WA 238/2008
BEFORE

THE HON'BLE CHIEF JUSTICE MR. J. CHELAMESWAR
THE HON'BLE MR. JUSTICE I.A. ANSARI

The four appellants are petitioners in WP(C) No.1355/2008, which was dismissed by an order, dated 25-7-08, alongwith a number of other writ petitions, which were clubbed together and heard by the learned Judge as certain common questions arose.

2. Essentially, the question, with reference to each of the appellants herein, is whether he or she is a 'citizen' of India or a 'foreigner' within the meaning of the expression foreigner , as defined under Section 2(a) of the Foreigners Act, 1946, which reads:

2(a) foreigner means a person, who is not a citizen of India.

3. The definition is couched in negative language. Therefore, it becomes necessary to examine whether a person is a citizen of India or not in order to determine whether the person is a foreigner or not. However, the expression citizen is not defined in any statute.

4. Who is a citizen of India ? The law, on this aspect, is contained in Part-II of the Constitution. Articles 5 to 11 thereof deal with the citizenship of this country. Article 5 declares as follows :-

5. Citizenship at the commencement of the Constitution.- At the commencement of this Constitution every person who has his domicile in the territory of India and -

(a) who was born in the territory of India; or
(b) either of whose parents was born in the territory of India; or
(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement,

shall be a citizen of India.

5. It can be seen that Article 5 deals with the citizenship of this country at the commencement of the Constitution. Article 5 recognises three categories of people to be citizens of India - (a) a person born in the territory of India, (b) persons either of whose parents was born in the territory of India and (c) persons, who are ordinarily resident in the territory of India for a period not less five years preceding the commencement of the Constitution. Person claiming to be the citizen of India, on the date of the commencement of the Constitution, is not only required to satisfy one of the three alternative specifications mentioned above but also satisfy that he had his domicile on the territory of India. What exactly is the import of the expression domicile in the context of Article 5 is not necessary for us to discuss in the instant case.

6. Articles 6 and 7 of the Constitution deal with special class of persons migrating either to or from the territory now included in Pakistan (i.e. on the date of the commencement of the Constitution). These Articles obviously were introduced in the background of partition of the territory, which was defined as India in the Govt of India Act, 1935, and the largescale exodus of people from the newly created two States of India and Pakistan. It may not be necessary for us to go into the details of the other Articles of Part-II of the Constitution except Article 11, which reads as follows :-

11. Parliament to regulate the right of citizenship by law.- Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

7. It can be seen from the above that Article 11 expressly authorises the Parliament to make law with respect to acquisition or termination of citi

zenship and all other matters relating to citizenship. In our view, such a power necessarily inheres in the Parliament, in view of Article 246(1) read with Entry 17 of List-I of the Seventh Schedule. Article 11 appears to have been made by way of abundant caution.

8. In exercise of the powers under Article 246(1) read with Entry 17 and Article 11, the Parliament made the Citizenship Act, 1955. Under the scheme of the said Act, there are four modes of acquiring citizenship of this country - (1) Citizenship by birth, (2) Citizenship by descent, (3) Citizenship by registration and (4) Citizenship by naturalisation.

9. Section 3 of the Citizenship Act, 1955, deals with citizenship by birth. It reads as follows :-

3. Citizenship by birth. -(1) Except as provided in sub-section (2), every person born in India,-

(a) on or after the 26th day of January, 1950, but before the 1st day of July, 1987;

(b) on or after the 1st

i. both of his parents are citizens of India; or

ii. one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth,

shall be a citizen of India by birth.

10. It can be seen from the above that there are three categories of persons, who can claim citizenship of this country if such a person is born in India (1) every person born on or after 26th day of January, 1950, but before 1st day of July 1987; such a person automatically becomes a citizen of this country even in the absence of any anterior connection with this country, (2) persons born in India after 1st day of July, 1987, but before the commencement of the Citizenship (Amendment) Act, 2003; in the cases of persons falling under this class, it is not only necessary that such a person was born in India between the above mentioned dates, but it is also necessary that at least, one of the parents of such a person must be a citizen of India at the time of his birth and (3) the category of persons, who are born in India after the commencement of the Citizenship (Amendment) Act, 2003. In the third category of cases, citizenship accrues to the benefit of such a person only if both the parents of such a person are citizens of India or at least, one parent is a citizen of India and the other is not an illegal migrant at the time of birth of such a person.

11. Sub-section (2) of Section 3 deals with exclusion of persons, who might, otherwise, satisfy one or the other conditions stipulated under Section 3(1). It may not be necessary for us to examine the scheme of Sub-section (2) in the context of the present controversy.

12. Section 4 of the Citizenship Act, 1955, deals with citizenship by descent, i.e., it deals with the citizenship status of a person born outside India, but becomes a citizen of India in the various contingencies contemplated under Section 4.

13. Section 5 provides for conferment of citizenship by registration by the Central Government on such a person, who is not a citizen of this country. It can be seen from the scheme of Section 5 that the registration, contemplated under Section 5, is permissibly only in the cases of such persons, who have some connection with India as specified in the various sub-clauses of the Section, but not citizens of India by virtue of operation of any of the provisions of the Constitution or the other provisions of the Citizenship Act.

14. Section 6 deals with conferment of citizenship by naturalisation, which enables the Central Government to confer citizenship on any applicant under the various conditions specified in the said Section read with Schedule-III.

15. Apart from the various modes by which citizenship is acquired or conferred, as discussed earlier, Section 6A of the Citizenship Act deals with a special situation, the citizenship status of persons, who migrated to Assam , a defined expression under Section 6A(1)(a). The Supreme Court, in its judgment, in Sonowal I, reported in (2005) 5 SCC 665, took note of the factual background in which Section 6A came to be introduced by an amendment. In making the said provision, the Parliament took note of the various historical facts of the partition of India , as defined under the Govt of India Act, 1935, into two States called India and Pakistan and the subsequent coming into existence of a new State known as Bangladesh, the territory of which State was part of Pakistan prior to 1971. The Parliament also took note of the fact that such major historical events resulted in a largescale migration of people to the State of Assam from Bangladesh or 'East Pakistan', as it was called prior to the formation of the new sovereign State called Bangladesh.

