Md. Rahim Ali @ Abdur Rahim vs The State Of Assam on 11 July, 2024

Author: Sudhanshu Dhulia

Bench: Vikram Nath, Sudhanshu Dhulia

2024 INSC 511

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2024
[@ SPECIAL LEAVE PETITION (CIVIL) NO. OF 2024]
[@ DIARY NO.20674 OF 2017]

MD. RAHIM ALI @ ABDUR RAHIM … APPELLANT

VERSUS

THE STATE OF ASSAM & ORS. … RESPONDENTS

RESPONDENT NO.	PARTICULARS
1	The State of Assam
2	Union of India represented by Secretary, Home Affairs

3 Superintendent of Police, Nalbari

2

J U D G M E N T

AHSANUDDIN AMANULLAH, J.

I.A. No.58315 of 2017 [Condonation of Delay] is allowed, keeping in mind the peculiar facts and circumstances herein. I.A. No.58325 of 2017 [Exemption from filing Certified Copy of the Impugned Judgment], being formal in nature, is also allowed.

2. Leave granted.

3. The present appeal arises out of the Final Judgment and Order passed by a Division Bench of the Gauhati High Court at Guwahati (hereinafter referred to as the "High Court") in Writ Petition (Civil) No.2668 of 2012 dated 23.11.2015 (hereinafter referred to as the "Impugned Judgment") by which the Writ Petition filed by the appellant was dismissed and the order passed by the Foreigners Tribunal, Nalbari (hereinafter referred to as the "Tribunal") dated 19.03.2012 passed in F.T. (Nal) Case No.(N)/1096/06 declaring the appellant to be a foreigner on the grounds that he failed to discharge his burden under Section 9 of the Foreigners Act, 1946 (hereinafter referred to as the "Act") and failed to prove that he is not a foreigner, was affirmed.

THE FACTUAL PRISM:

4. The appellant claims that his parents' names appeared in the Voter List of the year 1965 at Sl. Nos.71 & 72 showing the address as House No.17 in Village Dolur Pather, P.S. - Patacharkuchi, in the then district of Kamrup under 48 Bhabanipur Legislative Assembly Constituency in the State of Assam. It is further his claim that his parents' names also appeared in the Voter List of the year 1970 at Sl. Nos.79 & 80 showing the same address. The appellant was born in the Village Dolur under Patacharkuchi Police Station in the District of Barpeta and his name was enrolled alongwith his family members in the voter list of 1985 which appeared in the additional amended voter list of 1985 at Sl. No.552 showing the same address. However, upon getting married in the year 1997, he left the joint family and shifted to his present place of residence i.e., village Kashimpur, P.O.- Kendu Kuchi, P.S. - Nalbari, in the district of Nalbari in the State of Assam. As a result of this, the appellant's name was in the Voter List of the year 1997 at Sl. No.105 showing the address as House No.38 in Village Kashimpur, P.S. - Nalbari in the district of Nalbari under 61 No. Dharmapur LAC. In the year 2006, doubting his nationality, a case was registered in the Tribunal, Nalbari, being F.T. (Nal) Case No.(N)/1096/06, Police Reference No.948/04 and notice was served upon him.

5. The appellant's daughter was issued a certificate by the Gaonbura of Kashimpur Village stating the residential status of the appellant/his daughter on 07.09.2010.

6. The appellant, on receipt of notice from the Tribunal, appeared on 18.07.2011, praying for time to file Written Statement but the same could not be done as the appellant claimed to be suffering from serious health issues.

7. On 12.09.2011, the Gaonbura of Village Dolur Pathar issued certificate to the appellant regarding his residential status. By ex-parte order dated 19.03.2012, the Tribunal held that the appellant had failed to discharge his burden under Section 9 of the Act and failed to prove that he is not a foreigner. The appellant also obtained a medical certificate issued by the consultant doctor of Civil Hospital, Nalbari dated 24.04.2012 stating that he was suffering from Chronic Bronchitis Respiration disturbance from 25.11.2011 to 24.04.2012. Upon becoming aware of the order dated 19.03.2012 of the Tribunal from his counsel, the appellant filed Writ Petition (Civil) No.2668 of 2012 on 30.05.2012 before the High Court.

8. In the said writ petition, the High Court by its interim order dated 06.06.2012 stayed the operation of the Tribunal's order dated 19.03.2012 directing the authority not to deport the appellant during the pendency of the proceedings before itself. However, ultimately vide the order dated 23.11.2015, the High Court dismissed the Writ Petition, which is assailed herein.
SUBMISSIONS BY THE APPELLANT:

> 9. Learned counsel for the appellant submitted that he has been subjected to unfair treatment by the Tribunal as though he had entered appearance upon notice, one opportunity was required to be given to him since he was faced with serious penal consequences like detention and/or deportation from the country, which was not done. Further, it was submitted that even the High Court in the Impugned Judgment has gone on technicalities by accepting minor discrepancies in the documents which were not of the nature to lead to a presumption in law that the same were not correct and were merely differences in the spellings and date of birth. Even the medical certificate, which is disputed, has been issued by the consultant of the hospital, who was never examined. It was urged that as is known to everybody, on the prescription given to a patient, a doctor writes his opinion, record of which may not be maintained meticulously or even casually in a hospital which is at the level of the District, as may be done in big hospitals in cities.
>
> 10. It was submitted that the High Court has erroneously presumed that the ground for not appearing before the Tribunal was not genuine.

Learned counsel contended that even if for the sake of argument it is presumed that the reason for his absence was not genuine, it cannot take away the basic fundamental right of the appellant to be heard, that too in such an important case, where the appellant stood not only to lose his nationality but also separation from his family and possible deportation to a foreign State which would obviously not accept him because he was born in India and thus, there was no occasion for any foreign country to accept him as its citizen.

11. It was submitted that earlier also, this Court in the present proceedings by order dated 28.07.2017 had directed the Tribunal to decide the nationality of the appellant on merit by holding an enquiry and submit a report after hearing the appellant and the same has been done resulting in the Tribunal passing an opinion and order on 16.11.2017 which has again declared the appellant to be a foreigner.

