GAHC010031622022

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

Case No. : WP(C)/1296/2022

MAKIBUR RAHMAN
S/O. LT. SOUKAT ALI, VILL. SARUCHAKABAHA, MAJARBORI, P.S. MIKIRBHETA, DIST. MORIGAON, ASSAM.

VERSUS

THE UNION OF INDIA AND 7 ORS.
REP. BY THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY OF HOME AFFAIRS, NEW DELHI, 110001.

2:THE STATE OF ASSAM

REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GUWAHATI-781006.

3:THE ELECTION COMMISSION OF INDIA

NEW DELHI.

4:THE STATE COORDINATOR

NRC ASSAM
ACHYUT PLAZA
BHANGAGARH
GUWAHATI-781005.

5:THE STANDING COUNSEL

SPECIAL FT AND BORDER.

6:THE DY. COMMISSIONER

SIVASAGAR
ASSAM-785640.

7:THE SUPDT. OF POLICE(B)

SIVASAGAR
ASSAM-785640.

8:THE O/C

NAJIRA POLICE STATION
DIST. SIVASAGAR
ASSAM-785640

Advocate for the Petitioner : MR. P RAHMAN

Advocate for the Respondent : ASSTT.S.G.I.

WP(C)/4282/2022

MD. SARAFAT ALI @ SHARAFAT ALI
S/O LT. KHALILUR RAHMAN @ LT. MD. KHALILUR
VILL-PHALIHAMARI HABI
P.S.-MAYANG
DIST-MORIGAON
ASSAM

VERSUS

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NEW DELHI-110001

2:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
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GUWAHATI-781005
5:THE STANDING COUNSEL
SPECIAL FT AND BORDER
6:THE DEPUTY COMMISSIONER
SIVASAGAR
ASSAM-785640
7:THE SUPERINTENDENT OF POLICE (B)
SIVASAGAR
ASSAM-785640
8:THE O/C
NAJIRA POLICE STATION
DIST-SIVASAGAR
ASSAM-785640

Advocate for : MR. P RAHMAN
Advocate for : ASSTT.S.G.I. appearing for THE UNION OF INDIA AND 7 ORS.

WP(C)/4279/2022

MD. AMSER ALI @ AMSAR ALI
S/O LT. SUKUR ALI
VILL-PHALIHAMARI HABI
P.S.-MAYANG
DIST-MORIGAON
ASSAM

VERSUS

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2:THE STATE OF ASSAM
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SIVASAGAR
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7:THE SUPERINTENDENT OF POLICE (B)
SIVASAGAR
ASSAM-785640
8:THE O/C
NAZIRA POLICE STATION
DIST-SIVASAGAR
ASSAM-785640

Advocate for : MR. P RAHMAN
Advocate for : ASSTT.S.G.I. appearing for THE UNION OF INDIA AND 7 ORS.

WP(C)/3448/2022

MD. KAYSAR ALI @ KAYSAR ALI
S/O- LATE OSMAN ALI
R/O- VILLAGE KUKILAPAR

BOALEA PART II
P.O- HAZIRHAT
P.S- SUKCHAR
DIST- SOUTH SALMARA MANKACHAR
ASSAM

VERSUS

THE UNION OF INDIA AND 6 ORS
REP. BY THE SECRETARY TO THE GOVT. OF INDIA
MINISTRY OF HOME
NEW DELHI- 110001.

2:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI-6
3:THE ELECTION COMMISSION OF INDIA

NEW DELHI-110001

4:THE STATE COORDINATOR
NATIONAL REGISTER OF CITIZENS
ASSAM
ACHYUT PLAZA
BHANGAGARH
GUWAHATI-05
DIST- KAMRUP (M)
5:THE DEPUTY COMMISSIONER
SIVASAGAR
DIST- SIVASAGARr
ASSAM
PIN-785640
6:THE SUPERINTENDENT OF POLICE (B)
SIVASAGAR
DIST- SIVASAGARr
ASSAM
PIN-785640
7:THE OFFICER IN CHARGE
GAURISAGAR POLICE STATION
GAURISAGAR
DIST- SIVASAGARr
ASSAM

Advocate for : MR. J AHMED
Advocate for : ASSTT.S.G.I. appearing for THE UNION OF INDIA AND 6 ORS

WP(C)/1614/2022

SORHAB ALI @ MD. SAURAV ALI
S/O- LATE KHESU SHEKH @ KHESELA
VILL.- PAKORIA (PAKORIGURI)
P.S. MAYONG
DIST. MORIGAON
ASSAM

VERSUS

THE UNION OF INDIA AND 7 ORS.
REPRESENTED BY THE SECRETARY TO THE GOVT. OF INDIA
MINISTRY OF HOME AFFAIRS
NEW DELHI-110001.

2:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HOME DEPARTMENT

DISPUR
GUWAHATI-781006.
3:THE ELECTION COMMISSION OF INDIA
NEW DELHI.
4:THE STATE COORDINATOR
NRC
ASSAM
ACHYUT PLAZA
BHANGAGARH
GUWAHATI-781005.
5:THE STANDING COUNSEL
SPECIAL FT AND BORDER.
6:THE DEPUTY COMMISSIONER
SIVASAGAR
ASSAM-785640.
7:THE SUPERINTENDENT OF POLICE (B)
SIVASAGAR
ASSAM-785640.
8:THE OFFICER-IN-CHARGE
NAZIRA POLICE STATION
DIST. SIVASAGAR
ASSAM-785640.

Advocate for : MR. P RAHMAN
Advocate for : ASSTT.S.G.I. appearing for THE UNION OF INDIA AND 7 ORS.

BEFORE

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

HON'BLE MRS. JUSTICE MITALI THAKURIA

For the Petitioners : Shri J Ahmed, Advocate in WP(C)/3448/2022;

Shri P Rahman, Advocate in WP(C)/1296, 1614, 4279 & 4282/2022;

Shri S Islam, Advocate.