16. As long back as in 1950, the Parliament made an enactment called Immigrants (Expulsion from Assam) Act, 1950 (Act No.X of 1950). Under Section 2 of the said Act, it is provided that the Central Government may direct any person or class of persons, who are ordinarily resident in any place outside India and came into Assam, to remove himself either from India or Assam. Section 2 reads as follows :-

2. Power to order expulsion of certain immigrants - If the Central Government is of opinion that any person or class of persons, having been ordinarily resident in any place outside India, has or have whether before or after the commencement of this Act, come into Assam and that the stay of such person or class of person in Assam is detrimental to the interests of the general public of India or of any Section or of any Schedule Tribe in Assam, the Central Government may by order -

(a) direct such person or class of persons to remove himself or themselves from India or Assam within such time and by such route as may be specified in the order; and

(b) give such further directions in regard to his or their removal from India or Assam as it may consider necessary or expedient

17. It may not be necessary to examine, in details, the scheme and purpose of Section 2 of the Act, 1950. But what is important is the proviso to Section 2, which reads as follows :-

Provided that nothing in this section shall apply to any person who on account of civil disturbances or the fear of such disturbances in any area now forming part of Pakistan has been displaced from or has left his place or residence in such area and who has been subsequently residing in Assam.

18. It can be seen from the proviso that the authority, conferred on the Central Government under Section 2, does not extend to giving directions contemplated therein in the case of persons, who had been displaced from, or who left their places of residence from, any area forming part of Pakistan (which, now, includes Bangladesh) on account of civil disturbances or the fear of such disturbances.

19. Section 6A of the Citizenship Act, 1955, must be examined in the light of the proviso to Section 2 of the Immigrants (Expulsion from Assam) Act, 1950 (Act No.X of 1950), as there is a common legislative policy underlying therein.

20. Section 6A of the Citizenship Act, 1955, takes note of three categories of persons migrating into the territory of India and, more specifically, the territory of Assam , the definition for the purpose of Section 6A is already noticed earlier. Sub-section (2) of Section 6A deals with the citizenship status of the migrants who came before the 1st day of January, 1966, into the terri

tory of 'Assam'.
6A(2) Subject to the provisions of sub-sections (6) and (7), all persons of Indian origin who came before the 1st day of January, 1966 to Assam from the specified territory (including such of those whose names were included in the electoral rolls used for the purposes of General Election to the House of the People held in 1967) and who have been ordinarily resident in Assam since the dates of their entry into Assam shall be deemed to be citizens of India as from the 1st day of January, 1966.

21. Sub-section (3) of Section 6A deals with those persons, who came between the 1st day of January, 1966, but before 25th day of March, 1971.
6A(3) Subject to the provisions of sub-sections (6) and (7), every person of Indian origin who -
(a) came to Assam on or after the 1st day of January, 1966 but before the 25th day of March, 1971 from the specified territory; and
(b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and
(c) has been detected to be a foreigner,
shall register himself in accordance with the rules made by the Central Government in this behalf under section 18 with such authority (hereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll for any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom

22. In either case, the benefit contemplated is available only for those persons, who are of Indian origin and migrating to Assam from the specified territory . Both the expressions are defined under Sub-section (1)(c) and (1)(d).

23. The distinction between Sub-section (2) and Sub-section (3) of Section 6A, in our view, is this -
While persons, who came to Assam prior to 1st day of January, 1966, and have been ordinarily resident therein from the date of their entry, are deemed to be citizens of India from the 1st day of January, 1966, the other class of persons, arriving in Assam subsequent to the 1st day of January, 1966, but before the 25th day of March, 1971, are required to register themselves with the registering authority to acquire all the rights of citizens of India except the right to participate in the electoral process, either to the Assembly or the Parliament, for a period of 10 years commencing from the date on which such a person has been detected to be a foreigner. In this regard, Sub-section (4) of Section 6A provides as follows :-
(4) A person registered under sub-section (3) shall have, as from the date on which he has been detected to be a foreigner and till the expiry of a period of ten years from that date, the same rights and obligations as a citizen of India (including the right to obtain a passport under the Passports Act, 1967 (15 of 1967) and the obligations connected therewith), but shall not be entitled to have his name included in any electoral roll for any Assembly or Parliamentary constituency at any time before the expiry of the said period of ten years.

24. It is provided under Sub-section (5) of Section 6A that on expiry of the period of ten years, referred to in Sub-section (4), such a person is deemed to be citizens of India for all purposes. Sub-section (5) reads as follows :-
(5) A person registered under sub-section (3) shall be deemed to be a citizen of India for all purposes as from the date of expiry of a period of ten years from the date on which he has been detected to be a foreigner.

25. Section 6A was inserted by Act 65 of 1985 w.e.f. 7-12-1985. The Supreme Court, in Sonowal's case (Supra), took note of the fact that the amendme

nt was preceded by a Memo of Settlement, dated 15-8-1985. At para 18 of the judgment, the Supreme Court held as follows :-

18. Since extensive reference has been made in the affidavits to the Assam Accord, it is necessary to notice the main provisions thereof. It is a Memorandum of Settlement which was signed on 15th August, 1985 by the President and General Secretary of All Assam Students' Union and Convenor of All Assam Gana Parishad on the one hand and Home Secretary, Government of India and the Chief Secretary, Government of Assam on the other, in the presence of Shri Rajiv Gandhi, the then Prime Minister of India. The main clauses of the settlement which have a bearing on the case are being reproduced below :-

\MEMORANDUM OF SETTLEMENT

Government have all along been most anxious to find a satisfactory solution to the problem of foreigners in Assam. The All Assam Student Union (AASU) and the All Assam Gana Sangram Parishad (AAGSP) have also expressed their keenness to find such a solution.

2. The AASU through their Memorandum dated 2nd February 1980 presented to the late Prime Minister Smt. Indira Gandhi, conveyed their profound sense of apprehensions regarding the continuing influx of foreign nationals into Assam and the fear about adverse effects upon the political, social cultural and economic life of the State.

3. Being fully alive to the genuine apprehensions of the people of Assam, the then Prime Minister initiated the dialogue with the AASU/AAGSP. Subsequently, talks were held at the Prime Minister's and Home Minister's levels during the period 1980-83. Several rounds of informal talks were held during 1984. Formal discussions were resumed in March, 1985.