12. It was submitted that such declaration is totally perverse in the face of overwhelming evidence to show that the appellant besides being born in India and being a resident in India for his entire life and his blood relatives i.e., siblings and parents having been Indian citizens much prior to the cut-off date, the appellant has still been singled out to be declared a foreigner which does not stand to reason. Another point which learned counsel canvassed was that there was no occasion for the appellant's name to figure in the National Register of Citizens (hereinafter referred to as the "NRC") as he was declared a foreigner way back in the year 2012 and as per the judgment of this Court in Abdul Kuddus v Union of India, (2019) 6 SCC 604, a person whose name is not included in the NRC and is declared a foreigner by the Tribunal can only move before the High Court in writ proceedings, the relevant being Paragraph 271.

SUBMISSIONS BY THE STATE [RESPONDENTS NO.1 AND 3]:

13. Per contra, learned counsel for the State of Assam submitted that because of the grave threat to the economy, demography and culture on account of '27. As stated above, a person aggrieved by the opinion/order of the Tribunal can challenge the findings/opinion expressed by way of a writ petition wherein the High Court would be entitled to examine the issue with reference to the evidence and material in the exercise of its power of judicial review premised on the principle of "error in the decision-making process", etc. This serves as a necessary check to correct and rectify an "error" in the orders passed by the Tribunal.' unabated and large-scale illegal migration from Bangladesh, this Court in Sarbananda Sonowal v Union of India, (2005) 5 SCC 665 [hereinafter referred to as Sarbananda Sonowal I] had held 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. It, therefore, becomes the duty of India to take all measures for protection of the State of Assam from such external aggression and internal disturbance as in Article 355 of the Constitution...'.

14. It was submitted that the present was a case of illegal migration of a Bangladeshi national to India (Assam) after the cut-off date of 25.03.1971 and has to be dealt with utmost caution, considering the adverse consequence of illegal migration on the whole country in general and the respondent-State in particular. It was further submitted that the present proceedings against the appellant have been provides that the onus is on the person proceeded against/alleged foreigner to prove that he is not a foreigner.

15. Learned counsel contended that the justification for placing the burden upon the alleged foreigner has been dealt with by this Court in Sarbananda Sonowal I (supra) at Paragraph 262.

16. Learned counsel submitted that the proceeding against the appellant was initiated on the basis of inquiry conducted in the year 2004 and due to the appellant failing to produce any document before the Inquiry Officer, the case was referred to the Tribunal and after service of notice, the appellant had appeared on 18.07.2011 and prayed for time to file written statement which was allowed and the '26. There is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Sometimes the place of birth of his grandparents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.' matter was fixed for 11.08.2011, on which date his counsel filed a petition for further time and the matter was fixed for 09.09.2011, but thereafter the appellant remained absent on all subsequent dates. Thus, learned counsel contended that the appellant failed to discharge the burden cast upon him under Section 9 of the Act and the Tribunal had no option but to proceed and pass an ex-parte order/opinion on 19.03.2012 holding him to be a foreigner.

17. Learned counsel submitted that in the Writ Petition before the High Court, the appellant placed reliance on the medical certificate of Swahid Mukunda Kakati Civil Hospital, Nalbari dated 24.04.2012 to the effect that he was under treatment from '25.11.2011 till now'. The High Court, after verification, found the authenticity of the said certificate to be fake and held that the appellant had taken recourse to falsehood with production of fake medical certificate and on that count alone, the writ petition was dismissed which cannot be said to be unreasonable warranting interference. It was submitted that in compliance of the order of this Court in the present matter on 28.07.2017 directing the Tribunal to examine the documents filed by the appellant and to undertake an inquiry and submit report, the Tribunal undertook such exercise and submitted its opinion finally holding that the appellant had entered India illegally on or after 25.03.1971 i.e., the cut-off date and thus, was an illegal migrant post the cut-off date.

18. It was submitted that this Court may also consider the fact that the proceedings against the appellant had already taken two decades to reach this stage and any further delay would defeat the very object and purpose of the Act which is speedy detection and deportation of illegal migrants/foreigners staying in India. He also reiterated the fact that because the appellant was declared to be a foreigner prior to the preparation of the Draft and Supplementary NRC List, his name was not included in the same. Learned counsel submitted that this Court in Abdul Kuddus (supra) had settled the position that the proceedings before the Tribunal being quasi-judicial in nature, the findings thereof would operate as res judicata over the administrative process of inclusion in NRC List and any person aggrieved by the findings/opinion of the Tribunal would have to invoke the power of judicial review under writ jurisdiction. Thus, he contended that if any further

liberty is given to the appellant to again challenge the fresh report dated 16.11.2017 of the Tribunal in writ proceedings, a time-limit be fixed so that closure could be given to the proceedings.

ANALYSIS, REASONING AND CONCLUSION:

19. Having considered the matter, the Court finds that grave miscarriage of justice has occasioned in the instant case. We may note that Section 8 of the Act reads as follows:

> "8. Determination of nationality.—(1) When a foreigner is recognised as a national by the law of more than one foreign country or where for any reason it is uncertain what nationality if any is to be ascribed to a foreigner, that foreigner may be treated as the national of the country with which he appears to the prescribed authority to be most closely connected for the time being in interest or sympathy or if he is of uncertain nationality, of the country with which he was last so connected:
>
> Provided that where a foreigner acquired a nationality by birth, he shall, except where the Central Government so directs either generally or in a particular case, be deemed to retain that nationality unless he proves to the satisfaction of the said authority that he has subsequently acquired by naturalization or otherwise some other nationality and still recognized as entitled to protection by the Government of the country whose nationality he has so acquired.
>
> (2) A decision as to nationality given under sub-section (1) shall be final and shall not be called in question in any Court:
>
> Provided that the Central Government, either of its own motion or on an application by the foreigner concerned, may revise any such decision."

20. Undisputedly, the appellant is not a foreigner3 recognised as a national by the law of more than one foreign country. Thus, the appellant's case would A 'foreigner' under Section 2(a) of the Act means "a person who is not a citizen of India". not fall under Section 8 of the Act. That being the position as regards Section 8 of the Act, we venture forward.