For the Respondents : Shri RKD Choudhury, Dy. SGI;

Shri A Kalita, SC, Home & Political Department;

Shri P Sarma, Govt. Advocate, Assam and

Shri AI Ali, SC, Election Commission of India.

Dates of Hearing : 07.12.2023 & 08.12.2023.

Date of Judgment : 25.04.2024.

Judgment & Order

Sanjay Kumar Medhi, J.

The present reference has been made to this Bench on the issue of the power of the High Court in exercising of Article 226 of the Constitution of India to transfer a proceeding from one Foreigners Tribunal to another by doubting the correctness of the view expressed by an earlier Division Bench which had held that taking into consideration the statute holding the field on the aspect of detection and deportation of foreigners/illegal migrants and the objective of such statute, the power of transfer of proceedings cannot be read into Article 226 of the Constitution of India.

2. Before taking into account the issue which has been referred to this Bench, it would be convenient if the background facts of these cases which have led for referring this matter are placed on record.

3. A Division Bench of this Court had decided **WP(C)/2780/2019 (*Shariful Islam @ Soriful Islam & Anr. Vs. Union of India &Ors.*)**, reported in **(2019) 8 GLR 322**. The issue raised therein was whether a writ court can transfer a proceeding from one Foreigners Tribunal to another at the instance of an applicant against whom such proceeding under Foreigners Act, 1946 has been initiated. The Division Bench in the aforesaid case has held that the powers under Article 226 of the Constitution of India cannot be extended or include power to transfer such a proceeding. The Division Bench had relied and referred to a number of case laws, including the decision of the Hon'ble Supreme Court

rendered in the case of ***Anita Khushwaha Vs. Pushap Sudan***, reported in **(2016) 8 SCC 509**.

4. Subsequently, a similar issue was raised before another Division Bench of this Court in a bunch of other cases. The said Division Bench in the said cases had passed an order dated 27.12.2022 whereby, the opinion rendered earlier in the case of ***Shariful Islam*** (*supra*) has not been agreed to and accordingly, the issue has been referred to a larger Bench. It may, however, be mentioned that in the said bunch of cases, there was **WP(C)/7309/2019** with **IA(C)/1643/2021 (*Jonglu Ali @ Janglu Ali Vs. Union of India & Ors.*)** which incidentally was first in the chronological order of the bunch of cases. This Bench has, however, noticed that though the said case was a part of the referral order, the challenge was with regard to a final order dated 11.03.2010 passed by the learned Foreigners Tribunal, Jorhat in Case No. JFT/1767/2006 and in the said writ petition, the IA(C)/1643/2021 was filed seeking transfer of the case. In the said IA however, there was no order of the Court. Under such circumstance, this Bench had passed an order dated 07.12.2023 segregating the aforesaid writ petition and the IA from the bunch of cases.

5. We have heard Shri J Ahmed, learned counsel for the petitioner in WP(C)/3448/2022 and Shri P Rahman, learned counsel for the petitioners in WP(C)/1296, 1614, 4279 & 4282 of 2022. Also heard Shri A Kalita, learned Standing Counsel, Home and Political Department, Assam; Shri RKD Choudhury, learned Dy. SGI for the Union of India; Shri P Sarma, learned Government Advocate, Assam as well as Shri AI Ali, learned Standing Counsel, Election Commission of India (ECI).

6. Shri Ahmed, learned counsel for the petitioner in WP(C)/3448/2022 submits that to arrive at a fair and just conclusion, certain facts of the case are required to be noted. The petitioner in this case claims to be a resident of South Salmara, who, however, was working for gain at Sivasagar when the proceeding against him was initiated under the Foreigners Act, 1946 and the Rules framed thereunder in the Foreigners Tribunal, Sivasagar. The petitioner had appeared and filed his written statement followed by his examination-in-chief by way of affidavit. However, the rest of the evidence could not be filed as in the meantime, the petitioner had come to South Salmara. It is submitted that the petitioner would face hardships and inconvenience in defending himself in the trial before the Foreigners Tribunal at Sivasagar. Therefore, the present petition has been filed for transferring the case to the Foreigners Tribunal at Hatsingimari, South Salmara.

7. The learned counsel for the petitioner submits that when the statute holding the field on the aspect of transfer of proceedings is silent, the powers under Article 226 of the Constitution of India can be invoked. It is submitted that the said powers are wide for which substantial and complete justice can be done. In this connection, reference has been made to Section 21 of the General Clauses Act. For ready reference, the aforesaid provision is extracted hereinbelow:

> "*21. Power to issue, to include power to add to, amend, vary or rescind, notifications, orders, rules or bye-laws*
>
> *Where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued*."

8. It is submitted that by way of such transfer of the proceeding, no difficulties or prejudice would be caused to the State. The learned counsel has also referred to the Foreigners Tribunal Order, 2006.

9. The learned counsel for the petitioner clarifies that the present petition is not in connection with challenging the *vires* of any provision of the Act and the Rules.

10. It is also submitted that there was an earlier instance in which this Court had allowed transfer of a proceeding in a decision rendered on 17.07.2018 in **WP(C)/3644/2018 (*Ashadur Islam Vs. Union of India & Ors.*)** and the same was not brought to the notice of the Court while deciding the case of ***Shariful Islam*** (*supra*) on 07.06.2019. Reference is also made to a decision of the Hon'ble Supreme Court dated 29.01.2019 in **Civil Appeal No.1339/2019 (*Mainul Hoque Vs. Union of India & Ors.*)** whereby transfer of a proceeding was allowed from one Tribunal to another.