4. Keeping all aspects of the problem including constitutional and legal provisions, international agreements, national commitments and humanitarian considerations, it has been decided to proceed as follows: -

Foreigners Issue

5.1 For purposes of detection and deletion of foreigners, 1.1.1966 shall be the base date and year.

5.2 All persons who came to Assam prior to 1.1.1966, including those amongst them whose names appeared on the electoral rolls used in 1967 elections, shall be regularized.

5.3 Foreigners who came to Assam after 1.1.1966 (inclusive) and up to 24th March 1971 shall be detected in accordance with the provisions of the Foreigners Act, 1946 and the Foreigners (Tribunals) Order 1964.

5.4 Names of foreigners so detected will be deleted from the electoral rolls in force. Such persons will be required to register themselves before the Registration Office of the respective districts in accordance with the provisions of the Registration of Foreigners Act, 1939 and the Registration of Foreigners Rules, 1939.

5.5 For this purpose, Govt. of India will undertake suitable strengthening of the governmental machinery.

5.6 On the expiry of a period of ten years following the date of detection, the names of all such persons which have been deleted from the electoral rolls shall be restored.

5.7 All persons who were expelled earlier, but have since re-entered illegally into Assam, shall be expelled.

5.8 Foreigners who came to Assam on or after March 25, 1971 shall continue to be detected, deleted and expelled in accordance with law. Immediate and practical steps shall be taken to expel such foreigners.

5.9 The Government will give due consideration to certain difficulties expressed by the AASU/AAGSP regarding the implementation of the Illegal Migrants (Determination by Tribunals) Act, 1983.\

Subsequent thereto the Citizenship Act, 1955 was amended and Section 6-A was introduced w.e.f. 7.12.1985

26. Even before the Assam Accord, referred to above, came to be sign

ed, the Parliament had passed the Illegal Migrants (Determination by Tribunals) Act, 1983 (for short, 'the IMDT Act'). Section 1(3) of the said Act declares tha t it shall be deemed to have come into force in the State of Assam on the 15th d ay of October, 1983, i.e., with retrospective effect. The Supreme Court noted th e objects and reasons behind the Act at para 34 of the judgment and also took no te of the Preamble of the Act at para 35 of the judgment in Sonowal's case (Supr a) in the following words:

34. The provisions of the IMDT Act may now be examined. The Statement of Obj ects and Reasons of the Illegal Migrants (Determination by Tribunals) Act, 1983, reads as under :-

\Statement of Objects and Reasons, - The influx of foreigners who illegally migr ated into India across the borders of the sensitive eastern and north-eastern re gions of the country and remained in the country poses a threat to the integrity and security of the said regions. A substantial number of such foreigners who m igrated into India after the 25th day of March, 1971, have, by taking advantage of the circumstances of such migration and their ethnic similarities and other c onnections with the people of India, illegally remained in India without having in their possession lawful authority so to do. The continuance of these persons in India has given rise to serious problems. The clandestine manner in which the se persons have been trying to pass off as citizens of India has rendered their detection difficult. After taking into account the need for their speedy detecti on, the need for protection of genuine citizens of India and the interests of th e general public, the President promulgated, on the 15th October, 1983, the Ille gal Migrants (Determination by Tribunals) Ordinance, 1983, to provide for the es tablishment of Tribunals.\

35. The Preamble of the Act which finally came into force on 25th December, 1983 reads as under :-
\An Act to provide for the establishment of Tribunals for the determination, in a fair manner, of the question whether a person is an illegal migrant to enable the Central Government to expel illegal migrants from India and for matters conn ected therewith or incidental thereto.
WHEREAS a good number of the foreigners who migrated into India across the borde rs of the eastern and north-eastern regions of the country on and after the 25th day of March, 1971, have, by taking advantage of the circumstances of such migr ation and their ethnic similarities and other connections with the people of Ind ia and without having in their possession any lawful authority so to do, illegal ly remained in India;
AND WHEREAS the continuance of such foreigners in India is detrimental to the in terests of the public of India;
AND WHEREAS on account of the number of such foreigners and the manner in which such foreigners have clandestinely been trying to pass off as citizens of India and all other relevant circumstances, it is necessary for the protection of the citizens of India to make special provisions for the detection of such foreigner s in Assam and also in any other part of India in which such foreigners may be f ound to have remained illegally;\

27. It was the constitutional validity of the said Act, which was in question before the Supreme Court in Sonowal's case (Supra). The Supreme Court declared the Act and the Rules made thereunder as ultra vires the Constitution a nd struck down the same and gave a consequential declaration that the Tribunals, constituted under the said Act, shall cease to function with a further directio n that all the cases, pending before the Tribunals constituted under the said Ac t, shall stand transferred to the Tribunals constituted under the Foreigners (Tr ibunals) Order, 1964. The relevant portion of the judgment of the Supreme Court reads as follows:-
84. In view of the discussion made above, the writ petition succeeds and is all owed with the following directions :

(1) The provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 and the Illegal Migrants (Determination by Tribunals) Rules, 1984 are declared to be ultra vires the Constitution of India and are struck down;
(2) The Tribunals and the Appellate Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall cease to function;
(3) All cases pending before the Tribunals under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall stand transferred to the Tribunals constituted under the Foreigners (Tribunals) Order, 1964 and shall be decided in the manner provided in the Foreigners Act, the Rules made thereunder and the procedure prescribed under the Foreigners (Tribunals) Order, 1964.

28. It is in the background of the above mentioned legal history that proceedings, initiated against various persons under the IMDT Act, stood transferred to the Tribunals constituted under the Foreigners Act. A large number of persons, who had faced such proceedings before the Foreigners Tribunal and who had come to be declared 'foreigners' by the Foreigners Tribunal, Barpeta, by various orders passed in the year 2007, approached this court by way of various writ petitions. All the writ petitions were heard together and dismissed by a common judgment and order, dated 25-7-08. Though it is a common order, the learned Judge dealt with the individual merits of each of the writ petitions distinctly in the said order. Aggrieved by the said judgment, appeals are preferred.

