GAHC010219702019

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

WP(C) Nos.7309/2019, 4279/2022, 3448/2022,
WP(C) Nos.1614/2022, 4282/2022 & 1296/2022

(I) WP(C) Nos.7309/2019

JONGLU ALI @ JANGLU ALI,
S/O LATE HAIDAR ALI @ HAIDER ALI @ HAYDER ALI,
RESIDENT OF VILL. AIBHANDAR NO. 2 (AI-BHANDAR PART-II),
BHORAGURI, P.O. KAMALSING, P.S. GOSSAIGAON,
DIST. KOKRAJHAR, BTC, ASSAM.

.....*Petitioner*

VERSUS

1. THE UNION OF INDIA,
THROUGH THE SECRETARY TO THE GOVT. OF INDIA,
THE MINISTRY OF HOME AFFAIRS, GRIHA MANTRALAYA,
NEW DELHI, PIN- 110001.

2: THE STATE OF ASSAM,
THROUGH THE SECRETARY TO THE GOVERNMENT OF ASSAM,
HOME DEPARTMENT,
DISPUR, GUWAHATI- 781006.

3: THE ELECTION COMMISSION OF INDIA,
NIRVACHAN BHAWAN,
ASHOKA ROAD, NEW DELHI,
PIN 110001.

4:THE STATE CO-ORDINATOR,
NATIONAL REGISTRATION OF CITIZEN, ASSAM,
BHANGAGARH, GUWAHATI- 781005.

5: THE DEPUTY COMMISSIONER, JORHAT,
P.O. AND DIST. JORHAT, ASSAM,
PIN- 785001.

6: THE SUPERINTENDENT OF POLICE (BORDER), JORHAT,
P.O. AND DIST. JORHAT, ASSAM,
PIN- 785001.

.....*Respondents*

(II)WP(C)/4279/2022

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

.....*Petitioner*

VERSUS

1. THE UNION OF INDIA,
REPRESENTED BY THE SECRETARY TO THE GOVT. OF INDIA,
MINISTRY OF HOME AFFAIRS,
NEW DELHI-110001.

2: THE STATE OF ASSAM,
REPRESENTED 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 ELECTION COMMISSION OF INDIA, NEW DELHI.

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 NAZIRA POLICE STATION,
DIST-SIVASAGAR, ASSAM-785640

.....*Respondents*

(III) 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.

.....*Petitioner*

VERSUS

1. THE UNION OF INDIA
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- SIVASAGAR, ASSAM, PIN-785640.

6: THE SUPERINTENDENT OF POLICE (B), SIVASAGAR,
DIST- SIVASAGAR, ASSAM, PIN-785640.

7: THE OFFICER IN CHARGE, GAURISAGAR
POLICE STATION GAURISAGAR,
DIST- SIVASAGAR, ASSAM.

.....*Respondents*

(IV) WP(C)/1614/2022

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

.....*Petitioner*

VERSUS

1. THE UNION OF INDIA ,
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.

.....*Respondents*

(V) 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.

.....*Petitioner*

VERSUS

1. THE UNION OF INDIA,
REPRESENTED BY
THE SECRETARY TO THE GOVT. OF INDIA,
MINISTRY OF HOME AFFAIRS,
NEW DELHI-110001.

2: THE STATE OF ASSAM,
REPRESENTED 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 O/C, NAJIRA POLICE STATION
DIST-SIVASAGAR, ASSAM-785640.

.....*Respondents*

(VI) WP(C)/1296/2022

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

.....*Petitioner*

VERSUS

1. THE UNION OF INDIA,
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.

For the Petitioners : Mr. A.R. Sikdar, Adv.
[in WP(C) No.7309/2019]

: Mr. P. Rahman, Adv.
[in WP(C) Nos.1296/2022,1614/2022,
4279/2022 and 4282/2022]

: Mr. J. Ahmed, Adv.
[in WP(C) No.3448/2022]

Advocates

For the Respondents : Mr. P.K. Medhi, CGC

: Mr. J. Payeng, SC, FT,

: Mr. A.I. Ali, SC, ECI.

: Ms. N.K. Das, Govt. Adv., Assam.

: Ms. K. Phukan, Govt. Adv., Assam.

: Ms. L. Devi, SC, NRC.

Advocates

BEFORE

HON'BLE MR. JUSTICE N. KOTISWAR SINGH

HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY

Date of Hearing : 10.11.2022 & 14.11.2022

Date of Judgment : 27.12.2022

JUDGMENT AND ORDER (CAV)

[*N. Kotiswar Singh, J.*]

Heard Mr. A. R. Sikdar, learned counsel for the petitioner in WP(C) No.7309/2019, Mr. P. Rahman, learned counsel for the petitioners in WP(C) Nos.1296/2022, 1614/2022, 4279/2022 and 4282/2022 as well as Mr. J. Ahmed, learned counsel for the petitioner in WP(C) No.3448/2022. Also heard Mr. J. Payeng, learned Special Counsel, FT; Mr. P.K. Medhi, learned Central Government Counsel ; Ms. L. Devi, learned Standing Counsel, NRC; Mr. A. I. Ali, learned Standing Counsel, ECI and Ms. K. Phukan and Mr. N.K. Das, learned Government Advocate, Assam.

2. The present petitions have been heard together since a common issue runs through these petitions which relates to transfer of proceedings from one Foreigners Tribunal to another.

3. Before we advert to the detail facts and rival submissions of the contesting

parties, we will briefly refer to the relevant facts of each of the petitions.

4. WP(C) 7309/2019

4.1. The matter relates to the prayer for transfer of the proceeding from the Foreigners Tribunal, Jorhat to Foreigners Tribunal, Kokrajhar while challenging the impugned order dated 11.03.2010 passed by the Foreigners Tribunal, Jorhat in Case No. JFT 1767/2006.

4.2. The petitioner, Jonglu Ali @ Janglu Ali, is a permanent resident of Vill. Aibhandar No.2, Bhowraguri, PO. Kamalsing, PS. Gossaigaon, Kokrajhar, Assam. It is his case that because of economic necessity he had ventured out of his permanent place of residence in Kokrajhar and obtained a temporary employment in a brick field located in Hahchora under Teok Police Station, District-Jorhat and was employed with one Malay Saikia. After closing down of the said brick field, he left the said place in Jorhat in search of another employment. However, during his stay in Jorhat, an enquiry was initiated by the enquiring authority under the Foreigners Act as regards his citizenship status when certain doubts were raised about his citizenship. Accordingly, the statement of the petitioner was recorded by the enquiring authority. While recording the statement, the enquiring authority recorded the fact that the petitioner is otherwise a permanent resident of No.1 Aibhandar village and he came to the said brickfield located in Jorhat in search of his livelihood. The petitioner also informed the enquiring authority that his father had cast vote in 1966 and as such he is a citizen of India. He also stated that he possesses a plot of land measuring ½ bigha. However,

the petitioner admitted that he did not bring any documentary proof relating to his citizenship while coming to Jorhat. He also stated before the enquiring authority that he will be able to obtain necessary documents from his residence within 15 days.

It appears that the employee of the petitioner also gave statement stating that the petitioner hails from Kokrajhar district. On the basis of the said enquiry, a report was duly submitted to the referral authority and the referral authority, on the basis of the enquiry report, made a reference to the Foreigners Tribunal, Jorhat stating that the petitioner is a foreigner and, accordingly, JFT Case No.1767/2006 was initiated against him before the Foreigners Tribunal, Jorhat.

4.3. It has been submitted by Mr. Sikdar, learned counsel for the petitioner that, though an enquiry was held while the petitioner was in employment in the said brick field in Jorhat and thereafter, since the petitioner was not intimated about the result of the said enquiry, on the closure of the said brick field, the petitioner left the said employment in Jorhat. However, during his absence, the proceeding was initiated, and the notice was sought to be served at the address while he was an employee in the said brick field in Teok. Since the petitioner was not found in the said place, the Tribunal deemed the notice to have been served and, proceeded *ex parte* against the petitioner. By the *ex parte* order dated 11.03.2010 passed, the Tribunal declared him to be a foreigner.

4.4. It is this order, which is sought to be challenged in this petition and the petitioner is seeking remand of the matter to the competent Foreigners Tribunal in

Kokrajhar District.

4.5 Mr. Sikdar has raised two grounds in challenging this order. Firstly, the Tribunal, otherwise, could not have acted in the manner as has been done, as there were no proper enquiry and no proper reference and as such the Tribunal lacked jurisdictional facts to act. Secondly, it has been submitted that even if the State is desirous of proceeding against the petitioner, it ought to have proceeded before the Foreigners Tribunal in Kokrajhar and not before the Foreigners Tribunal, Jorhat, where he was staying temporarily for earning his livelihood.

Accordingly, it has been submitted that the impugned order be set aside and the matter be remanded to the Foreigners Tribunal in Kokrajhar.

4.6. Coming to the issue of lack of jurisdictional facts for initiation of proceeding before the Foreigners Tribunal, Jorhat, Mr. Sikdar has submitted that the petitioner, the son of late Haidar Ali @ Haider Ali @ Hayder Ali, who is a resident of village Aibhandar Part-II of Kokrajhar district and all the documents including the voters lists would show that his father was an Indian citizen and these documents were issued by authorities located in Kokrajhar district administration.

4.7. In this regard, Mr. Sikdar has drawn attention of this Court to the voters list of 1966 wherein the name of one Haider Ali is mentioned in respect of 38 No. LAC Kokrajhar West (ST) under 225 Aibhandar village, PO. Bhaoraguri, PS. Kokrajhar, District-Erstwhile Goalpara. Another voters list of 1970 in respect of the same village, LAC relating to his projected father has also been produced. Learned counsel has also

drawn attention to the voters list of 1985 wherein the name of his father Hayder is again shown in respect of the same village and constituency. So is the voters list of 1989 wherein the name of the petitioner is shown as son of Haider in respect of the same village.

Learned counsel for the petitioner has also drawn our attention to the voters list of 1993 showing his father as Hyder in respect of the same village. The other voters lists relied upon are voters lists of 1997, 2009, 2010, 2011, 2013, 2014 and 2017 in which the name of the petitioner along with his wife and children are found in respect of the same village under the same LAC. Thus, it has been submitted that the name of the petitioner is found recorded in the documents maintained by the district administration of Kokrajhar.

4.8. It has been submitted that apart from the relatives presently staying in Kokrajhar, there are other witnesses, who can establish his claim that he is Indian are all residents of Kokrajhar and none of them is residing at Jorhat where he had gone for temporary employment.

4.9. It has been submitted that under normal circumstances, the petitioner ought to have been proceeded before the Foreigners Tribunal in Kokrajhar and not before the Foreigners Tribunal in Jorhat as has been done. It is not a case that the authorities were unaware of the fact that the petitioner is a permanent resident of Kokrajhar. In fact, during investigation, which was carried out by the enquiring authority, as also revealed by the record, the enquiring authority was conscious of the fact that the

petitioner was a permanent resident of Kokrajhar as informed by him as well as by other witnesses who were the employees. In fact, during enquiry, he had mentioned before the enquiring authority that if he had been given 15 days to submit necessary documents, he would be able to do so as he is a permanent resident of Kokrajhar. However, no such opportunity was given to him to produce the documents.

