

GAHC010026612015



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

Case No. : WP(C) 7339/2015

1:MUSSTT. AMINA KHATUN
W/O- MD. OMAR ALI, R/O VILL.- PANBARI, P.S.- DHEKIAJULI, DIST.-
SONITPUR, ASSAM.

VERSUS

1:THE UNION OF INDIA and 3 ORS
REP. BY THE SECY. TO THE GOVT. OF INDIA, MINISTRY OF HOME
AFFAIRS, NEW DELHI.

2:THE COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY- 6.

3:THE SUPERINTENDENT OF POLICE BORDER
SONITPUR
DIST.- SONITPUR
ASSAM.

4:THE OFFICER-IN-CHARGE
SONITPUR POLICE STATION
DIST.- SONITPUR
ASSAM

Advocate for the Petitioner : MD.GIASH UDDIN

Advocate for the Respondent : AMICUS CURIAE

Linked Case : WP(C) 2422/2017

1:SAFIQUE UDDIN
S/O LT. MD SONA MIYA ALIAS SORA MIYA ALIAS SONAHAR ALI
VILL-PATIA PATHAR
P.S. JAMUNAMUKH
DIST. NAGAON NOW HOJAI
ASSAM

VERSUS

1:THE UNION OF INDIA and 6 ORS.
REP. BY THE SECY. TO THE GOVT. OF INDIA
HOME DEPARTMENT
NORTH BLOCK
NEW DELHI

2:STATE OF ASSAM
TO BE REPRESENTED BY THE COMMISSIONER and SECRETARY TO THE
GOVT. OF ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI-06

3:ADDITIONAL DIRECTOR GENERAL OF POLICE ASSAM BORDER
BHANGAGARH
GUWAHATI-05

4:DEPUTY COMMISSIONER
NAGAON
ASSAM

5:DEPUTY COMMISSIONER
HOJAI
SHANKARDEVNAGAR
ASSAM

6:SUPERINTENDENT OF POLICE BORDER
NAGAON
ASSAM

7:SUPERINTENDENT OF POLICE BORDER
HOJAI
ASSAM

Advocate for the Petitioner : MR.N H MAZARBHUYAN
Advocate for the Respondent : ADDL. AG
ASSAM

Linked Case : WP(C) 2186/2017

1:BHANU NESSA
W/O. MD. HUSSAIN ALI and D/O. LT. ATABUDDIN SHEIKH
R/O. KURUWATI
P.S. SOOTEA
DIST. SONITPUR
ASSAM.

VERSUS

1:THE STATE OF ASSAM and 3 ORS.
REP. BY THE COMM. and SECY.
DEPTT. OF HOME TO THE GOVT. OF ASSAM
DISPUR
GHY.-781006.

2:THE DY. COMMISSIONER
SONITPUR
TEZPUR
ASSAM
PIN-784001.

3:THE SUPDT. OF POLICE
SONITPUR
ASSAM
PIN-784001.

4:THE SUPDT. OF POLICE B
SONITPUR
ASSAM
PIN-784001.

Advocate for the Petitioner : MR.A AHMED
Advocate for the Respondent :

Linked Case : WP(C) 6006/2016

1:MD. AFFIRUDDIN
S/O. LT. LAL MAMUD @ LAL SEIKH
R/O. VILL. BAKRAPATTA
P.S. SOOTEA

DIST. SONITPUR NOW BISWANATH
ASSAM.

VERSUS

1:THE UNION OF INDIA AND 8 ORS
REP. BY THE SECRETARY TO THE MINISTRY OF HOME AFFAIRS
NEW DELHI
INDIA.

2:THE STATE OF ASSAM
REP. BY THE COMM. and SECY.
HOME DEPTT.
DISPUR
GUWAHATI -781006.

3:THE DEPUTY COMMISSIONERM
SONITPUR
TEZPUR
ASSAM
PIN. 784001.

4:THE DEPUTY COMMISSIONER
BISWANATH
BISWANATH CHARIALI
ASSAM.

5:THE SUPERINTENDENT OF POLICE
SONITPUR
TEZPUR
DIST. SONITPUR
ASSAM
PIN. 784001.

6:THE SUPERINTENDENT OF POLICE
BISWANATH
BISWANATH CHARIALI
DIST. BISWANATH
ASSAM.

7:THE SUPERINTENDENT OF POLICE B
BISWANATH
BISWANATH CHARIALI
DIST. BISWANATH
ASSAM.

8:THE SUPERINTENDENT OF POLICE B

SONITPUR
TEZPUR
DIST. SONITPUR
ASSAM
PIN. 784001.

9:THE OFFICER-IN-CHARGE
SOOTEA POLICE STATION
SOOTEA
DIST. BISWANATH
ASSAM.

Advocate for the Petitioner : MR.A C RAY
Advocate for the Respondent : GA
ASSAM

Linked Case : WP(C) 6779/2016

1:MUSST. MORIAM NESSA @ MOIRAM NESSA
W/O. ABDUL MAZID @ MAZID ALI
D/O. LT. ABDUL MUNCHI
R/O. VILL. BAKRAPATTA
P.S. SOOTEA
DIST. SONITPUR NOW BISWANATH
ASSAM.

VERSUS

1:THE UNION OF INDIA and 4 ORS
REP. BY THE SECRETARY OF THE MINISTRY OF HOME AFFAIRS
NEW DELHI
INDIA.

2:THE STATE OF ASSAM
REP. BY THE COMMISSIONER and SECRETARY
HOME DEPTT.
GUWAHATI - 781006.

3:THE DEPUTY COMMISSIONER
SONITPUR NOW BISWANATH
TEZPUR
ASSAM
PIN. 784001.

4:THE SUPERINTENDENT OF POLICE

SONITPUR NOW BISWANATH
TWZPUR
DIST. SONITPUR NOW BISWANATH
ASSAM
PIN. 784001.

5:THE SUPERINTENDENT OF POLICE B
SONITPUR NOW BISWANATH
TEZPUR
DIST. SONITPUR NOW BISWANATH
ASSAM
PIN. 784001.

6:THE OFFICER-IN-CHARGE
SOOTEA POLICE STATION
SOOTEA
DIST. SONITPUR NOW BISWANATH
ASSAM
PIN. 784001.

Advocate for the Petitioner : MR.A C RAY
Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : WP(C) 5925/2016

1:MD. ABDUL BAREK
S/O. LT. JAMIR ALI
VILL. BAKRAPATTA
P.S. SOOTEA
DIST. SONITPUR
ASSAM.

VERSUS

1:THE UNION OF INDIA and 8 ORS
REP. BY THE SECRETARY OF THE MINISTRY OF HOME AFFAIRS
NEW DELHI
INDIA.

2:THE STATE OF ASSAM
REP. BY THE COMM. and SECY.
HOME DEPTT.
DISPUR
GHY.-781006.

3:THE DY. COMMISSIONER
BISWANATH
BISWANATH CHARIALI
ASSAM

4:THE DY. COMMISSIONER
SONITPUR
TEZPUR
ASSAM.

5:THE SUPDT. OF POLICE
BISWANATH
BISWANATH CHARALI
DIST. BISWANATH
ASSAM.

6:THE SUPDT. OF POLICE
SONITPUR
TEZPUR
DIST. SONITPUR
ASSAM.

7:THE SUPDT. OF POLICE B
SONITPUR
TEZPUR
DIST. SONITPUR
ASSAM
PIN-784001.

8:THE SUPDT. OF POLICE B
BISWANATH
BISWANATH CHARIALI
DIST. BISWANATH
ASSAM.

9:THE OFFIER IN CHARGE
SOOTEA POLICE STATION
SOOTEA
DIST. BISWANATH
ASSAM
PIN-784001.

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

Linked Case : WP(C) 797/2017

1:AMIR UDDIN MAZUMDER
S/O LT. AMBARI ALI MAZUMDER R/O VILL- MADARTOLI MIKIR GAON P.O.
and P.S. DOBOKA DIST. HOJAI
ASSAM.

VERSUS

1:THE UNION OF INDIA and 3 ORS.
REP. BY THE SECRETARY TO THE GOVT. OF INDIA
MINISTRY OF HOME AFFAIRS
NEW DELHI.

2:THE COMMISSIONER AND SECRETARY
TO THE GOVT. OF ASSAM
HOME DEPARTMENT
DISPUR
GUWAHATI-6.

3:THE DEPUTY COMMISSIONER
HOJAI
P.O. and DIST. HOJAI
ASSAM.

4:THE SUPERINTENDENT OF POLICE BORDER
HOJAI
P.O. HOJAI
DIST. HOJAI
ASSAM

5:THE OFFICER-IN-CHARGE
DOBOKA POLICE STATION
P.O. DOBOKA
DIST. HOJAI
ASSAM.

