

GAHC010088072019



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

Case No. : WP(C) 2780/2019

1:SHARIFUL ISLAM @ SORIFUL ISLAM AND ANR.
S/O MUSTAFA AHMED, R/O. VILL. KATAHGURI, P.S. DHING, DIST.-
NAGAON, ASSAM.

2: MD. MUSTAFA AHMED
S/O. LT. NURUL ISLAM
R/O. VILL. KATAHGURI
P.S. DHING
DIST.- NAGAON
ASSAM

VERSUS

1:THE UNION OF INDIA AND 7 ORS.
REP. BY THE SECY. TO THE GOVT. OF INDIA, MINISTRY OF HOME
AFFAIRS, SHASTRI BHAWAN, TILOK MARG, NEW DELHI- 1.

2:THE STATE OF ASSAM
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY.-06.

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

4:THE DY. COMMISSIONER
SIBSAGAR
P.O. AND DIST. SIBSAGAR

ASSAM
PIN- 785640.

5:THE SUPERINTENDENT OF POLICE (B)
NAGAON
P.O. AND DIST. NAGAON
ASSAM
PIN- 782002.

6:THE SUPERINTENDENT OF POLICE (B)
SIVSAGAR
P.O. AND DIST. SIVSAGAR
ASSAM. PIN- 785640.

7:THE STATE CO-ORDINATOR
NRC
BHANGAGARH
GHY.-05.

8:THE ELECTION COMMISSIONER OF INDIA
NEW DELHI-1

Advocate for the Petitioner : MR. A R SIKDAR

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

Linked Case : WP(C) 895/2019

1:SANJIT ROY
S/O. LT. MONORANJAN ROY
VILLAGE- DHOLAI MOLAI PART-VI
P.O. DHOLAI SOUTH
KATLICHERRA
DIST. OF HAILAKANDI
ASSAM.

VERSUS

1:UNION OF INDIA AND 5 ORS.
TO BE REP. BY SECRETARY TO THE GOVT. OF INDIA
HOME DEPTT.
NORTH BLOCK
NEW DELHI.

2:THE STATE OF ASSAM
TO BE REP. BY COMMISSIONER AND SECRETARY TO THE GOVT. OF
ASSAM
HOME DEPTT.
DISPUR
GUWAHATI-06.

3:DEPUTY COMMISSIONER
HAILAKANDI
ASSAM.

4:ELECTION COMMISSION OF INDIA
TO BE REP. BY DISTRICT ELECTION OFFICER
HAILAKANDI
ASSAM.

5:SENIOR SUPERINTENDENT OF POLICE (BORDER)
CITY
GUWAHATI
ASSAM.

6:STATE CO-ORDINATOR
NRC
ACHYUT PLAZA
BHANGAGARH
GUWAHATI- 781005.

Advocate for the Petitioner : MR M J QUADIR
Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : WP(C) 925/2019

1:INAM UDDIN @ AINAMUDDIN SEIKH
S/O- ATAI MIA
VILL- DHOLAI MOLAI PART-VI
P.O. DHOLAI SOUTH
P.S. KATLICHERRA
DIST- HAILAKANDI
ASSAM

VERSUS

1:UNION OF INDIA AND 5 ORS.
TO BE REP. BY SECY. TO THE GOVT. OF INDIA

HOME DEPTT.
NORTH BLOCK
NEW DELHI

2:STATE OF ASSAM
TO BE REP. BY COMM. AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY-6

3:DY. COMMISSIONER
HAILAKANDI
ASSAM

4:ELECTION COMMISSION OF INDIA
TO BE REP. BY DISTRICT ELECTION OFFICER
HAILAKANDI
ASSAM

5:SENIOR SUPERINTENDENT OF POLICE (B)
CITY GUWAHATI
ASSAM

6:STATE CO-ORDINATOR
NRC
ACHYUT PLAZA
BHANGAGARH
GHY-5

Advocate for the Petitioner : MR M J QUADIR
Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : WP(C) 1720/2019

1:KAYSER ALI @ KOISER ALI
S/O LATE SHEPAT ALI
R/O.- VILLAGE AND P.O. BAGHMARI
P.S. SAPATGARM
DIST. DHUBRI
ASSAM.

VERSUS

1:UNION OF INDIA AND 7 ORS.
REP. BY THE SECRETARY TO THE GOVT. OF INDIA
MINISTRY OF HOME AFFAIRS
SHASTRI BHAWAN
NEW DELHI.

2:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GUWAHATI-6.

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

4:THE DEPUTY COMMISSIONER
DHUBRI
P.O. AND DIST. DHUBRI
ASSAM
PIN- 783301.

5:THE SUPERINTENDENT OF POLICE (B)
JORHAT
P.O. AND DIST.- JORHAT
ASSAM. PIN- 785001.

6:THE SUPERINTENDENT OF POLICE (B)
DHUBRI
P.O. AND DIST.- DHUBRI
ASSAM
PIN- 783301.

7:THE ELECTION COMMISSION OF INDIA
NEW DELHI.