4.10. Mr. Sikdar, learned counsel for the petitioner, accordingly submits that this would indicate that there was lack of proper application of mind by the enquiring authority when the enquiry was made against the petitioner. According to Mr. Sikdar, even if the enquiring authority had not made the report properly, the referral authority ought to have considered the fact that the petitioner is a permanent resident of Kokrajhar as a clearly reflected in the enquiry report and accordingly, the reference ought to have been made before the concerned Tribunal located in Kokrajhar.

4.11. Mr. Sikdar also submits that the enquiry itself was vitiated for the reason that the same was not done properly as held by the Full Bench of this Court in ***State of Assam and others Vs. Moslem Mondal, 2013(1) GLT 809,*** that fair investigation requires that while making investigation, the Investigation Officer is supposed to obtain signature of thumb impression of the person against whom such investigation is initiated after recording of his statement, which was not done.

4.12. It has been submitted that in the present case, the petitioner was very much cooperating with the authorities during the enquiry. However, no such signature was obtained from him, nor any copy of the statement or the copy of enquiry report given

to him. It itself indicates that the enquiry was not conducted properly. Be that as it may, when the report was submitted to the referral authority, the referral authority ought to have applied its mind properly on the investigation so made, and make the reference only after being satisfied that a proper investigation was carried out. In the present case, the reference was mechanically made by the referral authority as the referral authority did not apply his mind properly to the enquiry report.

Mr. Sikdar submits that it was known to the referral authority based on the enquiry report submitted that, the petitioner was a permanent resident of Kokrajhar, yet the referral authority decided to make the reference before the Foreigners Tribunal in Jorhat.

4.13. In this regard, Mr. Sikdar has placed reliance on the decision of the Full Bench of this Court in ***Moslem Mondal*** (supra) wherein it has been observed in paragraph-98 as follows:-

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

4.14. It has been further submitted that once the reference was made to the Tribunal,

the Tribunal ought to have satisfied itself about the investigation as well as the reference made, and upon being satisfied, the Tribunal ought to have proceeded with the matter. Further, the Tribunal ought to have been satisfied about the jurisdictional facts presented before it proceeding with the reference. If the Tribunal felt that it lacks jurisdictional facts, it ought not to have taken up the matter and ought to have referred the matter to the concerned Tribunal having jurisdictional facts.

4.15. It has been submitted that in the present case, it is clear that the petitioner is a permanent resident of Kokrajhar district, as such the Foreigners Tribunal, Jorhat ought to have referred the matter to the Foreigners Tribunal in Kokrajhar or direct the referral authority to refer the proceeding to the Foreigners Tribunal located in Kokrajhar, which however, having not been done, the proceeding is vitiated.

4.16. Mr. Sikdar submits that in ***Ashadur Islam Vs. Union of India and others (WP(C) No.3644/2018),*** disposed of on 17.07.2018 when a similar situation arose, this Court directed transfer of the proceeding from one Tribunal to another under whose jurisdiction the proceedee happened to be a permanent resident of.

4.17. Mr. Sikdar has also relied upon a decision of the Hon'ble Supreme Court in ***Mainul Hoque Vs. Union of India and others***, (SLP(C) No.12467 of 2018 decided on 29.01.2019) hereinafter referred to as the "***Mainul Hoque (SC)***" wherein the Hon'ble Supreme Court passed the following order:-

" 1) Leave granted.

2) Having gone through the pleadings, in particular, the counter affidavit filed by the State of Assam, we think it fit on the facts of this case to transfer the pending proceedings before the Foreigners' Tribunal No. 2, Kamrup(M), at Hedayatpur, Guwahati, to the Foreigners' Tribunal at Karimganj.

3) Accordingly, the impugned order is set aside. The appeal is allowed to the aforesaid terms.

4) Pending applications, if any, stand disposed of."

4.18. It has been submitted that similar fact situation arose in ***Mainul Hoque*** (supra) inasmuch as in the said case, the proceeding was sought to be transferred from the Foreigners Tribunal No.2, Kamrup (M), Hedayatpur to any Foreigners Tribunal at Karimganj. In the said case, it was specifically pleaded that all the records which the proceedee wanted to rely upon were issued by the district authorities of Karimganj and the proceedee had ailing parents who were required to adduce evidence in his support and the proceedee could not afford to travel the long distance between Karimganj and Guwahati, which is very expensive and beyond the financial capacity of the proceedee to arrange and the authorities who issued the certificates were located in Karimganj. The Hon'ble Supreme Court taking into consideration of the said plea, allowed transfer of the proceeding from Guwahati to Karimganj.

4.19. Mr. Sikdar has submitted that there is a certain beneficial clause under the Citizenship Act, 1955 as contained in Sub-Sections (3) and (4) of Section 6A of the Citizenship Act, 1955, which provides for registration of such person who are found to

be foreigners, but otherwise eligible to be registered as Indian citizen. Such persons are required to register themselves before the District Magistrate within whose jurisdiction such person ordinarily resides. In the present case, even if the petitioner is declared to be a foreigner within the meaning of Sub-Section (3) of Section 6A, he would be required to register himself before the District Magistrate in Kokrajhar not in Jorhat. Thus, the scheme of the Act would also indicate that Foreigners Tribunal before whom any suspect is to be proceeded should be the one under whose jurisdiction the proceedee claims to be ordinarily a resident of and where he can get registered as provided under Section 6A(4).

4.20. It has been submitted that in the present case, the petitioner had made a specific claim before the enquiring authority that he is a permanent resident of Kokrajhar which was duly noted by the enquiring authority while referring to the referral authority and also when the reference was made to the Foreigners Tribunal, Jorhat, but the Foreigners Tribunal, Jorhat without applying its mind on this issue proceeded *ex parte* against the petitioner. Accordingly, it has been submitted that the impugned order passed by the Tribunal is liable to be set aside and the matter be remanded for fresh reconsideration to the Foreigners Tribunal, Kokrajhar which is the competent Tribunal under whose jurisdiction the petitioner resides.

5. WP(C) 1296/2022

5.1. In this petition, the petitioner has prayed for transfer of the proceeding of F.T. Case No.F.T/SVR/1884/04 from the Foreigners Tribunal, Jorhat to any other competent

Foreigners Tribunal located in the district of Morigaon under whose jurisdiction the petitioner is presently a resident.

5.2. It has been submitted that the petitioner is a permanent resident of village Saruchokabaha, Majorbori under Mikirbheta Police Station in the district of Morigoan.

5.3. It is the case of the petitioner that in the year 2004, he went to Nazira for work and had stayed there in a rented place along with other co-labourers on being accommodated by his contractor. While he was residing temporarily at Nazira for his work as mentioned above, some enquiry was made against him as his citizenship was suspected.

5.4. Accordingly, the petitioner gave his statement to the effect that he is a permanent resident of Morigaon district, however, had been staying there for earning his livelihood. Unfortunately, the authorities proceeded against him before the Foreigners Tribunal, Jorhat under whose jurisdiction he was earlier working.

5.5. It has been submitted that the petitioner had left his work at Nazira and is now residing in his permanent residence in the district of Morigaon and as such, it has been submitted that the aforesaid proceeding FT Case No.F.T/SVR/1884/04 which was initiated before the Foreigners Tribunal, Jorhat may be transferred to the competent Foreigners Tribunal located in Morigaon district.

5.6 Learned counsel for the petitioner submits that the petitioner having been brought up in Morigaon District, had all the records relating to his parents which were

issued by the local and district administration of Morigaon. Further, all the witnesses who would support his claim that he is an Indian and not a foreigner, are based in and around Morigaon District and as such, it will be practically very difficult for the petitioner to travel to Jorhat regularly to contest the claim before the Foreigners Tribunal, Jorhat by bringing his witnesses there. It has been submitted that if the aforesaid proceeding is transferred and the petitioner is allowed to appear before the competent Foreigners Tribunal in Morigaon District, it will be more convenient and give the petitioner a more effective right to represent his case.

6. WP(C) 1614/2022

6.1. In this petition, the petitioner has prayed for transfer of the proceeding of F.T. Case No.F.T/SVR/2336/2008 from the Foreigners Tribunal, Jorhat to any other competent Foreigners Tribunal located in the district of Morigaon under whose jurisdiction the petitioner is presently a resident.

6.2. It has been submitted that the petitioner is a permanent resident of village Pakoria (Pakoriguri) under Mayong Police Station in the district of Morigoan.

6.3. It is the case of the petitioner that in the year 2006-2007, he also went to Nazira for work in a brick field and had stayed there in a rented place along with other co-labourers on being accommodated by his contractor. While he was residing temporarily at Nazira for his work as mentioned above, some enquiry was made against him as his citizenship was doubtful.

6.4. Accordingly, the petitioner gave his statement to the effect that he is a permanent resident of Morigaon district, however, he had been staying in Nazira for earning his livelihood. Unfortunately, the authorities proceeded against him before the Foreigners Tribunal, Jorhat under whose jurisdiction he was earlier working.

6.5. It has been submitted that the petitioner had left his work at Nazira and is now residing in his permanent residence in the district of Morigaon and as such, it has be submitted that the aforesaid proceeding FT Case No.F.T/SVR/2336/2008 which was initiated before the Foreigners Tribunal, Jorhat may be transferred to the competent Foreigners Tribunal located in Morigaon district.

6.6. The learned counsel for the petitioner submits that the petitioner having been brought up in Morigaon District, has all the records relating to parents which were issued by the local and district administration of Morigaon. Further, all the witnesses who would support his claim that he is an Indian and not a foreigner, are based in and around Morigaon District and as such, it will be practically very difficult for the petitioner to travel to Jorhat regularly to contest the claim before the Foreigners Tribunal, Jorhat. It has been submitted that if the aforesaid proceeding is transferred and the petitioner is allowed to appear before the competent Foreigners Tribunal in Morigaon District, it will be more convenient and give the petitioner a more effective right to represent his case.

7. WP(C) 3448/2022

7.1. In this petition, the petitioner has prayed for transfer of the proceeding of F.T. Case No.FT/SVR/286/2013 from the Foreigners Tribunal, Jorhat to the Foreigners Tribunal, Hatsingimari, District South Salmara Mankachar under whose jurisdiction the petitioner is presently residing.

7.2. It has been submitted that the petitioner is a permanent resident of village Kukilapar, Boalea Part II, under the Police Station Sukhchar in the District of South Salmara Mankachar. However, the petitioner had gone for looking employment opportunity in other districts of Assam and later came to Sivasagar District to work as a daily wage labourer. He was staying in the house of one Bipin Dowarah as a tenant in village Phulpanichiga under Police Station Gaurisagar in the District of Sivsagar as a daily wage earner where an enquiry was made against him on suspicion of being a foreigner. It has been submitted that the petitioner informed the enquiring authorities that he is otherwise a permanent resident of village Kukilapar, Boalea Part II under the Police Station Sukhchar, District South Salmara Mankachar. However, the authorities proceeded against him before the Foreigners Tribunal, Jorhat.