Advocate for the Petitioner : MR.A S TAPADER
Advocate for the Respondent :

Linked Case : WP(C) 2622/2017

1:MUJAMIL HAQUE
S/O LATE TAHER ALI@LATE TAHER MUNCHI@TAHER ALI MUNCHI
R/O VILLAGE- PUB MALA GAON

P.S.-SOOTE
DIST. SONITPUR
ASSAM

VERSUS

1:THE UNION OF INDIA and 5 ORS.
REP. BY THE SECY. TO THE MINISTRY OF HOME AFFAIRS
NEW DELHI
INDIA

2:THE STATE OF ASSAM
REP. BY THE COMMISSIONER and SECY.
HOME DEPTT.
DISPUR
GUWAHATI-781006

3:THE SUPERINTENDENT OF POLICE
SONITPUR NOW BISWANATH
TEZPUR
DIST. SONITPUR NOW BISWANATH
ASSAM
PIN-784001

4:THE SUPERINTENDENT OF POLICE B
SONITPUR NOW BISWANATH
TEZPUR
DIST. SONITPUR NOW BISWANATH
ASSAM
PIN-784001

5:THE OFFICER IN CHARGE
SOOTE
DIST. SONITPUR NOW BISWANATH
ASSAM
PIN-784001

6:THE DEPUTY COMMISSIONER
SONITPUR NOW BISWANATH
TEZPUR
ASSAM
PIN-784001

Advocate for the Petitioner : MR.N N JHA
Advocate for the Respondent :

Linked Case : WP(C) 4138/2017

1: BHAGIRATH MALODAS
S/O. MURULI MALODAS @ MURULI HAWALDAR
VILL. PANPUR GOPCHAR
P.S. JAMUGURI
DIST. SONITPUR
ASSAM.

VERSUS

1: THE UNION OF INDIA and 3 ORS.
REP. BY THE SECRETARY TO THE GOVT. OF INDIA
MINISTRY OF HOME AFFAIRS
GRIHA MANTRALAYA
NEW DELHI.

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

3: THE DY. COMMISSIONER
SONITPUR
TEZPUR
P.O. TEZPUR
DIST. SONITPUR
ASSAM
PIN-784001.

4: THE SUPDT. OF POLICE B
SONITPUR
TEZPUR
P.O. TEZPUR
DIST. SONITPUR
ASSAM
PIN-784001.

Advocate for the Petitioner : MR.U DAS
Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : WP(C) 6748/2016

1:MD. JAMAL UDDIN ALIAS BADIA JAMAL
S/O MUKLESUR RAHMAN VILL- AZAD NAGAR
P.S. DOBOKA DIST. NAGAON NOW HOJAI
ASSAM

VERSUS

1:THE UNION OF INDIA and 6 ORS
TO BE REP. BY SECRETARY TO THE GOVT. OF INDIA
HOME DEPARTMENT
NORTH BLOCK
NEW DELHI.

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

3:ADDITIONAL DIRECTOR GENERAL OF POLICE
ASSAM
BORDER
BHANGAGARH
GUWAHATI-05.

4:DEPUTY COMMISSIONER
NAGAON
ASSAM.

5:DEPUTY COMMISSIONER
HOJAI
SHANKARDEVNAGAR
ASSAM.

6:SUPERINTENDENT OF POLICE BORDER
NAGAON
ASSAM.

7:SUPERINTENDENT OF POLICE BORDER
HOJAI
ASSAM.

Advocate for the Petitioner : MR.N H MAZARBHUYAN
Advocate for the Respondent :

Linked Case : WP(C) 1849/2016

1:MD. HABIBUR RAHMAN
S/O- LT. DILWAR SHEIKH @ LT. DILWARUDDIN
R/O VILL.- NO. 2 BHOJMARI
P.S.- SOOTEA
DIST.- SONITPUR
ASSAM.

VERSUS

1:THE UNION OF INDIA and 3 ORS
THROUGH THE MINISTRY OF HOME AFFAIRS
GRIHA MANRALAYA
NEW DELHI.

2:THE STATE OF ASSAM
THROUGH THE SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY- 6.

3:THE DY. COMMISSIONER
SONITPUR
TEZPUR
DIST.- SONITPUR
ASSAM.

4:THE SUPERINTENDENT OF POLICE BORDER
BISWANATH CHARIALI
P.O.- BISWANATH CHARIALI
DIST.- SONITPUR
ASSAM.

Advocate for the Petitioner : MR. S BISWAS
Advocate for the Respondent : GA
ASSAM

Linked Case : WP(C) 1333/2016

1:BINOD BIHARI DEY @ BINOD DEY
S/O LT. BIPIN BIHARI DEY @ BIPIN DEY
R/O MOUDONGA
P.S. MURAJHAR
DIST- NAGAON

ASSAM

VERSUS

1:THE STATE OF ASSAM AND 3 ORS
REP. BY THE SECY. TO THE GOVT. OF ASSAM
HOME DEPTT.
DISPUR
GHY-6

2:THE SUPERINTENDENT OF POLICE B
HOJAI
ASSAM

3:THE DY. COMMISSIONER
NAGAON
DIST- NAGAON
ASSAM

4:THE UNION OF INDIA
REP. BY THE CHIEF SECY. TO THE GOVT. OF INDIA
DEPTT. OF HOME
NEW DELHI

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

Linked Case : WP(C) 1238/2017

1:MUSSTT. JAHANARA KHATOON @ MUSSTT. JAHANARA BEGUM
W/O MD. ZAMIR ALI D/O LT. HURMUZ ALI R/O VILL- BAKRAPATTA P.O.
BAKRAPATTA
P.S. SOOTEA DIST. BISWANATH
PIN - 784175
ASSAM.

VERSUS

1:THE UNION OF INDIA and 8 ORS.
TO BE REP. BY SECRETARY TO THE GOVT. OF INDIA
HOME DEPARTMENT
NORTH BLOCK
NEW DELHI.

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

3:THE ADDITIONAL DIRECTOR GENERAL OF POLICE
ASSAM BORDER BHANGAGARH
GUWAHATI-5.

4:THE DEPUTY COMMISSIONER
BISWANATH DISTRICT
ASSAM.

5:THE SUPERINTENDENT OF POLICE BORDER
BISWANATH DISTRICT
ASSAM

6:THE SUPERINTENDENT OF POLICE BORDER
SONITPUR DISTRICT
TEZPUR
ASSAM.

7:THE SUPERINTENDENT OF POLICE
BISWANATH DISTRICT
ASSAM

8:THE ELECTION OFFICER
BISWANATH DISTRICT
ASSAM.

9:THE OFFICER -IN-CHARGE
SOOTIA POLICE STATION
DIST. BISWANATH
ASSAM.

Advocate for the Petitioner : MR.A S TAPADER
Advocate for the Respondent : ASSTT.S.G.I.

Linked Case : WP(C) 7057/2016

1:MD. INTAJUR RAHMAN
S/O. LT. SYED ALI
VILL. MODERTOLI MIKIR GOAN
P.S. DOBOKA

DIST. NAGAON NOW HOJAI
ASSAM.

VERSUS

1:THE UNION OF INDIA and 6 ORS
TO BE REP. BY THE SECRETARY TO GOVT. OF INDIA
HOME DEPTT.
NORTH BLOCK
NEW DELHI.

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

3:ADDITIONAL DIRECTOR GENERAL OF POLICE
ASSAM BORDER
BHANGAGARH
GUWAHATI -05.

4:DEPUTY COMMISSIONER
NAGAON
ASSAM.

5:DEPUTY COMMISSIONER
HOJAI
SHANKARDEVNAGAR
ASSAM.

6:SUPERINTENDENT OF POLICE BORDER
NAGAON
ASSAM.

7:SUPERINTENDENT OF POLICE BORDER
HOJAI
ASSAM.

Advocate for the Petitioner : MR.N H MAZARBHUYAN
Advocate for the Respondent : AG
ASSAM

Linked Case : WP(C) 6327/2016

1:FIRUJA KHATUN
W/O JALAL ALI AND D/O ABDUL RAHIM
R/O KURUWATI
P.S. SOOTEA
DIST- SONITPUR
ASSAM

VERSUS

1:THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMMISSIONER and SECY.
DEPTT. OF HOME TO THE GOVT. OF ASSAM
DISPUR
GHY-6

2:THE DY. COMMISSIONER
SONITPUR
TEZPUR
ASSAM
PIN-784001

3:THE DISTRICT FOREIGNERS' TRIBUNAL
SONITPUR
TEZPUR
ASSAM
PIN-784001

4:THE SUPERINTENDENT OF POLICE
SONITPUR
ASSAM
PIN-784001

5:THE SUPERINTENDENT OF POLICE B
SONITPUR
ASSAM
PIN-784001

Advocate for the Petitioner : MR.A AHMED
Advocate for the Respondent :

BEFORE
HON'BLE MR. JUSTICE UJJAL BHUYAN
HON BLE MR. JUSTICE AJIT BORTHAKUR

ORDER

Date : 19-04-2018

(Ujjal Bhuyan, J.)