8:THE STATE COORDINATOR
NATIONAL REGISTRAR OF CITIZENS (NRC)
ASSAM.

Advocate for the Petitioner : MS. R CHOUDHURY
Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : WP(C) 2158/2019

1:SOBARAT KHAN
S/O. LATE MONNAF KHAN
R/O. VILLAGE- MOYNABANDHA
P.S. SOUTH SALMARA
DIST. SOUTH SALMARA MANKACHAR

VERSUS

1:THE UNION OF INDIA AND 6 ORS.
REP. BY ITS SECRETARY
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 DEPTT.
DISPUR
GUWAHATI-6.

3:THE DIRECTOR GENERAL OF POLICE (ADMINISTRATION)
ASSAM
ULUBARI
GUWAHATI-07.

4:THE DISTRICT MAGISTRATE CUM DEPUTY COMMISSIONER
KAMRUP(M)
DIST. KAMRUP(M)
ASSAM
PIN- 781001.

5:THE SUPERINTENDENT OF POLICE (BORDER)
KAMRUP(M)
DIST. KAMRUP(M)
ASSAM
PIN- 781001.

6:THE STATE COORDINATOR
NATIONAL REGISTRAR OF CITIZENS (NRC)
GUWAHATI
ASSAM
GUWAHATI-5.

7:THE ELECTION COMMISSION OF INDIA
NIRVACHAN SADAN
ASHOKA ROAD
NEW DELHI-110001.

Advocate for the Petitioner : MR. M KHAN
Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : WP(C) 2801/2019

1:KHAIRUL ALI @ KHAIRUL HUSSAIN
S/O TANJER ALI
R/O. BHELOGURI
P.S. MERAPANI
DIST. GOLAGHAT
ASSAM. PERMANENT RESIDENT OF VILL.- SALMARA
P.S. SIPAJHAR
SUB DIV. MANGALDAI
DIST. DARRANG
PIN- 784145.

VERSUS

1:THE UNION OF INDIA AND 6 ORS.
REP. BY THE SECY.
MINISTRY OF HOME AFFAIRS
GOVT. OF INDIA
NEW DELHI-01.

2:THE ELECTION COMMISSIONER OF INDIA
NEW DELHI-1.

3:THE STATE OF ASSAM
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY.-06.

4:THE CO-ORDINATOR OF NRC
BHANGAGARH
ASSAM
GHY.-05.

5:THE DY. COMMISSIONER

JORHAT
ASSAM
PIN- 782002.

6:THE SUPERINTENDENT OF POLICE (B)
JORHAT
DIST.- NAGAON
ASSAM
PIN- 782002.

7:THE OFFICER IN CHARGE OF MERAPANI POLICE STATION
GOLAGHAT.

Advocate for the Petitioner : MR. SK N MOHAMMAD
Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : WP(C) 826/2019

1:ASHIYA KHATUN
W/O LATE ABDUL JABBAR
R/O VILL- RAMPUR SATRA
P.O. KADOMONI
P.S. BATADRAVA
DIST.NAGAON
ASSAM

PIN - 782122

VERSUS

1:THE UNION OF INDIA AND 6 ORS.
REP. BY THE SECRETARY TO THE GOVT. OF INDIA

MINISTRY OF HOME AFFAIRS
NEW DELHI- 110001.

2:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI - 781006

3:THE DIRECTOR GENERAL OF POLICE
ASSAM
ULUBARI

GUWAHATI -781007.

4:THE DEPUTY COMMISSIONER
KAMRUP (M)
AT GUWAHATI
PIN -781001.

5:THE SUPERINTENDENT OF POLICE (B)
KAMRUP (M)
ASSAM

6:THE DEPUTY COMMISSIONER
NAGAON
P.O. AND P.S. NAGAON
ASSAM
PIN - 782001.

7:THE SUPERINTENDENT OF POLICE (B)
NAGAON
ASSAM
PIN - 782001.

Advocate for the Petitioner : MR M H AHMED
Advocate for the Respondent : ASSTT.S.G.I.

:: BEFORE ::

HON'BLE MR. JUSTICE MANOJIT BHUYAN
HON'BLE MR. JUSTICE MANISH CHOUDHURY

J U D G M E N T

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. Noticing the primary prayer made in the writ petitions, (i) WP(C) 2780/2019 relates to Case No. FT/SVR/12/17 with prayer for transfer of proceeding from the Foreigners' Tribunal, Jorhat, to the Foreigners' Tribunal at Dhing, in the district of Nagaon; (ii) WP(C) 826/2019 relates to F.T. Case No. 188/2015 and transfer is sought from Foreigners'

