A

SARBANANDA SONOWAL

v.

UNION OF INDIA AND ANR.

JULY 12, 2005

B

[R.C. LAHOTI, CJ., G.P. MATHUR AND P.K. BALASUBRAMANYAN, JJ.]

Illegal Migrants (Determination by Tribunals) Act, 1983:

C *Illegal Migrants (Determination by Tribunals) Rules, 1984:*

Constitution of India, 1950—Articles 14 and 355:

Act and Rules made applicable only to the State of Assam with overriding effect over Foreigners Act—For the purpose of effective detection D *and deportation of illegal migrants—In the rest of the Country Foreigners Act and Rules thereunder applicable—Constitutional validity of the Act and the Rules challenged—Held: the Act and the Rules are* **ultra vires** *the Constitution—Procedure under Foreigners Act was far more effective in detection and deportation of illegal migrants than the impugned Act—Rather* E *it is so made as to give advantage to the illegal migrants and not for achieving the real objective of the enactment—The provisions negate the constitutional mandate under Article 355—Applicability of the Act to the State of Assam alone, having no rational nexus with the policy and object of the Act, is violative of Article 14—The Act has stripped Central Government of its power to remove illegal migrants provided under Foreigners Act,* F *Immigrants (Expulsion from Assam) Act, Passport (Entry into India) Act— Tribunals constituted under the Act will cease to function and the cases pending before it would be transferred to Tribunals constituted under Foreigners Act—Passport (entry Into India) Act, 1920—Foreigners Act, 1946—Foreigners (Tribunals) Orders, 1964—Immigrants (Expulsion from* G *Assam) Act, 1950—Passport Act, 1967—Citizenship Act, 1955—Section 6A— Evidence Act, 1872—Section 106.*

Words and Phrases:

'Aggression'—Meaning of in the context of Constitution of India.

H

Illegal Migrants (Determination by Tribunals) Act, 1983 and Illegal Migrants (Determination by Tribunals) Rules, 1984 were made applicable to the State of Assam with the professed aim of making detection and deportation of illegal migrants residing in the State of Assam. Writ Petition u/A 32 of the Constitution of India was filed by way of Public Interest Litigation seeking declaration of certain provisions of the Act as ultra vires the Constitution of India and declaration of Rules, as ultra vires the Constitution and also u/s 28 of the Act and also sought declaration that Foreigners Act, 1946 and Rules made thereunder shall apply to the State of Assam.

Allowing the Petition, the Court

HELD: 1.1. The provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 (IMDT Act) are ultra vires the Constitution of India. The Illegal Migrants (Determination by Tribunals) Rules, 1984 are also ultra vires and are struck down. [542-C; 543-A]

1.2. The procedure under the Foreigners Act and also under the Foreigners (Tribunals) Order, 1964 is far more effective in identification and deportation of foreigners as compared to the procedure under the IMDT Act and the Rules made thereunder. There being no corresponding provision like Section 9 of the Foreigners Act which places the burden of proof upon the person concerned who claims to be an Indian citizen, which is absolutely essential in relation to the nature of inquiry being conducted regarding determination of a person's citizenship (where the facts on the basis of which an opinion is to be formed and a decision is taken are entirely within the knowledge of the said person) has made the task of the law enforcement agencies of the State not only difficult but virtually impossible. The IMDT Act has been so enacted and the Rules thereunder have been so made that innumerable and unsurmountable difficulties are created in the matter of identification and deportation of illegal migrants. The application of the IMDT Act and the Rules made thereunder in the State of Assam has created the biggest hurdle and is the main impediment or barrier in identification and deportation of illegal migrants. On the contrary, it is coming to the advantage of such illegal migrants as any proceedings initiated against them under the said provision which almost entirely ends in their favour, enables them to have a document having official sanctity to the effect that they are not illegal migrants. [529-A-F]

1.3. There is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country.

A In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Some times the place of birth of his grand parents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will not only be difficult but almost impossible B for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Though in a criminal case the general rule is that the burden of proof is on the prosecution but if any fact is especially C within the knowledge of the accused, he has to lead evidence to prove the said fact. [505-G-H; 506-A-B]

Shambhu Nath Mehra v. *The State of Ajmer,* AIR (1956) SC 404; *Collector of Customs, Madras* v. *D. Bhoormull,* AIR (1974) SC 859; *State of West Bengal* v. *Meer Mohd. Umar,* [2000] 8 SCC 382; *Sanjai @ Kaka* v. *State, (NCT of Delhi),* [2001] 3 SCC 190 and *Ezhil* v. *State of Tamil Nadu,* AIR (2002) SC 2017, relied on.

D *R.* v. *Oliver,* [1943] All ER 800 and *R.* v. *Turner* (1916) 5 M and S 206 14 Digest 430; *Williams* v. *Russel* (1993) 149 LT 190, referred to.

E 1.4. IMDT Act cannot be said to be providing a very fair procedure for determining whether a person is an illegal migrant or not. The Screening Committee does not consist of any judicial member but is manned by the executive. The same is the case with the Competent Authority. But the Screening Committee or the Competent Authority have the power to reject F an enquiry at the threshold by not making a reference to the Tribunal. The figures supplied in the affidavits show that more than 85 per cent of the enquiries were rejected in this manner. [520-B, C, D]

1.5. Realising the serious law and order problem created by migration from East Pakistan and the serious situation arising therefrom Immigrants G (Expulsion from Assam) Act, 1950 was enacted and conferred very wide powers upon the Central Government to direct removal of any person outside India. However, on account of Section 4 of the IMDT Act the 1950 Act has been superseded and the provisions of the said Act have ceased to apply to the State of Assam. Thus by enacting the IMDT Act the Parliament has divested the Central Government of the power to remove migrants from Bangladesh, whose H presence was creating serious law and order problem, which fact had been

realized by the Central Government as early as in 1950. The IMDT Act instead of maintaining peace has only revived internal disturbance. A

[530-H; 531-A, B]

1.6. The provisions of the The Passport (Entry into India) Act, 1920 have been superseded by Section 4 of the IMDT Act. It has stripped the Central Government of its power of removal of such person from India and also the power of arrest of such person without warrant possessed by a police officer of the rank of Sub-Inspector or above. [531-C, H; 532-A] B

2.1. Provisions of the IMDT Act and the Rules made thereunder clearly negate the constitutional mandate contained in Article 355 of the Constitution, where a duty has been cast upon the Union of India to protect every State against external aggression and internal disturbance. The IMDT Act which contravenes Article 355 of the Constitution is, therefore, wholly unconstitutional and must be struck down. [532-B] C

2.2. The foremost duty of the Central Government is to defend the borders of the country, prevent any trespass and make the life of the citizens safe and secure. The Government has also a duty to prevent any internal disturbance and maintain law and order. Article 355 of the Constitution of India deals with Duty of the Union to protect States against external aggression and internal disturbance. [522-D] D

Arthashastra by Kautilya translated by Shri L.N. Rangarajan, referred to. E

2.3. The word "aggression" is a word of very wide import. The word "aggression" is not to be confused only with "war". Though war would be included within the ambit and scope of the word "aggression" but it comprises many other acts which cannot be termed as war. "Aggression" is a word of very wide import having complex dimensions and would to a large extent depend upon fact situation and its impact. The word "aggression" is, therefore, an all comprehensive word having very wide meaning. Its meaning cannot be explained by a straight jacket formula but will depend on the fact situation of every case. The framers of the Constitution have consciously used the word "aggression" and not "war" in Article 355. [523-A-B-C] F G

Kawasaki v. *Bantahm S.S. Company,* [1938] 3 All ER 80 and *Chae Chan Ping* v. *United States,* 130 US 581, referred to. H

A *Introduction to International Law by J.G. Starke; Indian Journal of International Law* Vol. 11 (1971) p. 724 and *Essays on Modern Law of War by L.C. Green; Conflict through Consensus by Julius Stone* (1977 Edn.), referred to.