11. It is also submitted that the Foreigners Tribunal is a *quasi judicial* body and therefore, Section 24 of the CPC would apply to such a Tribunal. Reference has also been made to the observations made by the referral court in the order dated 27.12.2022 that if the proposition of ***Shariful Islam*** (*supra*) is to be accepted, there can never be a transfer of a case, unless a part of the cause of action arises in the transferee court also and further that it is not necessary for the transferee court to have territorial

jurisdiction.

12. It is submitted that in the case of ***Abdul Kuddus Vs. Union of India & Ors.***, reported in **(2019) 6 SCC 604**, it has been held that the provisions of *res judicata*, as mentioned in Section 11 of the CPC would be applicable in a proceeding of the present nature and therefore, there should be no reasons as to why the principles of Section 24 of the CPC would not be applicable.

13. Shri Ahmed has also criticized the observation made in the case of ***Shariful Islam*** (*supra*) in the context of the decision of the Hon'ble Supreme Court in the case of ***Mainul Hoque*** (*supra*). It may be mentioned that in the case of ***Shariful Islam*** (*supra*), the Division Bench of this Court had noted that the decision in ***Mainul Hoque*** (*supra*) was rendered by the Hon'ble Supreme Court in exercise of powers under Article 142 of the Constitution of India and further no reasons were assigned by the Hon'ble Supreme Court and therefore, it was held that no law, as such, was laid down in the said decision.

14. On the aspect of availability of a Commission to examine witnesses, the learned Counsel for the petitioner submits that even the said procedure would be an expensive one as the proceedee would have to bear the cost of such Commission. It is submitted that in the case of ***Anita Kushwaha Vs. Pushap Sudan***, reported in **(2016) 8 SCC 509** access to justice has been held to be a fundamental right and therefore, the present reference should be answered in favour of the petitioners.

15. Shri P Rahman, the learned counsel for the petitioners in the other writ petitions, by endorsing the aforesaid submissions, has additionally submitted that the travel and ancillary expenses to defend would be an impediment to a fair trial.

16. In support of the submissions, the learned counsel for the petitioners have relied upon the following case laws:

i) *Shangrila Food Products Ltd. & Anr. Vs. Life Insurance Corporation of India & Anr.*, (1996) 5 SCC 54;

ii) ***State of West Bengal & Ors. Vs. Committee for Protection of Democratic Rights, West Bengal & Ors.***, **(2010) 3 SCC 571**;

iii) ***Asha Ranjan Vs. State of Bihar & Ors.***, **(2017) 4 SCC 397**;

iv) Ashadur Islam Vs. Union of India & Ors., **[Order dated 17.07.2018 in WP(C)/3644/2018]**;

v) ***Whirlpool Corporation Vs. Registrar of Trade Mark***, **(1998) 8 SCC 1**.

17. In the case of ***Shangrila Food Products Ltd.*** (*supra*), the Hon'ble Supreme Court has reiterated the powers under Article 226 of the Constitution of India to give the parties complete and substantial justice.

18. The case of ***Committee for Protection of Democratic Rights*** (*supra*) has been cited to support the contention regarding the wide powers of judicial review under Articles 32 and 226 of the Constitution of India. The said views have been reiterated in the case of ***Asha Ranjan*** (*supra*).

19. The case of ***Ashadur Islam*** (*supra*) has been cited as in that case, transfer of a proceeding was allowed.

20. In the case of ***Anita Kushwaha*** (supra), the following has been laid down:

> "*41. That brings us to the second facet of the question referred to us, namely, whether Article 32 of the Constitution of India read with Article 142 empowers the Supreme Court to direct transfer in a situation where neither the Central Code of Civil Procedure or the Central Code of Criminal Procedure empowers such transfer to/from the State of Jammu and Kashmir. The need for transfer of cases from one court to the other often arises in several situations which are suitably addressed by the courts competent to direct transfers in exercise of powers available to them under the Code of Civil Procedure (CPC) or the Code of Criminal Procedure (CrPC). Convenience of parties and witnesses often figures as the main reason for the courts to direct such transfers. What is significant is that while in the rest of the country the courts deal with applications for transfer of civil/criminal cases under the provisions of CPC and CrPC the fact that there is no such enabling provision for transfer from or to the State of Jammu and Kashmir does not detract from the power of a superior court to direct such transfer, if it is of the opinion that such a direction is essential to subserve the interest of justice. In other words, even if the provision empowering courts to direct transfer from*

one court to other were to stand deleted from the statute, the superior courts would still be competent to direct such transfer in appropriate cases so long as such courts are satisfied that denial of such a transfer would result in violation of the right to access to justice to a litigant in a given fact situation.

42. Now if access to justice is a facet of the right to life guaranteed under Article 21 of the Constitution, a violation, actual or threatened, of that right would justify the invocation of this Court's powers under Article 32 of the Constitution. Exercise of the power vested in the Court under that Article could take the form of a direction for transfer of a case from one court to the other to meet situations where the statutory provisions do not provide for such transfers. Any such exercise would be legitimate, as it would prevent the violation of the fundamental right of the citizens guaranteed under Article 21 of the Constitution.