Tribunal No.3, Kamrup (Metro) at Guwahati to the Foreigners' Tribunal at Nagaon; (iii) WP(C) 895/2019 relates to F.T.K(M) Case No. 115/2017 where transfer is sought from the Foreigners' Tribunal No.3, Kamrup (Metro) at Guwahati to the Foreigners' Tribunal, Hailakandi; (iv) WP(C) 925/2019 relates to F.T.K(M) Case No. 114/2017 where transfer is sought from the Foreigners' Tribunal No.3, Kamrup (Metro) at Guwahati to the Foreigners' Tribunal, Hailakandi; (v) WP(C)1720/2019 relates to J.F.T. Case No.72/2007 for transfer of proceeding from the Foreigners' Tribunal, Jorhat to the Foreigners' Tribunal at Bilasipara in the district of Dhubri; (vi) WP(C) 2158/2019 relates to F.T. Case No. 119/2015, seeking transfer from the Foreigners' Tribunal No.2, Kamrup (Metro) at Guwahati to the Foreigners' Tribunal No.3, Dhubri at Hatsingimari; and (vii) WP(C) 2801/2019 relates to F.T.G(D) 480/2010, where transfer is sought from the Foreigners' Tribunal, Jorhat to the Foreigners' Tribunal at Mangaldoi in the district of Darrang.

2. 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*. In WP(C) 1720/2019 the ground urged is that the petitioner, as the proceedee, is unable to attend the Tribunal at Jorhat as he has to travel from Dhubri district and, that too, when his health is deteriorating due to old age ailments and he is suffering from loss of vision of both eyes. The legal aspects addressed are that access to justice being a basic and inalienable human right and a 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. In this regard, heavy reliance is placed in the case of *Anita Kushwaha vs. Pushap Sudan*, reported in

(2016) 8 SCC 509. Also, that the Foreigners' Tribunals, which are created under the *Foreigners Act, 1946* and the *Foreigners (Tribunals) Order, 1964*, are unlike other Tribunals created under Article 323A and 323B of the Constitution of India. The Foreigners' Tribunals are more like Courts of Executive Magistrates, where opinion is rendered in a summary procedure, and cases before it can be transferred. It is submitted that the provisions of section 24 of the *Code of Civil Procedure, 1908* cannot create any embargo in the transfer of a proceeding from one Foreigners' Tribunal to another. Further, 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. Lastly, the power to transfer a proceeding from one Tribunal to the other is available under Article 226 of the Constitution of India.

3. To answer the issue arising in this bunch of writ petitions and whether the prayer made therein can be entertained, we may discuss the relevant laws relating to the special provisions as to citizenship of persons covered by the Assam Accord, the law providing for the constitution of the Foreigners' Tribunals and its powers and jurisdiction, having regard to 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 "*1964 Order*") and law laid down by the Supreme Court relevant to the issue in hand.

4. The *Citizenship Act, 1955* is an Act to provide for the acquisition and determination of Indian citizenship. A special provision, in the shape of Section 6A, was inserted by Act 65 of 1985 w.e.f. 07.12.1985 as to citizenship of persons covered by the Assam Accord. As per section 6A(1)(b), "detected to be foreigner" means detected to be a foreigner in accordance with the provision of the *Act of 1946* and the *1964 Order* by a Tribunal constituted under the said *1964 Order*. Section 6A(1)(e) provides that a person shall be deemed to have been detected to be a foreigner on the date on which a Tribunal constituted under the aforesaid *1964 Order* submits its opinion to the effect that he is a

foreigner to the officer or authority concerned. Section 6A(2), *inter-alia*, provides that all persons of Indian origin who came before 01.01.1966 to Assam from the specified territory (including such of those whose names were included in the Electoral Rolls used for the purpose of the General Elections 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 01.01.1966. Section 6A(3) has prescribed that if a person of Indian origin has been detected to be a foreigner and who fulfils two other conditions, *firstly*, he came to Assam on or after 01.01.1966 but before 25.03.1971 from the specified territory and *secondly*, he had, since the date of his entry into Assam, been ordinarily resident in Assam, such a person would get an opportunity to become Indian citizen if he has registered himself in accordance with the Rules of 2009 made by the Central Government in that behalf under section 18 thereof with such authority, after the expiry of the period of 10 (ten) years from the date of such registration. A natural corollary to the aforesaid provision would be that a person who has been detected to be a foreigner by the Foreigners' Tribunal but does not fulfill the twin conditions, is not eligible to be granted citizenship of India and he is to be declared a foreigner being an illegal migrant.

5. Under the *Citizenship Rules, 2009*, framed in exercise of the powers conferred by section 18 of the *Act of 1955*, Part IV thereof contains Rules 19 to 22 providing for citizenship of India for persons covered by the Assam Accord. For ready reference, the same are reproduced hereunder:

PART IV

PROVISIONS AS TO CITIZENSHIP OF INDIA FOR PERSONS COVERED BY

ASSAM ACCORD

19. Registering authority for the purpose of sub-section (3) of section 6A and form for registration -

(1) *The Central Government may, for the purpose of sub-section (3) of section 6-A,*

appoint an officer not below the rank of Additional District Magistrate as the registering authority for every district of the State of Assam.

(2) An application for registration under sub-section (3) of section 6A shall be made in Form XVIII, by the person to the registering authority for the district in which such person is ordinarily a resident within a period of thirty days from the date of receipt of order of the Foreigners Tribunal declaring such person as a foreigner:

Provided that the registering authority may, for reasons to be recorded in writing, extend the said period to such further period as may be justified in each case but not exceeding sixty days.