21. There is judicial clarity as regards the scope and nature of proceedings before the Tribunal under the Act, as delineated by the judgments in Abdul Kuddus (supra) and Sarbananda Sonowal I (supra). For the purposes of proper appreciation, it is worthwhile to reproduce Section 9 of the Act which reads as under:

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

22. In Abdul Kuddus (supra), it has been explained that after the preparation and publication of NRC for the State of Assam, as set out in Paragraphs 2 to 8 of the Schedule to the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 made under Section 18 of the Citizenship Act, 1955 (hereinafter referred to as the "Citizenship Act"), the right to appeal before the Tribunal under Paragraph 8 would not be available to persons whose nationality and citizenship status, either as an Indian or as a foreign national, has already been adjudicated and declared under the Foreigners (Tribunal) Order, 1964 (hereinafter referred to as the "1964 Order") issued under Section 3 of the Act. In the present case, it is not in dispute that the matter was decided by the Tribunal and at the first round, the verdict was against the appellant based on an ex-parte proceeding. Later, in view of the interim order of this Court, after giving an opportunity to the appellant, the matter was again gone into by the Tribunal and a report submitted to this Court which reiterated its earlier decision that the appellant is a foreigner.

23. Thus, the Court, for completeness of adjudication, has to trace its steps back to the proceeding right to the stage of inception i.e., the very initiation of proceedings before the Tribunal under the Act.

24. A reference to Section 6A of the Citizenship Act is warranted:

> "6A. Special provisions as to citizenship of persons covered by the Assam Accord.—(1) For the purposes of this section
>
> (a) "Assam" means the territories included in the State of Assam immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985);
>
> b) "detected to be a foreigner" means detected to be a foreigner in accordance with the provisions of the Foreigners Act, 1946 (31 of 1946) and the Foreigners (Tribunals) Order, 1964 by a Tribunal constituted under the said Order;
>
> c) "specified territory" means the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985);
>
> (d) a person shall be deemed to be Indian origin, if he, or either of his parents or any of his grandparents was born in undivided India;
>
> (e) a person shall be deemed to have been detected to be a foreigner on the date on which a Tribunal constituted under the Foreigners (Tribunals) Order, 1964 submits its opinion to the effect that he is a foreigner to the officer or authority concerned.
>
> (2) Subject to the provisions of sub-

sections (6) and (7), all persons of Indian origin who came before the lst day of January, 1966 to Assam from the specified territory (including such of those whose names were included in the electoral rolls used for the purposes of the General Election to the House of the People held in 1967)

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

(3) Subject to the provisions of sub- sections (6) and (7), every person of Indian origin who☐

(a) came to Assam on or after the lst day of January, 1966 but before the 25th day of March, 1971 from the specified territory; and

(b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and

(c) has been detected to be a foreigner; shall register himself in accordance with the rules made by the Central Government in this behalf under section 18 with such authority (hereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll for any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom.

Explanation.☐In the case of every person seeking registration under this sub- section, the opinion of the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 holding such person to be a foreigner, shall be deemed to be sufficient proof of the requirement under clause (c) of this subsection and if any question arises as to whether such person complies with any other requirement under this sub-section, the registering authority shall,☐

(i) if such opinion contains a finding with respect to such other requirement, decide the question in conformity with such finding;

(ii) if such opinion does not contain a finding with respect to such other requirement, refer the question to a Tribunal constituted under the said Order having jurisdiction in accordance with such rules as the Central Government may make in this behalf under section 18 and decide the question in conformity with the opinion received on such reference. (4) A person registered under sub-

section (3) shall have, as from the date on which he has been detected to be a foreigner and till the expiry of a period of ten years from that date, the same rights and obligations as a citizen of India (including the right to obtain a passport under the Passports Act, 1967 (15 of 1967) and the obligations connected therewith), but shall not entitled to have his name included in any electoral roll for any Assembly or Parliamentary constituency at any time before the expiry of the said period of ten years.

(5) A person registered under sub-section (3) shall be deemed to be a citizen of India for all purposes as from the date of expiry of a period of ten years from the date on which he has been detected to be a foreigner.

(6) Without prejudice to the provisions of section 8☐

(a) if any person referred to in sub-

section (2) submits in the prescribed manner and form and to the prescribed authority within sixty days from the date of commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985), a declaration that he does not wish to be a citizen of India, such person shall not be deemed to have become a citizen of India under that sub-section;

(b) if any person referred to in sub-

section (3) submits in the prescribed manner and form and to the prescribed authority within sixty days from the date of commencement of the Citizenship (Amendment) Act, 1985(65 of 1985), or from the date on which he has been detected to be a foreigner, whichever is later, a declaration that he does not wish to be governed by the provisions of that sub-section and sub-sections (4) and (5), it shall not be necessary for such person to register himself under sub- section (3).

Explanation.□Where a person required to file a declaration under this sub-section does not have the capacity to enter into a contract, such declaration may be filed on his behalf by any person competent under the law for the time being in force to act on his behalf.

(7) Nothing in sub-sections (2) to (6) shall apply in relation to any person□

(a) who, immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985), is a citizen of India;

(b) who was expelled from India before the commencement of the Citizenship (Amendment) Act, 1985, under the Foreigners Act, 1946 (31 of 1946).

(8) Save as otherwise expressly provided in this section, the provisions of this section shall have effect notwithstanding anything contained in any other law for the time being in force."

25. From the aforesaid, it is clear that a cut-off date of 25.03.1971 was fixed with regard to deciding the status of persons who had come to Assam on or after 01.01.1966 but before 25.03.1971 from the "specified territory"4 and from the date of entry have been ordinarily resident in Assam and been detected to be foreigners. Such persons were required to register themselves with the Registering Authority in accordance with rules made by the Central Government under Section 18 of the Citizenship Act.

26. In the Explanation to Sub-section (3) of Section 6A of the Citizenship Act, it has been provided that the opinion of the Tribunal constituted under the 1964 Order holding the person to be a foreigner shall be deemed sufficient proof of the requirement under clause (c) of the sub- section aforesaid [viz. Section 6A(3)(c), Citizenship Act] and the same would also suffice for any other requirement of the Sub-section. If a question arises as to whether the person complies with any other requirement under this Sub-section, and the opinion of the Tribunal contains a finding Section 6A(1)(c) of the Citizenship Act states: '"specified territory" means the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985)' qua such other requirement, the Registering Authority will decide the question in

accordance with the opinion of the Tribunal. However, the Registering Authority is required to refer the matter to the Tribunal, if the opinion of the Tribunal is silent as to the other requirements, and thereupon the question is to be decided by the Registering Authority in conformity with the opinion received from the Tribunal.