A common question of law arises in this bunch of writ petitions because of which all the writ petitions were heard together, hearing of which was concluded on 10.04.2018 and today is fixed for delivery of order.

2. The issue which arises in this bunch of writ petitions is as under:-

“Whether the plea of res judicata as provided under Section 11 of the Code of Civil Procedure, 1908 would be attracted to a proceeding under the Foreigners Act, 1946 read with the Foreigners (Tribunals) Order, 1964?”

3. We have heard Mr. B.D. Das, learned Senior counsel for the petitioner in WP(C) No.797/2017; Mr. Giasuddin, learned counsel for the petitioner in WP(C) No.7339/2015; Mr. A.S. Tapadar, learned counsel for the petitioner in WP(C) No.1238/2017; Mr. U. Saikia, learned counsel for the petitioners in WP(C) Nos.6327/2016 and 2186/2017; Mr. B. Chanda, learned counsel for the petitioner in WP(C) No.1333/2016 and Mr. S.C. Biswas, learned counsel for the petitioner in WP(C) No.1849/2016. We have also heard Mr. N. Dutta, learned Senior counsel, as *amicus curiae*; Mr. S.C. Keyal, learned Assistant Solicitor General of India and Mr. U.K. Nair, learned Senior Special Counsel, Foreigners Tribunal (FT) assisted by Mr. A. Kalita, learned Special Counsel, FT.

4. In the course of the hearing, it was made clear to learned counsel for the parties that depending on the outcome of the hearing, individual writ petitions would be taken up separately.

5. The above question of law arose while hearing WP(C) No.7339/2015 (*Mustt. Amina Khatun Vs. Union of India*), which is taken up as the lead case. In this case, a reference was made by the Superintendent of Police (Border), Sonitpur with the allegation that petitioner Amina Khatun was a foreigner. The reference was registered as FT(D) Case No.3198/2013

before the Foreigners Tribunal No.3, Sonitpur at Tezpur. By order dated 29.04.2014, the said Tribunal had opined that petitioner Mustt. Amina Khatun was not a doubtful citizen of India.

5.1. Notwithstanding the same, a fresh reference was made by the Superintendent of Police (Border), Sonitpur with the allegation that petitioner Mustt. Amina Khatun was a foreigner. On the basis of the said reference, FT Case No.18/2015 was registered before the Foreigners Tribunal-9th, Sonitpur at Dhekiajuli. The Tribunal at Dhekiajuli answered the reference in favour of the State vide order dated 28.09.2015 by declaring the petitioner to be a foreigner who had illegally entered into India (Assam) from Bangladesh after 25.03.1971.

6. This came to be challenged before this Court in the related writ petition, i.e., the lead case being WP(C) No.7339/2015.

7. Notice in this case was issued on 04.12.2015 with an interim protection.

8. In the course of the hearing on 16.09.2016, this Court posed a question as to whether an opinion rendered by a Foreigners Tribunal in respect of the same proceedee would be binding on another Foreigners Tribunal following further reference made by the State. Having regard to the importance of the issue, Court requested Mr. N. Dutta, learned Senior counsel, to assist the Court as *amicus curiae*.

9. Similar issue has arisen in the subsequent writ petitions.

10. In WP(C) No.797/2017, petitioner Md. Amiruddin Mazumdar has assailed the legality and validity of the notice issued to the petitioner by the Foreigners Tribunal, Nagaon Court No.10th at Doboka in FT Case No.928/2015 on the ground that petitioner was already declared to be not a foreigner by the Foreigners Tribunal, Hojai in Case No. FT/H/303/2013 (*State Vs. Md. Amiruddin*).

11. This Court by order dated 14.02.2017 had issued notice while staying further proceedings in FT Case No.928/2015.

12. In all the cases, the common question which arises is whether an opinion rendered by a Foreigners Tribunal in respect of the same proceedee would be binding on another Foreigners Tribunal or the same Foreigners Tribunal following further or fresh reference made by the State.

13. As the hearing progressed, the issue which crystallized was applicability of the principle of *res judicata* to a proceeding before the Foreigners Tribunal, which has been extracted above.

14. Mr. N. Dutta, learned Senior counsel, had earlier argued that though Section 11 of the *Code of Civil Procedure, 1908* (Code) may not be strictly applicable to a proceeding before a Foreigners Tribunal, spirit or principle underlying Section 11 would govern a proceeding before a Foreigners Tribunal. He submits that principle of *res judicata* is based on public policy which has been recognized by the Supreme Court. Referring to the decision of the Supreme Court in ***Burn and Co. Vs. Employees, AIR 1957 SC 38***, he submits that it is a well-recognised principle in law that a decision once rendered by a competent Court on a matter in issue between the parties after a full enquiry should not be permitted to be re-agitated. It is on this principle which is founded on sound public policy that the rule of *res judicata* enacted in Section 11 of the Code is based. This principle is of universal application. He has placed further reliance in the case of ***Workmen Vs. M/s. Straw Board Manufacturing Company, (1974) 4 SCC 681***. Finally he relies upon the decision of the Supreme Court in ***Pondicherry Khadi and Village Industries Vs. P. Kulathangan, (2004) 1 SCC 68***, and contends that principle of *res judicata* operates in all civil proceedings.

15. Mr. B. D. Das, learned Senior counsel, who has appeared on behalf of the petitioner in WP(C) No.797/2017 Md. Amiruddin Mazumdar, has filed a written submission. According to him, under paragraph 4 of the *Foreigners (Tribunals) Order, 2006* (Foreigners Order), a Foreigners Tribunal has the power of a Civil Court in respect of summoning and enforcing attendance of any person and examining him on oath; requiring discovery and production of any document; and issuing commission for examination of any witness. Therefore, provisions of the Code would be applicable to a proceeding before a Foreigners Tribunal. Since in the case of the petitioner, he has already been declared to be not a foreigner by a competent Foreigners Tribunal, subsequent notice issued by another Foreigners Tribunal would be barred by the principle of *res judicata* under Section 11 of the Code since a person cannot be vexed twice on the same cause of action. Basic character of *res judicata* is public policy giving finality to a decision of the Court of competent jurisdiction and to prevent further litigation.

Doctrine of *res judicata* is not confined to the limits of Section 11 of the Code but is applicable universally to ensure finality in litigation. In support of his submissions, Mr. Das has placed reliance in the case of ***Govindan Gopalan Vs. Raman Gopalan, AIR 1978 Kerala 217; AIR 2017 SC 1962, Kausik Cooperative Civil Society Vs. N. Prabhathamma; and 1970 (1) SCC 673, B. Temple Vs. Vodapalli Venkata.***

16. Detailed submissions have also been by Mr. Giasuddin, learned counsel for the petitioner in WP(C) No.7339/2015 supporting the view of the learned *amicus curiae* that the underlying principle of *res judicata* would be applicable to a proceeding before a Foreigners Tribunal. In support of his contention, he has extensively referred to the decision of the Supreme Court in ***Subramanian Swamy Vs. State of Tamilnadu, (2014) 5 SCC 75.*** He is supported by learned counsel Mr. A.S. Tapadar who has appeared for the petitioner in WP(C) No.1238/2017. Mr. Tapadar has placed reliance on the following decisions:-

Suluchona Amma Vs. Naryanan Nair, (1994) 2 SCC 14;

Kunjan Nair Sivraman Nair Vs. Narayanan Nair, Civil Appeal No.838/2004,
decided on ***6.12.2004;***

2015 (3) GLT 771, Hussain Ahmed Vs. Ahmed Ali.

16.1. He has also referred to a decision of this Court in WP(C) No.2255/2017 (***Mojibar Rahman Vs. Union of India***) decided on 19.04.2017, wherein this Court had held that when the petitioner was already declared to be a foreigner, there was no need or necessity to make the second reference.

17. Mr. U. Saikia, learned counsel for the petitioners in WP(C) Nos.6327/2016 and 2186/2017 while endorsing the submissions made by the learned *amicus curiae* additionally placed reliance on the decision of the Supreme Court in ***AIR 1999 SC 1975, Industrial Grid and Investment Corporation of India Vs. Grapco Industries Ltd.***

18. Similar submissions have been made by Mr. B. Chanda, learned counsel for the petitioner in WP(C) No.1333/2016 and Mr. S. C. Biswas, learned counsel for the petitioner in WP(C) No.1849/2016.