(2A) A person who has been declared as a foreigner by the Foreigners Tribunal prior to 16th July, 2013 and has not been registered under sub-section (3) of Section 6A for the reason of non-receipt of order of the Foreigners Tribunal or refusal by the registering authority to register such person as a foreigner on account of delay may, within a period of thirty days from the date of receipt of the order passed by the Foreigners Tribunal, or, from the date of publication of this notification, make an application for registration in Form XVIII to the registering authority of the district in which such person is ordinarily a resident :

Provided that the registering authority may, for reasons to be recorded in writing, extend the said period to such further period as may be justified in each case but not exceeding one hundred eighty days.

(3) The registering authority shall, after entering the particulars of the application in a register in Form XIX, return a copy of the application under his seal to the applicant.

(4) One copy of every application received during a quarter shall be sent by the registering authority to the Central Government and the State Government of Assam along with a quarterly return in Form XX.

20. Reference to Tribunals – *Where, in case of a person seeking registration under sub-section (3) of Section 6A,-*

(a) any question arises as to whether such person fulfils any requirement contained in the said sub-section; or

(b) the opinion of the Tribunal constituted under the Foreigners (Tribunals) Order,

1964 in relation to such person does not contain a finding with respect to any requirement contained in the said sub-section other than the question that he is a foreigner,

then, the registering authority shall, within a period of fifteen days of the receipt of the application under sub-rule (2) of Rule 19, make a fresh reference to the Tribunal in this regard.

21. Jurisdiction of Tribunal – *The Tribunal constituted under the Foreigners (Tribunals) Order, 1964 having jurisdiction over a district or part thereof in the State of Assam shall have jurisdiction to decide references, received from the registering authority of that district or part thereof in relation to all references made under sub-section (3) of Section 6A.*

22. Declaration under sub-section (6) of Section 6A – *The declaration under sub-section (6) of Section 6A shall be made in Form XXI to the District Magistrate of the area within whose jurisdiction such person is ordinarily resident.*

6. The *Foreigners (Tribunals) Order, 1964* was enacted by the Central Government in exercise of the powers conferred by section 3 of the *Act of 1946*. Para 2 of the *1964 Order* provides for the constitution of Foreigners' Tribunal. It provides that the Central Government may by order, refer the question as to whether a person is or is not a foreigner within the meaning of the *Act of 1946* to a Tribunal for its opinion. Thus, by virtue of the provisions of para 2 of the *1964 Order*, read with Rule 21 of *the Rules of 2009*, it decides references received from the registering authority of that district by rendering opinion as to whether the proceedee is or is not a foreigner within the meaning of the *Act of 1946*. In this regard notice is had to the Notification dated 19.04.1958, issued by the Government of India in the Ministry of Home Affairs in exercise of powers under Clause (1) of Article 258 of the Constitution of India whereby the President, with the consent of the State Government concerned, entrusted to the Governments of each of the States mentioned therein, including the State of Assam, the functions of the Central Government in making orders of the nature specified in section 3 of the *Act of 1946*. Another notification by the same authority and in exercise of same powers was issued on 17.02.1976 entrusting the Superintendent of Police and Deputy Commissioner (In-charge

of Police) under the Government of Assam the functions of the Central Government in making orders of the nature specified in said section 3 of the *Act of 1946* within their respective jurisdictions, subject to the conditions mentioned therein, which included the condition that exercise of such function would be in respect of nationals of Bangladesh. Further, while exercising such functions, the Superintendent of Police and Deputy Commissioner (In-charge of Police) would comply with such general or special directions as the Government of Assam or the Central Government may issue from time to time. Thus, by the aforesaid Notifications dated 19.04.1958 and 17.02.1976, the Superintendent of Police and Deputy Commissioner (In-charge of Police) have been delegated the power to make reference to the Foreigners' Tribunal within their respective jurisdiction under para 2(1) of the *1964 Order* to seek opinion as to whether the proceedee is a foreigner or not within the meaning of the *Act of 1946*, whereupon the Tribunal is required to exercise jurisdiction, having regard to the provisions of Rule 21 of *the Rules of 2009*.

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

power by a Court of limited jurisdiction.

8. In the above context it can be seen that in the case of a Foreigners' Tribunal the jurisdictional fact is a reference made by the concerned jurisdictional registering authority seeking an opinion. The question, therefore, is that when a Foreigners' Tribunal is given to decide a reference received from the registering authority of that district or part thereof, can another Tribunal of a different district, not ordinarily having the jurisdiction to decide such a reference emanating from the other district, assume jurisdiction to decide the reference and whether the High Court, in exercise of its powers under Article 226 of the Constitution of India, can confer such jurisdiction to the other Foreigners' Tribunal to decide a transferred reference. Answer to the first part would not require any deeper consideration, inasmuch as, powers exercisable by a Foreigners' Tribunal are specifically laid down under para 4 of the *1964 Order*. The Foreigners' Tribunals are conferred with the powers of civil court while trying a suit under the *Code of Civil Procedure, 1908* and the powers of a Judicial Magistrate First Class under the *Code of Criminal Procedure, 1973* in respect of (a) summoning and enforcing the attendance of any person and examining him or her on oath; (b) requiring the discovery and production of any document; (c) issuing commissions for the examination of any witness; (d) directing the 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.