43. That apart from Article 32 even Article 142 of the Constitution can be invoked to direct transfer of a case from one court to the other, is also settled by a Constitution Bench decision of this Court in Union Carbide Corpn. v. Union of India. One of the questions that fell for consideration in that case was whether this Court could in exercise of its powers under Articles 136 and 142 withdraw a case pending in the lower court and dispose of the same finally even when Article 139-A does not empower the Court to do so. Answering the question in the affirmative, this Court held that the power to transfer cases is not exhausted under Article 139-A of the Constitution. This Court observed that Article 139-A enables the litigant to seek transfer of proceedings, if the conditions in the Article are satisfied. The said Article was not intended to nor does it operate to affect the wide powers available to this Court under Articles 136 and 142 of the Constitution. The following two passages from the judgments are apposite in this regard: (SCC p. 627, para 61)

> '*61. To the extent power of withdrawal and transfer of cases to the Apex Court is, in the opinion of the Court, necessary for the purpose of effectuating the high purpose of Articles 136 and 142(1), the power under Article 139-A must be held not to exhaust the power of withdrawal and transfer. Article 139-A, it is relevant to mention here, was introduced as part of the scheme of the Constitution Forty-second Amendment. That amendment proposed to invest the Supreme Court with exclusive jurisdiction to determine the constitutional validity of Central laws by inserting Articles 131-A, 139-A and 144-A. But Articles 131-A and 144-A were omitted by the Forty-third Amendment Act, 1977, leaving Article 139-A intact. That Article enables the litigants to approach the Apex Court for transfer of proceedings if the conditions envisaged in that Article are satisfied. Article 139-A was not intended, nor does it operate, to whittle down the existing wide powers under Articles 136 and 142 of the Constitution.*'"

21. The case of ***Whirlpool Corporation*** (*supra*) has been cited to bring home the contention that the powers under Article 226 of the Constitution of India can be exercised even when there

is alternative remedy. It may be noted that at the same time, it has been laid down that only on certain specific circumstances, the aforesaid power under Article 226 of the Constitution of India can be invoked. The relevant paragraph is extracted hereinbelow:

> "*Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point put to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.*"

22. *Per contra*, Shri A Kalita, learned Standing Counsel, Home & Political Department has submitted, at the outset that there was no occasion for making the instant reference as the law laid down in the case of ***Shariful Islam*** (*supra*) is after consideration of all the provisions of the statute holding the field. He further submits that the fulcrum of the present reference is the case of ***Anita Kushwaha*** (*supra*) of the Hon'ble Supreme Court and the said case was duly considered by the Division Bench while deciding the case of ***Shariful Islam*** (*supra*).

23. Shri Kalita submits that in the case of ***Shariful Islam*** (*supra*), it has been clearly laid down that the jurisdiction has to be conferred by the statute and in absence of the same, such jurisdiction or powers cannot be exercised or assumed. The relevant paragraphs of the aforesaid judgment are extracted hereinbelow:

"*7. With regard to the issue relating to assumption of jurisdiction by a Tribunal in answering reference made by the jurisdictional Superintendent of Police, the applicable law in this regard as laid down by the Supreme Court in a catena of decisions may be adverted to. In Arun Kumar and others v. Union of India and others, reported in (2007) 1 SCC 732 as well as in Carona Ltd. v. Parvathy Swaminathan & Sons, reported in (2007) 8 SCC 559, it has been held that a "jurisdictional fact" is a fact which must exist before a Court , Tribunal or an authority assumes jurisdiction over a particular matter. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, a Court, Tribunal or authority cannot act. A Court or a Tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. It was held that the underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate Court or an inferior Tribunal cannot confer upon itself jurisdiction which it otherwise does not possess. The Supreme Court held that the existence of jurisdictional fact is sine qua non or condition precedent for the exercise of power by a Court of limited jurisdiction.*

8. In the above context it can be seen that in the case of a Foreigners' Tribunal the jurisdictional fact is a reference made by the concerned jurisdictional registering authority seeking an opinion. The question, therefore, is that when a Foreigners' Tribunal is given to decide a reference received from the registering authority of that district or part thereof, can another Tribunal of a different district, not ordinarily having the jurisdiction to decide such a reference emanating from the other district, assume jurisdiction to decide the reference and whether the High Court , in exercise of its powers under Article 226 of the Constitution of India, can confer such jurisdiction to the other Foreigners' Tribunal to decide a transferred reference. Answer to the first part would not require any deeper consideration, inasmuch as, powers exercisable by a Foreigners' Tribunal are specifically laid down under para 4 of the 1964 Order. The Foreigners' Tribunals are conferred with the powers of civil court while

trying a suit under the Code of Civil Procedure, 1908 and the powers of a Judicial Magistrate First Class under the Code of Criminal Procedure, 1973 in respect of (a) summoning and enforcing the attendance of any person and examining him or her on oath; (b) requiring the discovery and production of any document; (c) issuing commissions for the examination of any witness; (d) directing the proceed to appear before it in person; and (e) issuing a warrant of arrest against the proceed if he or she fails to appear before it. Apparently, the Foreigners' Tribunals are not vested with powers to entertain any plea for transfer of a proceeding before it to another Tribunal. As regards entertaining a transferred proceeding, the same is also not permissible when jurisdictional fact relates to a different district and such fact is not found to exist in the transferred Tribunal. An answer to the second part is, indisputably, the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court. The Court or a Tribunal cannot derive jurisdiction apart from the statute. The finding of a Court or Tribunal becomes irrelevant, unenforceable, in-executable once the forum is found to have no jurisdiction. If a Court or a Tribunal lacks jurisdiction, acquiescence of party should not be permitted to perpetrate and perpetuate defeating of the legislative animation. This view is echoed in the case of Jagmittar Sain Bhagat and others v. Director, Health Services, Haryana and Others, reported in (2013) 10 SCC 136."

24. It is submitted that a power of transfer of proceedings from one court/tribunal to another is an exclusive power and until such power is explicitly conferred by a law, the said power cannot be exercised. There cannot be any inherent power to make such transfer.

25. By referring to the Foreigners Orders, 1964, Shri Kalita submits that the same does not lay down the aspect of territorial jurisdiction and it is the Superintendent Police of the district who makes the reference whenever a detection is made. Under such circumstances, it is the Foreigners Tribunal of only that district which shall have jurisdiction and no other Foreigners Tribunal. He reiterates that the issue

of domicile is a jurisdictional fact which is to be determined only by the concerned Tribunal. Shri Kalita adds that the jurisdiction of the concerned Foreigners Tribunal is not the subject matter of challenge and further, there is no denial to the fact that the proceedees were, at the relevant point of time, residing under the jurisdiction of the said Tribunal.