19. Opposing the submissions made by learned counsel for the petitioners as well as that of the learned *amicus curiae*, Mr. U.K. Nair, learned Senior Special Counsel, FT has contended that under Section 3 of the Foreigners Act, 1946, power is vested on the Central Government to detect and deport foreigners. For administrative exigencies, Central Government has delegated the power to the Superintendents of Police and deportation is executed by the Central Government. Under the Foreigners Order, Superintendents of Police only seek an opinion from the Foreigners Tribunals. The ultimate decision *vis-à-vis* an illegal foreigner is taken by the referral authority, i.e., the Superintendents of Police and deportation is executed by the Central Government. A Foreigners Tribunal only renders an opinion. Therefore, it would be wrong to say that the Central Government or for that matter, Superintendents of Police would be bound by the opinion of the Foreigners Tribunal. A reference made to a Foreigners Tribunal is neither a *lis* nor a controversy; consequently opinion rendered by a Foreigners Tribunal cannot be construed as a judgment. Though principle of *res judicata* may be based on public policy, detection and declaration of foreigners illegally residing in India concerns national security and is therefore of a higher public policy. Thus, on the ground of public policy, principle of *res judicata* cannot be invoked to prevent the State from acting against an illegal foreigner notwithstanding an adverse opinion previously rendered by a Foreigners Tribunal.

20. Mr. S.C. Keyal, learned Assistant Solicitor General of India has supported the submissions made by Mr. Nair and contends that there is no question of applicability of the principle of *res judicata* to a proceeding before the Foreigners Tribunal. In this connection, he has referred to Section 11 of the *Foreigners Act, 1946* (Foreigners Act).

21. Submissions made by learned counsel for the parties have been considered.

22. At the outset, it would be apposite to deal with Section 11 of the Code. Section 11 sans the explanations reads as under:-

“11. Res judicata - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

23. From a literal perspective, what is discernible is that firstly the principle of *res judicata*

as engrafted in Section 11 of the Code is operative on a Court. Secondly, it relates to a suit or an issue between the same parties litigating under the same title; and thirdly, the suit or issue between the same parties was heard and finally decided by the Court of competent jurisdiction. Therefore, *stricto sensu*, Section 11 of the Code is applicable to a Court trying a suit or an issue which was directly and substantially in issue in a former suit between the same parties litigating under the same title and which was finally heard and decided by the competent Court.

24. In ***Burn and Co. Ltd.*** (supra), which was a case under the Industrial Disputes Act, 1947, Supreme Court held that the rule of *res judicata* enacted in Section 11 of the Code is founded on sound public policy and is of universal application. Supreme Court extended the said principle to decisions of Industrial Tribunals also.

25. This position was reiterated in the case of ***Workmen of Straw Board Manufacturing Company*** (supra) which also pertained to industrial adjudication. In the context of that case, it was held that although the entire Code is not applicable to industrial adjudication, principle of *res judicata* laid down in Section 11 of the Code would be applicable. It was mentioned that multiplicity of litigation and agitation and re-agitation of the same dispute at issue between the same employer and his employees would not be conducive to industrial peace which is the principal objective of the Industrial Disputes Act. However, Supreme Court put in a caveat that whether a matter in issue in a subsequent case had earlier been directly and substantially been in issue between the same parties and whether the same had been heard and finally decided by the Tribunal would be of pertinent consideration and would have to be determined before holding in a particular case that the principle of *res judicata* is attracted.

26. Taking a slightly different view, Supreme Court in ***Pondicherry Khadi & Village Industries Board*** (supra), while reiterating the proposition that though the entire Code is not applicable to industrial adjudication, principle of *res judicata* laid down under Section 11 of the said Code is applicable including the principle of constructive *res judicata* but clarified that principle of *res judicata* operates on the Court. It is the Courts which are prohibited from trying the issue which was directly and substantially in issue in the earlier proceeding between the same parties provided the Court trying the subsequent proceeding is satisfied

that the earlier Court was competent to dispose of the earlier proceeding and that the matter had been heard and finally decided by such Court.

27. The above position was summed up by the Supreme Court in the case of ***Kunjan Nair Sivraman Nair*** (supra) wherein the Supreme Court held as under:-

“Rule of res judicata is contained in Section 11 of the Code. Bereft of all its explanations, namely, Explanations I to VIII, Section 11 is quoted below :

"11. Res judicata. - No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raise, and has been heard and finally decided by such court."

"Res judicata pro veritate accipitur" is the full maxim which has, over the years, shrunk to mere "res judicata". Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman Jurisprudence "Interest reipublicae ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "Nemo debet bis vexari pro una at eadem causa" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised.

The above position was noted in Deva Ram and Another v. Ishwar Chand and Another (1995) 6 SCC 733."

28. Again in ***Sulochana Amma*** (supra), Supreme Court held that the principle embodied in Section 11 of the Code, i.e., rule of conclusiveness does not create any right or interest in the property but merely operates as a bar to try the same issue once again and extended the principle to all judicial proceedings as well as *quasi judicial* proceedings of Tribunals and other Civil Courts. It was held thus:-

“5. Section 11 of CPC embodies the rule of conclusiveness as evidence or bars as a plea an issue tried in an earlier suit founded on a plaint in which the matter is directly and substantially in issue and became final. In a later suit between the same parties or their privies in a court competent to try such subsequent suit in which the issue has been directly and substantially raised and decided in the judgment and decree in the former suit would operate as res judicata. Section 11 does not create any right or interest in the property, but merely operates as a bar to try the same issue once over. In other words, it aims to prevent multiplicity of the proceedings and accords finality to an issue, which directly and substantially had arisen in the former suit

between the same parties or their privies, been decided and became final, so that parties are not vexed twice over; vexatious litigation would be put to an end and the valuable time of the court is saved. It is based on public policy, as well as private justice. They would apply, therefore, to all judicial proceedings whether civil or otherwise. It equally applies to quasi-judicial proceedings of the tribunals other than the civil courts."

29. Therefore, on a careful analysis of the provisions contained in Section 11 of the Code as explained by the Supreme Court, what can be deduced is that though the basic principle operates on the Courts and to parties in civil suit, the principle underlying Section 11 has been extended to other judicial and *quasi judicial* proceedings on the ground of public policy that there should be conclusiveness in adjudication though the rule by itself does not create any right or interest of the parties.

30. Having said that, we may now briefly analyse the provisions of the *Foreigners Act, 1946* (Foreigners Act). The *Foreigners Act, 1946* is an act to confer upon the Central Government certain powers in respect of foreigners. This act provides for the exercise of certain powers by the Central Government in respect of the entry of foreigners into India; their presence in India and their departure therefrom. Section 2 (a) defines a "foreigner" to mean a person who is not a citizen of India. Section 3 confers the power to make orders. As per Sub-section (1), the Central Government may by order make provision either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigners, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein. As per Sub-section (2), orders made under Section (1) may provide for the contingencies made therein including entry into India, departure from India, stay in India etc. Section 3 is extracted hereunder:-

"3. Power to make orders.—

(1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or, their departure therefrom or their presence or continued presence therein.

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner—

(a) shall not enter India, or shall enter [India] only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed;

(b) shall not depart from [India], or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed;

(c) shall not remain in [India], or in any prescribed area therein;

[(cc) shall, if he has been required by order under this section not to remain in India, meet from any resources at his disposal the cost of his removal from India and of his maintenance therein pending such removal;]

(d) shall remove himself to, and remain in, such area in [India] as may be prescribed;

(e) shall comply with such conditions as may be prescribed or specified—

(i) requiring him to reside in a particular place;

(ii) imposing any restrictions on his movements;

(iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified;

(iv) requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his handwriting and signature to such authority and at such time and place as may be prescribed or specified;

(v) requiring him to submit himself to such medical examination by such authority and at such time and place as may be prescribed or specified;

(vi) prohibiting him from association with persons of a prescribed or specified description;

(vii) prohibiting him from engaging in activities of a prescribed or specified description;

(viii) prohibiting him from using or possessing prescribed or specified articles;

(ix) otherwise regulating his conduct in any such particular as may be prescribed or specified;

(f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions;

(g) shall be arrested and detained or confined; and may make provision [for any matter which is to be or may be prescribed and] for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

(3) Any authority prescribed in this behalf may with respect to any particular foreigner make orders under clause (e) or clause (f) of sub-section (2).”