9. Touching upon the provisions of section 24 of the *Code of Civil Procedure, 1908*, it deals with the power of transfer of suit, appeal or other proceeding pending 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. A reading of section 24 makes it evident that the said provision would be attracted only in case of a suit or appeal or other proceeding pending before a Court. The proceeding before a Foreigners' Tribunal is quasi-judicial, as held by the Full Bench decision of this Court in *State of Assam and Others vs. Moslem Mondal and Others* reported in 2013 (1) GLT 809. The nature of proceeding is not akin to a civil suit or a criminal trial, as is commonly understood. The limited application of the provisions of the *Code of Civil Procedure, 1908* are those powers as prescribed under para 4 of the 1964 Order, as held by a Division Bench of this Court in the case of *Safiya Khatun vs. Union of India and Others*, reported in 2018 (5) GLT 491. The opinion rendered by a Foreigners' Tribunal is in the nature of quasi-judicial order, as held by the Supreme Court of India in its order dated 17.05.2019 passed in *Abdul Kuddus vs Union of India and Others* (in Civil Appeal No.5012 of 2019). The Foreigners' Tribunal rendering such opinion on a reference made by the jurisdictional Superintendent of Police, is certainly not a Court. The provisions or the principles governing section 24 of the *Code of Civil Procedure, 1908* would not be attracted in respect of proceeding before a Foreigners' Tribunal. In this connection it would be apposite to notice the status of the post of the Member presiding over a Foreigners' Tribunal. On the question as to whether such Member is a Judicial Officer of a subordinate Court within the meaning of Article 235 of the Constitution of India, a Single Bench of this Court exhaustively dealt with the issue in *Mamoni Rajkumari vs. State of Assam*, reported in 2017 (5) GLT 886 and at paragraph 31 thereof answered the issue in the following words:

“31. Article 236 of the Constitution defines “Judicial Officers” to mean a service consisting exclusively of persons intended to fill up the posts of District Judge and other civil judicial posts inferior to the post of District Judge. In *Shri Kumar Padma Prasad (supra)*, the Supreme Court had observed that the expression “judicial office” in generic sense may include wide variety of offices which are connected with the administration of justice in one way or the other. In the context of Article 217(2)(a), the Supreme Court held that the expression of “judicial office” means a judicial office which belongs to the judicial service as defined under Article 236(b) of the Constitution of India. The same analogy will have to be applied in respect of interpretation of Article 235 of the Constitution of India. The post of Member of FT is not a post under the Assam Judicial Service Rules, 2003 and, therefore, the submission of Mr. Bhattacharyya that the High Court has control as understood in terms of the Article 235 of the Constitution of India over the Members of FTs, is not tenable.”

Taking it further, it is seen that the provisions under 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 expeditiously in a time bound manner and para 4 thereof prescribes the limited powers of the Foreigners’ Tribunal *vis-à-vis* a Civil Court. The special enactments under which the Tribunals are created do not extend the procedure prescribed under the Code of Civil Procedure to the proceedings before such Tribunal. As in the case of Foreigners’ Tribunal, it is conferred with the power to choose its own procedure, which is an attribute distinguishing the Tribunal from the Civil Court. Again, a Civil Court cannot make departure from the procedure prescribed under the Code of Civil Procedure while a Tribunal can regulate its own procedure for disposal of the cases expeditiously in a time bound manner. As seen from para 4 of the *1964 Order* the provisions of the *Code of Civil Procedure, 1908* is applicable only for limited purposes like (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. This by itself makes it evident that the intention of the legislature has been to liberate the Foreigners’ Tribunals from the constraints of procedure prescribed under the *Code of Civil Procedure, 1908*. It can be deemed to be a Civil Court only for the limited purpose and to the limited extent the provision of the *1964 Order* stipulates.

Therefore, on the premises above, there can be no difference of views that a Foreigners' Tribunal, presided over by a Member who is not a Judicial Officer of subordinate Courts within the meaning of Article 235 of the Constitution of India, nor holds a post under the *Assam Judicial Service Rules, 2003* but holds a civil post, and which renders opinion in the nature of quasi-judicial order by discharging quasi-judicial functions by regulating its own procedure within the limited powers of a Civil Court vested in it under para 4 of the *1964 Order*, is not a Court so much so to attract the provisions of section 24 of the *Code of Civil Procedure, 1908*.