2.4. Presence of such a large number of illegal migrants from B Bangladesh, which runs into millions, is in fact an "aggression" on the State of Assam and has also contributed significantly in causing serious "internal disturbances" in the shape of insurgency of alarming proportion making the life of the people of Assam wholly insecure and the panic generated thereby has created a fear psychosis. This has resulted in seriously hampering the C growth of the State of Assam although it has vast natural resources as people from rest of the country have a general perception that it is a disturbed area and this factor has resulted in not generating any employment opportunity which has contributed to a large measure in giving rise to insurgency. The impact is such that it not only affects the State of Assam but it also affects its sister States like Arunachal Pradesh, Meghalaya, Nagaland, etc. as the route D to the said places passes through the State of Assam. [529-G-H; 530-A]

3.1. Since the classification made whereby IMDT Act is made applicable only to the State of Assam has no rational nexus with the policy and object of the Act, it is clearly violative of Article 14 of the Constitution and is liable to be struck down on this ground also. The influx of Bangladeshi nationals who E have illegally migrated into Assam pose a threat to the integrity and security of north-eastern region. Their presence has changed the demographic character of that region and the local people of Assam have been reduced to a status of minority in certain districts. In such circumstances, if the Parliament had enacted a legislation exclusively for the State of Assam which F was more stringent than the Foreigners Act, which is applicable to rest of India, and also in the State of Assam for identification of such persons who migrated from the territory of present Bangladesh between 1st January, 1966 to 24th March, 1971, such a legislation would have passed the test of Article 14 as the differentiation so made would have had rational nexus with the avowed policy and objective of the Act. But the mere making of a geographical G classification cannot be sustained where the Act instead of achieving the object of the legislation defeats the very purpose for which the legislation has been made. For satisfying the test of Article 14, the geographical factor alone in making a classification is not enough but there must be a nexus with the objects sought to be achieved. If geographical consideration becomes the sole H criteria completely overlooking the other aspect of "rational nexus with the

policy and object of the Act" it would be open to the legislature to apply enactments made by it to any sub-division or district within the State and leaving others at its sweet will. This is not the underlying spirit or the legal principle on which Article 14 is founded. [533-G-H; 534-A-D] A

3.2. Even though an order may have been passed under the Foreigners Act against an illegal migrant, he gets a right to make a representation to the Central Government for making a reference to the Tribunal, which will then proceed in accordance with IMDT Act having a further right of appeal to the Appellate Tribunal. There being no provision like Section 9 of the Foreigners Act regarding burden of proof in the IMDT Act, the whole complexion of the case will change in favour of the illegal migrant. This right is not available to any other person similarly situated against whom an order under the Foreigners Act may have been passed, if he is in any other part of India other than the State of Assam. [529-B] B C

Budhan Choudhry v. *State of Bihar,* AIR (1955) SC 191; *D.P. Joshi* v. *State of Madhya Bharat,* AIR (1955) SC 334; *Kishan Singh* v. *State of Rajasthan,* AIR (1955) SC 795; *Gopi Chand* v. *Delhi Administration* AIR (1959) SC 609; *Kangshari Haldar* v. *State of West Bengal,* AIR (1960) SC 457 and *Clarence Pais* v. *Union of India,* [2001] 4 SCC 325, referred to. D

[532-D, F-G]

4. In a criminal trial where a person is prosecuted and punished for commission of a crime and may thus be deprived of his life or liberty, it is not enough that he is prosecuted in accordance with the procedure prescribed by law but the procedure should be such which is just, fair and reasonable. This principle can have no application here for the obvious reason that in the matter of identification of a foreigner and his deportation, he is not being deprived of his life or personal liberty. The deportation proceedings are not proceedings for prosecution where a man may be convicted or sentenced. The Foreigners Act and the Foreigners (Tribunals) Order, 1964 are applicable to whole of India and even to the State of Assam for identification of foreigners who have entered Assam between 1st January, 1966 and 24th March, 1971 in view of the language used in Section 6-A of Citizenship Act. It is, therefore, not open to Union of India or State of Assam or for that matter anyone to contend that the procedure prescribed in the aforesaid enactment is not just, fair and reasonable and thus violative of Article 21 of the Constitution. The procedure under the Foreigners Act and the Foreigners (Tribunals) Order, 1964 is just, fair and reasonable and does not offend any constitutional provision. E F G H

[535-F-H; 536-A-B]

A 5. It cannot be said that aliens also possess several rights and the procedure for their identification and deportation should be detailed and elaborate in order to ensure fairness to them. The Bangladeshi nationals who have illegally crossed the border and have trespassed into Assam or are living in other parts of the country have no legal right of any kind to remain in India and they are liable to be deported. [536-C; 539-F]

B

Louis De Raedt v. *Union of India,* [1991] 3 SCC 554 and *State of Arunachal Pradesh* v. *Khudi Ram Chakma,* [1994] Supp. SCC 615, relied on. [539-A, C]

C *Rex* v. *Bottrill,* (1947) 1 K.B. 41; *Attorney-General for Canada* v. *Cain,* (1906) AC 542; *Chae Chan Ping* v. *United States,* (1930) U.S. 581; *Fong Yue Ting* v. *United States* 149 U.S. 698 and *Nishimura Ekiu* v. *United States,* 142, 652, referred to. [537-C, D, F; 538-A, F]

Introduction to International Law by J.G. Starke (1st Indian re-print D 1994) Chapter 12 (page 348); *Oppenheim's International Law* (Ninth Edn. 1992 - 400, 401 and 413, referred to. [536-C, H]

6. It cannot be said that vires of a special statute seeking to make some provisions or some defined object cannot be challenged by comparing its provisions with a general statute covering the field. The principle has no E application to the fact situation of the present case. The contention of the petitioner is not that merely because the provisions of the IMDT Act provide many safeguards to an alleged illegal migrant in comparison to the Foreigners Act the IMDT Act is *ultra vires.* The contention is that as the Statement of Objects and Reasons show that the influx of foreigners who illegally migrated into India across the borders of the sensitive Eastern and North-Eastern F regions of the country and have remained in the country, pose a threat to the integrity and security of the said region and further their continuance in India has given rise to serious problems and also the clandestine manner in which these persons are trying to pass off as citizens of India has rendered their detection difficult and there being need for their speedy detection and the G interest of general public, a classification was made on geographical basis whereby the Act was enforced only in the State of Assam in supersession to the Foreigners Act. But the Act so made contains such provisions and prescribes such procedure that it has become virtually impossible to detect and deport a foreigner which is evident from the statistical data furnished by the respondent themselves. The basis of differentiation has thus no nexus with H the object sought to be achieved and, therefore, the classification made for

application of IMDT Act to the State of Assam violates Article 14 and is consequently liable to be struck down. [539-G; 540-B-E] A

The Special Courts Bill, (178) AIR (1979) SC 478 and *A.R. Antulay* v. *R.S. Nayak,* AIR (1988) SC 153, referred to.

7. Section 8 of the IMDT Act is not similar to Section 9 of the Citizenship Act. Section 9 of the Citizenship Act applies to a situation where the question is whether an Indian citizen has lost his citizenship by acquiring the citizenship of a foreign country. Such a question can be decided only by the Central Government. The present case is concerned with identification and deportation of such Bangladeshi nationals who have illegally crossed the international border and have taken up residence in Assam. The question of loss of Indian citizenship on account of acquisition of citizenship of another country does not at all arise for consideration here. [540-F-G] B C

8. Article 51-A(d) of the Constitution says that it shall be the duty of every citizen of India to defend the country and render national service when called upon to do so. If an Act made by legislature has the disastrous effect of giving shelter and protection to foreign nationals who have illegally transgressed the international border and are residing in India and further the Act is unconstitutional, any citizen is entitled to bring it to the notice of the Court by filing a writ petition under Article 32 of the Constitution. [541-C-D] D E

Dr. D.C. Wadhwa v. *State of Bihar,* AIR (1987) SC 579 and *R.K. Garg* v. *Union of India,* AIR (1981) SC 2138, followed. [541-E; 542-A]

Prof. Yashpal and Anr. v. *State of Chhattisgarh,* JT (2005) 2 SC 165, relied on. [542-B] F

S.P. Gupta v. *Union of India,* [1981] Supp. SCC 87, referred to. [541-A]

9.1. The Tribunals and the Appellate Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall cease to function. The Passport (Entry into India) Act, 1920, the Foreigners Act, 1946, the Immigrants (Expulsion from Assam) Act, 1950 and the Passport Act, 1967 shall apply to the State of Assam. 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 G H

Act, the Rules made thereunder and the procedure prescribed under the Foreigners (Tribunals) Order, 1964. [542-C-E]

9.2. It will be open to the authorities of the Central Government or State Government to initiate fresh proceedings under the Foreigners Act against all such persons whose cases were not referred to the Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 by the competent authority whether on account of the recommendation of the Screening Committee or any other reason whatsoever. The appeals pending before the Appellate Tribunals shall be deemed to have abated. [542-F, G]

9.3. The respondents are directed to constitute sufficient number of Tribunals under the Foreigners (Tribunals) Order, 1964 to effectively deal with cases of foreigners, who have illegally come from Bangladesh or are illegally residing in Assam. [543-E]

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 131 of 2000.

(Under Article 32 of the Constitution of India).

Ashok H. Desai, Uday U. Lalit, Ms. Niti Dikshit, Prateek Jalan, Prashant Kumar with them for the Petitioner.