31. Therefore, from what has been extracted above, it is evident that under Section 3 of the Foreigners Act, the power to deal with foreigners including the decision to remove a foreigner vests in the Central Government. As a matter of fact, citizenship, naturalization and aliens; admission into and immigration and expulsion from India; passports and visas are subjects having entries in List-I, i.e., Union List under 7th Schedule to the Constitution of India. Therefore, for all intent and purpose, it is the Central Government which is the authority to deal with illegal migrants and issues relating to them, such as, detection and deportation.

32. Under Section 9 of the Foreigners Act, if any question arises as to whether any person is or is not a foreigner, the onus of proving that such a person is not a foreigner shall lie upon such person notwithstanding anything contained in the Indian Evidence Act, 1872.

33. Section 11 deals with power to give effect to orders, directions, etc and includes within its ambit any Police Officer who may take such steps as may in his opinion be reasonably necessary for securing compliance to any order or direction given under the Foreigners Act or to prevent or to rectify any breach thereof.

34. Section 12 deals with delegation of authority to authorize any subordinate authority to exercise such power on behalf of the delegatee authority.

35. In exercise of the powers conferred by Section 3 of the *Foreigners Act, 1946*, the Central Government made the *Foreigners Order, 1948*. According to Clause 3 thereof, no foreigner can enter into India otherwise than at such port or other place of entry on the border of India as a Registration Officer having jurisdiction may permit or without the leave of the civil authority having jurisdiction at such port or place.

36. Article 258 of the Constitution deals with power of the Union to confer powers etc on States in certain cases. Clause (1) of Article 258 starts with a *non-obstante* clause. It says that notwithstanding anything in the Constitution, President may with the consent of the Government of a State entrust either conditionally or unconditionally to that Government or to its officers, functions in relation to any matter to which the executive power of the Union extends. Clause (3) provides for making of payment by the Government of India to the State concerned such sum as may be agreed upon or in default of agreement through arbitration in respect of any extra-cost of administration incurred by the State in connection with the exercise of powers and duties of the Govt. of India conferred or imposed upon a State Government.

37. Ministry of Home Affairs, Government of India had issued a notification dated 19.04.1958 which was extracted in the case of ***Anwar Vs. State of J&K, (1971) 3 SCC 104***. The said notification was issued by the Central Government in exercise of the powers conferred by Clause (1) of Article 258 of the Constitution 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 (2) (c), (cc), (d), (e) and (f) of the *Foreigners Act, 1946* and under the *Foreigners (Orders), 1948*. While extracting this notification, Supreme Court held that this notification was a complete answer to the objection raised that it was the Central Government alone which could make a lawful deportation order under Section 3 (2)(c) of the *Foreigners Act, 1946*.

38. Government of India, Ministry of Home Affairs in exercise of the powers conferred by Article 258(1) of the Constitution issued a notification dated 17.02.1976 entrusting Superintendents of Police and Deputy Commissioners (in-charge of Police) under the Government of Assam functions of the Central Government in making orders of the natures

specified in clauses (a), (b), (c) and (cc), (e) and (f) of Sub-Section (2) of Section 3 of the Foreigners Act within their respective jurisdiction subject to conditions mentioned therein which included the condition that exercise of such functions would be in respect of nationals of Bangladesh and that while exercising such functions, Superintendents of Police and Deputy Commissioners (in-charge of Police) shall comply with such general or special directions as the Government of Assam or Central Government may issue from time to time.

39. In the year 1964, the Central Government in exercise of the powers conferred by Section 3 of the *Foreigners Act, 1946* had made the *Foreigners (Tribunals) Order, 1964*. Paragraph 2 thereof deals with constitution of Tribunals. Paragraph 2 (1) says 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 *Foreigners Act, 1946* to a Tribunal to be constituted for the purpose, for its opinion. We will advert to other provisions of the *Foreigners (Tribunals) Orders, 1964* (1964 orders) at a subsequent stage. At this stage, suffice it to say, under paragraph 2(1), the Central Government may by order refer a question to a Foreigners Tribunal as to whether a person is or is not a foreigner within the meaning of the *Foreigners Act, 1946*.

40. Following signing of the Assam Accord in 1985, Section 6 (A) was inserted in the *Citizenship Act, 1955 w.e.f. 07.12.1985*. Section 6 A deals with special provisions as to citizenship of persons covered by the Assam Accord. As per Section 6 A (1) (b), the expression "*detected to be a foreigner*" means detected to be a foreigner in accordance with the provisions of the *Foreigners Act, 1946* and the *Foreigners (Tribunals) Order, 1964* by a Tribunal constituted under the said Order. As per Section 6 A 1(e), a person shall be deemed to have been detected to be a foreigner on the date on which a Tribunal constituted under the *Foreigners (Tribunals) Order, 1964* submits its opinion to the effect that he is a foreigner to the officer or authority concerned. Even in case of a person of Indian origin who has been declared to be a foreigner belonging to the 01.01.1966 to 25.03.1971 stream. Explanation to Sub-section (3) of Section 6 A clearly indicates that for such a person to be registered as a foreigner belonging to the said stream, opinion of the Foreigners Tribunal constituted under the *Foreigners (Tribunals) Order, 1964* holding such person to be a foreigner, shall be deemed

to be sufficient proof of such a person being a foreigner.

41. Thus, we have two Central Government notifications, one dated 19.04.1958 and the other dated 17.02.1976, entrusting the Government of Assam, Superintendents of Police and Deputy Commissioners (In-charge of Police) to make orders of the nature specified in Sections 3(2)(a), (b), (c) and (cc), (e) and (f) after obtaining opinion from the Foreigners Tribunals by making reference under Paragraph 2(1) of the *Foreigners (Tribunals) Orders 1964*.

42. Paragraph 3 of the Foreigners (Tribunals) Order lays down the procedure for disposal of questions referred to the Foreigners Tribunals by the referral authority i.e., by the Superintendents of Police, since redesignated as Superintendents of Police (Border), authorized by the Central Government. Paragraph 3(1) reads as under:-

“3. Procedure for disposal of questions – (1) The Tribunal shall serve on the person to whom the question relates, a copy of the main grounds on which he is alleged to be a foreigner and give him a reasonable opportunity of making a representation and producing evidence in support of his case and after considering such evidence as may be produced and after hearing such persons as may desire to be heard, the Tribunal shall submit its opinion to the officer or authority specified in this behalf in the order of reference.”

42.1. Paragraph 3(5) deals with service of notice.

42.2. Paragraph 3(6) confers power on the Foreigners Tribunals for releasing a proceedee on bail while answering a reference.

42.3. From paragraphs 3(7) to 3(14), summary nature of the proceedings before a Foreigners Tribunal is discernible. For filing written statement ten days time is to be granted and further ten days time to adduce evidence. The concerned Superintendent of Police shall also be entitled to adduce evidence. Adjournments are to be avoided. Where the proceedee fails to produce any proof in support of his or her claim that he or she is not a foreigner and also cannot arrange for bail, he shall be detained and kept in internment or detention center. A Foreigners Tribunal is to answer a reference within 60 days on receipt of the reference.

42.4. Paragraphs 3(15) and 3(16) are relevant. As per paragraph 3(15), after hearing is concluded, the concerned Foreigners Tribunal is required to submit its opinion as soon as it is practicable to the authorities specified in the order of reference. As per paragraph 3(16), a final order of a Foreigners Tribunal shall contain its opinion on the question referred to it which shall be a concise statement of facts and the conclusion.

43. A careful and conjoint reading of paragraphs 3(1), 3(14), 3(15) and 3(16) would show that after following a summary procedure where reasonable opportunity is granted to the proceedee to file written statement and to adduce evidence, a Foreigners Tribunal is required to submit its opinion to the referral authority within a period of 60 days from the date of reference; the final order of the Tribunal shall contain its opinion on the question referred to it which shall be a concise statement of facts and conclusion.

44. From the above, what is evident is that a Foreigners Tribunal renders an opinion on the reference made to it and that opinion shall comprise of a concise statement of facts and conclusion. This however does not mean that the opinion rendered should contain only a concise statement of facts and the conclusion, bereft of any reasoning. It is implicit that there has to be some reasoning connecting the statement of facts to the conclusion though such reasoning need not be elaborate considering the summary nature of the proceeding. Of course, such reasoning has to be rational and tenable in law. It is trite that reasons are the live link between facts and the conclusion.

45. Paragraphs 3A(1) and (2) provide for setting aside an *ex parte* order and for review of the final order of the Foreigners Tribunal. A Full Bench of this Court in ***State Vs. Moslem Mondal, 2013 (1) GLT 809***, has held that an *ex parte* order is not to be set aside in a routine manner. Special or exceptional circumstances are to be demonstrated by the proceedee to explain the default before the Tribunal leading to the *ex parte* order. Under paragraph 3A(3), subject to the provisions of Foreigners (Tribunals) Order, a Foreigners Tribunal shall have the power to regulate its own procedure for disposal of cases expeditiously in a time-bound manner.