29. Writ Appeal No.238/2008 is one such appeal preferred by the unsuccessful petitioners in four different writ petitions [WP(C) Nos.1355/08, 1358/08, 1359/08 and 1364/08] consisting of 4, 5, 4 and 4 petitioners/appellants respectively.

30. For the purpose of deciding the legal parameters of the controversy, we decided to take up the facts of the WP(C) No.1355/08 alone. The other appeals, arising out of various writ petitions, though listed along with the present appeal, are not heard on merit and would be heard and decided in the light of the legal parameters to be determined in this appeal.

31. As already noticed, there are four petitioners in WP(C) No.1355/08, who are the appellants before us in WA No.238/08. They are (1) Moslem Mondal, s/o Sadar Mondal, (2) Rupjan Nessa, w/o Moslem Mondal, (3) Ainul Hoque, s/o Moslem Mondal and (4) Seheruddin, s/o Moslem Mondal. It is obvious from the above that all the four belong to one family headed by Moslem Mondal.

32. Initially, the cases of these four appellants/ petitioners were decided ex parte. Admittedly, all the four petitioners were served with notices of the pendency of the cases against them before the Foreigners Tribunal, Barpeta. They engaged two advocates (whose names are mentioned in the judgment under appeal, at para 30), to defend their cases. The learned Judge by the judgment under appeal, at para 33 and 34, recorded as follows :-

33. The reference was received by the Tribunal on 7.5.2007 and the petitioners duly appeared on the date fixed which was 18.6.2007. The prayer for adjournment was granted fixing the matter on 24.7.2007. On 24.7.2007, the petitioners did not appear before the Tribunal and the case was adjourned to 27.8.2007 on the basis of the prayer petition filed by the engaged counsel. 27.8.2007 was the date fixed for filing written statement. However, on 27.8.2007, the petitioners did not appear before the Tribunal and the case was adjourned to 28.9.2007 on the basis of the prayer made by their engaged counsel. On 28.9.2007 also, the petitioners remained absent and the matter was again adjourned to 26.10.2007 on the basis of the petition filed by their engaged advocate. Same petition was made on 26.10.2007. Noticing the fact that the petitioners had already taken four adjournments, the adjournment prayed for was granted as the last chance and the matter was fixed on 21.11.2007 on which date also, the petitioners remained absent without any steps.

34. After the aforesaid dates, the matter was fixed on 17.12.2007 on which d ate, the petitioners remained absent without any steps. Thus, naturally, the Tri bunal had no option than the order for Ex-parte hearing fixing the date as 29.12 .2007. The matter was heard on that day examining the I/O who proved the documen ts exhibited and thereafter the impugned judgment and order was delivered on 31. 12.2007.

33. However, the appellants, when they approached this court by way of WP(C) No.1355/2008 annexed certain documents to the writ petition in support of their claim of being citizens of India. The learned Judge also considered the effect of the documentary evidence sought to be produced by the petitioners/app ellants herein and reached the conclusion that even the documents, which were so ught to be (belatedly) produced before the learned Judge, did not establish the claim of the petitioners/appellants.

34. It was the case of these four petitioners/appellants (we may men tion here that it is the case of all the writ petitioners/appellants covered by the judgment under appeal) that they were let down by their engaged counsel befo re the Foreigners Tribunal and that they did not have an opportunity of defendin g themselves in the proceedings to establish that they are citizens of India. If there is even a particle of truth in the said statements, each of the appellant s would lose one of the most valuable rights, i.e., citizenship. This Court, the refore, at the stage of the admission of the appeals, called upon (as the record reveals) the appellants to establish their bona fides by lodging a complaint ag ainst the counsel, who are alleged to have let down the appellants by non-repres entation before the Tribunal. The appellants thereupon made a complaint to the B ar Council against the said counsel. Thereafter, by an order, dated 14-8-2008, t his Court, while admitting the writ appeals, directed the appellants to surrende r before the concerned Superintendent of Police. This Court also directed that o n such surrender, though the appellants would be detained but they would not be deported from India. This court further directed that the appellants be given an opportunity of producing further evidence, if any, before the concerned Foreign ers Tribunal and called upon the Tribunal to record such further evidence and re port it’s finding thereon to this Court.

35. Yet another reason, which justifies the giving of direction to t he appellants to adduce evidence, in the Tribunal, in support of their plea that they were not foreigners, is that the learned Single Judge, having taken the vi ew that the learned Tribunal was justified in holding the proceeding ex parte ag ainst the writ petitioners, chose, however, to consider the effect of the pleadi ngs of the writ petitioners, in their writ petition, in support of their plea th at they were Indian citizens and also the documents, which the writ petitioners had sought to rely upon.

36. Having considered the effect of the pleadings in the writ petiti on, and also the documents, sought to be produced by the writ petitioners, the l earned Single Judge reached the conclusion that even the documents, which were s ought to be (belatedly) produced in the writ petition, did not establish the cla im of the petitioners/appellants.

37. We deem it necessary to point out that under the scheme of the F oreigners Act, 1946, read with Foreigners (Tribunal) Order, 1964 (in short, ’196 4 Order’), the Tribunal, constituted under the 1964 Order, is required to give, on the ’reference’ made to it, only an ’opinion’ whether the person, proceeded against, is or is not a ’foreigner’. For the purpose of rendering such an opinio n, the Tribunal has to necessarily determine the question as to whether the pers on, against whom a ’reference’ is made, is or is not an Indian citizen . The que stion as to whether a person is or is not an Indian citizen can also be decided by a civil Court at the option of the person, who is alleged to be a foreigner o r held to be a foreigner by the Tribunal constituted under the 1964 Order, inasm

uch as a civil court is entitled to pass a decree declaring the status of a pers on as an India citizen. By enacting the Foreigners Act and/or the 1964 Order, th e power of the civil courts, to determine the status of a person as an India cit izen, has not been taken away.