7.3. It has been submitted by Mr. Ahmed, learned counsel for the petitioner that all the documents which the petitioner seeks to rely were issued by the local and district administration of the then Dhubri District out of which the new District of South Salmara Mankachar has been created. It has been accordingly submitted that though the petitioner has filed all the documents before the Foreigners Tribunal, Jorhat in

order to prove his claim, he would be required to adduce evidences by examining witnesses and it will be highly inconvenient if he is required to produce all his witnesses in Jorhat, who are all residing in South Salmara Mankachar which is about 600 Km away from the Foreigners Tribunal, Jorhat and as such, a prayer has been made on behalf of the petitioner for transfer of the aforesaid proceeding from the Foreigners Tribunal, Jorhat to any other competent Foreigners Tribunal located at Hatsingimari of South Salmara District.

7.4. Mr. Ahmed, learned counsel for the petitioner submits that that in a similar case, this Court has allowed transfer of a proceeding of Foreigners Tribunal, Jorhat to Foreigners Tribunal, Hatsingimari of South Salmara District where the proceedee was ordinarily residing and in this regard, the petitioner has relied on the decision of this Court in ***Ashadur Islam (***supra)***.***

7.5. Learned counsel for the petitioner submits that the present petitioner also belongs to the same locality as the petitioner in ***Ashadur Islam*** (supra) and as such, it has been prayed that the petitioner may be granted similar benefit by transferring the proceeding pending before the Foreigners Tribunal, Jorhat to Foreigners Tribunal, Hatsingimari, South Salmara Mankachar.

7.6. It has been submitted by the learned counsel for the petitioner that in the decision relied on by the State Government in ***Shariful Islam @ Soriful Islam and Anr. Vs. the Union of India and Ors***. and connected batch of writ petitions [**WP(C) No.2780/2019,** decided on 07.06.2019**]**, the earlier decision rendered by

this Court in ***Ashadur Islam*** (supra) which was decided on 17.08.2018 was not brought to the notice of this Court, and as such, the said subsequent decision in ***Shariful Islam*** (supra) may not have any binding precedent, more so, in view of the decision of the Hon'ble Supreme Court in ***Mainul Hoque Vs. The Union of India and Ors.*** [Civil Appeal No.1339/2019 arising out of SLP(C) No.12467/2018, decided on 29.01.2019] which allowed transfer of a proceeding from one Tribunal to another Tribunal.

7.7. Mr. Ahmed, learned counsel for the petitioner submits that it is also acknowledged by the State that the Foreigners Tribunal is a quasi-judicial body which exercises power following the principles laid down in the Code of Civil Procedure and as such, there is no reason why the principle contained under Section 24 of the CPC cannot be applicable to a Foreigners Tribunal.

8. WP(C) 4279/2022

8.1. In this petition, the petitioner has prayed for transfer of the proceeding of F.T. Case No.F.T/SVR/110/10 from the Foreigners Tribunal, Jorhat to any other competent Foreigners Tribunal located in the district of Morigaon under whose jurisdiction the petitioner is presently residing.

8.2. It has been submitted that the petitioner is a permanent resident of village Phalihamari Habi under Mayang Police Station in the district of Morigoan.

8.3. It is the case of the petitioner that in the year 2004, he went to Nazira for work

in a brick field and had stayed there in a rented place along with other co-workers on being accommodated by his contractor. While he was residing temporarily at Nazira for his work as mentioned above, an enquiry was made against him as his citizenship was suspected.

8.4. During the enquiry, the petitioner gave his statement to the effect that he is a permanent resident of Morigaon district, however, he had been staying in Nazira for earning his livelihood. Unfortunately, the authorities proceeded against him before the Foreigners Tribunal, Jorhat under whose jurisdiction he was earlier working.

8.5. It has been submitted that the petitioner had left his work at Nazira and is now residing in his permanent residence in the district of Morigaon and as such, it has be submitted that the aforesaid proceeding FT Case No.F.T/SVR/110/2010 which was initiated before the Foreigners Tribunal, Jorhat may be transferred to a competent Foreigners Tribunal located in Morigaon district.

8.6. Similar plea has been taken as in the case of WP(C) No.1296 of 2022 and WP(C) No.1614 of 2022 as referred to above for transfer of the proceeding before the Foreigners Tribunal.

9. WP(C) 4282/2022

9.1. In this petition, the petitioner has prayed for transfer of the proceeding of the F.T. Case No. F.T/SVR/111/10 from the Foreigners Tribunal, Jorhat to any other competent Foreigners Tribunal located in the district of Morigaon under whose

jurisdiction the petitioner is presently a resident.

9.2. It has been submitted that the petitioner is a permanent resident of village Phalimari Habi under the Mayang Police Station in the district of Morigoan.

9.3. It is the case of the petitioner that in the year 2004, he went to Nazira for work as a labour in a brick field and stayed there in the brickfield for some days along with other co-labourers on being accommodated by his contractor. While he was residing temporarily at Nazira for his work as mentioned above, there was an enquiry made against him as his citizenship was suspected.

9.4. His case and pleas taken are similar to the WP(C) No.1296 of 2022 and WP(C) No.4279 of 2022 discussed above.

9.5. The learned counsel for the petitioner also submits that the petitioner belongs to the poorer section of the society who has to go around looking for employment opportunities. If he has to attend the proceeding at Jorhat just because the investigation was conducted at Nazira though he is a permanent resident of Morigaon District, it would put him into serious inconveniences inasmuch as his documents and witnesses who would support his case that he is an Indian are all issued in/located in Morigaon District.

9.6. The learned counsel for the petitioner submits that Section 9 of the Foreigners Act, 1955, casts an onerous burden on a proceedee to discharge his burden that he is not a foreigner but an Indian and if the proceedee is made to travel far distances to

examine the local witnesses along with him, serious inconvenience and prejudice would be caused to the proceedee and as such, in the interest of justice, the petitioner may be allowed to face the proceeding in his own district in Morigaon and not in Jorhat.

9.7. In this connection, the learned counsel for the petitioner has relied on the decision of the Hon'ble Supreme Court in ***Kulwinder Kaur @ Kulwinder Gurcharan Singh Vs. Kandi Friends Education Trust and Ors. (2008) 3 SCC 659***, which dealt with similar situations, which includes inconvenience to the parties, to warrant transfer of a suit or appeal or other proceedings.

9.8. It has been submitted that the Hon'ble Supreme Court in ***Abdul Kuddus Vs. Union of India, (2019) 6 SCC 604*** held that the proceeding before the Foreigners Tribunal is a quasi-judicial one and as such, the principle of *res judicata* will be applicable in the cases before the Foreigners Tribunal. If that is so, there is no reason why the principles laid down in the Code of Civil Procedure for transfer of proceeding pending before the Foreigners Tribunal cannot be allowed if sufficient grounds exist for doing so.

ANALYSIS :

10. As evident from above, one of the common issues which runs through these petitions is that of a plea for transfer of the proceedings pending before the Foreigners Tribunal where the proceeding was initiated or where the reference was made to another Foreigners Tribunal where or within whose jurisdiction the proceedee

ordinarily or permanently resides.

11. A common plea taken in these petitions is that though the proceedees are permanent residents of the districts mentioned in their respective petitions, they had gone out and were temporarily staying in places in some other districts for earning their livelihood and while staying in such places in other districts, enquiries were held against them on suspicion of being a foreigner, and accordingly, references were made against them and proceedings were initiated before the Foreigners Tribunal within whose jurisdiction they were temporarily residing for gainful employment.

12. It is the common plea of the proceedees that since they are permanent residents of another district and not in the districts where the proceedings were initiated, and since they have to prove their citizenship which would necessarily involve producing relevant documents which are to be obtained primarily from the districts where they permanently reside, and also would require examination of witnesses including their relatives and neighbours who are residing in the place of their permanent residence, which are far away, it will not only be highly inconvenient, but will also cause serious hardships in trying to arrange producing documents and examination of witnesses before the Foreigners Tribunal located in a far away district.

13. Under the circumstances, it has been pleaded that if the proceedings are transferred to the Foreigners Tribunals of the districts where they are permanent residents or where they are ordinarily residents, it would not only be in the interest of the proceedees but also prevent great hardships.

It has been submitted that in any event since they are permanent residents of their respective districts, and their citizenship has been questioned, it can be said that part of the cause of action also arises in their original districts of which they are permanent residents, which would endow jurisdiction to the Foreigners Tribunals located in the districts.

14. In short, the plea of the petitioners is that since they are not permanent residents of the districts where the proceedings are pending, and these proceedings had been initiated purely because they happened to be there temporarily for gainful employment, these proceedings may be transferred to the Foreigners Tribunals located in their respective districts of which they are permanent residents, so as to enable them to effectively contest the proceedings for the purpose of establishment of their citizenship.

15. In support of their pleas, the learned counsel for the petitioners have relied on the following decisions,

1. ***Anita Kushwaha Vs. Pushap Sudan***, (2016) 8 SCC 509 [Transfer Petition (C) No.1343 of 2008 and other batch of petitions, decided on19.07.2016
2. ***Mainul Haque Vs. Union of India and Ors***., Civil Appeal No.1339 of 2019 arising out of Special Leave Appeal (C) No.(s) 1246/2018 [decided on 29.01.2019].
3. ***Haidar Ali Vs. Union of India***, (2021) AIR (Gauhati) 91 : (2021) 3 GauLT 85. [WP(C) No.30.03.2021]

4. ***State of Assam and Ors. Vs. Moslem Mondal and Ors***., 2013 (1) GLT 809.
5. ***Ashadur Islam Vs. The Union of India and Ors***., [WP(C) No.3644/2018, decided on 17.07.2018].
6. ***Kulwinder Kaur @ Kulwinder Gurcharan Singh Vs. Kandi Friends Education Trust and Others***, (2008) 3 SCC 659.
7. ***Abdul Kuddus Vs. Union of India and Ors***., (2019) 6 SCC 604.
8. ***Carona Ltd. Vs.Parvathy Swaminathan & Sons***, (2007) 8 SCC 559.

16. On the other hand, it has been submitted by Mr. Payeng, learned Special Counsel, Foreigners Tribunal that the issue of permissibility of the transfer of the proceedings of Foreigners Tribunals has been already considered by this Court in a number of cases and such prayers have been rejected by this Court.

17. Mr. Payeng submits that the matter has been already specifically decided by a Division Bench of this Court in ***Shariful Islam*** (supra), and as such, there is no scope for re-opening these issues now again and hence, the present petitions may be dismissed.

18. Since the learned counsel for the State has submitted that the matter relating to transfer of proceedings from one Tribunal to another has been already considered by this Court and rejected, we will consider the submission advanced by the learned counsel for the petitioners keeping the aforesaid submission of the State counsel in mind.

19. We would therefore, like to examine the said decision in ***Shariful Islam***

(supra) referred to by the learned counsel for the State therein regarding transfer of proceedings.

In ***Shariful Islam*** (supra), as can be seen from the judgment dated 07.06.2019, the learned Division Bench observed in the very beginning of the judgment that "*the common thread in the present bunch of writ petitions is on the question as to whether a proceeding before one Foreigners' Tribunal can be transferred to another Foreigners' Tribunal in exercise of powers under Article 226 of the Constitution of India*."

