, apart from the fact that the Passport (Entry into India) Act, 1920 ; the Foreigners act 1946 ; the Immigrants (Expulsion from Assam) Act, 1950 and the Passport Act, 1957, shall apply to the state of Assam, all cases pending before the Tribunals under the IM(D)T Act, 1983, shall also stand transferred to the Tribunals constituted under the Foreigners (Tribunals) Order, 1964 and shall be decided in a manner provided in the Foreigners Act, the rules made thereunder and the procedure prescribed under the Foreigners (Tribunals) Order, 1964. Had it been a case of jurisdiction being available with the civil court, the whole controversy relating to IM(D)T Act would not have arisen and the Apex Court would have made it explicitly clear in its directions contained in the said judgement. The very fact that all pending cases before the IM(D)T were to be transferred to the Foreigners Tribunals and the central Govt. was directed to constitute sufficient number of Tribunals under the Foreigners (Tribunals) Order, 1964 to effectively deal with the cases of foreigners, who have illegally come from Bangladesh or are illegally residing in Assam, would negate the plea that there is no ouster of jurisdiction of civil court. The directions in *Sarbananda Sonowal (Supra)* are only in the form of consolidating the position to the determination as to whether a person is a foreigner or not, is within the exclusive jurisdiction of the Foreigners Tribunals to be decided as per the provisions of the Citizenship Act, 1955 and the Foreigners Act, 1946 with the aid of the Foreigners (Tribunals) Order, 1964.

60. During the course of hearing of the writ petition, it was submitted by Mr. K.P. Pathak, learned ASGI and the appointed

Amicus Curiae, upon instruction received from Mr. M. Bhagawati, learned CGC that there are good number of civil suits filed by the suspected foreigners for declaration that they are Indian citizens, thereby frustrating the proceedings before the Foreigners Tribunals. He also apprised the Court that in most of the cases, orders are being passed for ex parte hearing in absence of any appointed counsel to defend those cases and it has become difficult for both the State and Union Government to defend those cases as they are scattered in various civil Courts. Be that as it may, in view of this judgement and order, no such civil suit shall be maintainable and all the proceedings thereto shall stand disposed of in terms of this judgement and order. Even if in the mean time any declaration has been made conferring Indian citizenship, same will have no effect as the same is without any jurisdiction and necessarily to be determined only by the Foreigners Tribunals.

61. For all the aforesaid reasons, it is hereby declared that the issue relating to citizenship being exclusively triable by the Foreigners Tribunals cannot be determined in civil suit and for that matter civil court jurisdiction is ousted in such matters. Consequently, the civil suit being Title Suit No. 95/2012 filed by the petitioner as plaintiff before the learned Munsiff No.1, Goalpara shall stand rejected being not maintainable and / or being barred by the provisions of the aforesaid Acts and the Rules. Similarly, all other civil suits raising the issue relating to citizenship being not maintainable, the plaint thereof shall stand rejected as per Order 7 Rule 11 of the CPC.

62. This now leads us to other grievance raised by the petitioner that the notice has not disclosed the grounds on which he and his family members have been alleged to be foreigners. As disclosed during the course of hearing, the petitioner has already responded to the proceeding before the Tribunal. If in the mean time, the grounds on which he along with his family members has been alleged to be foreigners have not been disclosed, the learned Foreigners Tribunal, Goalpara shall disclose the same to them on the next available date

or thereafter as the case may be, enabling the petitioner and his family members to defend the reference as provided for under Order No.3 of the **Foreigners (Tribunals) Order, 1964.**

63. While answering the issue that arose for consideration in this proceeding in the above manner, the writ petition is disposed of with the above direction to the learned Foreigners Tribunal, Goalpara to comply with the requirement of **Order No.3 of the aforesaid order of 1964.**

64. The Registry is directed to circulate this judgement and order to all the district courts for their appraisal about the ouster of jurisdiction of civil courts in the matter of determination of citizenship and the declaration as to whether a person is a foreigner or not.

65. While answering the writ petition in the above manner, the writ petition is dismissed, subject to the direction to the Foreigners Tribunals, Goalpara to furnish the grounds of reference to the petitioner and his family members, if not already furnished.