27. The very initiation of the proceeding was under

> the 1964 Order. It is worthwhile to point out that the 1964 Order has been subjected to multiple amendments. Para 3 of the 1964 Order has also undergone variation – a different version was in existence when the Tribunal examined the matter.
>
> However, as we are expounding the law, it is deemed appropriate to refer to the position as it prevails on date. Para 3 of the 1964 Order, last amended by GSR dated 30.08.2019, reads as under:
>
> "3. Procedure for disposal of questions.— (1) The Tribunal shall serve on the person to whom the question relates, a copy of the main grounds5 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 after considering such evidence as may be produced and after hearing such persons as may desire to be heard, the Tribunal shall submit its opinion to the officer or authority specified in this behalf in the order of reference.
>
> (2) The Foreigners Tribunal shall serve a show-cause notice on the person to whom the question relates, that is, the proceedee.
>
> (3) The notice referred to in sub-para (2) shall be served within ten days of the receipt of the reference of such question by the Central Government or any competent authority.
>
> (4) The notice shall be served in English and also in the official language of the State indicating that the burden is on the proceedee to prove that he or she is not a foreigner.
>
> (5)(a) The notice shall be served at the address where the proceedee last resided or reportedly resides or works for gain, and in case of change of place of residence, which has been duly intimated in writing to the investigating agency by the alleged person, it shall be served at This was brought in by GSR dated 30.09.1965 and has remained since then. In other words, when notice was served on the appellant, this portion of the 1964 Order was in existence.

such changed address by the Foreigners Tribunal.

(b) if the proceedee is not found at the address at the time of service of notice, the notice may be served on any adult member of the family of the proceedee and it shall be deemed to be served on the proceedee;

(c) where the notice is served on the adult member of the family of the proceedee, the process server shall obtain the signature or thumb impression of the adult member on the duplicate of the notice as a token of proof of the service;

(d) if the adult member of the family of the proceedee refuses to put a signature or the thumb impression, as the case may be, the process server shall report the same to the Foreigners Tribunals;

(e) if the proceedee or an available adult member of his or her family refuses to accept the notice, the process server shall give a report to the Foreigners Tribunal in that regard along with the name and address of a person of the locality, who was present at the time of making such an effort to get the notices served, provided such person is available and willing to be a witness to such service and the process server shall obtain the signature or thumb impression of such witness, if he or she is present and willing to sign or put his or her thumb impression, as the case may be;

(f) if the proceedee has changed the place of residence or place of work, without intimation to the investigating agency, the process server shall affix a copy of the notice on the outer door or some other conspicuous part of the house in which the proceedee ordinarily resides or last resided or reportedly resided or personally worked for gain or carries on business, and shall return the original to the Foreigners Tribunal from which it was issued with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did do, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed;

(g) where the proceedee or any adult member of his or her family or her is not found at the residence, a copy of the notice shall be pasted in a conspicuous place of his or her residence, witnessed by one respectable person of the locality, subject to his or her availability and willingness to be a witness in that regard and the process server shall obtain the signature or the thumb impression of that person in the manner in which such service is affected;

(h) where the proceedee resides outside the jurisdiction of the Foreigners Tribunal, the notice shall be sent for service to the officer incharge of the police station within whose jurisdiction the proceedee resides or last resided or is last known to have resided or worked for gain and the process server shall then cause the service of notice in the manner as provided hereinabove;

(i) if no person is available or willing to be the witness of service of notice or refuses to put his or her signature or thumb impression the process server shall file a signed certificate or verification to that effect, which shall be sufficient proof of such non-availability, unwillingness and refusal;

(j) on receipt of the signed certificate or verification referred to in clause (i) the Foreigners Tribunals shall return such references with such directions as it thinks fit to the competent authority for

tracing out the proceedee and produce before the said Tribunal.

(6) Where the proceedee appears or is brought before the Foreigners Tribunal and he produces the documents in support of his claim, the Foreigners Tribunal may release such person on bail and decide the matter accordingly.

(7) In case where notice is duly served, the proceedee shall appear before the Foreigners Tribunal in person or by a counsel engaged by him or her, as the case may be, on every hearing before the Foreigners Tribunal.

(8) The Foreigners Tribunal shall give the proceedee ten days time to give reply to the show-cause notice and further ten days time to produce evidence in support of his or her case.

(9) The Foreigners Tribunal may refuse a prayer for examination of witnesses on Commission for production of documents if, in the opinion of the Foreigners Tribunal, such prayer is made to delay the proceedings.

(10) The Foreigners Tribunal shall take such evidence as may be produced by the concerned Superintendent of Police. (11) The Foreigners Tribunal shall hear such persons as, in its opinion, are required to be heard.

(12) The Foreigners Tribunal may grant adjournment of the case on any plea sparingly and for reasons to be recorded in writing.

(13) Where the proceedee fails to produce any proof in support of his or her claim that he or she is not a foreigner and also not able to arrange for bail in respect of his or her claim, the proceedee shall be detained and kept in internment or detention centre;

(14) The Foreigners Tribunal shall dispose of the case within a period of sixty days of the receipt of the reference from the competent authority.

(15) After the case has been heard, the Foreigners Tribunal shall submit its opinion as soon thereafter as may be practicable, to the officer or the authority specified in this behalf in the order of reference.

(16) The final order of the Foreigners Tribunal shall contain its opinion on the question referred to which shall be a concise statement of facts and the conclusion." (emphasis supplied)

28. The case against the appellant was initiated in the year 2004 alleging that the appellant illegally migrated to India after 25.03.1971 from Village- Dorijahangirpur, Police Station - Torail, District- Mymansingh, Bangladesh and was living in Village Kasimpur, Police Station, District - Nalbari in the State of Assam in S.P. Reference No.948/2004. It appears that the State examined a Sub-Inspector of Police Sh. Bipin Dutta, who was the Investigating Officer in the case and in his evidence, has stated that on 12.05.2004, he was posted at Nalbari Police Station when the S.P. (B)

Nalbari, directed him to enquire into the nationality of the appellant pursuant to which on 17.05.2004, he opened a Case Diary and went to the house of the appellant, informed him about the enquiry and filled up Form No.I. This reference was made by the Superintendent of Police under Section 8(1) of the Illegal Migrants (Determination by Tribunals) Act, 1982 (hereinafter referred to as the "IMDT Act"), suspecting the appellant to be an illegal migrant on the ground that on being asked, he could not produce any documentary evidence in support of his/her entry into India, prior to 01.01.1966.