20. It also appears that similar plea was taken by the petitioners in those writ petitions as taken in these petitions as evident from para 2 of the judgment which records that "*the factual aspects for seeking transfer are basically that the proceedings pending before the Tribunals, which are located far away from the permanent place of residence of the petitioners, if allowed to continue or not transferred to their home district or home town, prejudice would be caused as the same creates physical and financial inconvenience to the proceedees to contest the reference cases by presenting witnesses for examination, who are various authorities and persons hailing from the native place, towards discharging their burden as not being foreigners, as required of them under section 9 of the Foreigners Act, 1946."*

21. The learned Division Bench of this Court in the said case ***Shariful Islam*** (supra) also considered the submission advanced therein that *access to justice being a basic and inalienable human right and facet of right to life guaranteed under Article 21*

of the Constitution of India, the Tribunal dealing with the citizenship status of the petitioners must be reasonably accessible in terms of distance and the petitioners' access to the adjudicatory process must be affordable.

The learned Division Bench also considered the decisions relied on by the petitioners therein, in the case of ***Anita Kushwaha*** (supra) that the nature of the proceedings before the Foreigners Tribunal which is akin to Courts of Executive Magistrate whose proceedings can be transferred, and also that the provisions of Section 24 of the Code of Civil Procedure, 1908 [CPC, in short] cannot create any embargo in the transfer of a proceeding from one Foreigners Tribunal to another.

The learned Division Bench also considered the plea raised that transfer of proceeding will not prejudice the State, but would rather act to the disadvantage of the proceedee and their witnesses, if not allowed.

The learned Division Bench also considered the submission that in any event, the power to transfer a proceeding from one Tribunal to another is available under Article 226 of the Constitution of India.

22. While considering these pleas, the learned Division Bench considered the various aspects of the Citizenship Act, 1955 (in short "Act of 1955), the Citizenship Rules, 2009 (in short "the Rules of 2009), the Foreigners Act, 1946 (in short "Act of 1946) , the Foreigners (Tribunals) Order, 1964 (in short "1946 Order) and law laid down by the Supreme Court in this regard.

23. The learned Division Bench thereafter dealt with the decision of the Honb'ble Supreme Court in ***Arun Kumar and Others Vs. Union of India and Ors.***, reported in ***(2007) 1 SCC 732*** as well as in ***Carona Ltd. Vs. Parvathy Swaminathan and Sons***, reported in ***(2007) 8 SCC 559*** wherein it had 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. The learned Division Bench further observed that if the jurisdictional does not exist, a Court, Tribunal or authority cannot act, by holding that a Court or a Tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter, the underlying principle being 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. Thus, it was held that existence of jurisdictional fact is *sina qua non* or a condition precedent for the exercise of power by a Court of limited jurisdiction.

24. The learned Division Bench then went to examine the proceeding before a Foreigner Tribunal and observed that the jurisdiction fact is a reference made by the concerned jurisdictional registering authority seeking an opinion. Therefore, the question is, when a Foreigners Tribunal is given to decide the 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.

25. To answer to the aforesaid questions framed by the learned Division Bench, it went on to observe that powers exercisable by a Foreigners Tribunal are specifically laid down under Para 4 of the 1964 Order.

Referring to Para 4 of the 1964 Order, which confers to the Tribunal the power 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; and (e) issuing a warrant of arrest against the proceedee if he or she fails to appear before it, the Division Bench observed that the 1964 Order does not vest the Foreigners Tribunal with the power to entertain any plea for transfer of proceeding before it to another Foreigners Tribunal.

26. The learned Division Bench observed as regards entertaining a transfer proceeding that the same is not permissible when the jurisdictional fact relates to a different district, and such jurisdictional fact is not found to exist in the transferred Tribunal by observing 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. Thus, the finding of a

Court or a Tribunal becomes irrelevant, unenforceable, inexecutable once the forum is found to have no jurisdiction and if the Court or a Tribunal lacks jurisdiction, acquiescence of party should not be permitted to perpetrate and perpetuate defeating of the legislative animation as observed in the case of ***Jamittar Sain Bhagat and Others Vs***. ***Director, Health Services, Haryana and Others***, reported in ***(2013) 10 SCC 136***.

27. The learned Division Bench also referred to the provisions of Section 24 of the CPC, which deals with the power of transfer of suit, appeal or other proceeding before the High Court or the District Court to any Court subordinate to it for trial or disposal or withdrawal of any suit, appeal or other proceeding pending in any Court subordinate to it to try or dispose of the same, but held that the nature of proceeding before the Foreigners Tribunal is not akin to a civil suit, but with limited power of the Code of Civil Procedure, 1908 or Cr.P.C. as provided under para 4 of 1964 Orders as mentioned above. It was also observed that though the opinion rendered by the Foreigners Tribunal is in the nature of *quasi judicial* order as held by the Supreme Court in ***Abdul Kuddus*** (supra), the Foreigners Tribunal rendering such opinion on a reference made by the jurisdictional Superintendent of Police is certainly not a Court and as such, the principles governing CPC will not be applicable in respect of transfer of proceeding before a Foreigners Tribunal.

28. In support of its view, the learned Division Bench relied on the decision of this Court in ***Mamoni Rajkumari Vs. State of Assam***, reported in ***2017 (5) GLT 886***

wherein it was held that the post of a member of a Foreigners Tribunal is not a post under the Assam Judicial Service Rules, 2003 and as such, the High Court has no control as understood in terms of the Article 235 of the Constitution of India.

29. The learned Division Bench also went on to observe that para 3A(3) of the 1964 Order provides that the Foreigners Tribunal shall have the powers to regulate its own procedure for disposal of the cases with limited powers of civil courts as provided under para 4 of 1964 Order.

30. The learned Division Bench also noted that in case of a Civil Court, it cannot make a departure from the procedure prescribed under the CPC, unlike the Foreigners Tribunal which can regulate its own procedure. Therefore, it is very clear that as the Member of the Foreigners Tribunal is not a Judicial Officer of subordinate courts within the meaning of Article 235 of the Constitution of India, and since the Foreigners Tribunal renders its opinion which is *quasi judicial* in nature, with limited powers of Civil Courts, the provisions of Section 24 of the CPC cannot be attracted.

31. The learned Division Bench also considered the submissions advanced on behalf of the petitioners that the decision of the Supreme Court in ***Civil Appeal No.1339/2019*** [arising out of ***SLP(C) No.12467 of 2018***] [***Mainul Hoque Vs. Union of India & Ors.***, herein referred to as ***Mainul Hoque*** (***SC***)] is binding on this High Court as provided under Article 141 of the Constitution of India.

The Hon'ble Supreme Court in the aforesaid Civil Appeal No.13339/2019 set aside the decision of this Court rendered in ***Mainul Hoque Vs. Union of India and***

Others, [2018(1) GLT 777] on 12.01.2016 wherein this Court had declined to entertain the plea for transfer. The Supreme Court by taking into consideration the pleadings, in particular, the counter affidavit filed by the State of Assam, transferred the pending proceedings before the Foreigners Tribunal No.2, Kamrup (Metro) at Hedayatpur, Guwahati to the Foreigners Tribunal at Karimganj.

32. In ***Shariful Islam*** (supra), the learned Division Bench of this Court held that what is binding is the ratio of the decisions and not any findings of fact and a decision which is not expressed and is not founded on reasons, nor is proceeded on consideration of issue, cannot be deemed to be a law declared to have binding effect as contemplated under Article 141 and held that the aforesaid decision of the Supreme Court in ***Mainul Hoque (SC)*** is not binding on the High Court as it is not founded on reasons.

33. The learned Division Bench in ***Shariful Islam*** (supra) further observed that the powers of Supreme Court of India under Article 142 of the Constitution of India is exclusive to it and not available to a High Court under its plenary jurisdiction and the directions issued under Article 142 of the Constitution of India do not constitute a binding precedent unlike Article 141 of the Constitution of India.

34. The learned Division Bench also held that in ***Anita Khushwaha*** (supra), the Supreme Court was examining whether it 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,* and that power was exercised by the Supreme Court under

Article 142 of the Constitution of India.

35. Referring to the plea taken that access to justice is a fundamental right guaranteed under Article 21 of the Constitution of India and by continuing a proceeding far-away place from the district which would impede access to justice, in ***Shariful Islam*** (supra) the learned Division Bench of this Court observed in a case of inconvenience, both physical and financial, faced by the parties and witnesses to travel distance to contest the reference case, in individual and appropriate case, the 1964 Order itself provides the balm by vesting with the Foreigners Tribunal the power to entertain prayer of examination of witnesses and for production of documents by issuing Commissions.

36. Further, the learned Division Bench of this Court observed in ***Shariful Islam*** (supra) that as far as to exercise the powers under Article 226 of the Constitution of India is concerned, in absence of any enabling provision derived from any statute, and since the existence of jurisdictional fact being *sina qua non* for assumption of jurisdiction by a Tribunal, and as Section 24 of the CPC is not applicable in relation to a proceeding before the Foreigners Tribunal, and in view of lack of any such equivalent power of the High Court as conferred to the Supreme Court under Article 142 of the Constitution of India, the High Court cannot entertain the prayer of transfer of proceedings of the Foreigners Tribunal and accordingly, dismissed the petitions.

37. The present bunch of petitions in which similar relief have been sought for, ordinarily ought to be decided on the basis of the decision of this Court in ***Shariful***

Islam (supra) and accordingly dismiss these petitions.

38. However, because of certain reasons which will be discussed hereinafter, we are unable to subscribe to the view taken by the learned Division Bench of this Court in ***Shariful Islam*** (supra), and accordingly, in order to maintain judicial propriety and decorum we deem it appropriate to refer the matters to a Larger Bench of this Court to decide the issue as to whether a proceeding before the Foreigners Tribunal can be transferred to another Foreigner Tribunal and if so, under what circumstances.

REASONS FOR REFERERING TO A LARGER BENCH :

39. One of the reasons the learned Division Bench of this Court in ***Shariful Islam*** (supra) declined the plea for transfer a proceeding from one Foreigners Tribunal to another Foreigners Tribunal was that the Foreigners Tribunal gets the jurisdiction to render its opinion upon a reference made by the Superintendent of Police. Consequently, only such Foreigners Tribunal to which a reference has been made by the jurisdictional Superintendent of Police will have the jurisdiction to proceed with the matter. As a corollary, any other Foreigners Tribunal to which no such reference is made by the jurisdictional Superintendent of Police cannot have any jurisdiction to proceed with the proceeding and accordingly, it would be impermissible to confer jurisdiction to a Foreigners Tribunal which it does not possess if transfer petition is allowed, inasmuch as, by transferring a proceeding pending before a Foreigners Tribunal which has jurisdiction to do so on the basis of reference made to it by jurisdictional Superintendent of Police which, will then be dealt with by another

Foreigners Tribunal to which no such reference has been made by the jurisdictional Superintendent of Police and accordingly, does not have the jurisdiction to decide to reference.

According to the learned Division Bench in ***Shariful Islam*** (supra) in the case of a Foreigners Tribunal, the jurisdictional fact is the reference made by the concerned jurisdictional registering authority seeking an opinion, as observed in para 8 of the judgment, which is reproduced hereinbelow:

> "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 proceedee to appear before it in person; and (e) issuing a warrant of arrest against the proceedee

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, inexecutable 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 vs. Director, Health Services, Haryana and Others,* reported in *(2013) 10 SCC 136*."

[emphasis added]

40. According to the learned Division Bench in ***Shariful Islam*** (supra), the High Court in exercise of powers under Article 226 of the Constitution, certainly, cannot confer such jurisdiction to the Foreigners Tribunal.