26. Shri Kalita submits that unlike the Central Administrative Tribunals Act where the Principal Bench is vested with the powers to transfer, there is no such provision in the statute holding the field. Reference has also been made to the judgment of the Hon'ble Allahabad High Court in ***Shankar Lal Jaiswal Vs. Asha Devi & Ors.***, **2018 SCC OnLine All 2545** wherein the petition for transfer of proceedings from one Tribunal to the other was rejected. It was held that until the statute holding the field categorically states the applicability of Section 24 of the CPC, the same cannot automatically apply to a proceeding before a Tribunal. In the said case, the Hon'ble Allahabad High Court was examining Rule 221 of the UP Motor Vehicles Rules, 1998.

27. He submits that the referral order dated 27.12.2022 in paragraph 75 has held that the High Court has taken into account the provisions of Section 24 of the CPC and Section 407 of the Cr.PC to come to a conclusion as to why similar powers cannot be exercised for transfer of proceedings from one Foreigners Tribunal to another by assuming that the transferee tribunal has the jurisdiction to conduct the trial. It is submitted that when the jurisdictional fact is itself absent, such Tribunal cannot be held to be competent to conduct the trial.

28. On the aspect of the applicability of the doctrine of *res judicata* laid down in Section 11 of the CPC in a proceeding before the Foreigners Tribunal, as has been held by the Hon'ble Supreme Court in the case of ***Abdul Kuddus*** (*supra*), Shri Kalita, learned counsel has submitted that the same analogy would not apply to hold that Section 24 of the CPC would also be applicable. It is submitted that Section 24 is an enabling section vesting powers upon the Court to transfer suit, appeal or proceedings and such powers cannot be extended to the High Court exercising powers under Article 226 of the Constitution of India.

29. In support of his submissions, Shri Kalita, learned Standing Counsel has placed reliance upon the following case laws:

i) ***Smt. Satya Vs. Shri Teja Singh***, **(1975) 1 SCC 120**;

ii) ***Arun Kumar & Ors. Vs. Union of India & Ors.***, **(2007) 1 SCC 732**;

iii) ***Carona Ltd. Vs. Parvathy Swaminathan & Sons***, **(2007) 8 SCC 559**;

iv) ***Jagmittar Sain Bhagat & Ors. Vs. Director, Health Services, Haryana & Ors.***, **(2013) 10 SCC 136**;

v) ***Shankar Lal Jaiswal Vs. Asha Devi & Ors.***, **2018 SCC OnLine All 2545**;

30. The case of ***Smt. Satya*** (*supra*) has been cited to bring home the contention that domicile is a jurisdictional fact. In the said case, a foreign decree of divorce was the subject matter of challenge in which the aforesaid law has been laid down.

31. In the case of ***Arun Kumar*** (*supra*), the concept of "jurisdictional fact" has been explained, the relevant part of which is extracted hereinbelow:

"*74. A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.*

84. From the above decisions, it is clear that existence of "jurisdictional fact" is

sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of "jurisdictional fact", it can decide the "fact in issue" or "adjudicatory fact". A wrong decision on "fact in issue" or on "adjudicatory fact" would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present."

32. The case of ***Carona Ltd.*** (*supra*) has been cited to bring home the contention of the requirement of jurisdictional fact. The distinction between jurisdictional fact and adjudicatory fact has been explained by the Hon'ble Supreme Court in the following manner:

"*36. It is thus clear that for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide adjudicatory facts or facts in issue.*"

33. The case of ***Jagmittar Sain Bhagat & Ors.*** (*supra*) has been cited to bring home the contention that unless a jurisdiction is conferred by the Legislature, such jurisdiction cannot be conferred with the consent of the parties or by a superior court. For ready reference, the relevant paragraph is extracted hereinbelow:

"*9. Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a court or tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a*

court/tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetrate and perpetuate defeating of the legislative animation. The court cannot derive jurisdiction apart from the statute. In such eventuality the doctrine of waiver also does not apply."

34. Shri Kalita, learned Standing Counsel has submitted that the writ petitions have been structured with the facet of certiorari jurisdiction. He clarifies that the certiorari jurisdiction of this Court is not involved at all and in any case, such writs are to be issued only in extra-ordinary circumstances and not as a routine manner. In this connection, he has cited a recent judgment dated 16.08.2023 of the Hon'ble Supreme Court in ***Central Council for Research in Ayurvedic Sciences & Anr. Vs. Bikartan Das & Ors.***, ***[Civil Appeal No.3339 of 2023*** wherein the following has been laid down:

"*49. Before we close this matter, we would like to observe something important in the aforesaid context: Two cardinal principles of law governing exercise of extraordinary jurisdiction under Article 226 of the Constitution more particularly when it comes to issue of writ of certiorari.*

50. The first cardinal principle of law that governs the exercise of extraordinary jurisdiction under Article 226 of the Constitution, more particularly when it comes to the issue of a writ of certiorari is that in granting such a writ, the High Court does not exercise the powers of Appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The writ of certiorari can be issued if an error of law is apparent on the face of the record. A writ

of certiorari, being a high prerogative writ, should not be issued on mere asking.

51. The second cardinal principle of exercise of extraordinary jurisdiction under Article 226 of the Constitution is that in a given case, even if some action or order challenged in the writ petition is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it with a view to doing substantial justice between the parties. Article 226 of the Constitution grants an extraordinary remedy, which is essentially discretionary, although founded on legal injury. It is perfectly open for the writ court, exercising this flexible power to pass such orders as public interest dictates & equity projects. The legal formulations cannot be enforced divorced from the realities of the fact situation of the case. While administering law, it is to be tempered with equity and if the equitable situation demands after setting right the legal formulations, not to take it to the logical end, the High Court would be failing in its duty if it does not notice equitable consideration and mould the final order in exercise of its extraordinary jurisdiction. Any other approach would render the High Court a normal court of appeal which it is not."