38. Moreover, a writ proceeding is not, and cannot be made, a substi tute for a proceeding before the said Tribunal. For instance, in the case at han d, the learned single Judge, having extensively discussed the pleadings of the w rit petitioners and the documents, relied upon by them, came to the conclusion t hat even the documents, which the petitioners had sought to rely upon, did not e stablish their claim of being Indian citizens. Supposing, for instance, the lear ned single Judge would have found the documents, which were sought to be relied upon by the writ petitioners, enough to hold that they were Indian citizens. Cou ld the learned Single Judge have, while dealing with a writ petition, arising ou t of an order passed by a Tribunal opining that the proceedee is a foreigner, up set the decision of the Tribunal, and, contrary to the opinion expressed by the Tribunal, hold, on the basis of the pleadings of the parties in the writ proceed ing and the documents, relied upon by them, that the proceedee was an Indian ci tizen? The answer to this question has to be in the negative inasmuch as the Sta te cannot be denied the opportunity to cross-examine a writ petitioner before th e Court relies upon any document annexed to a writ petition or produced by a wri t petitioner during the course of hearing in a writ proceeding. At the same time , the writ petitioner too cannot be denied the opportunity of adducing evidence if his writ petition is to be made basis for determination of the question as to whether he (writ petitioner) is or is not a foreigner.

39. It is, thus, clear that on the basis of the pleadings of the par ties in a writ proceeding and/or, on the basis of the documents placed on the re cord in a writ proceeding, a Court cannot determine the question as to whether a person is or is not a foreigner. The determination of the question, as to wheth er a person is or is not a foreigner, falls, when a 'reference' is made to a Tr ibunal under the provisions of the Foreigners Act read with the 1964 Order, with in the ambit of the powers of the Tribunal and, in other cases, by a civil court of competent jurisdiction. We may hasten to point out that so far as the Tribun al is concerned, it only renders an 'opinion' with regard to the question as to whether the person alleged to be a foreigner is or is not a foreigner and, then, it is for the Central Government or the authorities, otherwise empowered, to de cide as to whether such a foreigner needs to be deported from the territory of I ndia or not. Thus, the procedure, adopted, in the writ proceeding, in the presen t case of determining, on the basis of the pleadings made in the writ proceeding and the documents annexed thereto, whether the writ petitioners were or were no t foreigners, cannot be said to be a legally permissible procedure.

40. We wish to make it clear that against the finding of a Tribunal constituted under the 1964 Order, when a writ petition is entertained and the Hi gh Court takes the view that the Tribunal was justified in proceeding ex parte a nd in coming to the conclusion, which it has reached, that the person, proceeded against, is a foreigner, the Court is not required to, once again, determine af resh in the writ proceeding, on the basis of the pleadings of the parties and th e documents brought on record in the writ proceeding, the question as to whether the petitioner is or is not a foreigner. If, however, the Court decides and ent ers into the question of the merit of the conclusion, which the Tribunal has rea ched, the Court's decision has to be based on the materials, which were availabl e before the Tribunal, and not on the basis of such a material, which was not av ailable with the Tribunal or has not been allowed to be produced, as additional evidence, in the writ proceeding, by the High Court. Taking of additional eviden ce obviously means examining the witness, in person, with regard to the oral evi dence, which he likes to give, and also with regard to the documentary evidence, which he would like to rely upon. Examination of the writ petitioner, in such a case, would be subject to cross-examination by the State. No such procedure wa

s, admittedly, followed in the present writ proceeding.

41. As the learned Single Judge had already held, on the basis of pl eadings and the documents available on record, that the petitioners had failed t o establish their claim of being Indian citizens, it was necessary that the Trib unal be given an opportunity to determine for itself the status of the writ peti tioners, on the basis of the evidence, which the writ petitioners might have ad duced, and to allow them to be cross-examined by the State and also give an oppo rtunity to the State to adduce any such evidence, which the State considered nec essary to adduce in rebuttal of the petitioners' claim of being Indian citizens.

42. In compliance of the interim direction, referred to above, the f our appellants surrendered and produced evidence before the Tribunal. The Tribun al, after examining the evidence, by its report, dated 15-10-2008, reached the c onclusion as follows :-

10. In view of the above discussions and in view of the evidence on record, I am of the opinion that opposite parties/appellants No.1 and 2 have clearly pro ved that their families have been living in India since before 1951 and other op posite parties/appellants No.3 and 4 i.e. Ainal Mandal and Jahur Mandal being so ns, obviously could be born only in Indian soil. They have also proved that they have not entered into Assam after 25-03-71 as alleged in the reference and henc e they cannot be declared as foreigners.

43. Certain common questions of law arise in all these appeals. Ther efore, we though it fit to request the learned counsel, appearing for the variou s parties, in this batch of appeals, to identify the questions of law, which ari se for consideration of this court for deciding this batch of appeals and make t heir submissions. The learned Court for all the parties have accordingly made th eir submissions on the commonly identified questions of law. The following quest ions of law are identified :-

i) when proceedings under the Foreigners Act are initiated before the Tribu nal constituted under the Foreigners Order, 1964 on whom does the burden of proo f lie ?

ii) whether the State is required to prima facie satisfy the Tribunal before a person, against whom proceedings are initiated, is called upon to discharge t he burden under Section 9 of the Foreigners Act ?

iii) whether the documents prepared under the Census Act and the Electoral Ro lls prepared for the purpose of elections under the Representation of the People Act are admissible piece of evidence and if they are admissible what is the evi dentiary value of such documents ?

iv) what is the standard of proof in such proceedings ?

v) what is the role of the Tribunal in such proceedings ?

44. The Foreigners Act, 1946, in our view, was not designed essentia lly to deal with the situation such as the one on hand. We may not be understood to say that the provisions of the said Act cannot be made applicable to the sit uation such as the one on hand. By the expression situation on hand , we mean a large scale immigration into the territory of India. The said Act was, primaril y, enacted to regulate the entry, stay and departure of individuals, who are not citizens of India. The scheme of the said Act contemplates that every movement from the time of the entry of a foreigner be monitored and properly documented f or the various activities of the foreigners on Indian soil.

45. Under Section 3(1) of the Foreigners Act, 1946, the Central Gove rnment is authorised to make orders providing for prohibiting, regulating or res tricting entry of foreigners into India or their departure or continued presence from or in India. Sub-section (2) clauses (a) to (g) of Section 3 enumerates va rious matters with reference to which the power contemplated under Section 3(1)

could be exercised. The enumeration, made in Sub-section (2), is not to be exhaustive of the authority given under Sub-section (1), but only illustrative. It may also be noticed that the power under Section 3(1) could be exercised by the Central Government generally with respect to all foreigners or with respect to any particular foreigner or with respect to any prescribed class of foreigners. The other provisions of the Foreigners Act may not be necessary for the present purpose.