41. While there cannot be any denying the fact that a Foreigners Tribunal to which a reference is made by the jurisdictional Superintendent of Police will have the jurisdiction to make an opinion, such a situation, in our view, perhaps may not be relevant, when the High Court is considering a plea for transfer of the proceeding from one Foreigners Tribunal to another Foreigners Tribunal. The proceedees in this bunch of petitions are not questioning the competency or jurisdictional authority of the

Tribunal, but are seeking for transfer of the proceedings to another Foreigners Tribunal on the grounds discussed above.

42. In our opinion, as regards transfer of a proceeding from one Court or Tribunal to another Court or Tribunal, the transferee Court, so long as it has legal competency to try such a proceeding, it can be effected.

43. It is for this reason, we find in both the Code of Civil Procedure (CPC) dealing with civil suits, and the Code of Criminal Procedure (Cr.P.C.) dealing with criminal enquiry or trial, the High Court has been empowered to transfer a case on certain conditions from one court to another court.

44. As far as provisions under CPC is concerned, the same is provided under Section 24 of the CPC where High Court or the District Court has been empowered to transfer any suit, appeal or a proceeding pending before it for disposal to any Court subordinate to it and *competent* to try or dispose the same, as well as withdraw any suit, appeal or proceeding pending in a Court subordinate, to try and dispose of the same, or transfer for trial and disposal to any Court subordinate to it and *competent* to try or dispose of the same.

45. One of the grounds available for transfer is the convenience of the parties, which is to prevent inconvenience or hardships to a party unless it does not cause undue prejudice to other party. It is also important to note that a transferee Court or Tribunal should be also *competent* to try such a case.

46. The cardinal principle for exercise of power under Section 24 of CPC is the convenience and inconvenience of the parties and the question of expediency would depend on facts and circumstance of each case, but the paramount consideration for exercise of such power must be to meet the ends of justice.

47. This Court in ***Rosalind Margaret Baksh Vs. District Judge, Golaghat, 2004 SCC OnLine Gau 268 : 2005 (1) GLR 394***, had observed that the inconvenience or difficulty contemplated under Section 24 of CPC, for transfer of a case, should be of nature which may lead to injustice, if the party is asked to continue the trial at a place, where it has been initiated or when the court comes to the conclusion that suit has been filed in a particular court for causing injustice. It was further observed that as a general rule, courts should not transfer the matter unless expenses and the difficulties would lead to the injustice, and in the matter of transfer of the case from one court to another, the main consideration is failure of justice and therefore, a case has to be made out that the party has a reasonable apprehension that justice will be denied to him.

48. Similarly, the High Courts exercise a power of transfer of criminal case or trial as provided under Section 407 of Cr.P.C. It has been provided thereunder that whenever it is made to appear to the High Court,

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or expedient for the ends of justice,

it may order-

(i) that any offence be inquired into or tried by any Court not qualified under Section 177 to 185 (both inclusive), but in other respects *competent* to inquire into or try such offence.

(ii) that any particular case or appeal, or class or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of *equal* or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

49. Thus, from the above what is clear is that under the CPC or in the Cr.P.C., for the purpose of transfer of a case, territorial jurisdiction of the Court to try is not relevant, so long as the transferee court has *competency* to try the case. In other words, "competency" is the fundamental requirement which the transferee court must have, to try the case.

50. Therefore, in our view, insisting upon the territorial jurisdiction of a Foreigners Tribunal while considering of transfer of a proceeding, perhaps, does not appear to be

the correct view.

51. We would like to observe that once the citizenship of a person has been doubted by the competent authority in a particular place, irrespective of where he goes in the entire State of Assam, he will continue to be a doubtful citizen. Though it has been provided that the competent authority where he was detected to be a foreigner, has to refer the case to the concerned jurisdictional Foreigners Tribunal, it does not necessarily mean that the Foreigners Tribunal in other parts of the districts of Assam will not have jurisdiction to continue the proceeding inasmuch, as the issue as to whether a particular proceedee is a foreigner or not can be decided by any of the Foreigners Tribunals constituted and functioning in the State of Assam under the Foreigners (Tribunals) Order, 1964. All the Foreigners Tribunals constituted and functioning in the State of Assam would have jurisdiction to deal with the doubtful citizenship of any person in Assam.

52. The Notification dated 19.04.1958 and 17.02.1976 issued by the Government of India to which a reference has been made by the learned Division Bench in ***Shariful Islam*** (supra) by which powers have been delegated to the Superintendents of Police and Deputy Commissioners (In-charge of Police) to make reference to the Foreigners Tribunals within their respective jurisdiction under Para 1(1) of 1964 Order to seek opinion as to whether the proceedee is a foreigner or not within the meaning of the Foreigners Act of 1946, whereupon the Foreigners Tribunal acquires jurisdiction, essentially relates to territorial jurisdiction of the competent Foreigners Tribunal.

53. However, it does not necessarily mean that "jurisdictional facts", as discussed by the learned Division Bench, is linked only with the territoriality of the jurisdiction of the Tribunal.

54. In our opinion, it is important to understand what are "jurisdictional facts" *qua* a Foreigners Tribunal functioning in the State of Assam.

In order to understand this, we may have to refer to certain provisions of the following statutes, namely,

(i) Section 6A of Citizenship Act, 1955.

(ii) The Foreigners (Tribunals) Order, 1964.

(iii) The Foreigners Act, 1946.

(iv) Part IV of the Citizenship Rules, 2009.

55. Section 6A of Citizenship Act, 1955 relates to special provisions regarding citizenship of persons covered by Assam Accord. It contemplates two categories of persons who enter Assam, whose citizenship will depend on the dates of entry and other conditions mentioned therein.

Sub-Section (2) of Section 6A of the Citizenship Act, 1955 deals with those persons of Indian origin who came to Assam from the specified territory, [which means territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985] before the 1st January, 1966 and who have been ordinarily residents in Assam, since the dates of their entry into Assam shall be deemed to be citizen of India as from the 1st day of January, 1966.

Section 6A(2) reads as follows:

"**6A. Special provisions as to citizenship of persons covered by the Assam Accord.—**

.....

(2) Subject to the provisions of sub-sections (6) and (7), all persons of Indian origin who came before the 1st 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 1st day of January, 1966."

From the above Sub-Section (2) of Section 6A of the Citizenship Act, 1955, it is clear that even if a person, a foreigner, happens to come from the Specified Territory before 01.01.1966 and had been ordinarily residing in Assam since the date of entry, shall be treated to be a citizen of India.

56. There is another category of persons of Indian origin, who- (a) entered Assam on or after the 1st day of January, 1966 but before the 25th day of March, 1971 from the specified territory; and (b) has, since the date of entry into Assam, been ordinarily resident of Assam; and (c) has been detected to be a foreigner; shall be entitled to register himself with such competent authority, as provided under Sub-Section (3) of Section 6A.

Section 6A(3) reads as follows:

"**6A. ……**

.....

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

(a) came to Assam on or after the 1st day of January, 1966 but before the 25th day of March, 1971 from the specified territory; and

(b) has, since the date of 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 with such authority (thereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll for any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom.

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

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

(ii) if such opinion does not contain a finding with respect to such other requirement, refer the question to a Tribunal constituted under the said Order hang 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."

57. Sub-Section (4) of Section 6A of the Citizenship Act, 1955 provides that such person who is covered by Sub-Section (3) of Section 6A, who gets registered shall enjoy some rights and obligation as a citizen of India but shall not be entitled to have his name included in any electoral roll for any Assembly or Parliamentary Constituency at any time for 10(ten) years.

However, as provided under Sub-Section (5) of Section 6A such persons shall be deemed to be citizen of India for all purposes on expiry of 10(ten) years period of registration from the date on which he has been detected to be a foreigner.

Sections 6A(4) and 6A(5) read as follows:

"6A. .....

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

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

58. Thus, from the above, it is evident that the category of persons who entered Assam from the specified territory between 01.01.1966 and 25.03.1971 and have been detected to be foreigners, if register themselves with the competent authority, shall for all practical purposes, be deemed to be Indian citizens except for a period of 10(ten) years when they shall not have any right to cast vote.

59. The Citizenship Act, 1955 does not mention as to what will happen to the category of persons who are found to have entered Assam after 25.03.1971. For this category of persons, the law will take its own course in terms of provisions of the Foreigners Act, 1946 and such persons will be liable to be detained and deported.

60. As regards the aforesaid category of persons covered by Sub-Section (3) of Section 6A who have been detected to be foreigners and who seek registration under Sub-Section 6A(4) of the Citizenship Act, 1955, the opinion of a Tribunal constituted under the Foreigners (Tribunals) Order, 1964 shall be deemed to be sufficient proof of the requirements under clause (c) of Sub-Section (3) of Section 6A of the Citizenship Act, 1955 as provided under *Explanation* to Sub-Section (3) of Section 6A of Citizenship Act, 1955.

61. Thus, the role and jurisdiction of the Foreigners Tribunal has to be examined in the

context of Sub-Section (3) of Section 6A of the Citizenship Act, 1955.

62. How the Foreigners Tribunals are constituted is to be found under the Foreigners (Tribunals) Order, 1964.

Though Order 1(2) of the Foreigners Tribunal Order 1964 provides that this order shall apply to the whole of India except the State of Assam, yet, in view of the specific provision under Section 6A of the Citizenship Act, 1955, we will refer to the provisions of the Foreigners (Tribunal) Order 1964.

Order 2(1) of the Foreigners Tribunals Order, 1964 provides that the Central Government may refer the question as to whether a person is or is not a foreigner within the meaning of Foreigners Act, 1946 to a Tribunal to be constituted for the purpose of its opinion.

63. As to who is a foreigner within the meaning of Foreigners Act, 1946 has been defined under Section 2(a) of the Foreigners Act, 1946 which defines as a person who is not a citizen of India to be a foreigner.

64. Part IV of the Citizenship Rules, 2009 deals with citizenship of India for persons covered by Assam Accord with reference to Section 6A of the Citizenship Act, 1955.

Rule 19 of the Citizenship Rules, 2009 provides that an application for registration shall be made by the person to the registering authority for the district in which such a person is ordinarily a resident within a period of 30(thirty) days from the date of receipt of order of the Foreigners Tribunal declaring such a person as a foreigner.

Rule 20 of the Citizenship Rules, 2009 provides that where, in case of a person seeking registration under Sub-Section (3) of Section 6A, any question arises as to whether such person fulfills any requirement contained in Sub-Section of Section 6A of the Citizenship Act,

1955 or the opinion of the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 in relation to such person does not contain a finding with respect of any requirement contained in the said Sub-Section other than the question that he is a foreigner, then the registering authority shall make a fresh reference to the Tribunal in this regard.

Rule 21 of the Citizenship Rules, 2009 deals with the jurisdiction of Tribunal by stating that the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 having jurisdiction over a district or part thereof in the State of Assam shall have jurisdiction to decide reference received from the registering authority of that district or part thereof in relation to the references made under Sub-Section (3) of Section 6A of the Citizenship Act, 1955.

It may be mentioned, as provided under Rule 21 of the Citizenship Rules, 2009, that the jurisdiction of the Tribunal has been defined with reference to the district to decide the reference received from the registering authority of the particular district. This Rule 21 obviously deals with the territorial jurisdiction of the Tribunal. It does not indicate what would be the "jurisdictional facts".