35. Supporting and endorsing the submissions made on behalf of the State, Shri RK Deb Choudhury, learned Dy. SGI submits that the views expressed by this Court in the case of ***Shariful Islam*** (*supra*) would not require any reconsideration as all the relevant aspects have been taken into consideration. He reiterates that the case of ***Anita Kushwaha*** (*supra*) has been elaborately discussed in the aforesaid case of ***Shariful Islam*** (*supra*) and therefore, he contends that the present reference was not even called for.

36. The learned Dy. SGI has submitted that the case of ***Mainul Hoque*** (*supra*) would not come to the aid of the petitioners. He submits that though the Hon'ble Supreme Court in the aforesaid case of ***Mainul Hoque*** (*supra*) had interfered with the views of this Court, there is no discussion of the facts and therefore, no ratio, as such has been laid down. In this connection, he refers to the decision of the Hon'ble Supreme Court in the case of ***Arnit Das Vs. State of Bihar***, reported in **(2000) 5 SCC 488** in which the following has been laid down:

> "*20. A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined.*"

37. Shri Deb Choudhury further submits that though in Article 226, the expression "any other purpose" has been used, the said expression cannot be understood to mean that for even trivial matters, the powers are to be exercised and only in extra-ordinary circumstances, such powers may be exercised. In this connection, he has cited the case of ***G. Veerappa Pillai Vs. Raman and Raman Ltd. & Ors.***, reported in **AIR 1952 SC 192** wherein the following has been laid down:

> "*20. Such writs as are referred to in Art. 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper*

view to be taken or the order to be made."

38. He has also cited the case of ***Quinn Vs. Leathem***, **(1901) AC 495 HL** on the aspect of the meaning of precedent.

39. The rival contentions of the learned counsel for the parties have been duly considered and the materials placed on records have been carefully examined.

40. As regards the argument advanced on behalf of the petitioners regarding applicability of Section 24 of the CPC in a writ proceeding by bringing in the analogy of the applicability of Section 11 of the CPC, as has been held by the Hon'ble Supreme Court in the case of ***Abdul Kuddus*** (*supra*), we are of the opinion that Section 11 is only a codification of the doctrine of *res judicata* which is a common law doctrine. In fact, in our view, even without reference to Section 11 of the CPC, the aforesaid doctrine of *res judicata* would otherwise also be applicable as the said doctrine is for maintaining judicial discipline and to bring a finality to a *lis* between the same parties. *Juxtaposed*, the provision of Section 24 of the CPC is an enabling provision by which general power of transfer and withdrawal has been given to the High Court or the District Court.

41. To appreciate the issue, it would be beneficial to examine the aforesaid Section 24 of the CPC which is extracted hereinbelow:

"24. General power of transfer and withdrawal.

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and—

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of any order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section,—

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.

(4) the Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it."

42. The aforesaid provision would clearly reveal that the power of transfer is only for any suit, appeal or other proceeding. Section 141 of the CPC, more particularly, the explanation thereto would be relevant in the present discussion. For ready reference, Section 141 of the CPC is extracted hereinbelow:

"141. Miscellaneous proceedings.

The procedure provided in this Code in regard to suit shall be followed, as far as it can be made applicable, in all proceedings in

> any Court of civil jurisdiction.
>
> Explanation.—In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution."

43. As indicated above, the explanation thereto which was inserted by an amendment in the year 1976 makes it clear that the expression "proceedings" does not include any proceeding under Article 226 of the Constitution of India.

44. In view of the aforesaid discussions, we are unable to accede to the submission made on behalf of the petitioners that Section 24 of the CPC would come to the aid of the petitioners to support their claim for transferring proceedings from one Foreigners Tribunal to the another by the High Court under Article 226 of the Constitution of India.

45. As regards the case of ***Anita Khushwaha*** (*supra*), we find force in the submission made on behalf of the respondents that the background of the said case was wholly different for which the order was passed by the Hon'ble Supreme Court. In the said case, certain cases which were pending in courts in the State of Jammu and Kashmir were prayed to be transferred to any other State. It was argued that Section 25 of the CPC and Section 406 of the Cr.PC which empower the Hon'ble Supreme Court to direct transfer of civil and criminal cases from one State to another do not extend to the State of Jammu and Kashmir and therefore, cannot be invoked to direct such transfer. It was also argued that the Jammu & Kashmir Code of Civil Procedure, 1977 and the Jammu & Kashmir Code of Criminal Procedure 1989 do not contain any provisions empowering the Hon'ble Supreme Court to direct transfer a case from that State to another State. The Hon'ble Supreme Court has, however, held that the powers under Article 32 and Article 142 of the Constitution of India can be invoked even in absence of a specific enabling provision. It is, however, required to be noted that Article 32 is itself a part of the fundamental rights guaranteed to a citizen under Part-III of the Constitution of India and Article 142 confers plenary power upon the Supreme Court to do complete justice.