66. I place on record my words of appreciation for Mr. K. P. Pathak, learned ASGI, the Court appointed Amicus Curiae and Mr. K. N. Choudhury, learned Sr. AAG, Govt. of Assam for their assistance in the matter towards resolution of the significant and important issue discussed and answered in this judgement and order.

Sd/- B.K. SHARMA

JUDGE

Memo No. HC. XXI. 14561-95 R M. Dtd. 26/4/13

Copy forwarded for information and necessary action to: -

1. The Secretary, Govt. of India, Ministry of Home Affairs, Shastri Bhawan, Tilak Marg, New Delhi.
2. The Commissioner & Secretary, Govt. of Assam, Home Deptt., Dispur, Ghy.- 6.
3. The Election Commissioner, Election Deptt., 4th Floor, Block-"C", Assam Secretariat, Dispur, Ghy.- 6.

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Register (Juddh)
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4. The District Election Officer, Goalpara, P.O. Baladmari, P.S. + Dist.- Goalpara, Assam. PIN- 783121.
5. The Superintendent of Police (B), Goalpara, P.O.- Baladmari, Dist.- Goalpara, Assam. PIN- 783121.
6. The Foreigners' Tribunal, Goalpara, P.O. + Dist.- Goalpara, Assam, PIN- 783121.
7. Md. Bahaluddin Sheikh, S/o. Late Sarubuddin Sheikh, Vill.- Bherbari (Bamune Panikhowa), P.O.- Jira, P.S.- Krishnai, Dist.- Goalpara, Assam.
8. The Registrar General, Gauhati High Court, Ghy.- 1.
9. The District & Sessions Judge, Kamrup, Dist.- Kamrup (M), Ghy.- 1.
10. The District & Sessions Judge, Karbi Anglong, Dist.- Karbi Anglong, Assam.
11. The District & Sessions Judge, Lakhimpur, Dist.- North Lakhimpur, Assam.
12. The District & Sessions Judge, Sonitpur, Dist.- Sonitpur, Assam.
13. The District & Sessions Judge, Barpeta, Dist.- Barpeta, Assam.
14. The District & Sessions Judge, Bongaigaon, Dist.- Bongaigaon, Assam.
15. The District & Sessions Judge, Baksa, Dist.- Baksa, Assam.
16. The District & Sessions Judge, Cachar, Dist.- Cachar, Assam.
17. The District & Sessions Judge, Chirang, Dist.- Chirang, Assam.
18. The District & Sessions Judge, Dhubri, Dist.- Dhubri, Assam.
19. The District & Sessions Judge, Golaghat, Dist.- Golaghat, Assam.
20. The District & Sessions Judge, Goalpara, Dist.- Gaolpara, Assam.
21. The District & Sessions Judge, Hailakandi, Dist.- Hailakandi, Assam.
22. The District & Sessions Judge, Jorhat, Dist.- Jorhat, Assam.
23. The District & Sessions Judge, Karimganj, Dist.- Karimganj, Assam.
24. The District & Sessions Judge, Kokrajhar, Dist.- Kokrajhar, Assam.
25. The District & Sessions Judge, Dibrugarh, Dist.- Dibrugarh, Assam.
26. The District & Sessions Judge, Morigaon, Dist.- Morigaon, Assam.
27. The District & Sessions Judge, Nagaon, Dist.- Nagaon, Assam.
28. The District & Sessions Judge, Nalbari, Dist.- Nalbari, Assam.
29. The District & Sessions Judge, Udalguri, Dist.- Udalguri, Assam.
30. The District & Sessions Judge, Darrang, Dist.- Darrang, Assam.
31. The District & Sessions Judge, Dhemaji, Dist.- Dhemaji, Assam.
32. The District & Sessions Judge, Sibsagar, Dist.- Sibsagar, Assam.
33. The District & Sessions Judge, Haflong, Dist.- Dima Hasao, Assam.
34. The Additional District & Sessions Judge, FTC, Rangia, Dist.- Kamrup (R), Assam.

By Order



Deputy Registrar
(Institution Management)
Gauhati High Court, Guwahati.