65. Thus, keeping the aforesaid provisions in mind, we can determine what would be the "jurisdictional facts" as far as the Foreigners Tribunals are concerned.

66. Keeping the aforesaid provisions of law, in our opinion, the "jurisdictional facts" with reference to the Foreigners Tribunal would be that a person must be alleged to have come from the specified territory during the period from 01.01.1966 and 25.03.1971, and that they have been staying in the State of Assam without proper and valid documents.

It is in respect of these persons that a reference will be made to the Tribunals, which will give the opinion whether they entered during that period and thereafter stayed in Assam,

or not.

Such person may be located anywhere in any part or any district of Assam and he may keep shifting from one district to another district either by way of change of residence or to earn his livelihood or for any matter. Yet, if a person is charged of entering Assam illegally during the aforesaid period, and his citizen is doubted, such doubtful status of the person will not change with the change of district. Such doubtfulness of his citizenship will not be district specific but will be time specific.

As provided under Sub-Section (3) of Section 6A of the Citizenship Act, 1955 only when the competent authority finds that a person of Indian origin has entered Assam during the aforesaid period without any valid authority, then a reference can be made to a Foreigners Tribunal constituted under the Foreigners (Tribunals) Order, 1964, to decide the status of his citizenship as clearly mentioned in the *Explanation* to Sub-Section (3) of Section 6A of the Citizenship Act, 1955. *Explanation* to Section 6A(3) is not concerned so much with the territorial location of the Foreigners Tribunal nor with the territorial location of the suspected foreigner but about the person who came to Assam during the aforesaid period, regarding which the Tribunal has to give the opinion.

67. Therefore, in our opinion, the "jurisdictional facts" relating to a Foreigners Tribunal would be, as to (i) whether a person of Indian origin come to Assam on or after 01.01.1966 but before 25.03.1971 from the specified territory, and (ii) whether since his entry into Assam has been ordinarily a resident of Assam or not, and (iii) whether he has been detected to be a foreigner, for which the opinion of the Tribunal will be the deciding factor.

Therefore, we respectfully disagree with the view expressed by the learned Division

Bench in ***Shariful Islam*** (supra) in para 8 thereof, that the "jurisdictional fact" in respect of the Foreigners Tribunal is the reference made by the concerned jurisdictional registering authority seeking an opinion. It is merely part of the process of the detection of a foreigner, but not the jurisdictional fact.

68. In our opinion, the learned Division Bench has mixed up the "jurisdictional fact" with the "territorial jurisdiction" of a forum/Tribunal.

There may be as many as 10(ten) different kinds of jurisdictions relating to a court or Tribunal, which are as follows:

(i) Territorial Jurisdiction,

(ii) Pecuniary Jurisdiction,

(iii) Subject matter Jurisdiction,

(iv) Exclusive Jurisdiction,

(v) Concurrent Jurisdiction,

(vi) Appellate Jurisdiction,

(vii) Original Jurisdiction,

(viii) Special Jurisdiction,

(ix) Legal Jurisdiction,

(x) Extending Jurisdiction.

In all these jurisdictions, however, "jurisdiction fact" must be present before the Court/Tribunal can exercise its jurisdiction. Yet, "Jurisdictional fact" must not be equated with

any of the above jurisdictional matters. In other words, "jurisdictional fact" is the foundation for any kind of jurisdiction of the court or Tribunal.

The same has been succinctly explained by the Hon'ble Supreme Court in ***Carona Ltd. (***supra) in the following words.

> "***JURISDICTIONAL FACT***
>
> **26**. The learned counsel for the appellant- Company submitted that the fact as to 'paid up share capital' of rupees one crore or more of a Company is a 'jurisdictional fact' and in absence of such fact, the Court has no jurisdiction to proceed on the basis that the Rent Act is not applicable. The learned counsel is right. The fact as to 'paid up share capital' of a Company can be said to be a 'preliminary' or 'jurisdictional fact' and said fact would confer jurisdiction on the Court to consider the question whether the provisions of the Rent Act were applicable. The question, however, is whether in the present case, the learned counsel for the appellant tenant is right in submitting that the 'jurisdictional fact' did not exist and the Rent Act was, therefore, applicable.
>
> **27**. Stated simply, the fact or facts upon which the jurisdiction of a Court, a Tribunal or an Authority depends can be said to be a 'jurisdictional fact'. If the jurisdictional fact exists, a Court, Tribunal or Authority has jurisdiction to decide other issues. If such fact does not exist, a Court, Tribunal or Authority cannot act. It is also well settled that a Court or a Tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. 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 posses.
>
> **28**. In *Halsbury's Laws of England, (4th Edn.), Vol.1, para 55, p.61*; Reissue, Vol.1(1), para 68, pp.114- 15, it has been stated:
>
> > "Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs,that state of affairs may be described as preliminary to, or collateral to the merits of the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive".
>
> The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a Court or Tribunal."

69. It has been further observed by the Hon'ble Supreme Court in ***Carona Ltd.*** (supra) that it may be difficult to distinguish between the "jurisdictional fact" and "adjudicatory fact", though there is a difference, as observed in para Nos.29, 30 and 31 of ***Carona Ltd.*** (supra),

which are reproduced hereinbelow,

"**JURISDICTIONAL FACT AND ADJUDICATORY FACT**

29. But there is distinction between 'jurisdictional fact' and 'adjudicatory fact' which cannot be ignored. An 'adjudicatory fact' is a 'fact in issue' and can be determined by a Court, Tribunal or Authority on 'merits', on the basis of evidence adduced by the parties. It is no doubt true that it is very difficult to distinguish 'jurisdictional fact' and 'fact in issue' or 'adjudicatory fact'. Nonetheless the difference between the two cannot be overlooked.

30. In *Halsbury's Laws of England* (4th Edn.), Vol.1, para 55, p.61; Reissue, Vol.1(1), para 68, pp.114- 15, it is stated:

> "There is often great difficulty in determining whether a matter is collateral to the merits or goes to the merits. The distinction may still be important; for an erroneous decision on the merits of the case will be unimpeachable unless an error of law is apparent on the face of the record of the determination or unless a right of appeal lies to a court in respect of the matter alleged to have been erroneously determined. An error of law or fact on an issue collateral to the merits may be impugned on an application for an order of certiorari to quash the decision or in any other appropriate form of proceedings, including indirect or collateral proceedings. Affidavit evidence is admissible on a disputed issue of jurisdictional fact, although the superior courts are reluctant to make an independent determination of an issue of fact on which there was a conflict of evidence before the inferior tribunal or which has been found by an inspector after a local inquiry".

31. *In R. v. Fulham Hammersmith and Kensington Rent Tribunal, ex P Philippe*[6], it was held that the question whether premium for renewal of tenancy was or was not paid was a jurisdictional fact and, therefore, was held to be a condition precedent for the lawful exercise of jurisdiction by a Rent Tribunal. In *Brittain v. Kinnaird*[7], however, the factum as to possession of a 'boat' with gunpowder on board was held to be a part of the offence charged and thus a finding of fact or adjudicatory fact. It was stated:

6: (1950) 2 All ER 211(DC)

7: (1819) 1 B&B 432 : (1814-23) All ER Rep 593

"*The logical basis for discriminating between these cases and other falling on opposite sides of the line, is not easily discernible*".

(emphasis supplied)

70. In the same way, we may not confuse the "jurisdiction fact" with the "territorial jurisdiction", and if these two are mixed up, which appears to have been done in the case of ***Shariful Islam*** (supra), the problem will arise.

If we delink "territorial jurisdiction" from "jurisdictional fact", there can be no difficulty for directing transfer of a proceeding from one Foreigners Tribunal to another Foreigners Tribunal. Each and every Foreigners Tribunal constituted and operating in the State of Assam under the Foreigners (Tribunals) Order, 1964 has the competency and jurisdiction to decide this issue as to whether a person is a foreigner within the meaning of Section 6A(3) of Citizenship Act, 1955 as discussed above.

71. If the proposition of the learned Division Bench in ***Shariful Islam*** (supra) is to be accepted, in that event, there can never be transfer of case from one Court to another Court unless a part of the cause of action arises in the transferee Court also. For transfer of a civil suit or criminal trial, it is not a *sina qua non* that the transferee Court should also have the territorial jurisdiction and cause of action may not have arisen in the territorial jurisdiction of such a Court, except that it must be also "competent" to try such case. If the transferee is competent is "competent", it then also possess the "jurisdictional facts". Without "jurisdictional facts", a court can be said to be competent to try such suit or case. There is no such condition precedent that

whenever a suit or a trial is sought to be transferred under CPC or Cr.P.C., the transferee Court must also have a territorial jurisdiction over it. The problem will arise when the "jurisdictional facts" get mixed with "territorial" jurisdiction. Therefore, we are not able to subscribe the view taken that only the original Foreigners Tribunal have the jurisdiction to decide any reference made against a person who is suspected to be a foreigner within the State of Assam and that only the original Foreigners Tribunal will have "jurisdictional facts" and not the transferee Tribunal. Any transferee Foreigners Tribunal would also have the same jurisdiction and competency to decide the issue as to whether a suspected person is a foreigner or not within the meaning of 1964 Order and Citizenship Act of 1955. There is no such provision under the 1964 Order and Citizenship Act, 1955 which debars consideration of a reference by a Foreigners Tribunal other than the Foreigners Tribunal in respect of a person against whom a reference has been made by a particular Superintendent of Police.

72. In our opinion, making a reference to a Foreigners Tribunal would activate a Foreigners Tribunal, yet, the jurisdiction of the Foreigners tribunal is already there even before the reference is made. Making a reference to a Tribunal merely activates the jurisdiction of the Tribunal. by The learned Division Bench in ***Shariful Islam*** (supra) has held that making a reference in respect of a person suspected of entering in the State of Assam during the aforesaid period as contemplated under Section 6A(3) of the Citizenship Act, 1955, is a "jurisdictional fact". We would like to go further by stating that the "jurisdictional fact" is not related to the "specific" act of reference by the referring authority of the "particular" district to a "particular" Foreigners Tribunal. In our view, "jurisdictional fact cannot be equated to the

process of making reference to a Tribunal. In our opinion, "particularity" of the referring authority and "particularity" of the Tribunal to which a reference is made, to which the learned Division Bench in ***Shariful Islam*** (supra) has laid much emphasis, fall within the realm of "territorial jurisdiction".

Therefore, in our opinion, making of a reference to a Tribunal by a "particular" jurisdictional Superintendent of Police to a particular Tribunal having "territorial jurisdiction" cannot be said to be the "jurisdictional fact".

73. While there cannot be any dispute about the requirement of existence of "jurisdictional fact" before a Court can be said to have jurisdiction to decide any dispute, yet, by transferring a proceeding from one Foreigners Tribunal to another Foreigners Tribunal located in other district, it cannot be said that the "jurisdictional facts" cease to exist inasmuch as the Foreigners Tribunal located in another district also has the competency to decide the issue when the citizenship of a person is doubted, in spite of change in the territorial jurisdiction of the Foreigners Tribunal. In our view, transfer of the proceedings does not necessarily divest the transferee Tribunal the "jurisdictional fact". As discussed above, a person whose citizenship is doubted can be proceeded before any Tribunal in any part of the State within the scope of Section 6(A) of Citizenship Act, 1955. "Jurisdictional fact" *qua* a Foreigners Tribunal in our opinion is the allegation that the person concerned is an illegal migrant, a foreigner who entered India (Assam) without valid documents. It is only in respect of such a person of doubtful citizenship that a reference can be made to a Foreigners

Tribunal.