10. We may now turn to the submission made on behalf of the petitioners on the binding nature of judgments rendered by the Supreme Court of India, which is placed in the context of the order dated 29.01.2019 passed in Civil Appeal No.1339/2019 [arising out of SLP(C) No.12467 of 2018 (*Mainul Hoque vs. Union of India and Others*)]. The said case before the Supreme Court arose out of the final judgment and order dated 12.01.2018 passed by this Court in WP(C) 148/2018 [*Mainul Hoque vs. Union of India and Others*, reported in *2018 (1) GLT 777*]. In the case of *Mainul Hoque (supra)* before this Court, prayer was made for transfer of the reference case pending before the Foreigners' Tribunal No.2, Kamrup (M), Hedayatpur at Guwahati to any Foreigners' Tribunal at Karimganj. Basic ground urged was that the petitioner therein being a resident of village Hijim under Nilambazar Police Station, district Karimganj, it would be inconvenient for him to appear before the Foreigners' Tribunal, Guwahati for adducing evidence. Relying on the decision of the Supreme Court in *Anita Kushwaha vs. Pushap Sudan*, reported in *(2016) 8 SCC 509*, it was contended that for the ends of justice this Court can always issue directions to transfer references from one Tribunal to another Tribunal. The operative part of the judgment passed by this Court while answering the said writ petition may usefully be reproduced hereunder :

“This Court has held in a number of cases that the provisions or the principles governing Section 24 of the Code of Civil Procedure, 1908 would not be attracted to a proceeding before a Foreigners Tribunal, which is governed by the provisions of the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964, as amended. This Court has also held that *situs* of

residence of the proceedee or the inconvenience of a proceedee would be no ground for transfer of a reference from one Foreigners Tribunal to another Foreigners Tribunal.

A proceeding before a Foreigners Tribunal is *sui generis*. It is neither a civil suit as is commonly understood nor it is a criminal trial. There is no adjudication of *lis* between two litigants in an adversarial manner. The State through the Superintendent of Police (Border) makes a reference to the concerned Foreigners Tribunal seeking its opinion whether the proceedee is a foreigner or not and if foreigner, to which stream. Reverting to Section 24 of the Code of Civil Procedure, 1908 we find that the said provision deals with transfer of suit, appeal or other proceeding pending before the High Court or the District Court to any Court sub-ordinate to it for trial or disposal; or withdraw any suit, appeal or other proceeding pending in any Court sub-ordinate to it and try or dispose of the same. Therefore, it is evident that provisions of Section 24 of the Code of Civil Procedure would be attracted only in case of a suit or appeal or other proceeding pending before a Court. It is the settled position that a Tribunal is not a Court. A Foreigners Tribunal assigned the task of rendering an opinion on a reference made by the Superintendent of Police is certainly not a Court.

In so far the case of **Anita Kushwaha** (supra) is concerned, the issue before the Supreme Court was whether Supreme Court had 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*. It may be mentioned that under Section 1(3) of the Code of Civil Procedure, 1908, it is clearly stated that the Civil Procedure Code extends to the whole of India, except the State of Jammu and Kashmir and the State of Nagaland and tribal areas. Likewise, under Section 1(2) of the Code of Criminal Procedure, 1973, it is mentioned that the provisions of the Criminal Procedure Code would extend to the whole of India, except to the State of Jammu and Kashmir. It is in this context that the reference was made to the Constitution Bench of the Supreme Court to examine the above issue. Referring to the expansive meaning given to Article 21 of the Constitution of India as well as to right to access justice under Article 39(d) of the Constitution of India, Supreme Court held that the provisions of Articles 32, 136 and 142 of the Constitution are wide enough to empower the Supreme Court to direct transfer of civil and criminal cases from the State of Jammu and Kashmir to outside the State of Jammu and Kashmir in appropriate situations, notwithstanding the fact that Civil Procedure Code and Criminal Procedure Code do not extend to the State of Jammu and Kashmir. This was the precise issue before the Supreme Court in **Anita Kushwaha** (supra). Endeavour of learned counsel for the petitioner to apply the said decision in the case of an opinion by a Foreigners Tribunal, in our considered view, is farfetched and does not stand to reason.

Consequently, we are not inclined to entertain the writ petition.

Writ petition is accordingly dismissed."

11. The aforesaid order of this Court, on being assailed in SLP(C) No.12467 of 2018 (Civil Appeal No.1339/2019), was disposed of by passing 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."

12. On behalf of the petitioners it is stated that the order passed by the Supreme Court in *Mainul Hoque* (supra) creates a binding precedent, which would squarely be applicable in the cases in hand. Reliance is placed in *South Central Railway Employees Cooperative Credit Society Employees Union vs. B. Yashodabai and Others*, reported in (2015) 2 SCC 727 wherein the Supreme Court, in the facts of that case, held that it was not open to the High Court to hold that the judgment delivered by the Supreme Court in *South Central Railway Employees Coop. Credit Society Employees' Union vs. Registrar of Coop. Societies* was per incuriam. In this context the Supreme Court observed that when a higher court has rendered a particular decision, the said decision must be followed by a subordinate or lower court unless it is distinguished or overruled or set aside. Further, by not following the law laid down by the Supreme Court, the High Court or the subordinate courts would be violating the provisions of Article 141 of the Constitution of India. Reliance is also placed in the case of *Palitana Sugar Mills (P) Ltd. and Another vs. State of Gujarat and Others*, reported in (2004) 12 SCC 645 to say that it is well settled that the judgments of Supreme Court are binding on all the authorities under Article 142 of the Constitution and it is not open to any authority to ignore a binding judgment of this Court.