46. Section 3 of the said Act, in this regard, authorises the Central Government to pass appropriate orders regulating the various aspects of the entry, stay and departure of the foreigners indicated under Sub-section (2) thereof. For example, Sub-section (2)(a) enables the Govt of India to make an order providing for prohibition or regulation of the entry of foreigners into India by such routes or by such course and the conditions subject to which such arrival is permitted. In exercise of the said power, the Govt of India made an Order known as the Foreigners Order, 1948, which prescribes the various conditions regulating the entry of the foreigners into India. Section 14 of the Foreigners Act makes it a punishable offence for any person to contravene any provisions of the Foreigners Act and any order made or direction given under the said Act. Such an offence is punishable with imprisonment, which may extend to five years alongwith fine. In other words, in the context of the entry into India, when a person enters into Indian territory without appropriate permission evidenced by appropriate documents, such as, visa, etc, he commits a punishable offence under Section 14 referred to above.

47. But the Indian Govt is faced with the situation ? on its own admission ? of about ten million illegal migrants from Bangladesh in India; a fact testified to by an affidavit before the Supreme Court in Sonowal's Case (Supra). The Foreigners Act was made in an era, when international travelling was a luxury available to a limited number of people. It was also possible those days to identify foreigners by their appearance/anthropological features, such as, the colour of the skin, facial features, etc. The subsequent historical developments in the sub continent of India created three sovereign States from out of the same territory that was called India before enactment of the Foreigners Act, 1946 (India, Pakistan and Bangladesh). The consequence is that there exist a huge number of people, who became foreigners within the meaning of the Foreigners Act, 1946, though they were citizens of this country at one point of time and it is difficult to identify them as foreigners on the basis of their anthropological features. (See Sonowal I).

48. Under Section 9 of the Foreigners Act, whenever a question arises whether any person is or is not a foreigner with reference to any provision of the said Act or an Order made under the said Act, the burden is upon such person. Section 9 reads as follows :-

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

49. Two factors are required to be taken note in the context of Section 9. First of all, that it has no application to the cases falling under Section 8 of the Act. It may be stated here that admittedly, none of the cases on hand are cases falling under Section 8 and, therefore, we need not examine that aspect of the matter. Secondly, that the rule of evidence contained under Section 9 is notwithstanding anything contained under the Indian Evidence Act, 1872. In other words, when it comes to the questions of deciding whether a particular individual is a foreigner or not, the Indian Evidence Act has no application to the

extent as Section 9 envisages. In this regard, the Supreme Court in AIR 1965 SC 810 at para 10 held -

10. There is one more point which deserves to be mentioned before dealing with the merits of the case. The appellant is being prosecuted under Section 14 of th e Foreigners Act, 1946 (31 of 1946). In determining the question as to whether h e is a foreigner within the meaning of the said Act or not, Section 9 of the sai d Act will have to be borne in mind. Section 9 applies to all cases under the Ac t which do not fall under Section 8, and this case does not fall under Section 8 , and so, Section 9 is relevant. Under this section, the legislature has placed the burden of proof on a person who is accused of an offence punishable under Se ction 14. This section provides inter alia that where any question arises with r eference to the said Act, or any order made, or direction given thereunder, whet her any person is or is not a foreigner, the onus of proving that such a person is not a foreigner, shall notwithstanding anything contained in the Indian Evide nce Act, lie upon such person; so that in the present proceedings in deciding th e question as to whether the appellant was an Indian citizen within the meaning of Article 5, the onus of proof will have to be placed on the appellant to show that he was domiciled in the territory of India on January 26, 1950 and that he satisfied one of the three conditions prescribed by clause (a), (b) and (c) of t he said article. It is on this basis that the trial of the appellant will have t o proceed.

50. The Supreme Court, in Sonowal I (Supra), at para 24, held that s uch a rule of evidence, in the context of the citizenship of a person, exists in the leading democracies of the world. The Supreme Court, at para 24 and 25, too k note of the similar provisions of the United Kingdom, the United States of Ame rica, Canada and Australia and, then, held, at para 32, as follows :-

32. Section 9 of the Foreigners Act regarding burden of proof is basically on t he same lines as the corresponding provision is in U.K. and some other Western n ations and is based upon sound legal principle that the facts which are peculiar ly within the knowledge of a person should prove it and not the party who avers the negative.

51. Further, the Supreme Court took note of the scheme of the Eviden ce Act regarding the burden of proof as contained under Section 101, 106, etc, a nd also the earlier decisions of the Supreme Court in AIR 1956 SC 404 (Sambhu Na th Mehra vs. State of Ajmer), (1974) 2SCC 544 (Collector of Customs vs. D Bhoorm all), (2000) 8SCC 382 (State of W.B. vs. Mir Mohd Omar), (1943) 2 All ER 800 (R. Vs. Oliver) and (1993) 149 LT 190 (Williams vs. Russel) and held that such plac ement of burden of proof is not only consistent with the international practice of the countries following the Anglo Saxon jurisprudence, but also legally justi fied. The relevant observations of the Supreme Court appear, in this regard, at para 26 in Sonowal I (supra).

52. Further, at para 73, the Supreme Court, in Sonowal I (supra), al so declared that -

In our opinion, the procedure under the Foreigners Act and the Foreigners (Trib unals) Order, 1964 is just, fair and reasonable and does not offend any constitu tional provision.

53. That the burden of proof under Section 9 of the Foreigners Act is not on the State but on the person, whose nationality is in question is well recognise d in this country (AIR 1961 SC 1522, AIR 1961 SC 1526 and AIR 1963 SC 1035).

54. The expression burden of proof , occurring under Section 9 of t he Foreigners Act, has more than one facet to it. Phipson, on his classical work , on the law of evidence (14th edition) at chapter 4, discussed the concept. Acc ording to him, the phrase burden of proof has three meanings -

(i) the persuasive burden, the burden of proof as a matter of law and pleading the burden of establishing a case, whether by preponderance of evidence or beyond a reasonable doubt.
(ii) the evidential burden, the burden of proof in the sense of adducing evidence.
(iii) the burden of establishing the admissibility of evidence.