Merely because a proceeding may be transferred from one Foreigners Tribunal to another Foreigners Tribunal in another district, it does not lead to extinguishment of the "jurisdictional fact" of the original Court.

Furthermore, it is well settled principle of law that in case of any case, the transferee Court or forum must also be competent to decide the issue, be it a civil suit or a criminal trial.

74. We would also like to make the observation that if the "territorial jurisdiction" is not delinked, the provisions contemplated under Section 24 of the CPC as well as Section 407 of Cr.P.C. will become unworkable inasmuch as by transferring the case from one court to another court, it will be transferring a case to a transferee court, which does not have "territorial jurisdiction".

What the law contemplates is, unless the transferee court has the competency, and thus the legal jurisdiction, the High Court cannot direct transfer of case either under the Section 24 of CPC or Section 407 of the CPC. While transferring a case, the High Court does not endow new jurisdiction to the transferee court, inasmuch the transferee court is already a competent court to deal with such case.

However, if the aforesaid view of the learned Division Bench in ***Shariful Islam*** (supra) is considered to be correct, the provisions of Section 24 of CPC and Section 407 of Cr.P.C. will become unworkable inasmuch as the jurisdiction to a court can be conferred only by the legislature only, not by the court while directing transfer of a case.

75. From the provisions of Section 24 of CPC and 407 of Cr.P.C., what is clearly evident is that the High Court in directing transfer, does not endow jurisdiction to the transferee court to try the suit or appeal inasmuch as the transferee court is already competent to by such a case. Accordingly, there is no reason why similar power of the High Court should be denied when it relates to a transfer of proceeding from one Foreigners Tribunal to another Foreigners Tribunal if good grounds exist for directing transfer, for the reason that the Foreigners Tribunal located in another district is also a competent forum to give opinion as to whether a person is a foreigner or not.

76. Thus, in the matter relating to transfer of a proceeding from one Foreigners Tribunal to another, what is important is that the transferee Tribunal should have competency or legal jurisdiction to try such a proceeding and the territorial jurisdiction will not come in the way.

77. We are also not able to agree with the finding of the learned Division Bench in ***Shariful Islam*** (supra) that provision of Section 24 of the CPC cannot be made applicable to Foreigners Tribunal inasmuch as the Foreigners Tribunal is a *quasi judicial* body and the nature of the proceeding before the Foreigners Tribunal is not akin to a civil court or criminal trial as commonly understood. In our opinion, even if the Tribunal is not akin to civil or criminal court, yet, the principles underlying Section 24 of CPC can be applied in a proceeding before the Foreigners Tribunal.

78. The learned Division Bench also mentioned of the order passed by the Hon'ble Supreme Court in ***Abdul Kuddus*** (supra) that the opinion rendered by the Foreigners

Tribunal is in the nature of *quasi-judicial* order. The learned Division Bench, however, proceeded to hold that the Foreigners Tribunal renders such opinion on reference made by the jurisdictional Superintendent of Police is certainly not a Court and as such, the provisions or the principle governing under Section 24 CPC would not be attracted in respect of proceeding before the Foreigners Tribunal.

79. The learned Division Bench also referred to the decision of ***Mamoni Rajkumari*** (supra) in support of its view that the Member of the Foreigners Tribunal is not a Judicial Officer as contemplated under Article 235 of the Constitution of India and moreover, the Foreigners Tribunal has been endowed the power of the CPC under para 4 of the 1964 Order for limited purposes like (a) summoning and enforcing the attendance of any person and examining him or her an oath; (b) requiring the discovery and production of any documents; (c) issuing commissions for the examination of any witness; (d) directing the proceedee to appear before it in person; and (e) issuing a warrant of arrest against the proceedee if he or she fails to appear before it etc.

80. We are unable to agree with the aforesaid opinion in the teeth of the decision rendered by the Hon'ble Supreme Court in ***Abdul Kuddus*** (supra) wherein it has been clearly held that Foreigners Tribunal being a *quasi-judicial* body, the principle of *res judicata* will be applicable. Relying on the decision in ***Srimati Ujjambai Vs. State of Uttar Pradesh, (2004) AIR 62 SC 1621,*** the Hon'ble Supreme Court in ***Abdul Kuddus*** (supra) held that principle of *res judicata* is equally apply to *quasi-*

judicial bodies.

81. The principle of *res judicata* has been incorporated and condified under Section 11 of the CPC.

If we have to subscribe to the view of the learned Division Bench that the principles of the CPC are not applicable in a proceeding before the Foreigners Tribunal, obviously, *res judicata* which is specifically mentioned under Section 11 of the CPC cannot be also made applicable to it. However, it has been held by the Hon'ble Supreme Court in ***Abdul Kuddus*** (supra) that the same is applicable.

Therefore, we do not see any reason why the principles underlying Section 24 of CPC which deals with a very important aspect of the judicial proceedings cannot be applied to the Foreigners Tribunal, as in the case of *res-judicata* provided under Section 11 of the CPC.

82. We would like to mention that this Court has also specifically dealt with the issue relating to the principles governing the law of limitation. The Foreigners Tribunal has been given the power to review its orders, provided the application for review and to set aside an *ex-parte* order is filed within 30 (thirty) days as provided under 1964 Order. However, there is no specific provision for condoning the delay in making an application beyond 30(thirty) days. On refusal of the Foreigners Tribunal to entertain such an application beyond 30 (thirty) days on the ground that the Foreigners Tribunal does not have the power to condone any delay, the matter was placed before this Court in ***WP(C) No.1505/2020*** [***Abdul Salam Vs. the Union of India and Ors***.].

This Court in the said case of ***Abdul Salam*** (supra), [disposed of on 23.02.2021] held that though the provisions of Limitation Act may not be applicable in a proceeding before the Foreigners Tribunal, yet the principles underlying the provision of Section 5 of the Limitation Act can be made applicable where it advances the cause of justice and also by applying the principle of *ubi jus ibi remedium.*

83. Accordingly, we are of the view that even if the provisions of Section 24 of CPC may not be applicable in a proceeding before the Foreigners Tribunal, the principles underlying the same can be made applicable to a proceeding before a Foreigners Tribunal if it advances the cause of justice.

84. Referring to the decision Hon'ble Supreme Court in ***Mainul Hoque*** (supra), the learned Division Bench in ***Shariful Islam*** (supra) held that while the Supreme Court can pass such orders in exercise of power under Article 142 of the Constitution of India, this power is not available to the High Court, and such a decision of the Supreme Court rendered under Article 142 of the Constitution of India does not constitute any law. It has been further observed that the decision of the Hon'ble Supreme Court without giving reasons for it may not amount to declaration of law as contemplated under Article 141 of the Constitution of India.

85. Certainly, a decision of the Hon'ble Supreme Court which has not expressed any reason on consideration of an issue cannot be deemed to be law and cannot have binding effect as contemplated under Article 141 as held by the Supreme Court in ***Anita Kushwaha*** (supra), yet, it indicates that under certain situation, transfer of

proceeding from one Foreigners Tribunal to another Foreigners Tribunal can certainly be made.

It is, however, to be noted that the decision of this Court dated 12.01.2018 passed in ***WP(C) No.148/2018*** [***Mainul Hoque Vs. Union of India***, ***2018(1) GLT 777***] hereinafter referred to as ***Mainul Hoque (High Court)*** in which a detail speaking order was passed by this Court in rejecting the plea for transfer of a proceeding has been set aside by the Hon'ble Supreme Court in the aforesaid ***Civil Appeal No.1339/2019*** [***Mainul Hoque Vs. Union of India and Ors.***, herein referred to as **Mainul Hoque (SC)**].

86. In other words, a decision rendered earlier by a Division Bench of this Court ***in WP(C) No.148/2018*** [***Mainul Hoque Vs. Union of India***] has been specifically set aside by the Hon'ble Supreme Court and as such, the said decision rendered by this Court in ***Mainul Hoque*** (***High Court***) has no more legal force and also devoid of any persuasive value. It is interesting to note that in ***Mainul Hoque*** (***High Court***), which was set aside by the Hon'ble Supreme Court, the Division Bench of this Court had also specifically held that the provisions or the principle governing Section 24 of CPC would not be attracted in a proceeding before the Foreigners Tribunal. Similarly, the said learned Division Bench in ***Mainul Hoque*** (***High Court***) also categorically held that the decision of the Hon'ble Supreme Court in ***Anita Khuswaha*** (supra) is not applicable in the matter relating to a proceeding before the Foreigners Tribunal. What is also noticeable is that the Division Bench in ***Shariful Islam*** (supra) adopted

the same view taken by the earlier Division Bench in ***Mainul Hoque*** (High Court) which had been specifically rejected and set aside by the Hon'ble Supreme Court in holding that the proceeding before the Foreigners Tribunal is not transferrable.

We would, therefore, take the view that since the most of the reasons assigned by the learned Division Bench in ***Shariful Islam*** (supra) were similar to the reasons given by the learned Division Bench in ***Mainul Hoque*** (High Court) which were nullified by the Hon'ble Supreme Court in ***Mainul Hoque*** (SC), to that extent, such reasons devoid of legal force, cannot be invoked again to dismiss application for transfer of the proceeding.

87. This Court in ***Shariful Islam*** (supra) categorically held that the decision of the Hon'ble Supreme Court in ***Anita Khuswaha*** (supra) is not applicable in the matter relating to a proceeding before the Foreigners Tribunal inasmuch it was rendered in exercise of power under Article 142 of the Constitution of India. It was also held that even if there is certain hardship, inconvenience, physical or financial faced by the parties and witnesses traveling to distance to contest the reference case, there is certainly provision in para 4(c) of 1964 Orders, which allows issuing commissions for examination of any witness which acts as a balm to such hardships.

88. In our opinion, issuing commissions will not mitigate the hardships of the proceedees inasmuch as the proceedees will have to bear the costs for such commissions, thus, it would be equally expensive for the proceedees.

89. We would also like to observe that though the decision rendered in ***Anita***

Khuswaha (supra) may have been rendered by the Hon'ble Supreme Court in exercise of power under Article 142 of the Constitution of India, yet, the Hon'ble Supreme Court held that provisions of Article 32, 136 and 142 are wide enough to empower the Supreme Court to direct transfer in appropriate situations, no matter the Central Code of Civil and Criminal Procedure do not extend to the State or nor do the State Codes of Civil and Criminal Procedure contain any provision that empowers the Supreme Court to transfer cases.

90. The aforesaid decision in ***Anita Khuswaha*** (supra) was rendered by the Hon'ble Supreme Court after a detail discussion on the right to access of justice which is considered to be a fundamental right and thus part of Article 21 of the Constitution of India, which invariably has the following facets, namely,

(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.

Accordingly, it was held that, access to justice being a fundamental right, the Supreme Court by invoking power under 32 of the Constitution of India can enforce such a right by issuing necessary directions including direct transfer of cases from a Court to another Court.