Amarendra Sharan, Additional Solicitor General, K.K.Venugopal, M.N. Krishnamani, Amit Bhandari, Ashok Bhan, Navin Prakash, Ms.Rekha Pandey, Ms. Purnima Bhat Kak, A. Subba Rao, Gaurav Aggarwal, Manish Tiwari, P. Parmeswaran, Ms. Sushama Suri, D.S. Mahra, Mrs.Anil Katiyar, S.B. Upadhay, (NP), Ms. Neelam Sharma, Tara Chandra Sharma, Ajay Sharma, Rupesh Kumar, Tarun Sharma, Ms. Seema Bengani, Rituraj Biswas, Gopal Singh, Ms.Hemantika Wahi, Ms. Sadhna Sandhu, Mrs. Monika Bapna, Shakil Ahmed Syed, V.K. Sidharthan, J.R. Luwang, Atul Kumar, Anil Srivastava, Saurabh Srivastava, Ranjan Mukherjee, Azim H. Laskar, Anil K. Chopra, Abhijit Sengupta, Manish Goswami, Sanjib Goswami, U.Hazarika and Ms. Sumita Hazarika with them for the Respondents.

The Judgment of the Court was delivered by

G.P. MATHUR, J. 1. This writ petition under Article 32 of the Constitution of India has been filed by way of public interest litigation for declaring certain provisions of the Illegal Migrants (Determination by Tribunals) Act, (Act No.39 of 1983) 1983 as *ultra vires* the Constitution of India, null and void and consequent declaration that the Foreigners Act, 1946 and the Rules made thereunder shall apply to the State of Assam. The second prayer made is to declare the Illegal Migrants (Determination by Tribunals) Rules, 1984 as *ultra*

vires the Constitution of India and also under Section 28 of the aforesaid Act and, therefore, null and void. Some more reliefs have been claimed which will be referred to at the appropriate stage. The respondents to the writ petition are the Union of India and the State of Assam. A

2. The case set up in the writ petition is that the petitioner is a citizen of India and is ordinarily resident in the State of Assam. He is a former President of the All Assam Students Union, which is the largest non-political students organization in the State which was responsible for leading the students movement in Assam in the late 1970s and early 1980s. He is also a former Chairman of the North East Students' Organisation, which is an umbrella organization of students' association from Assam, Meghalaya, Manipur, Nagaland, Tripura and Arunachal Pradesh and has been actively involved in issues concerning the rights of the people of Assam including the question of illegal migrants settled in the said State. The issues raised in the writ petition concern all residents in the State of Assam whose rights as citizens of India have been materially and gravely prejudiced by the operation of the Illegal Migrants (Determination by Tribunals) Act, 1983 (hereinafter referred to as "the IMDT Act"). The principal grievance of the petitioner is that the IMDT Act is wholly arbitrary, unreasonable and discriminates against a class of citizens of India, making it impossible for citizens who are residents in Assam to secure the detection and deportation of foreigners from Indian soil. The Foreigners Act, 1946, applies to all the foreigners throughout India, but the IMDT Act which was enacted subsequently with the professed aim of making detection and deportation of the illegal migrants residing in Assam easier has completely failed to meet even the standards prescribed in the Foreigners Act. That apart, even those provisions of the IMDT Act which afford some measure of protection to some genuine Indian citizens against illegal migrants are not being properly enforced due to extraneous political considerations in derogation of the rights of Indian citizens living in Assam. The result of the IMDT Act has been that a number of non-Indians, who surreptitiously entered into Assam after March 25, 1971 without possession of valid passport, travel documents or other lawful authority to do so, continue to reside in Assam. Their presence has changed the whole character, cultural and ethnic composition of the area and the IMDT Act creates a situation whereunder it has become virtually impossible to challenge the presence of a foreigner and to secure his detection, deportation or even deletion of his name from the electoral list as they get protection on account of the provisions of the Act. According to the census figures, which have been given in the writ petition, the rate of growth of the population in Assam is far more than B C D E F G H

A rest of India which shows that large number of foreigners have migrated to different areas of Assam and have settled there. It is further averred that in view of the problem of illegal migration of foreigners into Assam and their continued presence therein, a State wide protest movement of students was organized which continued for a long period. As a result of the students' movement and ensuing negotiations, a memorandum of settlement dated 15th B August, 1985 was entered into between All Assam Students' Union and the Union of India and the State of Assam, which is commonly known as "Assam Accord". The terms of the Accord specifically provided that steps would be taken to detect and deport illegal migrants from Assam and it also contained a clause that "the Government will give due consideration to certain difficulties C expressed by AASU/AAGSP regarding the implementation of the Illegal Migrants (Determination by Tribunals) Act, 1983." The Accord further provided that foreigners who have entered into India after 25th March, 1971 will continue to be detected, their names deleted from the electoral rolls and they will be deported from India. In pursuance of this provision, the Citizenship Act, 1955 was amended by Act No.65 of 1985 and Section 6A was inserted D with the heading "Special Provisions as to Citizenship of Persons covered by the Assam Accord." It provides that the term "detected to be a foreigner" shall mean so detected under the Foreigners Act and the Foreigners (Tribunals) Order, 1964 framed thereunder. Under the said provision a person of Indian origin as defined under Section 6-A(3) who entered into Assam prior to 1st E January, 1966 and has been resident in Assam since then is deemed to be a citizen of India. However, if such a person entered into Assam between 1st January, 1966 and before 25th March, 1971 and has been detected to be a foreigner under the Foreigners Act then he is not entitled to be included in the electoral list for a period of 10 years from the date of detection. This amendment of the Citizenship Act makes it clear that the question of F determination or detection of a foreigner is to be governed by the provisions of the existing Central legislation, viz. the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964.

3. It is further pleaded that after signing of the Assam Accord, several G assurances were given and statements have been made by the Central Government that it is examining the failure of the IMDT Act regarding detection and deportation of foreigners and it is considering steps to repeal the Act. A document was signed by Union Home Secretary and Chief Secretary of Assam on 27th January, 1990 regarding preparation of a timeframe for class-wise implementation of the Assam Accord and it was mentioned therein that H a decision on the repeal of the IMDT Act would be taken by 28th February,

1991. In a meeting held on 20th September, 1990 between Union Home Minister, Chief Minister of Assam and representatives of All Assam Students' Union, the student union reiterated their demand for repeal of the IMDT Act, which demand was noted and an assurance was given that the Central Government would initiate discussions with other political parties. The Union Home Minister in a meeting held on 11th August, 1997, wherein the petitioner was also present in his capacity as President of the AASU, stated that the results achieved were extremely poor. It was decided therein that Home Minister would visit certain sectors of Indo-Bangladesh border to take stock of the situation regarding illegal immigration and the inadequacy of the measures taken to prevent such immigration. Reference has been made to certain other meetings with the officers of Government of India (Ministry of Home Affairs) on 6th April, 1998 and 23rd September, 1998 wherein it was informed that the repeal of the IMDT Act was under active consideration of the Government. It is averred in paragraph 5 (viii)(f) of the writ petition that the President of India in his address to the Parliament in February, 1999 said that the repeal of the Act was under active consideration of the Government. A meeting was again held on 18th March, 1999 between the representatives of the Government of India and Government of Assam and also of All Assam Students' Union, wherein it was assured that the repeal of the IMDT Act was under active consideration of the Central Government and measures would be taken to identify foreigners and steps will be taken to seal the border. Copies of the minutes of the meetings have been filed along with the writ petition. The difficulties created by the provisions of the IMDT Act due to which it has become extremely difficult to identify an illegal migrant and pass a deportation order have also been enumerated in detail. Figures regarding the inquiries initiated since the enforcement of the Act in 1983 and total number of illegal migrants expelled have been given to which we will refer to later on. It is also pleaded that a huge number of Bangladesh nationals who have crossed over to India, have occupied vast tracts of land in sensitive international border which has very serious implication for national security.