13. There can never be any dispute with regard to the submissions made on behalf of the petitioners based on the judgments rendered in *South Central Railway* (supra) and *Palitana Sugar Mills* (supra). The question is whether the order of the Supreme Court dated 29.01.2019 in *Mainul Hoque* (supra) operates as a binding precedent, as contemplated by Article 141 of the Constitution of India, on the cases in hand or is it an order passed in exercise of powers under Article 142 of the Constitution of India on the

facts obtaining before it. To answer the question, we may refer to the case in *Director of Settlements, A.P. and Others vs. M.R. Apparao and Another*, reported in (2002) 4 SCC 638. On the applicability of Article 141 the Supreme Court held that the said provision in the Constitution unequivocally indicates that law declared by the Supreme Court shall be binding on all Courts within the territory of India. However, the statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. What is binding is the ratio of the decision and not any findings of fact. To determine whether a decision has declared a law, it cannot be said to be a law when a point is disposed of on concession. In the said case the Supreme Court referred to the cases in *State of U.P. vs. Synthetics and Chemicals Ltd.*, reported (1991) 4 SCC 139 and *Arnit Das vs. State of Behar*, reported in (2000) 5 SCC 488, which held that “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 is contemplated by Article 141”.

14. The powers of the Supreme Court of India under Article 142 of the Constitution of India, which is exclusive to it and not available to a High Court under its plenary jurisdiction, is a power that gives preference to equity over law. It is a justice-oriented approach as against the strict rigours of the law. The principle and power of Article 142 has been expounded with great clarity in the case of *Indian Bank vs. ABS Marine Products (P) Ltd.*, reported in (2006) 5 SCC 72; *Ram Pravesh Singh vs. State of Bihar*, reported in (2006) 8 SCC 381; and *State of U.P. Vs. Neeraj Awasthi*, reported in (2006) 1 SCC 667. The Supreme Court held that directions issued under Article 142 do not constitute a binding precedent unlike Article 141 of the Constitution of India. Further, direction under Article 142 is issued to do proper justice and the exercise of such power cannot be considered as law laid down by the Supreme Court under Article 141. To take a leaf out of the case in *State of Punjab and Others vs. Rafiq Masih (Whitewasher)*, reported in (2014) 8 SCC 883, the Supreme Court held that “The directions of the Court under Article 142 of the Constitution, while moulding the relief, that relax the application of law or exempt the

case in hand from the rigour of the law in view of the peculiar facts and circumstances do not comprise the ratio decidendi and therefore lose its basic premise of making it a binding precedent. This Court on the qui vive has expanded the horizons of Article 142 of the Constitution by keeping it outside the purview of Article 141 of the Constitution and by declaring it a direction of the Court that changes its complexion with the peculiarity in the facts and circumstances of the case.”

15. The counsels for the petitioners laid much emphasis in the case of *Anita Kushwaha* (supra) to say that access to justice being guaranteed under Article 14 and 21 of the Constitution of India, the physical and financial inconvenience of parties and witnesses in appearing before Foreigners’ Tribunals located away from their home town are relevant considerations for seeking transfer of cases from the Tribunal where the case is pending to the Tribunal located in their home district. Submission is also made that this Court, in exercise of powers under Article 226 of the Constitution of India, is competent to direct such transfer. In order to reach a conclusion on the submissions made, it would be pertinent to understand the context in which the decision in *Anita Kushwaha* (supra) was rendered.

16. The Constitution Bench of the Supreme Court in *Anita Kushwaha* (supra) was called upon to examine whether the Supreme Court has the power to transfer a civil or criminal case pending in any court in the State of Jammu and Kashmir to a court outside that State and *vice versa*. Opposing transfers, arguments made are that the provisions of Section 25 of the Code of Civil Procedure and Section 406 of the Code of Criminal Procedure, which empowers the Supreme Court to direct transfer of civil and criminal cases from one State to the other, do not extend to the State of Jammu and Kashmir and, therefore, cannot be invoked to direct any such transfer. Notice was had to Section 1(3) of the *Code of Civil Procedure, 1908*, which stipulates that the Civil Procedure Code extends to the whole of India except the State of Jammu and Kashmir as well as the State of Nagaland and the tribal areas. Notice was also had to Section 1(2) of the *Code of*

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

17. The issue in *Anita Kushwaha* (supra) was answered by first holding that access to justice is a facet of right to life guaranteed under Article 21 as well as a facet of the right guaranteed under Article 14 of the Constitution. Further, the Constitution which guarantees equality before law and equal protection of laws is not limited in its application to the domain of executive action that enforces the law. It is as much available in relation to proceedings before courts and tribunals and adjudicatory fora where law is applied and justice administered. The Supreme Court culled out four main facets which constitute the essence of access to justice, being (i) the State must provide an effective adjudicatory mechanism; (ii) the mechanism so provided must be reasonably accessible in terms of distance; (iii) the process of adjudication must be speedy; and (iv) the litigant's access to the adjudicatory process must be affordable. On the other aspect of the matter, namely the powers of the Supreme Court to direct transfer in a situation where there are no enabling provision for transfer under the Code of Civil Procedure or the Code of Criminal Procedure, it was held that Article 32 and even Article 142 of the Constitution can be invoked to direct transfer of a case from one court to the other. Reference was made to the Constitution Bench decision of the Supreme Court in *Union Carbide Corpn. -vs- Union of India* [(1991) 4 SCC 584], where one of the questions falling for consideration was