29. Thus, IMDT Case No.692/05 was registered before the then IMD Tribunal, Nalbari. The same case was re-registered under the 1964 Order as F.T.(Nal) Case No.(N)1096/06 upon the IMDT Act being declared unconstitutional by this Court in Sarbananda Sonowal I (supra) on 12.07.2005.

30. Consequently, the notice issued under Section 8(1), IMDT Act became a nullity and therefore F.T. (Nal) Case No.(N) 1096/06 was started and a reference was made to the Tribunal. The Tribunal answered the reference by order dated 19.03.2012 as under:

> "This is a reference u/s 2(1) of the Foreigner's Tribunal (Order) 1964 for opinion whether O.P. Md. Rahim Ali son of Late Solimuddin Ali of Village Kasimpur Police Statin and District nalbari, Assam is a foreigner or not. The reference is that O.P. Ms. Rahim Ali illegally migrated to India after 25th March, 1971 from village Darijahangirpur Police Station Tarail District Mymansingh Bangladesh and is living in village Kasimpur Police Station and District nalbari, Assam.
>
> Notice was serve upon the O.P. and the O.P. appeared in the case and prayed time for filing written statement by submitting petition. Thereafter o.P. became absent without step for which the case preceded ex-parte.
>
> State examined S.I. of police Sri Bipin Dutta who is I/O of this case and he deposed in his evidence that on 12.5.04 he was at Nabari Police Station and on that day, S.P. (B) Nalbari, directed him to enquire the nationality of suspect Ms. Rahim Ali of village Kasimpur Police Station Nalbari. On 17.5.04 he opened the Case Diary and went to the house of suspect Rahim Ali with staff. He met the suspect in his house and informed, him about the enquiry and filled up Folm No.I as per version of suspect. Then we asked the suspect to show the documents regarding his India nationality. Then suspect told him that he has no documents in his hand and he can show the documents if time allowed. Then he recorded the statement of suspect Rahim Ali and witness Samin Bore and kept in the Case Diary. He gave 7 days time to the suspect to show the documents but, the suspect failed to do so. Then he filled up Form No.II and submitted his report to the authority with the case diary. Form enquiry it reveals that suspect. Rahim Ali illegally migrated to Assam from Bangladesh after 25th march, 1971.
>
> O.P. has failed to discharges his burden U/s 9 of the Foreigner's Act and failed to prove that he is not a foreigner.

Considering the above, I am of the opinion that O.P. Md. Rahim Ali is a foreigner.

Sd/- B.K. Sarma Member, F.T. Balbari" (sic)

31. Some repetition in narration is inescapable. As obvious from the above, the initiation of the case against the appellant was based on the report submitted by the Sub-Inspector Sh. Bipin Dutta which in turn was based on the fact that in his deposition he had stated that upon being directed by the S.P. (B), Nalbari, he had undertaken an inquiry against the appellant and asked him to show the documents regarding his Indian nationality, whereupon the appellant had asked for time and was given 7 days' time, but did not show any document(s) and thus, Sh. Bipin Dutta filled up Form No.II and submitted his report along with the case diary before the authority.

32. It is further stated that from such inquiry it is revealed that the appellant had illegally migrated to Assam from Bangladesh after 25.03.1971 and based on the same, the opinion given was that the appellant was a foreigner.

33. Section 9 of the Act stipulates if in a case not falling under Section 8 of the Act, any question arises as to whether a person is or is not a foreigner or is or is not a foreigner of a particular class, the person concerned must prove that he/she is not a foreigner or not a foreigner of that particular class. This provision prevails notwithstanding anything in the Indian Evidence Act, 1872.

34. However, the question is that does Section 9 of the Act empower the Executive to pick a person at random, knock at his/her/their door, tell him/her/they/them 'We suspect you of being a foreigner.', and then rest easy basis Section 9? Let us contextualise this to the facts at hand. The originating point of inquiry is the S.P. (B) Nalbari's direction to Sub-Inspector Dutta on 12.05.2004. The pleadings and the record are silent as to what was the basis of the S.P. (B) Nalbari's direction? What materials or information had come to his knowledge or possession that warranted his direction? Obviously, the State cannot proceed in such manner. Neither can we as a Court countenance such approach.

35. First, it is for the authorities concerned to have in their knowledge or possession, some material basis or information to suspect that a person is a foreigner and not an Indian. In the present case, though it is mentioned that from inquiry it was revealed that the appellant had migrated illegally to the State of Assam from Bangladesh after 25.03.1971 but nothing has come on record to indicate even an iota of evidence against him, except for the bald allegation that he had illegally migrated to India post 25.03.1971. It is also not known as to who, if any person, had alleged that the appellant had migrated to India after 25.03.1971 from Village - Dorijahangirpur, Police Station - Torail, District - Mymansingh in Bangladesh. It needs no reiteration that a person charged or accused would generally not be able to prove to the negative, if he/she is not aware of the evidence/material against him/her which leads to the person being labelled suspect. Ipso facto just an allegation/accusation cannot lead to shifting of the burden to the accused, unless he/she is confronted with the allegation as also the material backing such allegation. Of course, at such stage, the evidentiary value of the material would not be required to be gone into, as the same would be done by the Tribunal in the reference. However, mere allegation, that too, being as vague as to

mechanically reproduce simply the words which mirror the text of provisions in the Act cannot be permitted under law. Even for the person to discharge the burden statutorily imposed on him by virtue of Section 9 of the Act, the person has to be intimated of the information and material available against him, such that he/she can contest and defend the proceedings against him.

36. In the present case, it was specifically alleged that the appellant had come to Assam from Village - Dorijahangirpur, Police Station - Torail, District - Mymansingh in Bangladesh while making a reference to the Tribunal. Hence, it was incumbent on the authority making the reference to provide details as to how it had received such information as also its bona fide belief of such factum being true. In other words, the authority had been, as claimed, able to trace the appellant's place of origin. Surely then, the authority had some material to back its assertion. The record does not show such material was given either to the appellant or the Tribunal by the authority.

37. In the absence of the basic/primary material, it cannot be left to the untrammelled or arbitrary discretion of the authorities to initiate proceedings, which have life-altering and very serious consequences for the person, basis hearsay or bald and vague allegation(s). In neither round of the proceedings before the Tribunal, whether it be the initial ex-parte one, or even after the matter was referred by this Court to the Tribunal to hear the appellant and pass an order, has it been revealed as to how and from where such specific allegation, down to the alleged village of origin of the appellant in Bangladesh was brought to or came to the knowledge of the authorities. Nor do we locate any supporting material.