4. The Union of India filed a counter affidavit on 18th July, 2000, which has been sworn by Shri Jatinder Bir Singh, Director, Ministry of Home Affairs. In paragraph 7 of this affidavit, it was stated that a proposal to repeal the IMDT Act is under consideration of Government of India. A copy of the reply given by Shri I.D. Swami, Minister of State in the Ministry of Home Affairs in the Rajya Sabha on 8th March, 2000 has been filed as Annexure R-2 to the counter affidavit, wherein the Minister had said that in the State of Assam Foreigners Tribunals under the Foreigners Act, 1946 are functioning for

A detection of illegal migrants, who had come to the State of Assam after 1st January, 1966 and up to 24th March, 1971 and the Illegal Migrants Determination Tribunals under the IMDT Act have been constituted for detection and deportation of illegal migrants, who had entered into India on or after 25th March, 1971. The Hon'ble Minister had further stated that the Government is of the view that application of the IMDT Act to the State of Assam alone B is discriminatory and a proposal to repeal the said Act is under consideration of the Government. A true copy of the latest status report filed by the Government in Writ Petition No. 125 of 1998, which has been filed seeking deportation of all Bangladeshi nationals from India, has been filed as Annexure R-1 to the Counter Affidavit and paragraphs 3 to 7 of the said status report C are being reproduced below :

"3. Continuing influx of Bangladeshi nationals into India has been on account of a variety of reasons including religious and economic. There is a combination of factors on both sides which are responsible for continuing influx of illegal immigration from Bangladesh. The D important "Push Factors" on the Bangladesh side include: -

(a) steep and continuous increase in population;

(b) sharp deterioration in land-man ratio;

(c) low rates of economic growth particularly poor performance in E agriculture;

The "Pull Factors" on the Indian side include:

(a) ethnic proximity and kinship enabling easy shelter to the immigrants;

F (b) porous and easily negotiable border with Bangladesh;

(c) better economic opportunities;

(d) interested religious and political elements encouraging immigration;

4. It is difficult to make a realistic estimate of the number of illegal G immigrants from Bangladesh because they enter surreptitiously and are able to mingle easily with the local population due to ethnic and linguistic similarities. The demographic composition in the districts bordering Bangladesh has altered with the illegal immigration from Bangladesh. The districts of Assam and West Bengal bordering Bangladesh have recorded growth of population higher than the national H average. The States of Meghalaya, Mizoram and Tripura have also

recorded high rates of population growth. Illegal immigrants from Bangladesh have also been using West Bengal as a corridor to migrate to other parts of the country.

5. The large-scale influx of illegal Bangladesh immigrants has led to large tracts of sensitive international borders being occupied by foreigners. This has serious implications for internal security.

6. The types of illegal migrants are as follows:

(a) those who came with valid visa/documents and overstayed;

(b) those who came with forged visa/documents; and

(c) those who entered surreptitiously.

7. During talks between the Prime Ministers of India and Bangladesh in February, 1972, the Prime Minister of Bangladesh had assured the return of all Bangladesh nationals who had taken shelter in India since March 25, 1971. Accordingly a circular was issued by the Government of India on 30.9.1972 setting out guidelines for action to be taken in respect of persons who had come to India from Bangladesh. According to this circular, those Bangladesh nationals who had come to India before 25 March 1971 were not to be sent back and those who entered India in or after the said date were to be repatriated."

In paragraph 12 of the counter affidavit it is stated that "the basic objection of the petitioner is under consideration of the Central Government that the IMDT Act and the Rules made thereunder are not effective in comparison to the Foreigners Act, 1946, which is applicable to the whole country except to the State of Assam." In paragraph 18 of the counter affidavit it is stated that the administrative powers in respect of the IMDT Act have been delegated to the Government of Assam under Section 21 of the aforesaid Act. The second sub-paragraph of paragraph 18 and paragraph 19 of the counter affidavit are important and are being reproduced below :-

"It is further submitted that the detection/expulsion of illegal migrants under the IMDT Act, has been extremely dismal. According to the information furnished by the Government of Assam, the progress in respect of detection/expulsion of illegal migrants (those who entered Assam on or after 25.3.1971 upto 30.4.2000) is as follows:

1	Total number of enquiries initiated	3,10,759
2	Total number of enquiries completed	3,07,955
3	Total number of enquiries referred to Screening Committee	3,01,986
4	Total number of enquiries made by the Screening Committee	2,98,465
5	Total number of enquiries referred to IM(DT)s	38,631
6	Total number of enquiries disposed of by IM(DT)s	16,599
7	Total number of persons declared as illegal migrants	10,015
8	Total number of illegal migrants physically expelled	1,481
9	Total number of illegal migrants to whom expulsion order served	5,733
10	Total number of enquiries pending with Screening Committee	3,521
11	Total number of enquiries pending with the Tribunal	22,072

In reply to para 9, it is submitted that the Chief Minister of Assam had requested the then Prime Minister vide his letter dated 22.6.96 regarding repeal of the IMDT Act. The Chief Minister again reiterated for scrapping the IMDT Act, vide his letter dated 31.7.96 addressed to the Home Minister. This view has been reconfirmed by the State Govt. vide its message dated 23.4.98."

In paragraph 22 of the counter affidavit it is stated that a proposal to repeal the IMDT Act is under consideration of the Government of India and in paragraph 24 it is stated that there is need for a uniform Act for detection and deportation of foreigners for the entire country including Assam.

5. The State of Assam filed a counter affidavit on 28th August, 2000, wherein it is stated that the State Government has been persistently writing

to the Central Government that the IMDT Act is operating against national interest inasmuch as in view of the stringent provisions in the IMDT Act regarding detection and deportation of foreigners, the illegal migrants whose presence are in lakhs in the State of Assam could not be deported. The State Government has thus been insisting upon the Central Government for repeal of the IMDT Act. On account of unabated influx of illegal migrants from Bangladesh, a widespread movement started in Assam spearheaded by All Assam Students' Union (AASU) in the year 1978-79 demanding expulsion of such illegal migrants from Assam which as contended by the agitationists, not only threatened their own existence in their own State but also threatened security of the country. Large scale satyagrah, bandhs, dharnas, etc. were organized by AASU and All Assam Gana Sangram Parishad and the agitation got mass support from the people. After several rounds of discussion, a memorandum of settlement known as Assam Accord was signed on 15th August, 1985 which, amongst others, envisaged the provision for detection and deletion of name of foreigners from the electoral roll and also their deportation. Paragraph 8 of the counter affidavit, which has a bearing on the controversy in hand, is being reproduced below :-

> "8. That it is pertinent to mention that there has been a sharp increase of the Muslim population in the Respondent/State in the last few decades.
>
> The statistical analysis of the sharp growth of Muslim population in Assam *vis-a-vis* Hindu population for the decades 1951-61, 1961-71 and 1971-1991 is as follows:

Year	Assam	
	Muslim	Hindu
1951-1961	38.37	33.70
1961-1971	30.99	37.18
1971-1991	77.42	41.89

(*Source Directorate of Census, Government of India)

> The chart given above clearly indicates that Muslim population of Assam has shown a rise of 77.42% in 1971-1991, whereas Hindu population has risen by nearly 41.89% during the said period.

A There are three Districts in Assam, which has borders with Bangladesh viz. Karimganj, Cachar and Dhubri. All India percentage of decadal increase in population during 1981-1991 is 23.85% whereas in the Border districts of Assam namely, Karimganj shows decadal increase of 42.08%, Cachar district 47.59% and Dhubri district 56.57%. From the above it can be assumed that the infiltration of foreigners B from Bangladesh contributed significantly to the sharp increase of population in Assam."

In paragraph 9 of the counter affidavit, the major impediment in implementation of the IMDT Act have been pointed out in detail and it is also C averred that the Act is discriminatory as it has been made applicable only to the State of Assam and not to other States like West Bengal, Tripura and Meghalaya, etc. which are facing similar problem of illegal migrants. Copies of several communications sent to the Government of India by the State of Assam requesting for repeal of the IMDT Act and also seeking appropriate amendment to the Citizenship Act, 1955, in order to declare the children of D the illegal migrants entering into India after 1971 as foreigners, have also been filed. The difficulties in the implementation of the Act and the Rules have been pointed out which we will advert to later on. It is further averred that despite repeated advertisements and serious efforts, the State Government has not been able to get qualified persons to fill in the vacant posts in the Tribunals. Figures as on 31st March, 2000, of total number of inquiries E initiated, total number of persons declared as illegal migrants and the number of persons physically expelled have been given. It is specifically pleaded that the IMDT Act is an ineffective piece of legislation and it is standing in the way of detection and deletion of post 1971 foreigners in Assam and, therefore, the same should be repealed.

F

6. However, on 8th August, 2001, the State of Assam moved I.A. No.5 of 2001 praying that the State of Assam be permitted to withdraw the earlier affidavit filed on 28th August, 2000 and seeking permission to place on record a new affidavit. In this affidavit it is averred that general elections were held in the State of Assam in May 2001 wherein the Congress government had G come to power replacing the government headed by Assam Gana Parishad. The State Government in its Cabinet meeting held on 28th June, 2001 had reviewed the earlier affidavit and had obtained a legal opinion in the matter. It is further averred that "the affidavit filed by the former AGP led government does not reflect the correct position of law and hence a new affidavit is H required to be filed. The State Government is of the opinion that the IMDT

Act is constitutional and there is no question of either repeal or striking down of the Act." It is also averred that in the election manifesto of the Indian National Congress in the just concluded elections, it was specifically declared that the Act was introduced to save the Indian citizens from unnecessary harassment in the name of detection of foreigners and the Congress party is committed to oppose any move to repeal the Act. Apart from making a bald statement that the IMDT Act is not arbitrary or discriminatory and denial of the averment that it makes the task of securing the detection and deportation of foreigners impossible or that non-citizens are getting protection to the detriment of *bona fide* citizens of India, nothing specific is stated nor any specific statement made in the earlier affidavit or the facts and figures supplied therein have been controverted. A general statement is made that the State of Assam is making all steps for effective implementation of the IMDT Act and deportation of illegal migrants.