46. We have noticed that the present reference has been made by doubting the correctness of the views expressed by the Division Bench in the case of ***Shariful Islam*** (*supra*) mainly by referring to the decision of the Hon'ble Supreme Court in the case of ***Anita Khushwaha*** (*supra*). However, in the

case of ***Shariful Islam*** (*supra*), the case of ***Anita Khushwaha*** (*supra*) was duly considered and extensively discussed. For ready reference, the relevant paragraphs of ***Shariful Islam*** (*supra*) are extracted hereinbelow:

> "*15. The counsels for the petitioners laid much emphasis in the case of Anita Kushwaha (supra) to say that access to justice being guaranteed under Article 14 and 21 of the Constitution of India, the physical and financial inconvenience of parties and witnesses in appearing before Foreigners' Tribunals located away from their home town are relevant considerations for seeking transfer of cases from the Tribunal where the case is pending to the Tribunal located in their home district. Submission is also made that this Court, in exercise of powers under Article 226 of the Constitution of India, is competent to direct such transfer. In order to reach a conclusion on the submissions made, it would be pertinent to understand the context in which the decision in Anita Kushwaha (supra) was rendered.*
>
> *16. The Constitution Bench of the Supreme Court in Anita Kushwaha (supra) was called upon to examine whether the Supreme Court has the power to transfer a civil or criminal case pending in any court in the State of Jammu and Kashmir to a court outside that State and vice versa. Opposing transfers, arguments made are that the provisions of section 25 of the Code of Civil Procedure and section 406 of the Code of Criminal Procedure, 1973 which empowers the Supreme Court to direct transfer of civil and criminal cases from one State to the other, do not extend to the State of Jammu and Kashmir and, therefore, cannot be invoked to direct any such transfer. Notice was had to section 1(3) of the Code of Civil Procedure, 1908, which stipulates that the Civil Procedure Code extends to the whole of India except the State of Jammu and*

Kashmir as well as the State of Nagaland and the tribal areas. Notice was also had to section 1(2) of the Code of Criminal Procedure, 1973, which stipulates that the provisions of the Criminal Procedure Code would extend to the whole of India except to the State of Jammu and Kashmir. The rival submission was that access to justice being a fundamental right guaranteed under Article 21 of the Constitution of India, any litigant whose fundamental right to access to justice is denied or jeopardised, can approach the Supreme Court for redress under Article 32 of the Constitution of India. It was argued that Article 142 of the Constitution of India read with Article 32 amply empowers the Supreme Court to intervene and issue suitable directions to do complete justice to the parties, including justice in the matter of ensuring that litigants engaged in legal proceedings in any court within or outside the State of Jammu and Kashmir get a fair and reasonable opportunity to access justice by transfer of their cases to or from that State, if necessary.

17. The issue in Anita Kushwaha (supra) was answered by first holding that access to justice is a facet of right to life guaranteed under Article 21 as well as a facet of the right guaranteed under Article 14 of the Constitution. Further, the Constitution which guarantees equality before law and equal protection of laws is not limited in its application to the domain of executive action that enforces the law. It is as much available in relation to proceedings before courts and tribunals and adjudicatory fora where law is applied and justice administered. The Supreme Court culled out four main facets which constitute the essence of access to justice, being (i) the State must provide an effective adjudicatory mechanism; (ii) the mechanism so provided must be reasonably accessible in terms of distance; (iii) the process of adjudication must be speedy; and (iv) the litigant's access to the adjudicatory process must be

affordable. On the other aspect of the matter, namely the powers of the Supreme Court to direct transfer in a situation where there are no enabling provision for transfer under the Code of Civil Procedure or the Code of Criminal Procedure, it was held that Article 32 and even Article 142 of the Constitution can be invoked to direct transfer of a case from one court to the other. Reference was made to the Constitution Bench decision of the Supreme Court in Union Carbide Corpn. v. Union of India [(1991) 4 SCC 584], where one of the questions falling for consideration was whether the Supreme Court could in exercise of its powers under Articles 136 and 142 withdraw a case pending in the lower court and dispose of the same finally even when Article 139-A does not empower the Supreme Court to do so. The said question was answered by the Constitution Bench holding that the power of the Supreme Court to transfer cases is not exhausted under Article 139A of the Constitution. Further, Article 139-A was not intended to nor does it operate to affect the wide powers available to the Supreme Court under Articles 136 and 142 of the Constitution. Paragraph 83 of the Constitution Bench was reproduced, wherein it was held that the power under Article 142 is on a different plane and of a different quality, inasmuch as, prohibitions or limitations or provisions contained in ordinary laws cannot act as prohibitions or limitations on the constitutional powers under Article 142. Thus, in Anita Kushwaha (supra) the Supreme Court concluded by laying down the law in the operative portion of paragraph 45 in the following words:

> '*The extraordinary power available to this Court under Article 142 of the Constitution can, therefore, be usefully invoked in a situation where the Court is satisfied that denial of an order of transfer from or to the court in the State of Jammu and Kashmir*

will deny the citizen his/her right of access to justice. The provisions of Articles 32, 136 and 142 are, therefore, wide enough to empower this Court to direct such transfer in appropriate situations, no matter the Central Codes of Civil and Criminal Procedure do not extend to the State nor do the State Codes of Civil and Criminal Procedure contain any provision that empowers this Court to transfer cases.'"

47. It is trite law that the ratio of a decision is to be understood in the context of the facts and background of that case.

48. The Hon'ble Supreme Court in the case of ***Padmasundara Rao & Ors. Vs. State of T.N. & Ors.***, reported in **(2002) 3 SCC 533** has laid down that a ratio of the case has to be understood with the facts of that case. For ready reference, the relevant part is extracted herein below:

"*9. Courts 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) 2 WLR 537]. Circumstantial flexibility, one additional or different fact may make a word of difference between conclusions in two cases.*"

49. The aspect of the precedential value has also been explained by the Hon'ble Supreme Court in the case of ***Ambica Quarry Works Vs. State of Gujarat & Ors.***, reported in **(1987) 1 SCC 213** in the following manner:

"*18. ….. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. [See Lord Halsbury in Quinn v. Leathem (1901) AC 495] ….*"

50. The House of Lords in the case of ***Quinn Vs. Leathem*** (*supra*) has laid down that a judgment is to be read in the context of the background facts. The Hon'ble Supreme Court by approving the aforesaid observation in the case of ***Government of Karnataka & Ors. Vs. Gowramma & Ors.***, reported in **(2007) 13 SCC 482** has held as follows:

"*10. '12. ... Reliance on the decision without looking into the factual background of the case before it, is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament. In Quinn v. Leathem the Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the*

whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides'."