38. In the present case, clearly the authorities concerned have gravely faulted by construing the words 'a copy of the main grounds on which he is alleged to be a foreigner' in Para 3(1) of the 1964 Order to mean the allegations levelled against the person. This error at the very inception stage is enough to render a fatal blow to the entire exercise undertaken. The term 'main grounds' is not synonymous or interchangeable with the term 'allegation(s)'. There is no, and there cannot be any, ambiguity that 'main grounds' is totally distinct and different from the 'allegation' of being 'a foreigner'.

39. For avoidance of doubt, we may restate that this does not imply that strict proof of such allegation has to be given to the accused person but the material on which such allegation is founded has to be shared with the person. For obvious reasons and as pointed out hereinbefore, at this stage, the question of the evidentiary nature of the material and/or its authenticity is not required. However, under the garb of and by taking recourse to Section 9 of the Act, the authority, or for that matter, the Tribunal, cannot give a go-by to the settled principles of natural justice. Audi alteram partem does not merely envisage a fair and reasonable opportunity of being heard. In our opinion, it would encompass within itself the obligation to share material collected with the person/accused concerned. It is no longer res integra that principles of natural justice need to be observed even if the statute is silent on that aspect, as laid down in Mangilal v State of Madhya Pradesh, (2004) 2 SCC 447:

> '10. Even if a statute is silent and there are no positive words in the Act or the Rules made thereunder, there could be nothing wrong in spelling out the need to hear the

parties whose rights and interest are likely to be affected by the orders that may be passed, and making it a requirement to follow a fair procedure before taking a decision, unless the statute provides otherwise. The principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary. No form or procedure should ever be permitted to exclude the presentation of a litigant's defence or stand. Even in the absence of a provision in procedural laws, power inheres in every tribunal/court of a judicial or quasi- judicial character, to adopt modalities necessary to achieve requirements of natural justice and fair play to ensure better and proper discharge of their duties. Procedure is mainly grounded on the principles of natural justice irrespective of the extent of its application by express provision in that regard in a given situation. It has always been a cherished principle. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice where substantial rights of parties are considerably affected. The application of natural justice becomes presumptive, unless found excluded by express words of statute or necessary intendment. Its aim is to secure justice or to prevent miscarriage of justice. Principles of natural justice do not supplant the law, but supplement it. These rules operate only in areas not covered by any law validly made. They are a means to an end and not an end in themselves. ...' (emphasis supplied)

40. The initial infirmity of there being nothing on record as regards what grounds or material were actually available with the authorities to question the appellant's status as to his nationality, is fatal to the projected case. The appellant had obtained documents/certificates from various officers with regard to his/his parents' continuous presence in India much prior to the date 25.03.1971, which were produced before the Tribunal and have been noted by the Tribunal in its report dated 16.11.2017. Another relevant aspect is the prevalent situation on the ground where uninformed/illiterate persons or persons not being well-informed, in the absence of any requirement to obtain and hold an official document and without possessing property in their own names, would not have any official document issued by the government, State or Central.

It is neither difficult nor inconceivable to fathom such scenario amongst the rural populace, including within Assam.

41. The evidence produced before the Tribunal by the appellant to indicate that his parents had been resident in India much prior to 01.01.1966 whereas his siblings and he himself much prior to 25.03.1971, has been disbelieved only on the ground of mismatch of actual English spelling of the names and discrepancy in dates. As far as the discrepancy(ies) in dates and spellings are concerned, we are of the view that the same are minor in nature. Variation in name spelling is not a foreign phenomenon in preparation of the Electoral Roll. Further, the Electoral Roll has no acceptance in the eyes of law insofar as proof of date of birth is concerned. A casual entry by the enumerators when noting and entering the name(s) and dates of birth(s) as also the address(es) of the person(s)

while making preparatory surveys for the purposes of preparing the Electoral Rolls cannot visit the appellant with dire consequences. Moreover, in our country, sometimes a title is prefixed or suffixed to a name such that the same person may be known also by one or two aliases. The Tribunal seems to have been totally oblivious to all this.

42. The State of Assam, as per the Census 2011, boasts of 72.19% literacy rate, with females at 66.27% and males at 77.85%. However, this was not the case during the 1960s or even 1970s. Not just in Assam but in many States, it is seen that names of people, even on important government documents can have and do have varied spellings depending on them being in English or Hindi or Bangla or Assamese or any other language, for that matter. Moreover, names of persons which are written either by the persons preparing the Voters List or by the personnel making entries into different Government records, the spelling of the name, based upon its pronunciation, may take on slight variations. It is not uncommon throughout India that different spellings may be written in the regional/vernacular language and in English. Such/same person will have a differently spelt name in English and the local language. This is more pronounced where due to specific pronunciation habits or styles there can be different spellings for the same name in different languages viz. English/Hindi/Urdu/Assamese/Bangla etc.

43. The appellant had produced a document showing that his father and mother had been resident of Village Dolur Pather since 1965; that his sibling had also been declared not to be a foreigner by the Tribunal, and; his elder brother and he were both voters as per the 1985 Electoral Roll relating to 41 Bhabanipur Legislative Assembly Constituency. Further, upon his marriage, the appellant came to Village Kasimpur in District - Nalbari, Assam where his name appeared in the Electoral Roll of 1997 for 61 Dharmapur Legislative Assembly Constituency.

44. From an overall discussion on the Report/opinion of the Tribunal dated 16.11.2017, it is clear that there are minor discrepancy(ies) in the appellant's documents, however their authenticity is not in doubt. In the considered opinion of this Court, the same would further buttress the appellant's claim, that not being in the wrong, and being an ignorant person, he, truthfully and faithfully produced the official records as they were in his possession. We do not see any attempt by the appellant to get his official records prepared meticulously without any discrepancy. The conduct of an illegal migrant would not be so casual.