7. The aforesaid I.A. No.5 of 2001 came up for consideration before a Three Judge Bench presided by the then Chief Justice of India on 15th October, 2001 and the relevant portion of the order passed thereon is being reproduced below :-

> "An application has been filed on behalf of the State of Assam seeking permission to file "a new counter affidavit". The application is supported by an affidavit of the Commissioner & Secretary, Home Department, Government of Assam.
>
> Mr. Kapil Sibal, learned senior counsel appearing for the State submits that he does not press prayer 'a' and that the affidavit which has been filed along with this application, may be treated as 'an additional affidavit'. Learned counsel appearing for other parties have no objection to that course being adopted. We, therefore, take on record the new affidavit as an additional affidavit filed on behalf of State of Assam and reject prayer 'a'. The application is allowed in above terms.
>
> Mr. Ashok Desai, learned senior counsel prays for and is granted four weeks' time to file his response to the additional affidavit filed by the State. All other parties may also file their response, if any, within the same period, to the additional affidavit.
>
> List the writ petitions after four weeks before a three Judge Bench for further proceedings."

A 8. The Union of India filed a counter affidavit sworn by Shri Jatinder Bir Singh, Director, Ministry of Home Affairs, in reply to the additional affidavit of the State of Assam. It is averred therein that the matter of constitutional validity of the IMDT Act does not depend on political issues, but depends on facts and legal grounds. The relevant part of the opening part of the affidavit which has some relevance is being reproduced below :-

B

> "In this context, it is submitted that detection of illegal migrants, who belong to the same ethnic stock as Indians is not an easy task. However, large-scale illegal migrants from Bangladesh have not only threatened the demographic structure of the area but have seriously
C impaired the security of the nation, particularly in the present circumstances. The need for expeditious identification of illegal migrants is more pressing now than ever. It is not a matter of dealing with a religious or linguistic group. It is a question of identifying those who illegally crossed over the border and continue to live in India contrary to the Indian law and the Constitution.
D
> The facts and figures which have been stated by the Union of India in its affidavit filed in the case titled *"Jamiat Ulama-E-Hind and Anr.* v. *Union of India and Ors. Writ Petition (Civil)* No. 7 of 2001" clearly indicate that it is the existence of the IMDT Act, which has been the single factor responsible for dismal detection and expulsion
E of illegal migrants in Assam. It has also been pointed out that in the neighbouring States, where this law is not in force, the process of detection (although far from satisfactory) has been far more effective than in the State of Assam. The application of IMDT Act, 1983 in Assam virtually gives the illegal migrants, in the State, preferential
F protection in a matter relating to the citizenship of India. This is clearly unconstitutional and violative of the principles of equality. The affidavit of the State seems to suggest that the matter has now become a political rather than a legal issue. However, it is submitted that as far as the present pleadings are concerned, the issues indicated in the present affidavit of the State under reply, are not relevant. None
G of the submissions made in the connected affidavit, referred to above filed by the Union of India in connected Writ Petition No. 7/2001, are controverted by the State of Assam in present affidavit. Besides this, the State has not given any fresh facts and figures, which would seek to suggest that this Act has secured the object of dealing with illegal
H infiltrators."

In paragraph 2 it is averred that though the administrative power have been delegated to the Government of Assam to implement the IMDT Act but the entire expenditure incurred is being reimbursed by the Central Government to the Government of Assam. It is further averred that since the enforcement of the IMDT Act only 1494 illegal migrants had been deported from Assam upto 30th June, 2001. In contrast 489046 number of Bangladeshi nationals had been actually deported under the Foreigners Act, 1946 from the State of West Bengal between 1983 and November 1998. The IMDT Act had failed to fulfil the objects for which it was enacted which is apparent from the poor results and it places Assam in a different position from rest of the country where the Foreigners Act, 1946 is applicable. The provisions of the IMDT Act and the Rules made thereunder are highly burdensome for the public, as a result whereof no worthwhile cooperation/response is received from the public in the detection and deportation of illegal migrants. The Act failed to achieve its object rather it generated its side effects. It is also averred that there is no justification in the application of the IMDT Act to the State of Assam when the provisions of the Foreigners Act, 1946 are quite effective for detection and deportation of illegal migrants (foreigners) which is applicable to the rest of the country. Lastly, it is prayed that the constitutional validity of the IMDT Act may be examined in the light and background of the above facts.

9. The petitioner has also filed a reply to the additional affidavit filed on behalf of the State of Assam, where besides reiterating his earlier pleas, it is averred that the Indian National Congress representatives from North East have themselves alluded to the problem of illegal migration in the past. Reference is made to a report of the General Secretaries to the Seventh General Conference of the North-Eastern Congress (I) Co-Ordination Committee dated 3rd July, 1992 wherein it was recorded as under :-

"20.1 There are infiltrations though it is a difficult task to examine the precise number.

20.2 The infiltrations are not only by minorities of Bangladesh but also from the majority Muslims. In absolute terms, the number of [illegible] India is likely to be much larger than that

20.3 An ideological support is given to the phenomenon by the Islamic Fundamentalists creating the vision of a larger country comprising Bangladesh and the entire North East where its economic problems

A will be solved and security ensured.

20.4 There is a direct correlation between the rise of fundamentalism and increase in influx."

It is further averred in paragraphs 9 and 10 of this affidavit that the Law Commission of India in its 175th Report on the Foreigners (Amendment) Bill, B 2000 (submitted in September 2000) has also dealt with this issue. While noting that entry of illegal migrants and other undesirable aliens into India has posed a grave threat to our democracy and the security of India, especially for the eastern part of the country and Jammu and Kashmir, the Law Commission has observed that influx of migrants from Bangladesh has remained C unabated and has acquired frightening proportions. The Law Commission has also referred to the Report of the Governor of Assam dated 8th November, 1998 submitted to the President of India highlighting dangerous dimensions of the unprecedented migration of Bangladeshis to Assam and the security threats and strategic and economic consequences thereof. The Law Commission has proposed a draft Foreigners (Amendment) Bill, governing D foreigners in India and the prevailing discriminatory position by the application of IMDT Act only to the State of Assam has been sought to be done away with by providing in Section 8(1) of the draft Bill for repeal of the said Act and dissolution of the Tribunals constituted thereunder.

E 10. The Union of India has filed another affidavit on 24th November, 2004 wherein it is averred that though in the earlier affidavit a prayer was made to examine the constitutional validity of the IMDT Act, but on reconsideration the Central Government has taken a decision to retain the IMDT Act in present form in its application to the State of Assam. It is averred that allegations were made by various organizations that a large F number of genuine Indian citizens were deported under the Foreigners Act, 1946 and, therefore, the IMDT Act was enforced whose purpose is to protect the genuine Indian citizens and it introduced an element of judicial scrutiny to determine the citizenship of a person. It is further averred that upto 31st March, 2004, the number of complaints received under the IMDT Act were G 401598 wherein inquiries were completed in 397835 cases and 376341 inquiries were referred to the Screening Committee. Out of these 87222 cases were referred to Tribunals for opinion and 12180 persons were declared as illegal migrants. This, according to the affidavit, shows that but for the element of judicial scrutiny thousands of Indians would have been deported. It is further averred that as on 31st March, 2004, 519391 number of inquiries were completed H by the Tribunals under the Foreigners Act to detect those foreigners who

came into Assam during the period 1st January, 1966 to 24th March, 1971 and 29189 persons were declared as foreigners and their names were deleted from the electoral rolls. This shows that the results obtained under the IMDT Act and the Foreigners Act were more or less comparable. Besides above, the details of the fencing work and construction of roads done at the border have also been given.

11. In I.A. No.6 of 2004, the copy of the memorandum submitted before the Parliamentary Standing Committee of Home Affairs on "The Illegal Migrants Laws (Replacing & Amending) Bill, 2003" on behalf of Government of Assam has been filed, which contains the figures regarding inquiries conducted upto 31st August, 2003 and the same is as under :-

1.	Total number of enquiries initiated	386249
2.	Total number of enquiries completed	379521
3.	Total number of enquiries referred to Screening Committee	362592
4.	Total number of enquiries made by the Screening Committee	359733
5.	Total number of enquiries referred to the IM(DT)s	76228
6.	Total number of enquiries disposed of by the IM(DT)s	21169
7.	Total number of persons declared as illegal migrants	11636
8.	Total number of illegal migrants physically expelled	1517
9.	Total number of illegal migrants to whom expulsion orders served	6159
10.	Total number of enquiries pending with the Screening Committee	2859
11.	Total number of cases pending with the Tribunals	55059

A copy of the report dated 8th November, 1998 sent by Governor of Assam, Lt. Gen. S.K. Sinha (Retired), former Deputy Chief of Army Staff, has also been filed along with this application. The report is a long and comprehensive one which was prepared after thorough inspection of border areas and districts, discussion with Indian Ambassador in Bangladesh and

A talks with political leaders. Some portions of the report are being reproduced below :-

"1. The unabated influx of illegal migrants from Bangladesh into Assam and the consequent perceptible change in the demographic pattern of the State has been a matter of grave concern. It threatens to reduce
B the Assamese people to a minority in their own State, as happened in Tripura and Sikkim.