55. The Privy Council, on more than one occasion, had to deal with the question as to what burden of proof means. In AIR (33) 1946 PC 156 at para 19 and 20, the Privy Council held as follows :-

19. & & when the familiar metaphor of the burden of proof is employed, precely what it means. The strict meaning of the term onus probandi,, said Parke, B, in the case already cited, is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him A valuable supplement to this observation is to be found in the words used by Lord Dunedin when he delivered the judgment of their Lordships' Board in (1927) AC 515 at p.520 :-

20. Onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that is can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

56. In AIR 1949 (36) 1949 PC 278 it is held, in this regard, at paras 43, 44 and 45, as follows :-

43. What is called the burden of proof on the pleadings should not be confused with the burden of adducing evidence which is described as shifting . The burden of proof on the pleadings never shifts, it always remains constant (see Pickup v. Thames Insurance Co, (1878) 3 Q.B.D.594 : (47 L.J. Q.B. 749). These two aspects of the burden of proof are embodied in Ss.101 and 102 respectively of the Indian Evidence Act. Section 101 states :

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102 states :

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

44. This section shows that the initial burden of proving a prima facie case in his favour is cast on the plaintiff; when he given such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden; but if it has on the evidence no difficulty in arriving at a definite conclusion, then the burden of proof on the pleadings recedes into the background.

45. How the above rules relating to onus operate in a case is thus described by Lord Dunedin in Robins v. National Trust Co. Ltd, ((1927) A.C. 515 at p.520 : (96 L.J.P.C. 84):

Their Lordships cannot help thinking that the appellant takes rather a wrong view of what is truly the function of the question of onus in such cases. Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a man who is alive was born requires no proof. The onus i

s not on the person making the assertion, because it is self-evidence that he ha d been born. But to assert that he was born on a certain date, if the date is ma terial, requires proof; the onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will ofte n find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumst ances the onus shifts. But onus as a determining factor of the whole case can on ly arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further conside red.

[See also (2006) 6 SCC 94 at para 31]

57. In (1977) 1SCC 133, the Supreme Court, at para 15, noted the con fusion prevailing in legal literature regarding the phrase burden of proof . It further took note of Phipson's analysis of the concept of burden of proof. At paras 16 and 17 of the said judgment, the Supreme Court held as follows :-

16. In Phipson on Evidence (11th Edn) at page 40, paragraph 92), we find the pr inciples stated in a manner which sheds considerable light on the meanings of th e relevant provisions of our Evidence Act:

> As applied to judicial proceedings the phrase 'burden of proof' has two distinct and frequently confused meanings : (1) the burden of proof as a matter of law and pleading - the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) the burden of proof in the sense of adducing evidence.

It is then explained :

> The burden of proof, in this sense, rests upon the party, whether plaint iff or defendant, who substantially asserts the affirmative of the issue. 'It is an ancient rule founded on consideration of good sense, and it should not be de parted from without strong reasons.' It is fixed at the beginning of the trial b y the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never s hifting in any circumstances whatever. If, when all the evidence, by whomsoever introduced, is in, the party who has thus burden has not discharged it, the deci sion must be against him.

17. The application of rules relating to burden of proof in various types of cas es is thus elaborated and illustrated in Phipson by reference to decide cases (s ee p.40 para 93) :

> In deciding which party asserts the affirmative, regard must of course b e had to the substance of the issue and not merely to its grammatical form, whic h later the pleader can frequently vary at will, moreover a negative allegation must not e confounded with the mere traverse of an affirmative one. The true mea ning of the rule is that where a given allegation, whether affirmative or negati ve, forms an essential party of a party's case, the proof of such allegation res ts on him; e.g. in an action against a tenant for not repairing according to cov enant, or against a horse-dealer that a horse sold with a warranty is unsound, p roof of these allegations is on the plaintiff, so in actions of malicious prosec ution, it is upon him to show not only that the defendant prosecuted him unsucce ssfully, but also the absence of reasonable and probable cause; while in action s for false imprisonment, proof of the existence of reasonable cause is upon the defendant, since arrest, unlike prosecution, is prima facie a tort and demands justification. In bailment cases, the bailee must prove that the goods were lost without his fault. Under the Courts (Emergency Powers) Act, 1939, the burden of proving that the defendant was unable immediately to satisfy the judgment and t hat that inability arose from circumstances attributable to the war rested on th e defendant. But it would seem that in an election petition alleging breaches of

rules made under the Representation of the People Act, 1949, the court will look at the evidence as a whole, and that even if breaches are proved by the petitioner, the burden of showing that the election was conducted substantially in accordance with the law does not rest upon the respondent. Where a corporation does an act under statutory powers which do not prescribe the method, and that act invades the rights of others, the burden is on the corporation to show that there was no other practical way of carrying out the power which would not have that effect.

58. At para 23 of its judgment, in Narayan Govind Gavate (supra), the Supreme Court explained the nature of the trial proceedings and the manner of assessment of the evidence and held, at para 29, as follows :-

29. & & The principle of onus of proof becomes important in cases of either paucity of evidence or in cases where evidence given by two sides is so equibalanced that the court is unable to hold where the truth lay.

59. Section 2(a) of the Foreigners Act defines 'foreigner' as a person, who is not a citizen of India. Thus, the definition of foreigner, under the said Act, is a negative definition. Proving of a negative fact is difficult and, at times, even impossible. No wonder, therefore, that Section 9 places the onus of proving that he is not a foreigner on the person, who is proceeded against. In order to enable the Tribunal hold, if the proceedee so desires, that the proceedee is not a foreigner, the proceedee has to necessarily prove to the satisfaction of the Tribunal that he is an Indian citizen.