45. The debate has long been settled that penal statutes must be construed strictly [Tolaram Relumal v State of Bombay, (1955) 1 SCR 158 at Para 86; Krishi Utpadan Mandi Samiti v Pilibhit Pantnagar Beej Ltd., (2004) 1 SCC 391 at Paras 57-587; Govind Impex Pvt. Ltd. v Appropriate Authority, Income Tax Dept., (2011) 1 SCC 529 at Para 118, and; Commissioner of Customs (Import), Mumbai v Dilip '8. The question that needs our determination in such a situation is whether Section 18(1) makes punishable receipt of money at a moment of time when the lease had not come into existence, and when there was a possibility that the contemplated lease might never come into existence. It may be here observed that the provisions of Section 18(1) are penal in nature and it is a well-settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not

competent to the court to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature. As pointed out by Lord Macmillan in London and North Eastern Railway Co. v. Berriman [1946 AC 278, 295] "where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however, beneficient its intention, beyond the fair and ordinary meaning of its language".' '57. Although the dictionary meaning of business may be wide, in our opinion, for the purpose of considering the same in the context of regulatory and penal statute like the Act, the same must be read as carrying on a commercial venture in agricultural produce. The rule of strict construction should be applied in the instant case. The intention of the legislature in directing the trader to obtain licence is absolutely clear and unambiguous insofar as it seeks to regulate the trade for purchase and sale. Thus a person who is not buying an agricultural produce for the purpose of selling it whether in the same form or in the transformed form may not be a trader. Furthermore, it is well known that construction of a statute will depend upon the purport and object of the Act, as has been held in Sri Krishna Coconut case [AIR 1967 SC 973] itself. Therefore, different provisions of the statute which have the object of enforcing the provisions thereof, namely, levy of market fee, which was to be collected for the benefit of the producers, in our opinion, is to be interpreted differently from a provision where it requires a person to obtain a licence so as to regulate a trade. It is now well known that in case of doubt in construction of a penal statute, the same should be construed in favour of the subject and against the State.

58. In the case of London and North Eastern Rly. Co. v. Berriman [1946 AC 278 : (1946) 1 All ER 255 (HL)] , Lord Simonds quoted with approval (at All ER p. 270 C-D) the following observations of Lord Esher, M.R. in the case of Tuck & Sons v. Priester [(1887) 19 QBD 629 : 56 LJ QB 553 (CA)] , QBD at p. 638:

> "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections." It is trite that fiscal statute must not only be construed literally, but also strictly. It is further well known that if in terms of the provisions of a penal statute a person becomes liable to follow the provisions thereof it should be clear and unambiguous so as to let him know his legal obligations and liabilities thereunder.' '11. Mr Salve submits that a statute providing for penal prosecution has to be construed strictly. He refers to Clause 12 aforesaid and contends that it shall govern the field. Mr Bhatt submits that it is Clause 1 of the lease deed which shall govern the issue. We do not have the slightest hesitation in accepting the broad submission of Mr Salve that a penal statute which makes an act a penal offence or imposes penalty is to be strictly construed and if two views are possible, one favourable to the citizen is to be ordinarily preferred but this principle has no application in the facts of the present case. There is no serious dispute in regard to the interpretation of Explanation to Section 269-UA(f) of the Act and in fact, we are proceeding on an assumption that it will cover only such cases where exists provision for extension in lease deed.' Kumar & Company, (2018) 9 SCC 1 at Para 249].

> Equally, 'If special provisions are made in derogation to the general right of a citizen, the statute, in our opinion, should receive strict construction. ...'10 The consequences which would befall the person declared as a foreigner are no doubt penal and severe. The moment a person is declared to be a foreigner, he/she is liable to be detained and deported to the country of his/her origin. Thus, the same would necessarily pre-suppose existence of material to (a) prove the person is not an Indian national, and (b) establish or identify his/her country of origin. Herein, on the facts, the authorities have not been able to succeed either on
>
> (a) or on (b). Another possibility is that if the foreign country refuses to accept the foreigner, he '24. In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocents might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, Article 265 of the Constitution ["265. Taxes not to be imposed save by authority of law.— No tax shall be levied or collected except by authority of law."] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the legislature.' Karnataka State Financial Corporation v N Narasimhaiah, (2008) 5 SCC 176 at Para 18.

would be rendered stateless, and languish for the remainder of his life in confinement.

46. Notably, under the Constitution of India, Part III [Fundamental Rights] distinguishes between citizens and non-citizens. Articles 14, 20, 21, 22, 25 and 27 are available to all persons. We have kept in mind Articles 1411 and 2112 of the Constitution while penning down this judgment.

47. In Mukesh Singh v State (Narcotic Branch of Delhi), (2020) 10 SCC 120, a Bench of 5 learned Judges held:

> '11.3. Now so far as the observations made by this Court in para 13 in Mohan Lal [Mohan Lal v. State of Punjab, (2018) 17 SCC 627 : (2019) 4 SCC (Cri) 215] that in the nature of reverse burden of proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstance that may raise doubt about its veracity, it is to be noted that the presumption under the Act is against the accused as per Sections 35 and 54 of the NDPS Act. Thus, in the cases of reverse '14. Equality before law.— The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.' '21. Protection of life and personal liberty.— No person shall be deprived of his life or personal liberty except according to procedure established by law.' burden of proof, the presumption can operate only after the initial burden which exists on the

prosecution is satisfied. At this stage, it is required to be noted that the reverse burden does not merely exist in special enactments like the NDPS Act and the Prevention of Corruption Act, but is also a part of the IPC — Section 304-B and all such offences under the Penal Code are to be investigated in accordance with the provisions of CrPC and consequently the informant can himself investigate the said offences under Section 157 CrPC.' (emphasis supplied)

48. Before Mukesh Singh (supra), 2 learned Judges of this Court, in Noor Aga v State of Punjab, (2008) 16 SCC 417, had examined the imposition of a reverse burden, on an accused, under the Narcotic Drugs and Psychotropic Substances Act, 1985. While holding the provisions concerned imposing reverse burden as not ultra vires the Constitution, it was held:

'54. Provisions imposing reverse burden, however, must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the statute in question. xxx

56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. "proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of "wider civilisation". The court must always remind itself that it is a well-

settled principle of criminal jurisprudence that more serious the

offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjab v. Baldev Singh [(1999) 6 SCC 172: 1999 SCC (Cri) 1080] it was stated: (SCC p. 199, para 28) "28. ... It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed." (See also Ritesh Chakarvarti v. State of M.P. [(2006) 12 SCC 321: (2007) 1 SCC (Cri) 744])

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that

> suspicion, however high it may be, can under no circumstances, be held to be a substitute for legal evidence.
>
> 58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

xxx

63. Placing persuasive burden on the accused persons must justify the loss of protection which will be suffered by the accused. Fairness and reasonableness of trial as also maintenance of the individual dignity of the accused must be uppermost in the court's mind.' (emphasis supplied)

49. In Sarbananda Sonowal v Union of India, (2007) 1 SCC 174 [hereinafter referred to as Sarbananda Sonowal II], it was held:

> '55. There cannot, however, be any doubt whatsoever that adequate care should be taken to see that no genuine citizen of India is thrown out of the country. A person who claims himself to be a citizen of India in terms of the Constitution of India or the Citizenship Act is entitled to all safeguards both substantive and procedural provided for therein to show that he is a citizen.
>
> 56. Status of a person, however, is determined according to statute. The Evidence Act of our country has made provisions as regards "burden of proof".