46. Under paragraph 4, for the purpose of summoning and enforcing attendance of any person and examining him or her on oath; requiring the discovery and production of

document; issuing commission for examination of any witness; directing the proceedee to appear before it in person; issuing warrant of arrest against the proceedee if he or she fails to appear before it, a Foreigners Tribunal shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 and the powers of a First Class Judicial Magistrate under the Code of Criminal Procedure, 1973.

47. A careful examination of paragraph 4 would indicate that the powers of a Civil Court and the powers of a Judicial Magistrate First Class conferred upon a Foreigners Tribunal are confined to the situations enumerated thereunder. The provisions contained in paragraph 4 cannot be stretched to contend that while answering a reference or while conducting proceeding upon receipt of reference under Foreigners (Tribunals) Order, a Foreigners Tribunal functions like a Civil Court under the Civil Procedure Code or functions like a Criminal Court under the Code of Criminal Procedure.

48. On a cumulative analysis of the various provisions of the Foreigners (Tribunals) Order, it is evident that a proceeding before a Foreigners Tribunal is summary in nature as a Foreigners Tribunal is only required to render its opinion on the reference made to it as to whether the proceedee is a foreigner or not.

49. As noticed above, a Foreigners Tribunal shall have the power to regulate its own procedure to dispose of a reference expeditiously in a time-bound manner. A proceeding before a Foreigners Tribunal is neither civil nor criminal notwithstanding the fact that for attendance of any person or examination of witnesses it has the powers of a Civil Court under the Civil Procedure Code and for issuing warrant of arrest against a proceedee for default, it has the powers of a Judicial Magistrate First Class. Therefore, it may not be wrong to say that a proceeding before the Foreigners Tribunal is *sui generis*.

50. A question arose as to whether a reference can be transferred from one Foreigners Tribunal to another Foreigners Tribunal. In ***Mainul Haque Vs. Union of India, 2018 (1) GLT 777***, petitioner had approached this Court seeking a direction for transfer of FT Case No.187/2017 where he was the proceedee and which was pending before the Foreigners Tribunal No.2, Kamrup (Metro), Hedayatpur at Guwahati to another Foreigners Tribunal at Karimganj on the ground that he was a resident of Karimganj district and, therefore, it would

be inconvenient for him to appear before the Foreigners Tribunal at Karimganj for adducing evidence. This prayer of the petitioner was rejected by the Tribunal on the ground that a Foreigners Tribunal has got no power to transfer such reference. This led to filing of the related writ petition. Referring to Section 24 of the Code of Civil Procedure, which deals with transfer of suits, appeals or other proceedings by the High Court or by a District Court, this Court held that provisions or the principles governing Section 24 of the Code of Civil Procedure would not be attracted to a proceeding before a Foreigners Tribunal, which is governed by the provisions of the Foreigners Act and the Foreigners (Tribunals) Order. It has been held that *situs* of residence of the proceedee or inconvenience of a proceedee would be no ground for transfer of a reference from one Foreigners Tribunal to another Foreigners Tribunal. Examining the nature of the proceeding, this Court held that 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 jurisdictional Superintendent of Police (Border) makes a reference to the concerned Foreigners Tribunal seeking its opinion whether the proceedee is a foreigner or not. Section 24 of the Code of Civil Procedure is attracted to a suit or appeal or other proceeding pending before a Court. A Tribunal is not a Court; a Foreigners Tribunal assigned the task of rendering opinion on a reference made by the Superintendent of Police as to whether the proceedee is a foreigner or not is certainly not a Court. It was held thus:-

“11. 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.

12. 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 subordinate 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."

51. This position has been reiterated in ***Sarifa Begum Vs. Union of India, WP(C) No.4989/2016***, order dated 08.03.2018, where it has been held that a proceeding before a Foreigners Tribunal is summary in nature as it is required to render an opinion as to whether the proceedee is a foreigner or not and going by the nature of the proceeding where it has the power to regulate its own procedure, it has been held that it is *sui generis*.

52. Before we elaborate on this a little more, we may briefly examine the legal context in which a Foreigners Tribunal renders opinion.

53. Section 6A was inserted in the Citizenship Act, 1955 with effect from 07.12.1985 following signing of the Assam Accord. Assam Accord was signed between the All Assam Student Union and All Assam Gana Sangram Parishad on the one hand and the Central Government on the other hand with Government of Assam as a signatory following a six year agitation in the State of Assam for detection, deletion (from voters list) and deportation (from India) of foreigners who had illegally entered into India (Assam), particularly from East Pakistan and thereafter from Bangladesh. Section 6A deals with special provision as to citizenship of persons covered by the Assam Accord. While the other provisions may not be necessary for answering the question before us, it will be useful to refer to Section 6A(1)(b) and (e). As per these two provisions, a person detected to be a foreigner would mean detected to be a foreigner in accordance with the provisions of the Foreigners Act and the Foreigners (Tribunals) Order by a Tribunal constituted thereunder and he would be deemed to have been detected to be a foreigner on the date on which a Tribunal constituted under the Foreigners (Tribunals) Order submits its opinion to the referral authority to the effect that he is a foreigner.

54. *Illegal Migrants (Determination by Tribunals) Act, 1983* was enacted to provide for establishment of Tribunals for determination in a fair manner of the question whether a person is an illegal migrant to enable the Central Government to expel the illegal migrants from India. While the preamble of the IMDT Act acknowledged that a good number of foreigners had migrated into India across the borders of the eastern and north eastern regions of the country on or after 25-03-1971 without lawful authority and thereafter continued to remain illegally in India whose continuance was detrimental to the interest of the public of India, provisions of the IMDT Act were enacted in such a manner that it was meant to give shelter or protection to illegal migrants who came to Assam from Bangladesh on or after 25.03.1971 rather than their detection.

55.1. In exercise of powers conferred by Section 28 of the IMDT Act, the Central Government made the *Illegal Migrants (Determination by Tribunals) Rules, 1984* (IMDT Rules). Amongst other things, IMDT Rules provided for constitution of a Screening Committee at every sub-divisional level comprising of Sub-Divisional Magistrate and a police officer not below the rank of Deputy Superintendent of Police. Enquiry report following enquiry conducted against a person who was suspected to be an illegal migrant was required to be submitted by the Enquiry Officer who was a police officer not below the rank of Sub-Inspector of Police to the Screening Committee for scrutiny. Only after the Screening Committee accepted such report and made recommendation for making of reference that the competent authority could make a reference. Here also, the competent authority had the discretion whether to make a reference to the Tribunal or not. If the competent authority decided not to make a reference, there was no right of appeal and the alleged illegal migrant remained untouched.

55.2. It is in that context that challenge was made to the constitutionality of the IMDT Act and the IMDT Rules in ***Sarbananda Sonowal Vs. Union of India, (2005) 5 SCC 665.*** Supreme Court declared the IMDT Act and the IMDT Rules as *ultra vires* the constitution and struck down the same with the declaration that *Passport (Entry into India) Act, 1920; Foreigners Act, 1946; Immigrants (Expulsion from Assam) Act, 1950; and Passport Act, 1967* would apply to the State of Assam with the further direction that all the references which were pending before the Tribunals constituted under the IMDT Act should be transferred to

the Tribunals constituted under the Foreigners (Tribunals) Order and decided in the manner provided in the Foreigners Act and the Foreigners (Tribunals) Order.

55.3. While declaring so, Supreme Court clearly held in paragraphs 63 and 64 of ***Sarbananda Sonowal*** (supra) that there is no manner of doubt that the State of Assam is facing external aggression and internal disturbance on account of large-scale illegal migration of Bangladeshi nationals. It, therefore, becomes the duty of the Union of India to take all measures for protection of the State of Assam from such external aggression and internal disturbance as enjoined in Article 355 of the Constitution. In paragraph 70, Supreme Court clearly mentioned that illegal influx of Bangladeshi nationals into Assam posed a threat to the integrity and security of the North-Eastern region; their presence has changed the demographic character of that region and the local people of Assam has been reduced to a status of minority in certain districts.