51. We have already discussed the background and context under which the decision was rendered in the case of ***Anita Kushwaha*** (*supra*) by the Hon'ble Supreme Court wherein the powers under Articles 32 and 142 were invoked. We are of the considered opinion that the aforesaid decision of ***Anita Kushwaha*** (*supra*) cannot be applied in the facts of the instant cases both from the context of the background facts and powers vested upon this Court.

52. We are also of the view that jurisdictional fact is a *sine qua non* which has to be decided first and such jurisdiction can be conferred only by a statute. We have also noted that in none of the cases, the jurisdiction of the concerned Foreigners Tribunal has been challenged. It is also not in dispute that the concerned proceedee was, at one point of time residing within the jurisdiction of the concerned Foreigners Tribunal. We have also noted that in the referral order, there is an assumption that the Tribunal where transfer is sought for has the jurisdiction and competency. We are afraid that unless the jurisdictional fact is established in accordance with law, such assumption cannot be drawn. The facts in issue which would constitute the jurisdiction have to be decided by the concerned Tribunal. The Hon'ble Supreme Court in the case of ***Sarbananda Sonowal Vs. Union of India***, reported in **(2005) 5 SCC 665** has held that residence of a proceedee is a fact in issue which has to be decided by the concerned Tribunal. For ready reference, the relevant part is extracted hereinbelow:

"*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."

53. As regards the order dated 29.01.2019 of the Hon'ble Supreme Court in the case of ***Mainul Hoque*** (*supra*) is concerned, the Division Bench of this Court in the case of ***Shariful Islam*** (*supra*) had noted that the decision in ***Mainul Hoque*** (*supra*) was rendered by the Hon'ble Supreme Court by exercise of powers under Article 142 of the Constitution of India and further, no reasons were assigned by the Hon'ble Supreme Court and therefore, it was held that no law, as such, was laid down in the said decision. The said order which has been brought on record would show that the Hon'ble Supreme Court had passed the same by considering the counter-affidavit filed by the State and on "*the facts of that case*". We are therefore, in agreement with the reasoning of the Division Bench in the case of ***Shariful*** (*supra*) that no ratio, as such can be said to have been laid down.

54. The petitioners have tried to rely upon the Foreigners Tribunals Order, 2006 and have contended that no difficulties would be faced by the State. However, in the case of ***Sarbananda Sonowal (II) Vs. Union of India***, reported in **(2007) 1 SCC 174**, the aforesaid Foreigners Tribunals Order of 2006 has been quashed. The records reveal that the Government has determined the Foreigners Tribunals and such Foreigners Tribunals have been constituted district wise and in fact, in certain districts, there are more than one Foreigners Tribunal. However, the issue involved in this reference was not with regard to transfer from one Tribunal to another Tribunal within the same district but from one Tribunal to another Tribunal in a different district.

55. A contention has been raised on behalf of the petitioners that even though the statute provides for a Commission to record evidence, the same may not be an efficacious one and expenses would be involved. The said contention does not appeal to us in the context that the entire statute and the scheme

is for detection and deportation of foreign nationals from the country in which such a suspect is given due opportunity to prove his or her citizenship by cogent, reliable and acceptable evidence which are supported by contemporaneous records. When the objective of the statute is directly connected with the integrity of the country which is undoubtedly a paramount public interest, we are of the view that provision of a Commission is only to facilitate a reasonable and adequate opportunity to a proceedee. We are also of the view that the referral order was in the context of a proceedee who was residing under the jurisdiction of the concerned Tribunal and after initiation of such proceedings, if a proceedee on his own volition leaves the said district, it would be against the equities even to consider a prayer for transferring a proceeding only for the convenience of such proceedee, that too, without any express powers being vested by law upon this Court. We are also of the view that the rights of a proceedee *qua* access to justice is not in any manner infringed as such proceedee has all the opportunity in law to defend himself/herself in the concerned Tribunal.

56. Though it is true that the power under Article 226 of the Constitution of India is an unbridled and unfettered power, there are self-imposed restrictions. Under the aforesaid powers, a High Court can issue prerogative writs and this jurisdiction is an extra-ordinary one. Such jurisdictions are not to be exercised in a routine manner. Further, it is only an equitable jurisdiction exercised by a Court under Article 226 of the Constitution of India and there is an obligation cast upon the Court to balance the equities. We are of the considered view that in the facts and circumstances of the cases, more particularly, taking the objective of the statute, the powers of this Court under Article 226 of the Constitution of India would not extend to direct transfer of a proceeding under the Foreigners Act, 1946 from one district to another.

57. We, accordingly hold that the views expressed by the learned Division Bench in the case of ***Shariful Islam*** (*supra*) do not require any re-consideration and is the correct view.

58. The reference is answered accordingly.

59. Having answered the reference in the manner indicated above, we would, however, like to make some clarifications. Though we have held that the powers under Article 226 of the Constitution of India cannot be generally invoked for transferring a proceeding from one Foreigners Tribunal to another, in

exceptional circumstances, as indicated below, such considerations may be made. Such exceptional circumstances would be:

i) When there is only one Foreigners Tribunal in a particular district and the same is not functioning due to non-availability of the Presiding Officer for a long period of time; or

ii) When there is only one Foreigners Tribunal in a particular district and the Presiding Officer of the said Tribunal recuses from a particular case.

It is further clarified that the said power may be exercised only for transferring such a proceeding to the appropriate Foreigners Tribunal in the adjacent district.

60. The aforesaid clarifications, in the form of exceptions are given to ensure that the right to access to justice is not fettered.

JUDGE **JUDGE** **JUDGE**

Comparing Assistant