91. In our opinion, if access of justice is declared to be a fundamental right, which can be enforced by invoking Article 32 of the Constitution of India, nothing prevents an aggrieved citizen also to apply this High Court under Article 226 of Constitution of India to enforce such a fundamental right inasmuch as the High Court can also enforce the fundamental rights by invoking the jurisdiction under Article 226 of the Constitution of India. Accordingly, we are of the view that the decision in ***Anita Khuswaha*** (supra) by implication certainly endows power to the High Court under Article 226 of the Constitution of India to enforce an important fundamental right, that is, to access to justice, which includes that mechanism must be functional, accessible in terms of distance, and such process of adjudication must be affordable to the proceedees, which are grounds generally taken for transfer of a proceeding from one Foreigners Tribunal to another Foreigners Tribunal.

92. Accordingly, we are of the view that the decision in ***Anita Kushwaha*** (supra) cannot be ignored by this Court and can be applied in appropriate cases for transfer of case/proceeding from one Foreigners Tribunal to another Foreigners Tribunal for enforcement of fundamental right of access to justice.

93. We would also like to mention that once a reference is made by the authorities validly and if the Foreigners Tribunal satisfied that the reference has been made validly, the onus entirely shifts to the proceedee to discharge his burden that he is not a foreigner but an Indian as provided under Section 9 of the Foreigners Act, 1946. Therefore, it is clearly evident that in a proceeding before the Foreigners Tribunal, the

role of the proceedee takes centre stage inasmuch as it is his responsibility, onus and burden to prove that he is not a foreigner but an Indian for which he has to produce the necessary documents and examine witnesses in support of his claim.

Under the circumstances, if the proceedings of the Foreigners Tribunal is transferred from one Foreigners Tribunal to another, it cannot be said that the State will be greatly prejudiced, inasmuch as the entire burden rests on the proceedee to prove his case.

94. As regards the power of this Court under Article 226 of the Constitution of India, to transfer any proceeding, we are of the view that in absence of any bar provided under the 1964 Order or the Foreigners Act, 1946, the extraordinary power conferred on the High Court to permit transfer of a proceeding from one Foreigners Tribunal to another Foreigners Tribunal cannot be disabled if it subserves the interest of justice.

95. While it is well settled that the exercise of the extraordinary power to do complete justice is available to the Supreme Court under Article 142(1) of the Constitution of India and not available to the High Court under Article 226 of the Constitution of India, nevertheless, the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India can take cognizance of entire facts and circumstances of the case and pass appropriate orders to give the parties complete substantial justice keeping in mind the principle of equity which promotes transparency and a fair play as held by the Hon'ble Supreme Court in ***Sangrila Food Products Limited & Anr. Vs. Life Insurance Corporation of India, (1996) 5***

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> "11. It is well-settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognisance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priorty, before invoking the jurisdiction of the High Court, the court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief. What precisely has been done by the learned Single Judge, is clear from the above emphasised words which be re- read with advantage. The question of claim to damages and their ascertainment would only arise in the event of the Life Insurance Corporation, respondent, succeeding to prove that the appellant Company was an unlawful sub-tenant and therefore in unauthorised occupation of public premises. If the finding were to go in favour of the appellant Company and it is proved to be a lawful sub-tenant and hence not an unauthorised occupant, the direction to adjudge the claim for damages would be rendered sterile and otiose. It is only in the event of the appellant Company being held to be an unlawful sub-tenant and hence an unauthorised occupant that the claim for damages would be determinable. We see therefore no fault in the High Court adopting such course in order to balance the equities between the contestants especially when it otherwise had power of superintendance under Article 227 of the Constitution in addition. We cannot be oblivious to the fact that when the occupation of the premises in question was a factor in continuation the liability to pay for the use and occupation thereof, be it in the form of rent or damages, was also a continuing factor. The cause of justice, as viewed by the High Court, did clearly warrant that both these questions be viewed inter-dependently. For those who seek equity must bow to equity."

96. Thus, in a given situation if it is found that a proceedee has been greatly prejudiced due to his inability to gather documents and witnesses to prove his case before a Foreigners Tribunal because of long distance between the place where he ordinarily he resides and where the proceeding has been initiated, in our view, the High Court can direct transfer of the proceeding from one Foreigners Tribunal to the

Foreigners Tribunal located near or the place where the proceedee ordinarily resides.

97. In fact, it was, what was done by this Court in ***Ashadur Islam*** (supra) when it directed transfer of the proceedings from the Foreigners Tribunal, Jorhat to the Foreigners Tribunal, Hatsingimari of South Salmara District. This Court allowed the petition when it was submitted by the petitioner therein that thought he petitioner was ready and willing to face cross-examination at the Foreigners Tribunal at Jorhat, because of financial constraints, the other two witnesses were not willing to travel to Jorhat for the purpose of cross-examination. It was submitted that, the burden of proof being on the petitioner to establish that he is not a foreigner, if his two witnesses do not appear before the Tribunal at Jorhat, the petitioner will suffer irreparable loss and injury, and the two witnesses appear before Tribunal at Hatsingimari if the cases so transferred. Under the circumstances, this Court directed the proceeding to be transferred from the Foreigners Tribunal, Jorhat to Foreigners Tribunal at Hatsingimari, South Salmara.

From the above decision of this Court in ***Ashadur Islam*** (supra), it is evident that though this Court has not discussed the legal principle/basis for the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India to direct transfer of proceeding from one Foreigners Tribunal to another, for the convenience of the party based on the principle of ensuring access to justice and avoid any prejudice to a proceedee upon whom an onerous burden is cast under Section 9 of the Foreigners Act, 1946 to prove that he is not a foreigner.

Therefore, in our view, even if the legal principles are not spelt out, yet, can certainly be read with the order, which is based on the principle discussed above. Accordingly, we are of the view that in appropriate cases, for the ends of justice, not to cause any prejudice to any party, this Court in exercise of power under Article 226 of the Constitution of India can direct transfer of a proceeding from one Foreigners Tribunal to another Foreigners Tribunal.

98. Coming to the specific reasons, in the case of **Jonglu Ali** [Petitioner in WP(C) No.7309/2019], the enquiring authority were quite aware of the permanent residence of the petitioner inasmuch as in the records, it is clearly mentioned that the petitioner, Junglu Ali, son of Late Haidor Ali is a resident of Village No.2 Aibhandar, PS-Gossaigaon, District Kokrajhar and his temporary address has been recorded as Village Hauchora Itabhata under the care of Sri Moloyas Siakia, P.S. Teok where he claimed to be staying for earning his livelihood. Under such circumstances, the Superintendent of Police certainly could have made the reference to the Foreigners Tribunal located in Kokrajhar District where the petitioner ordinarily resides.

99. As regards the defects in the enquiry and reference made as alleged by the petitioner **Jonglu Ali** [petitioner in WP(C) No.7309/2019], we would like to observe that the enquiry authority also appears to have proceeded merely because the petitioner could not immediately furnish the documents to prove that he is an Indian though he had sought for 15(fifteen) days' time to do so. We want to clarify that at the enquiry stage, till the matter is placed before the learned Tribunal upon reference,

it is the responsibility of the enquiry officer as well as the referral authority to make proper enquiry into the matter and it only after being fully satisfied a person is suspected to be a foreigner that a reference can be made against him.

Reverse burden as placed on a proceedee as contemplated under Section 9 of the Foreigners Act, 1946 comes to operation only after a proper investigation is conducted and the referral authority examines the same. Such reverse burden does not apply during the investigation stage or the referral stage. However, it appears from the nature of the enquiry conducted and the reference made, the enquiry officer as well as referral authority appears to have been guided by the presumption that a proceedee appears to be a foreigner.

100. Similarly, in respect of Md. Makibur Rahman, [Petitioner in WP(C) No.1296/2022], find that there is a finding by the enquiring authority that he is ordinarily resident of village Sarusukabala under Police Station Mikirbheta, District Morigaon, though at the time of enquiry he was residing under the care one Md. Jakirul Hussain, Cottage Tila Ali, P.S. Nazira, District Sivasagar where he was staying for earning his livelihood.

101. In respect of Md. Kaysar Ali [Petitioner in WP(C) No. 3448/2022] also, in the enquiry report, it is shown that he is the son of Late Osman Ali, a resident of village Kakilarpar, P.S. Sukchar, District Dhubri though at the time of enquiry, he was residing under the care of one Bipin Dowarah in village Phulpanisinga, P.S. Gaurisagar, District Sivasagar where he was gainfully employed.

102. In respect of Amser Ali [Petitioner in WP(C) No.4279/2022], in the enquiry report it is mentioned that he is the son of Late Sukur Ali and a permanent resident of Village Phalihamari Habi, P.S. Mayang, District Morigaon, Assam and at the time of enquiry, he was temporarily residing under the care of Shri Uttamjit Borah of Village Bokabil, P.S. and District Sivasagar (Contractor Camp Mitong Bandh).

103. As regards Sarafat Ali, [Petitioner in WP(C) No.4282/2022], in the enquiry report, it is mentioned that he is the son of Lt. Khalilur Rahman and a permanent resident of Village Phalimamari Habi, P.S. Mayang, District Morigaon though he was staying temporarily under the care of Shri Uttamjit Borah of Village Bokabil, P.S. and District Sivasagar camp at Mitong Bandh for his gainful employment.

104. In respect of Sorhab Ali [Petitioner No.1614/2022], he has been shown to be son of Late Khesu Ali and a permanent resident of village Pakuria, P.S. Mayong, District Morigaon. However, when the enquiry was held he is shown to be residing under the care of one Dulal Barua, resident of village No.1 Monigaon, P.S. Gaurisagar, District Sivasagar.

105. Be that as it may, since the authorities were fully aware of the permanent residents of the petitioners at the time of enquiry, nothing prevented the referral authority to make the reference to the Foreigners Tribunals in the districts where the petitioners are ordinarily/permanent residents.

It is held that concerned Superintendent of Police (Border) does not have the authority to make the reference to a Foreigners Tribunal located in another district,

nothing prevents to Superintendent of Police (Border) to transfer the entire records to the Superintendent of Police (Border) of the district where the proceedee is ordinarily/permanent residents of.

It is also held that there is no such provisions under the 1964 Order or the Citizenship Act, 1955.

106. Accordingly, we are of the view that though the references had been made before the Foreigners Tribunal in the respective districts where the petitioners were staying temporarily, nothing prevented the referral authority to refer the matter to the Foreigners Tribunals located in the districts where the petitioners were residing permanently.

107. Be that as it may, since the petitioners have sought for transfer of the proceedings from the Foreigners Tribunal where the proceedings have been initiated to Foreigners Tribunal located in the districts where they are permanently residents, in our view, nothing prevents the High Court for directing transfer of a proceeding from one Foreigners Tribunal to another Foreigners Tribunal in the interest of justice in the light of the decision of the Hon'ble Supreme Court in ***Anita Khushwaha*** (supra) in exercise of the power under Article 226 of the Constitution.

108. For the reasons discussed above, we respectfully disagree with the opinion rendered by the learned Division Bench of this Court in ***Shariful Islam*** (supra) and accordingly, refer this matter to a Larger Bench to decide as to whether the High Court under Article 226 of the Constitution has power to transfer the proceeding from one

Foreigners Tribunal to another Foreigners Tribunal in the State of Assam in appropriate cases.

109. The Registry is directed to place these matters before the Hon'ble the Chief Justice for constituting a Larger Bench.

JUDGE **JUDGE**

Comparing Assistant