whether the Supreme Court could in exercise of its powers under Articles 136 and 142 withdraw a case pending in the lower court and dispose of the same finally even when Article 139-A does not empower the Supreme Court to do so. The said question was answered by the Constitution Bench holding that the power of the Supreme Court to transfer cases is not exhausted under Article 139-A of the Constitution. Further, Article 139-A was not intended to nor does it operate to affect the wide powers available to the Supreme Court under Articles 136 and 142 of the Constitution. Paragraph 83 of the Constitution Bench was reproduced, wherein it was held that the power under Article 142 is on a different plane and of a different quality, inasmuch as, prohibitions or limitations or provisions contained in ordinary laws cannot act as prohibitions or limitations on the constitutional powers under Article 142. Thus, in *Anita Kushwaha* (supra) the Supreme Court concluded by laying down the law in the operative portion of paragraph 45 in the following words:

“The extraordinary power available to this Court under Article 142 of the Constitution can, therefore, be usefully invoked in a situation where the Court is satisfied that denial of an order of transfer from or to the court in the State of Jammu and Kashmir will deny the citizen his/her right of access to justice. The provisions of Articles 32, 136 and 142 are, therefore, wide enough to empower this Court to direct such transfer in appropriate situations, no matter the Central Codes of Civil and Criminal Procedure do not extend to the State nor do the State Codes of Civil and Criminal Procedure contain any provision that empowers this Court to transfer cases.”

18. Lastly, the counsels for the petitioners have contended that in terms of paragraph 97 of the Full Bench decision of this Court in *State of Assam and Others -vs- Moslem Mondal and Others*, reported in *2013 (1) GLT 809*, there has to be a fair and proper investigation by the investigating agency before making a reference to the Tribunal. Further, in terms of paragraph 55 in *Sarbananda Sonowal (II) -vs- Union of India*, reported in *(2007) 1 SCC 174*, a person who claims to be a citizen of India in terms of the Constitution of India or the Citizenship Act is entitled to all safeguards both substantive

and procedural provided for therein to show that he is a citizen. With due respects, we fail to understand in what context paragraph 97 of *Moslem Mondan* (supra) and paragraph 55 of *Sarbananda Sonowal (II)* (supra) have been referred when the issue for determination in the present bunch of cases relates to whether power inheres on this Court to transfer reference cases from one Tribunal to the other in exercise of powers under Article 226 of the Constitution of India.

19. Access to justice as a fundamental right belonging to the petitioners do not pose any debate. Primary grounds urged for transfer is only with regard to inconvenience, physical and financial, faced by the parties and witnesses to travel distance to contest the reference cases. Indeed, the adjudicatory mechanism to be reasonably accessible in terms of distance and the same being affordable, are two of the main facets constituting the essence of access to justice. In individual and appropriate cases where financial and physical hardship caused to parties and witnesses on account of travel is taken up, the *1964 Order* itself provides the balm by vesting with the Foreigners' Tribunal the power to entertain prayer for examination of witnesses and for production of documents by issuing Commissions. Such power is conferred under para 4(c) of the said *1964 Order*. A caveat is, however, expressed in para 3(9) thereof where prayer for examination of witnesses on Commission may be refused if, in the opinion of the Foreigners' Tribunal, such prayer is made to delay the proceedings.

20. As regards the all-important issue whether this Court can transfer reference case from one Foreigners' Tribunal to the other in exercise of powers under Article 226 of the Constitution of India, suffice to say that in the absence of any enabling provision derived from any statute and in view of the discussions above as regards the existence of jurisdictional fact being a *sine qua non* for assumption of jurisdiction by a Tribunal; the fact of non-application of the provisions of section 24 of the *Code of Civil Procedure, 1908* in relation to proceedings before a Foreigners' Tribunal; the law with regard to the binding nature of a decision rendered by the Supreme Court of India *vis-à-vis* the scope and

purport of Article 141 of the Constitution of India; the exclusivity of power of the Supreme Court of India under Article 142 of the Constitution of India and the context and the power under which the decision in *Anita Kushwaha* (supra) was rendered, this Court cannot entertain the prayer for transfer of proceedings made in the writ petitions. Further, this Court also cannot entertain the submission that the order of the Supreme Court of India dated 29.01.2019 passed in Civil Appeal No.1339/2019 [arising out of SLP(C) No.12467 of 2018 (*Mainul Hoque vs. Union of India and Others*)] is applicable and would operate *proprio vigore* in the present bunch of cases.

21. For the foregoing, we find no merit in the writ petitions. Accordingly, the same are dismissed, however, without any order as to cost.

JUDGE

JUDGE

Comparing Assistant