2. Illegal migration into Assam was the core issue behind the Assam student movement. It was also the prime contributory factor behind the outbreak of insurgency in the State. Yet we have not made much
C tangible progress in dealing with this all important issue.

3. There is a tendency to view illegal migration into Assam as a regional matter affecting only the people of Assam. It's more dangerous dimensions of greatly undermining our national security, is ignored. The long cherished design of Greater East Pakistan/Bangladesh, making
D in-roads into strategic land link of Assam with the rest of the country, can lead to severing the entire land mass of the North-East, with all its rich resources from the rest of the country. They will have disastrous strategic and economic consequences.

E *MIGRATION INTO ASSAM*
HISTORICAL BACKGROUND

7. Failure to get Assam included in East Pakistan in 1947 remained a source of abiding resentment in that country. Zulfikar Ali Bhutto in his book "Myths of Independence" wrote "It would be wrong that
F Kashmir is the only dispute that divides India and Pakistan, though undoubtedly the most significant. One at least is nearly as important as the Kashmir dispute, that of Assam and some districts of India adjacent to East Pakistan. To these Pakistan has very good claims". Even a pro-India leader like Sheikh Mujibur Rahman in his book "Eastern Pakistan; its population & economics" observed, "Because
G Eastern Pakistan must have sufficient land for its expansion and because Assam has abundant forests and mineral resources, coal, petroleum etc., Eastern Pakistan must include Assam to be financially and economically strong.

H

CONTRIBUTORY FACTORS

10. Besides the above considerations, there are other contributory factors facilitating infiltration from Bangladesh. Ethnic, linguistic and religious commonality between the illegal migrants and many people on our side of the border enables them to find shelter. It makes their detection difficult. Some political parties have been encouraging and even helping illegal migration with a view to building vote banks. These immigrants are hardworking and are prepared to work as cheap labour and domestic help for lower remuneration than the local people. This makes them acceptable. Moreover, with corruption being all pervasive, corrupt officials are bribed to provide help. Recently, a racket has been busted in Lakhimpur. Four individuals were found to have been providing forged citizenship certificates and other documents to illegal migrants for the last 14 years.

ILLEGAL MIGRANTS

15. ..... Mr. Mulan described this as invasion using military terminology which in present geostrategic context, underscores the strategic aspect of the problem. It is unfortunate that to this day, after half a century of independence, we have chosen to remain virtually oblivious to the grave danger to our national security arising from this unabated influx of illegal migrants. Third, the prophecy that except the Sibsagar district, the Assamese people will not find themselves at home in Assam, is well on its way to becoming true as reflected by the present demographic pattern of Assam.

16. Mr. Inderjit Gupta, the then Home Minister of India stated in the Parliament on May 6, 1997 that there were 10 million illegal migrants residing in India. Quoting Home Ministry/Intelligence Bureau sources, the August 10, 1998 issue of India Today has given the breakdown of these illegal migrants by States :-

West Bengal	-	5.4 million
Assam	-	4 million
Tripura	-	0.8 million
Bihar	-	0.5 million
Maharashtra	-	0.5 million

A Rajasthan - 0.5 million

Delhi - 0.3 million Making a

total of - 10.83 millions

Community wise growth

B

	Assam		India	
	Hindus	Muslims	Hindus	Muslims
(1) 1951-1961	33.71	38.35	20.29	25.61
C (2) 1961-1971	37.17	30.99	23.72	30.85
(3) 1971-1991	41.89	77.42	48.38	55.04

EXPLANATORY NOTE

D ..... In the case of Muslims the Assam growth rate was much higher than the All India rate. This suggests continued large scale Muslim illegal migration into Assam.

(d) Muslim population in Assam has shown a rise of 77.42 per cent in 1991 from what it was in 1971. Hindu population has risen by nearly 41.89 per cent in this period.

E

(e) Muslim population in Assam has risen from 24.68 per cent in 1951 to 28.42 per cent in 1991. As per 1991 census four districts (Dhubri, Goalpara, Barpeta and Hailakandi) have become Muslim majority districts. Two more districts (Nagaon and Karimganj) should have become so by 1998 and one district Morigaon is fast approaching this position.

F

20. The growth of Muslim population has been emphasized in the previous paragraph to indicate the extent of illegal migration from Bangladesh to Assam because as stated earlier, the illegal migrants coming into India after 1971 have been almost exclusively Muslims.

G

21. Pakistan's ISI has been active in Bangladesh supporting militant movement in Assam. Muslim militant organization have mushroomed in Assam and there are reports of some 50 Assamese Muslim youths having gone for training to Afghanistan and Kashmir.

H

CONSEQUENCES

22. The dangerous consequences of large scale illegal migration from Bangladesh, both for the people of Assam and more for the Nation as a whole, need to be emphatically stressed. No misconceived and mistaken notions of secularism should be allowed to come in the way of doing so.

23. As a result of population movement from Bangladesh, the spectre looms large of the indigenous people of Assam being reduced to a minority in their home State. Their cultural survival will be in jeopardy, their political control will be a weakened and their employment opportunities will be undetermined.

24. The silent and invidious demographic invasion of Assam may result in the loss of the geostrategically vital districts of lower Assam. The influx of these illegal migrants is turning these districts into a Muslim majority region. It will then only be a matter of time when a demand for their merger with Bangladesh may be made. The rapid growth of international Islamic fundamentalism may provide for driving force for this demand. In this context, it is pertinent that Bangladesh has long discarded secularism and has chosen to become an Islamic State. Loss of lower Assam will severe the entire land mass of the North East, from the rest of India and the rich natural resources of that region will be lost to the Nation."

12. 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)

A 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 B 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 C 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 D 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. E

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 F 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 G 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.

H 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. The relevant provisions of Section 6-A are being reproduced below: -

"6(A) Special provisions as to citizenship of persons covered by the Assam Accord. - (1) For the purposes of this section

(a) "Assam" means the territories included in the State of Assam immediately before the commencement of the Citizenship (Amendment) Act, 1985;

(b) "detected to be a foreigner" means detected to be a foreigner in accordance with the provisions of the Foreigners Act, 1946 (31 of 1946) and the Foreigners (Tribunals) Orders, 1964 by a Tribunal constituted under the said Order;

(c) "specified territory" means the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985;

(d) a person shall be deemed to be of Indian origin, if he, or either of his parents or any of his grandparents was born in undivided India;

(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.

(2) Subject to the provisions of sub-section (6) and (7), all persons of

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

(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.

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

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

(ii) if such opinion does not contain a finding with respect to such other requirement, refer the question to a Tribunal constituted under the said Order having jurisdiction in accordance with such rules as the Central Government may make in this behalf under section 18 and decide the question in conformity with the opinion received on such reference.

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

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

(6) ..... (Omitted as not relevant).

(7) Nothing in sub-sections (2) to (6) shall apply in relation to any person

(a) who, immediately before the commencement of the Citizenship (Amendment) Act, 1985, for year is a citizen of India;

(b) who was expelled from India before the commencement of the Citizenship (Amendment) Act, 1985, under the Foreigners Act, 1946 (31 of 1946).

(8) Save as otherwise expressly provided in this section, the provisions of this section shall have effect not withstanding anything contained in any other law for the time being in force."

13. In this writ petition we are basically concerned with the constitutional validity of the IMDT Act, which has been made applicable only to the State of Assam and that too for detection and deportation of illegal migrants, who have entered India on 25th March, 1971 or thereafter. The IMDT Act has not been enforced in the rest of the country. The election manifesto of a political party has no relevance and cannot be taken into consideration for judging the constitutional validity of any enactment, whether made by State or by Centre, as it is a purely legal issue and lies within the domain of judiciary.

14. Before adverting to the provisions of the IMDT Act, it is necessary to have a brief look at the enactments made for dealing with foreigners. The first enactment governing the foreigners was the Foreigners Act, 1864, which

provided for the expulsion of foreigners and their apprehension, detention pending removal and for a ban on their entry into India after removal. The situation created by the Second World War led to promulgation of Foreigners Ordinance in 1939 which was replaced by Foreigners Act, 1940. Section 7 of this Act read as under :-

> *"Burden of proof*—If any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or 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 Indian Evidence Act, 1872, lie upon such person."