55.4. Pausing here for a moment, we find that confronted with the magnitude of the problem of influx of illegal migrants from Bangladesh into Assam, Supreme Court has declared that State of Assam is facing external aggression and internal disturbance and it is the duty of the Union Government to take all measures for protection of the State of Assam from such external aggression and internal disturbance since such illegal migration has posed a threat to the integrity and security of the North-Eastern region. Therefore, in the context of the State of Assam facing external aggression and internal disturbance with threat to the integrity and security of North-Eastern region, it is in the national interest that such illegal migrants are detected whereafter steps for their deportation may be taken. Detection of illegal migrants or foreigners is therefore of paramount importance having overriding national interest. All other public interest or public policy would have to give way to the overarching public policy of detection of illegal foreign nationals residing in the State of Assam.

55.5. When the Central Government made the Foreigners (Tribunals) Order, 2006 to amend the Foreigners (Tribunals) Order virtually nullifying the mandamus issued by the Supreme Court in ***Sarbananda Sonowal***¹, the second writ petition was filed in ***Sarbananda Sonowal Vs. Union of India, (2007) 1 SCC 174***. In paragraph 7 of ***Sarbananda Sonowal***², Supreme Court has held that the *mandamus* issued in ***Sarbananda Sonowal***¹

was essentially in the interest of national security and to preserve the demographic balance of a part of India, i.e., Bharat. While striking down the *Foreigners (Tribunals) Amendment Order, 2006*, Supreme Court reiterated what was declared in ***Sarbananda Sonowal*¹** that uncontrolled immigration into the North-Eastern region from Bangladesh has posed a threat to the integrity of the nation. Supreme Court also observed in paragraph 26 that Foreigners Tribunals have not been set up in any other part of India except the State of Assam. A different regime therefore exists in the State of Assam in contradiction to the rest of the country where foreigners are identified by the executive machinery of the State. Thus, only the province of Assam has been singled out for adopting a different procedure though the problem of illegal migration faced by Assam is faced by other States of the country, such as, West Bengal, Tripura, etc.

56. At this stage, it may be mentioned that both in ***Sarbananda Sonowal*¹** and in ***Sarbananda Sonowal*²**, Supreme Court has held that Foreigners Act and the Foreigners (Tribunals) Order contain inbuilt procedure of natural justice and fairness. It has been held that the procedures laid down therein are fair and reasonable and do not offend any constitutional provision, including Article 21.

57. Therefore, it is evident that only in the State of Assam, Tribunal system is in vogue whereas in the rest of the country, foreigners are detected by the executive machinery of the State. The procedure followed by the Foreigners Tribunals has been held to be fair and reasonable and not offending Articles 14 and 21 of the Constitution. An illegal migrant entering into the State of Assam from Bangladesh after 25.03.1971 would have to be declared to be so by a competent Foreigners Tribunal upon a reference made to it by the jurisdictional Superintendent of Police (Border) by following the principles of natural justice and fairness as contained in paragraph 3 of the Foreigners (Tribunals) Order but such a foreigner in any other State of India would face expulsion from the country only on an executive order of the State.

58. It is in the light of the above that we are to examine the question framed viz., whether the principle of *res judicata* would be attracted to a proceeding before a Foreigners Tribunal.

59. In ***Bahaluddin Sheikh (Mohd.) Vs. Union of India, 2013 (3) GLT 264***, a Single

Bench of this Court held that there is no manner of doubt that the provisions contained in the *Citizenship Act, 1955* and the *Foreigners Act, 1946* are all inbuilt provisions and in case of requiring any determination relating to citizenship of a person, it is only by the Central Government and/or by the Foreigners Tribunal as operating in the State of Assam have the jurisdiction. It was further held that by necessary implication, jurisdiction of the Civil Court stands ousted.

60. Holding that there is ouster of jurisdiction of Civil Courts in the matter of determination of Indian citizenship in view of the special laws in force and in view of the direction of the Supreme Court that pending references under the Illegal Migrant Determination (IMD) Tribunals should be transferred to the Foreigners Tribunals and that provisions of the *Passport (Entry into Assam) Act, 1920; Foreigners Act, 1946; Immigrants (Expulsion from Assam) Act, 1950; and Passport Act, 1957* shall apply to the State of Assam, it was declared that the issue relating to citizenship being exclusively determined by the Foreigners Tribunals, cannot be determined in civil suit and therefore Civil Court's jurisdiction stood ousted in such matters.

61. At this stage, it may also be mentioned that Supreme Court once again intervened in ***Assam Sanmilita Mahasangha Vs. Union of India, (2015) 3 SCC 1***, following which 64 additional Tribunals have been constituted in the State of Assam in addition to 36 already existing, i.e., total 100, for rendering opinion on reference made by the jurisdictional Superintendents of Police (Border) as to whether a proceedee is a foreigner or not.

62. In the light of the above and for the reasons given, we concur with the decision of the Single Bench in ***Bahaluddin Sheikh (Mohd.)*** (supra).

63. At this stage, we may briefly note that while under Section 9 of the Foreigners Act, burden is on the suspect to prove that he is not a foreigner but a citizen of India, there was no such burden under the IMDT Act; rather under the IMDT Act, burden was on the State or on the complainant to prove that the suspect was an illegal migrant.

64. In ***Anowar Ali Vs. State of Assam, 2014 (3) GLT 500***, the following question was referred to the Full Bench:-

“Whether the orders passed by the IMDT ceased to exist after declaration of Illegal Migrants

(Determination by Tribunals) Act, 1983 as unconstitutional by the Apex Court in Sarbananda Sonowal Vs. Union of India reported in AIR 2005 SC 2920? In other words, whether such proceedings, which had already been decided by the IMDT prior to such declaration, have to be decided by the Foreigners Tribunal afresh?"

65. The Full Bench observed that while ***Sarbananda Sonowal***¹ took into account pending references before the IMD Tribunals but at the same time declaring the appeals before the appellate Tribunals to have abated, nothing was stated about the opinions already rendered by the IMD Tribunals. Therefore, the Full Bench posed a question to itself as to what would be the fate of those opinions?

65.1. Full Bench noted that a very heavy burden was cast upon the State or the complainant under the IMDT Act to establish that the suspect was an illegal migrant. If in spite of such serious obstacles, IMD Tribunals had held the suspect to be an illegal migrant, it would not be correct and justified to hold that the reference against the suspect should be proceeded afresh in the Foreigners Tribunals. Full Bench took the view that to hold so would be self-defeating and will run counter to the very objective of detection and deportation of illegal migrants. It was held that final orders of IMD Tribunals are conclusive so far IMDT Act is concerned and are not obliterated only because the IMDT Act had been struck down though such opinion of the IMD Tribunal would be open to challenge in a writ petition filed under Article 226 of the Constitution of India.

65.2. Highlighting the difference regarding burden of proof under the IMDT Act on the one hand and under the Foreigners Act on the other, the Full Bench categorically held that even if a finding is recorded in a writ petition in favour of a person who was declared an illegal migrant by the IMD Tribunal, State will not be precluded from proceeding afresh against such a person under the provisions of the Foreigners Act and the Foreigners (Tribunals) Order. It was further held that in respect of those references where the IMD Tribunal had opined that proceedee was not an illegal migrant, it would be open to the State in all such cases to proceed against those persons afresh under the Foreigners Act and the Foreigners (Tribunals) Order. The reference was answered by the Full Bench by holding that orders passed by the IMD Tribunals did not cease to exist with the striking down of the IMDT Act by the Supreme Court and consequently it does not necessarily follow that all references decided by the IMD

Tribunals have to be decided afresh by the Foreigners Tribunals; the same can be decided afresh by the Foreigners Tribunals only on a remand by the High Court in a proceeding under Article 226 of the Constitution of India.

65.3. Thus from the above, it is evidently clear that Full Bench has categorically held that even if an IMD Tribunal had declared the proceedee to be not an illegal migrant, it is open to the State to make fresh reference against such proceedee under the Foreigners Act and the Foreigners (Tribunals) Order. Not only that, it has also been held that even if a writ petition filed against such order of IMD Tribunal is allowed by the High Court by declaring the proceedee to be not an illegal migrant, even then State will not be precluded from making fresh reference against the proceedee under the Foreigners Act and the Foreigners (Tribunals) Order. Implicit in such declaration is that the principle of *res judicata* would not be applicable in such situations.

66. Reverting back to the issue in hand, we agree with the submissions made by Mr. Nair, learned Senior Special Counsel that a reference made by a referral authority to a Foreigners Tribunal is neither a *lis* nor a controversy. In *Concise Oxford English Dictionary, Indian Edition*, '*lis*' has been defined to mean a law suit; a dispute. In *Black's Law Dictionary, 6th Edition*, '*lis*' has been defined to mean a controversy or a dispute; a suit or action at law.