Different statutes also lay down as to how and in what manner burden is to be discharged. Even some penal statutes contain provisions that burden of proof shall be on the accused. Only because burden of proof under certain situations is placed on the accused, the same would not mean that he is deprived of the procedural safeguard.

57. In Hiten P. Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16: 2001 SCC (Cri) 960] this Court categorically opined: (SCC pp. 24-25, paras 22-23) "22. ... Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The

obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, 'after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists'.

Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'." xxx

60. Having regard to the fact that the Tribunal in the notice to be sent to the proceedee is required to set out the main grounds; evidently the primary onus in relation thereto would be on the State. However, once the Tribunal satisfied itself about the existence of grounds, the burden of proof would be upon the proceedee.

61. In Sonowal I [(2005) 5 SCC 665] this Court clearly held that the burden of proof would be upon the proceedee as he would be possessing the necessary documents to show that he is a citizen not only within the meaning of the provisions of the Constitution of India but also within the provisions of the Citizenship Act.' (emphasis supplied)

50. Evidently, our understanding and exposition of the law in the preceding paragraphs can be read with Sarbananda Sonowal I (supra) and Sarbananda Sonowal II (supra). It embodies meaning as to what is expected of the authorities till the stage of Section 9 of the Act arrives. The statutory burden would kick in thereafter.

51. 5 learned Judges of this Court in Union of India v Ghaus Mohammad, 1961 SCC OnLine SC 2 held:

> '6. Section 9 of this Act is the one that is relevant. That section so far as is material is in these terms:
>
> "xxx" It is quite clear that this section applies to the present case and the onus of showing that he is not a foreigner was upon the respondent. The High Court entirely overlooked the provisions of this section and misdirected itself as to the question that arose for decision. It does not seem to have realised that the burden of proving that he was not a foreigner, was on the respondent and appears to have placed that burden on the Union. This was a wholly wrong approach to the question.'

52. However, the above conclusion was premised on what the Court noted in the preceding paragraph in Ghaus Mohammad (supra):

> '2. The High Court observed that: "There must be prima facie material on the basis of which the authority can proceed to pass an order under Section 3(2)(c) of the Foreigners Act, 1946. No doubt if there exists such a material and then the order is made which is on the face of it a valid order, then this Court cannot go into the question whether or not a particular person is a foreigner or, in other words, not a citizen of this country because according to Section 9 of the Citizenship Act, 1955, this question is to be decided by a prescribed authority and under the Citizenship Rules, 1956, that authority is the Central Government". The High Court then examined the materials before it and held, "in the present case there was no material at all on the basis of which the proper authority could proceed to issue an order under Section 3(2)(c) of the Foreigners Act, 1946". In this view of the matter the High Court quashed the order.'

53. We need not be detained on Ghaus Mohammad (supra) as it is clear that therein, the Punjab High Court (Circuit Bench) at Delhi had conflated the Act with the Citizenship Act. Fateh Mohd. v Delhi Administration, 1963 Supp (2) SCR 560 by a 4-Judge Bench and Masud Khan v State of Uttar Pradesh, (1974) 3 SCC 469 [3-Judge Bench] followed Ghaus Mohammad (supra). We are of the opinion that the facts therein were also different than what stares us in the case at hand. No doubt the principles of law stand, yet we see no real difficulty in our formulations hereinabove harmonising with what has been held in the gamut of case-law. As such, the burden under Section 9 of the Act would operate in the manner delineated by us, factoring in the imperative to maintain consistency amongst Ghaus Mohammad (supra), Sarbananda Sonowal I (supra), Sarbananda Sonowal II (supra), Mukesh Singh (supra) and this judgment.

54. For and on the strength of the totality of reasons afore-indicated, this Court finds that the report/opinion of the Tribunal dated 16.11.2017, as sought by this Court through order dated 28.07.201713, is wholly unsustainable. Accordingly, the report/opinion dated 16.11.2017 is quashed. As the report/opinion dated 16.11.2017 has been examined threadbare by us, we have no hesitation in setting aside the Tribunal's order dated 19.03.2012 as also the Impugned Judgment dated 23.11.2015 passed by the High Court. In any event, once this Court had passed the order dated 28.07.2017 (supra) 'In the peculiar facts of the case, we would request the Foreign Tribunal, Nalbari, to examine the documents filed by the petitioner on the basis of which the petitioner is claiming that he is not a foreigner but a national of this country. The petitioner shall appear before the Tribunal on 21.08.2017 and give the copies of the documents which are filed along with this petition. The Tribunal shall thereafter undertake an inquiry into those documents and submit its report.

List the matter after four months.

In the meantime, the petitioner shall not be deported.' calling for a fresh report/opinion, the sequitur logically would translate into the Tribunal's order dated 19.03.2012 and the Impugned Judgment becoming susceptible to being quashed. It is so ordered.

55. This Court has found that the inferences drawn by the Tribunal do not falsify the appellant's claim. In view of detailed analysis, the discrepancy(ies) in the material produced by the appellant can be termed minor. The same were not sufficient to lead the Tribunal to doubt and disbelieve the appellant and the version put forth by him. Thus, we are not inclined to remand the matter to the Tribunal for another round of consideration. Putting an authoritative quietus to the issue, the appellant is declared an Indian citizen and not a foreigner.

56. Necessary consequences in law shall follow.

57. The appeal would, accordingly, stand allowed on the aforementioned terms, without any order as to costs.

58. Let a copy of the judgment be circulated to the Tribunals constituted under the 1964 Order by the Registrar General of the High Court.

.....J. [VIKRAM NATH] .....J. [AHSANUDDIN AMANULLAH] NEW DELHI JULY 11, 2024