The legislature then enacted the Foreigners Act, 1946 which repealed the 1940 Act. Section 2(a) of this Act defines a "foreigner" and it means a person who is not a citizen of India. Sub-Section (1) of Section 3 lays down that 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. Without prejudice to the generality of the powers conferred by sub-section (1), sub-section (2) confers power to make wide ranging orders concerning a foreigner which have been numerated in clauses (a) to (g), which include that a foreigner shall not remain in India or in any prescribed area therein, or if he has been required by an order under this Section not to remain in India, meet from any resources at his disposal the cost of his removal from India or remain in such area as may be prescribed and shall comply with such condition as may be specified or shall be arrested or detained or confined. Sub-section (3) provides that any authority prescribed in this behalf may with respect to any particular foreigner make orders under clause (c) or clause (f) of sub-section (2). Section 4 confers power for directing a foreigner to be detained or confined in such place and manner as the Central Government by order determine. Section 4(3) directs that no person shall knowingly assist an internee to escape from custody or harbour an escaped internee or to give any assistance to such a foreigner. Section 5 places restriction upon a foreigner to change his name while in India. Section 6 casts an obligation on master of any vessel and pilot of any aircraft landing or embarking at any place in India to give particulars with respect to any passenger or members of any crew who are foreigners. Section

7 casts a similar obligation on hotel keepers in respect of foreigners accommodated therein. Section 12 confers power upon any authority who has been conferred power to make or give any direction under the Act to further delegate to any subordinate authority to exercise such power on its behalf. Section 14 has been amended by Act No. 16 of 2004 and now maximum punishment under the said section is five years and also fine. Section 14A and 14B, which have been added by the aforesaid amendment, provide for punishment with imprisonment for a term which shall not be less than two years but may extend to eight years. Section 14C provides for some punishment for abetment of offences under Section 14A or 14B. Section 9 of this Act is important and it reads as under :-

> "9. *Burden of proof*—If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or 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 Indian Evidence Act, 1872 (1 of 1872), lie upon such person."

This Act confers wide ranging powers to deal with all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner for prohibiting, regulating or restricting their or his entry into India or their presence or continued presence including his arrest, detention and confinement. The most important provision is Section 9 which casts the burden of proving that a person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall lie upon such person. Therefore, where an order made under the Foreigners Act is challenged and a question arises whether the person against whom the order has been made is a foreigner or not, the burden of proving that he is not a foreigner is upon such a person. In *Union of India* v. *Ghaus Mohammed,* AIR (1961) SC 1526, the Chief Commissioner of Delhi served an order on Ghaus Mohammad to leave India within three days as he was a Pakistani national. He challenged the order before the High Court which set aside the order by observing that there must be *prima facie* material on the basis of which the authority can proceed to pass an order under Section 3(2)(c) of the Foreigners Act, 1946. In appeal the Constitution Bench reversed the judgment of the High Court holding that onus of showing that he is not a foreigner was upon the respondent.

15. The Central Government has made the Foreigners (Tribunals) Order, 1964 in exercise of powers conferred by Section 3 of the Foreigners Act. Clause 2(1) of this Order provides that the Central Government may by order refer the question as to whether a person is or is not a foreigner within the meaning of Foreigners Act, 1946, to a Tribunal to be constituted for the purpose, for its opinion. Clause 3(1) provides that 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. Clause 3(1-A) provides that the Tribunal shall, before giving its opinion on the question referred to in sub-paragraph (1-A) of paragraph 2, give the person in respect of whom the opinion is sought, a reasonable opportunity to represent his case. Clause 4 provides that the Tribunal shall have the powers of a Civil Court while trying a suit under the Code of Civil Procedure in respect of summoning and enforcing the attendance of any person and examining him on oath, requiring the discovery and production of any document and issuing commissions for the examination of any witness.

16. It needs to be emphasized that the general rule in the leading democracies of the world is that where a person claims to be a citizen of a particular country, the burden is upon him to prove that he is a citizen of that country. In United Kingdom, the relevant provision is contained in the Immigration Act, 1971 and sub-Section (1), (8) and (9) of Section 3 thereof read as under :

> "3. *General provisions for regulation and control.* (1) Except as otherwise provided by or under this Act, where a person is not a British citizen
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under this Act;
>
> (b) he may be given leave to enter the United Kingdom (or when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
>
> (c) if he is given a limited leave to enter or remain in the United Kingdom, it may be given subject to conditions restricting his employment or occupation in the United Kingdom, or requiring

him to register with the police, or both. A

xxx xxx xxx xxx

(8) When any question arises under this Act whether or not a person is a British citizen, or is entitled to any exemption under this Act, it shall lie on the person asserting it to prove that he is. B

(9) A person seeking to enter the United Kingdom and claiming to have the right of abode there shall prove that he has that right by means of either

(a) a United Kingdom passport describing him as a British citizen of the United Kingdom and Colonies having the right of abode in C the United Kingdom; or

(b) a certificate of entitlement."

Somewhat similar provision is contained in Immigration and Nationality Act of USA and Section 291 places the burden of proof upon the person D concerned in any removal proceeding. Section 318 provides that no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of the Act and the burden of proof shall be upon such person to show that he entered the United States lawfully. The Immigration and Refugee Protection Act, 2001 of Canada contains a provision of placing the burden upon the E concerned person to establish his right to have a permanent residence in the said country. Section 188 of the Migration Act, 1958 of Australia provides that an officer may require a person whom the officer knows or suspects is a non-citizen to (a) show the officer evidence of being a lawful non-citizen; or (b) show the officer evidence of the person's identity. F

17. There is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Some times the place of birth of his grand G parents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will H

A not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

B 18. Though in a criminal case the general rule is that the burden of proof is on the prosecution but if any fact is especially within the knowledge of the accused, he has to lead evidence to prove the said fact. In *Shambhu Nath Mehra* v. *The State of Ajmer,* AIR (1956) SC 404 it was held as follows:

> C "Section 106 is an exception to S. 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and S. 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which D are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

In *Collector of Customs, Madras* v. *D. Bhoormull,* AIR (1974) SC 859, E proceedings were initiated under Section 167(8)(c) of the Customs Act for confiscation of contraband or smuggled goods and it was observed:

> ".....Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the accused, it is not obliged to prove them as part of F its primary burden." ....
> (Paragraph 31)

> ".....On the principle underlying S. 106 Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts G may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty.

In *state of West Bengal* v. *Meer Mohd. Umar,* [2000] 8 SCC 382, it was H

held that the legislature engrafted special rule in Section 106 of the Evidence Act to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. This principle was reiterated in *Sanjai @ Kaka* v. *State (NCT of Delhi),* [2001] 3 SCC 190 and *Ezhil* v. *State of Tamil Nadu,* AIR (2002) SC 2017.

In *R.* v. *Oliver,* (1943) All ER 800, the accused was charged with having sold sugar as a whole-sale seller without the necessary licence. It was held that whether the accused had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence lay upon him. It was further held that in the circumstances of the case the prosecution was under no necessity to give *prima facie* evidence of non-existence of a licence. In this case reference is made to some earlier decisions and it will be useful to notice the same. In *R.* v. *Turner,* (1916) 5 M & S 206 : 14 Digest 430, the learned Judge observed as follows:

> "I have always understood it to be a general rule, that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative."

In *Williams* v. *Russel,* (1993) 149 LT 190, the learned Judge held as under:

> "On the principle laid down in *R.* v. *Turner and numerous Ors.,* cases where it is an offence to do an act without lawful authority, the person who sets up the lawful authority must prove it and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute."

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

20. Clause (b) of sub-Section 6-A(1) of the Citizenship Act, 1955 defines "detected to be a foreigner" and it means detected to be a foreigner in

A accordance with the provisions of the Foreigners Act, 1946 and the Foreigners (Tribunals) Order 1964 by a Tribunal constituted under the said Order. Similarly, the explanation appended to Section 6-A(2) also refers to the "opinion of the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 holding such person to be a foreigner". These provisions mandate the establishment and functioning of a Tribunal constituted under the Foreigners (Tribunals) B Order, 1964 in the State of Assam. The learned Additional Solicitor General and Shri K.K. Venugopal, learned senior counsel for the State of Assam have made a statement that such Tribunals are actually functioning in the State of Assam.

C 21. The provisions of the IMDT Act may now be examined. The Statement of Objects 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 migrated into India across the borders of the sensitive eastern D and north-eastern regions 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 migrated 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 connections with the people of India, illegally remained in India without E 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 these 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 detection, the need for F protection of genuine citizens of India and the interests of the general public, the President promulgated, on the 15th October, 1983, the Illegal Migrants (Determination by Tribunals) Ordinance, 1983, to provide for the establishment of Tribunals."