60. What is, now, of immense importance to note is that while Section 9 of the Foreigners Act starts with the heading, 'burden of proof', this Section, in its body, lays down that when any question arises, in the reference, as to whether any person is or is not a foreigner, 'onus of proving' that such a person is not a foreigner or is not a foreigner of a particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person. Thus, one can clearly notice that the legislature has used, in Section 9 of the Foreigners Act, both the expressions, namely, 'burden of proof' and the 'onus of proving', i.e. 'onus of proof'. It cannot be presumed that the legislature, while making the legislation, did not know the distinction between the 'burden of proof' and 'onus of proof'. Though burden of proof and onus of proof are, at times, inter-changeable expressions, both these expressions carry different meanings. Before, however, we, in the context of 1964 Order, explain the two expressions, namely, 'burden of proof' vis-à-vis the 'onus of proof', one needs to take note of para 3 of 1964 Order, which embodies the procedure for disposal of the question, which may arise for determination before the Tribunal. Para 3 lays down 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 deserve to be heard, the Tribunal shall submit its opinion to the officer or authority specified in this behalf in the order of reference.

61. From a cautious reading of para 3, what transpires is that the Tribunal, on receiving the reference, shall serve, on the person to whom the question relates (i.e., the proceedee), a copy of the 'main grounds' on which he is alleged to be a foreigner and give him a reasonable opportunity of making representation and producing evidence in support of his case. Thus, before a Tribunal issues a notice, the reference, which the Central Government or any other authority, competent, in this regard, makes, must contain the 'grounds' on which the person concerned is alleged to be a foreigner. This is obviously required so that the Tribunal knows as to why the proceedee is being alleged to be a foreigner.

This apart, the 'grounds', so furnished, by the notice, to the proceedee, serve the purpose of enabling the proceedee to know as to why he is alleged to be a foreigner. The Tribunal is also required to give to the person concerned a reasonable opportunity of making not only representation, but also producing evidence in support of his case. Para 3 requires the Tribunal to consider 'such evidence' as may be produced. The expression 'such evidence', occurring in para 3, obviously refers to the evidence, which may be adduced by the proceedee.

62. There is, thus, no specific provision, in para 3, requiring the Tribunal or permitting the Tribunal to allow the State to adduce evidence. Does this mean that the State has no right, under the 1964 Order, to adduce evidence in order to rebut the evidence given by the person proceeded against? Such an interpretation would defeat the very purpose of enacting Section 9 read with para 3 aforementioned, inasmuch as Section 9 and /or para 3 aforementioned, while placing the onus, on the person against whom the 'reference' is made, to adduce evidence in support of his plea that he is an Indian citizen, cannot be reasonably expected to have divested the Central Government of the opportunity to give evidence in rebuttal of the evidence, which the alleged foreigner may adduce. Necessarily, therefore, such an opportunity for the Central Government has to be read into the scheme of para 3. Can it be so read? It needs to be noted, in this regard, that apart from the evidence, which the alleged foreigner can produce in support of his case, the Tribunal has also been given the responsibility of 'hearing such persons as may deserve to be heard'. Such a 'hearing' would obviously include hearing of the Central Government too. Logically extended, the opportunity of 'hearing' would include the opportunity to adduce evidence. Thus, though it is not specifically mentioned in para 3 that the Central Government shall have the opportunity of adducing evidence or shall be given the opportunity to adduce evidence, such a right has to be inferred in favour of the Central Government in order to ensure that the procedure, as envisaged by para 3, is not rendered otiose.

63. What follows from the above discussion is that it is, eventually, the Central Government, which has to obtain the Tribunal's opinion that the person, proceeded against, is a foreigner. We need to be conscious of the fact that, it is the Central Government, which makes the 'reference', and the 'reference' would fail if no evidence is adduced from either side and the truth or veracity of the grounds ,which form basis of the making of the 'reference', remains unproved.

64. Thus, the onus probandi, as the burden of proof is, at times, called ,stands placed by Section 9 on the State, because it is the State, which has approached the Tribunal to hold that the person, alleged by the Central Government to be foreigner, is, in fact, a foreigner. In order, however, to avoid a negative definition from being proved, the law, overrides the provision of the Evidence Act, which are to the contrary and places the onus, on the alleged foreigner, to prove that he is an Indian citizen. How the State, under the scheme of the Foreigners Act read with 1964 Order, can discharge this burden? This is, now, the momentous question and calls for a deep and patient analysis of the scheme contained therein.

65. While considering the question, raised above, it is of utmost importance to bear in mind that though it is the State, which seeks the opinion of the Tribunal as to whether the person, against whom the 'reference' is made, is or is not a foreigner, the fact remains that since it is within the special knowledge of the person proceeded against as to who he is, the onus of proving, under Section 9, that he is an Indian citizen, is placed by the legislature on the person, who is proceeded against. In other words, it is the proceedee, who has the onus to prove that he is an Indian citizen.

66. Thus, while, it is the State, which goes, under para 3 of 1964

Order, to the Tribunal seeking its opinion if the proceedee is or is not a 'foreigner' and, ordinarily, it is the State, which shall have the burden of proving that the proceedee is not an Indian citizen, Section 9, on the other hand, places the onus of proving that he is an Indian citizen on the proceedee. How to reconcile these two distinctly different requirements ?

67. The question, posed above, may be answered, more clearly by illustration. Let us assume, for a moment, that in a case, as the one at hand, a police report is laid before the Tribunal, wherein the police reports that according to what the reporting police officer has been informed by 'X', 'Y' is a foreigner inasmuch as 'Y' has recently moved into the locality in which 'X' resides. The Tribunal, on receiving such a report, issues a notice, under para 3 of 1964 Order, to 'Y'. When a notice is given to an alleged foreigner, under para 3, such as 'Y', 'Y' would have a right to make a representation, wherein he may admit that he is a foreigner or he may assert that he is an Indian citizen. If 'Y' asserts that he is an Indian citizen and he seeks to adduce evidence in support of his plea, para 3 allows him to adduce such evidence. Supposing the person proceeded against, i.e., 'Y', does not appear in the proceeding and does not contest the proceeding. Does it, as a corollary, mean that, on the basis of the police report itself, and, without determining for itself if a person, called 'X', at all exists or had existed or whether 'X' had ever reported to the police, as claimed by the police, that 'Y' is a foreigner, the Tribunal would render an opinion against the proceedee, i.e., 'Y', that he is a foreigner?

68. The answer to the above question has to be in the negative inasmuch as t