67. In the context of what we have discussed above and keeping in mind the nature of the proceeding before a Foreigners Tribunal, a reference made by the referral authority, i.e., Superintendent of Police (Border) to a Foreigners Tribunal cannot certainly be construed to be a *lis*. An opinion is only sought for by the referral authority from the Foreigners Tribunal whether the suspect is a foreigner or not. To that extent, neither the reference can be construed as a *lis* nor the referral authority and the suspect can be called parties to the *lis*. They are not litigants to any dispute. Following the procedure laid down in paragraph 3 of the Foreigners (Tribunals) Order, a Foreigners Tribunal only renders an opinion on the reference made to it. Such an opinion cannot be equated with or construed as a judgment in a civil suit or award in an industrial adjudication.

68. Section 33 of the Code provides that the Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow which is executable

through the Court procedure. Judgment has been defined in Section 2(9) of the Code of Civil Procedure to mean the statement given by the Judge on the grounds of a decree or order. As per Section 2(8) thereof, a Judge means the presiding officer of a Civil Court.

68.1. A judgment is, therefore, the final determination of the rights of the parties in respect of the claim before the Court. It imports absolute verity. There is finality attached to a judgment in as much as there is final determination of the dispute between the parties at that stage of adjudication, be it at the stage of trial or be it at the stage of appeal.

68.2. A judgment of a Court is entered of record and can be changed only through a regular application to the Court.

69. In ***State of Tamil Nadu -Vs- S. Thangavel, AIR 1997 SC 2232***, Supreme Court noticed that Administrative Tribunals were treating their decisions as '*judgment and order*'. Referring to Sections 2(9) and 2(8) of the Code of Civil Procedure, Supreme Court held that judgment is the decision of a court of justice upon the respective rights and claims of the parties to an action in a suit submitted to it for determination. Holding that members of Administrative Tribunals cannot be considered to be judges, Supreme Court declared that orders of Administrative Tribunals cannot be treated as judgment but only as order.

70. Similarly, an award following adjudication of industrial dispute between management and workmen under the Industrial Disputes Act, 1947 attains finality after publication under Section 17 thereof and becomes enforceable thereafter.

71. In contradistinction, an opinion rendered by a Foreigners Tribunal upon a reference made to it by the referral authority under paragraph 2(1) of the Foreigners Tribunals Order remains an opinion even after the Central Government acts on it and takes steps for expulsion of the declared foreigner under Section 3 of the Foreigners Act based on such opinion. It does not change its character from opinion to judgment upon execution. In ***Mainul Hoque*** (supra), this Court has held that a Foreigners Tribunal assigned the task of rendering an opinion on a reference made to it by the Superintendent of Police (Border) is not a Court. Therefore, a Member of Foreigners Tribunal is not a judge. Viewed in the above context, a negative opinion rendered by a Foreigners Tribunal opining that the proceedee is not a foreigner is not a judgment and cannot bind the Central Government or the delegated

authority i.e., the jurisdictional Superintendent of Police (Border) for all times to come and certainly cannot debar them from seeking a fresh opinion, if circumstances so warrant.

72. Therefore, an opinion rendered by a Foreigners Tribunal is not a judgment. Foreigners Tribunal is only to render an opinion on the reference made to it but the ultimate decision rests with the Central Government under Section 3 of the Foreigners Act. If the Central Government or the delegated authority, which in the case of Assam is the Superintendent of Police (Border), finds that the negative opinion rendered was contrary to the materials on record or there was no proper appreciation of the materials on record or if new materials emerge against a suspect or if the opinion of a Foreigners Tribunal is palpably wrong, can the Central Government or the Superintendent of Police (Border) be debarred from seeking a fresh opinion from a Foreigners Tribunal? For example, we may take up the case of Md. Amiruddin, petitioner in WP(C) No.797/2017. In his case, the earlier Member of Foreigners Tribunal, Hojai in Case No. FT/H/303/2013 (*State Vs. Amiruddin*) after summing up the testimony of the proceedee and describing the exhibits, opined that the proceedee was not a foreigner. The opinion was rendered as under:-

“I have gone through and examined all documents, produced and exhibited by the respondent very carefully and considering all these above, I give my opinion that the respondent Md. Amiruddin, son of late Ambor Ali is not a foreigner.”

72.1. There was no appreciation of the evidence tendered by the proceedee – whether the evidence were admissible? Whether the documents were proved? Whether there was relevancy of evidence? No reasons were mentioned and no reasonings given while rendering the aforesaid opinion. Such an opinion is no opinion at all in the eye of law and on the basis of such an opinion, neither the Central Government nor the delegated authority, i.e., the jurisdictional Superintendent of Police (Border) can be debarred from seeking a fresh opinion.

73. In the light of what we have discussed above and particularly having regard to the fact that State of Assam is facing external aggression and security and integrity of the nation has

been threatened on account of large scale illegal migration of foreigners from Bangladesh into Assam, to hold that principles of *res judicata* would be applicable to a proceeding under the Foreigners Act and the Foreigners (Tribunals) Order would be self-defeating and against the overarching public policy, i.e., to ensure national security and to protect the integrity of the nation.

74. It naturally follows that a Foreigners Tribunal cannot decline to render an opinion on the ground of *res judicata*. If a previous opinion favourable to the proceedee is placed before the Foreigners Tribunal by a proceedee, Foreigners Tribunal will consider the same (provided it is found to be genuine and proved) and thereafter render its opinion. If the subsequent opinion is adverse to the proceedee and is challenged by the proceedee in a proceeding under Article 226 of the Constitution of India, then the High Court will consider both the opinions while examining the correctness of the latter. Each challenge would have to be decided on case to case basis.

75. Though the principle of *res judicata* is based on public policy, the same will stand subsumed under the overarching public policy governing a sovereign nation while dealing with illegal foreigners under the Foreigners Act and the Foreigners (Tribunals) Order.

76. In ***Masud Khan Vs. State of UP, (1974) 3 SCC 469***, Supreme Court held that principles governing '*issue estoppel*' would not be applicable to a proceeding under Section 9 of the Foreigners Act. In that case, petitioner, a Pakistani national, was prosecuted under Section 14 of the Foreigners Act but was acquitted. Petitioner was thereafter arrested under paragraph 5 of the *Foreigners (Internment) Order, 1962*. He therefore moved the Supreme Court praying for his release by terming his detention as illegal, contending that the question as to whether the petitioner was a foreigner or not was a matter of *issue estoppel*; he having been acquitted in the criminal case where the charge was that he was an illegal Pakistani national, he could not again be charged as a Pakistani national under the *Foreigners (Internment) Order, 1962*. The principle of *issue estoppel* was explained by the Supreme Court in the following manner:-

“4. The principle of *issue estoppel* is simply this : that where an issue of fact has been tried by a competent court on a former occasion and a finding has

been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently, even for a different offence which might be permitted by law.”

76.1. Therefore, it was held that *issue estoppel* would arise only if the earlier as well as the subsequent proceedings were criminal prosecutions. In the case of Masud Khan, the petitioner, while the earlier one was a criminal prosecution, the latter was merely an action taken under the Foreigners ((Internment) Order for the purpose of deporting the petitioner out of India. It was not a criminal prosecution. Adverting to Section 9 of the Foreigners Act, Supreme Court held that burden was upon the petitioner to establish that he was not a foreigner but a citizen of India in the manner claimed by him and that burden not having been discharged by the petitioner, it should be held that he was a foreigner. Petitioner’s claim was therefore rejected and his petition dismissed.

77. Reliance placed on WP(C) No.2255/2017 (***Mojibur Rahman Vs. Union of India***) by Mr. Tapadar, learned counsel for the petitioner is misplaced inasmuch as in the facts of that case, it was held that when the petitioner was already declared to be a foreigner, there was no need or necessity to make the second reference. Therefore, it was held that the second reference was uncalled for and unwarranted. The position is quite simple. The referral authority suspects a person to be a foreigner. After enquiry, if the suspicion is fortified, reference is made. If the reference is answered by the Foreigners Tribunal by opining that the suspect was indeed a foreigner, then why would the referral authority again make a second reference. The referral authority already suspects the suspect to be a foreigner. As such, when the Foreigners Tribunal opines such a person to be a foreigner, question of again making a reference by the referral authority to the Foreigners Tribunal cannot and does not arise. Therefore, this decision instead of assisting the petitioners only goes against them.

78. For all the aforesaid reasons, we hold that as a legal proposition, principle of *res judicata* embodied in Section 11 of the Code would not be attracted to a proceeding under the Foreigners Act and the Foreigners (Tribunals) Order.

79. In view of the answer given, all the writ petitions will now be listed separately and decided on their own merit.

80. Before parting with the record, we place on record our appreciation for the valuable assistance rendered by Mr. N. Dutta, learned *amicus curiae*.

JUDGE

JUDGE

Comparing Assistant