The Preamble of the Act which finally came into force on 25th December, G 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 connected therewith or incidental* H *thereto."*

WHEREAS a good number of the foreigners who migrated into India across the borders 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 migration and their ethnic similarities and other connections with the people of India and without having in their possession any lawful authority so to do, illegally remained in India;

AND WHEREAS the continuance of such foreigners in India is detrimental to the interests 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 foreigners in Assam and also in any other part of India in which such foreigners may be found to have remained illegally;"

Some of the provisions of the Act which are relevant are being reproduced below :-

3. *Definitions and construction of references* - (1) In this Act, unless the context requires

(a) xxx xxx xxx

(b) "foreigner" has the same meaning as in the Foreigners Act, 1946;

(c) "illegal migrant" means a person in respect of whom each of the following conditions is satisfied, namely:-

(i) he has entered into India on or after the 25th day of March, 1971;

(ii) he is a foreigner;

(iii) he has entered into India without being in possession of a valid passport or other travel document or any other lawful authority in that behalf;

4. *Overriding effect of the Act.*—(1) The provisions of this Act or of any rule or order made thereunder shall have effect notwithstanding anything contained in the Passport (Entry into India) Act, 1920 or the

Foreigners Act, 1946 or the Immigrants (Expulsion from Assam) Act, 1950 or the Passport Act, 1967 or any rule or order made under any of the said Acts and in force for the time being.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), nothing in the proviso to section 2 of the Immigrants (Expulsion from Assam) Act, 1950 shall apply to or in relation to an illegal migrant as defined in clause (c) of sub-section (1) of section 3.

8. *References or applications to Tribunals* - (1) If any question arises as to whether any person is or is not an illegal migrant, the Central Government may, whether such question has arisen on a representation made by such person against any order under the Foreigners Act, 1946 requiring him not to remain in India or to any other effect or has arisen in any other manner whatsoever, refer such question to a Tribunal for decision.

(2) Any person may make an application to the Tribunal, for its decision, as to whether the person whose name and other particulars are given in the application, is or is not an illegal migrant :

Provided that no such application shall be entertained by the Tribunal unless the person in relation to whom the application is made is found, or resides, within the jurisdiction of the same police station where the applicant has his place of residence.

(3) Every application made under sub-section (2) shall be made in such form and in such manner as may be prescribed and shall be accompanied by affidavits sworn by not less than two persons residing within the jurisdiction of the same police station in which the person referred to in the application is found, or residing, corroborating the averments made in the application, and shall also be accompanied by such fee, being not less than (ten) and not more than one hundred, rupees, as may be prescribed.

(4) Every reference under sub-section (1) shall be made to the Tribunal within the territorial limits of whose jurisdiction the place of residence of the person name in such reference is, at the time of making such reference, situated :

Provided that where such person has no place of residence, the reference shall be made to the Tribunal within the territorial limits of

whose jurisdiction such person is, at the time of making such reference, found.

(5) Every application under sub-section (2) shall be made to the Tribunal within the territorial limits of whose jurisdiction the person named in such application is found or, as the case may be, has his place of residence, at the time of making such application.

8-A. *Application to the Central Government for reference*—(1) Any person may make an application to the Central Government, for decision by a Tribunal, as to whether the person whose name and other particulars are given in the application, is or is not an illegal migrant, and where any such application is received by the Central Government, it may, on the basis of any information in its possession or after making such inquiry as it deems fit, reject the application on the ground that the application is frivolous or vexatious or it does not comply with the requirements of this section or refer such application to a Tribunal for decision.

(2) Every application made under sub-section (1) shall be made in such form and in such manner as may be prescribed and shall be accompanied by a declaration by another person residing within the jurisdiction of the same revenue sub-division in which the applicant resides in such form as may be prescribed to the effect that the particulars mentioned in the application are true to his knowledge, information and belief :

Provided that no person shall make more than ten such applications or more than ten such declarations.

(3) Every reference under sub-section (1) shall be made to the Tribunal within the territorial limits of whose jurisdiction the place of residence of the person named in such reference is, at the time of making such reference, situated :

Provided that where such person has no place of residence, the reference shall be made to the Tribunal within the territorial limits of whose jurisdiction such person is, at the time of making such reference, found.

10. *Procedure with respect to references under sub-section (1) of section 8* On receipt of a reference under sub-section (1) of section

8 or sub-section (1) of section 8-A the Tribunal shall serve on the person named in such reference, a notice, accompanied by a copy of such reference, calling upon him to make, within a period of thirty days from the date of receipt of such notice, such representation with regard to the averments made in the reference, and to produce such evidence as he may think fit in support of his defence :

Provided that if the Tribunal is satisfied that the person aforesaid was prevented by sufficient cause from making his representation and from producing evidence in support of his defence within the said period of thirty days, it may permit him to make his representation and to produce evidence in support of his defence, within such further period, not exceeding thirty days, as it may, by order, specify.

11. *Procedure with respect to applications under sub-section (2) of section 8.*—On receipt of an application under sub-section (2) of section 8, the Tribunal shall issue a notice, accompanied by a copy of the application, to the prescribed authority calling upon it to furnish, after making such inquiry as that authority may deem fit, a report to the Tribunal with regard to the averments made in the application.

(2) If, on a consideration of the report made by the prescribed authority, the Tribunal is satisfied that-

(a) the person named in the application is not an illegal migrant or that the applicant is frivolous or vexatious, or has not been made in good faith, the Tribunal shall, after giving the applicant an opportunity to be heard, reject the application ;

(b) there are reasonable grounds to believe that the person named in the application is an illegal migrant, the Tribunal shall issue a notice accompanied by a copy of the application, to the person named in the application, calling upon him to make, within thirty days from the date of receipt of the notice, such representation with regard to the averments made in the application and to produce such evidence as he may think fit in support of his defence ;

Provided that if the Tribunal is satisfied that the person aforesaid was prevented by sufficient cause from making his representation and from producing evidence in support of his defence within the said period of thirty days, it may permit him to make his representation and to produce evidence in support of his defence, within such further

period, not exceeding thirty days, as it may, by order, specify. A

12. *Determination of the question as to whether a person is an illegal migrant* - (1) The Tribunal to which a reference has been made under section 8 or section 8-A, or to which an application has been made under section 8, shall after taking such evidence as may be adduced before it and after making such inquiry as it may think fit and after B hearing such persons as it may deem appropriate, by order, decide the question as to whether the person named in such reference or application, as the case may be, is or is not an illegal migrant :

Provided that where for the determination of such question in any case the decision on any issue renders any decision on any other C issue or issues unnecessary, the Tribunal may not decide such other issue or issues.

(2) Where the members of the Tribunal differ on their opinion on any point, the Chairman of the Tribunal shall state the point or points on which they differ and make a reference to the President of the D Appellate Tribunal which exercises jurisdiction in relation to the Tribunal who shall refer the case for hearing on such point or points by a member of another Tribunal under its jurisdiction and such point or points shall be decided according to the opinion of that member and such decision shall be deemed to be the decision of the Tribunal. E

(3) The Tribunal shall send a copy of every order passed by it to the prescribed authority or authorities and to the parties to the reference, or the application, as the case may be.

(4) Every order passed under sub-section (1) shall, subject to the decision of the Appellate Tribunal, be final and shall not be called in F question in any Court.

14. *Appeal*—The Central Government, or any person, named in a reference or an application under section 8, or any application under sub-section (2) of that section or any person named in a reference under section 8-A may, if it or he is not satisfied with any order made G by a Tribunal under section 12, prefer an appeal to the Appellate Tribunal against such order.

20. *Expulsion of illegal migrant*—(1) Where a person has been determined by a Tribunal, or, as the case may be, by the Appellate H

A Tribunal, to be an illegal migrant, the Central Government shall, by order served on such person, direct such person to remove himself from India within such time and by such route as may be specified in the order and may give such further directions in regard to his removal from India as it may consider necessary or expedient.

B (2) Any police officer not below the rank of a Superintendent of Police shall have such powers as may be necessary, including the power to obtain a bond from any person for the due compliance of an order under sub-section (1) and to arrest such person in the event of his failure to furnish such bond to the satisfaction of such police officer.

C

22. Section 5 provides for establishment of Illegal Migrants (Determination) Tribunals. Only a person who has been a District Judge or Additional District Judge is eligible for becoming a member of the Tribunal and each Tribunal has to consist of two members. Section 9 gives the powers D of the Tribunal. Section 15 provides for establishment of an Appellate Tribunal which shall consist of not less than two and not more than six members as the Central Government may think fit and only a person who is or has been a Judge of the High Court is eligible to be appointed as member thereof. The Appellate Tribunal shall function in benches consisting of not less than two members. The Memorandum of Appeal shall be accompanied by such fee not E being less than Rs. 25 or more than Rs.100, as may be prescribed. Section 21A provides that it shall be lawful for the police officer not below the rank of Superintendent of Police, if he is satisfied that the circumstances so require, and for reasons to be recorded in writing direct any person against whom a reference or an application has been made under this Act to enter into a bond F with or without sureties for making himself available for inquiry. Section 25 provides that any person who contravenes or attempts to contravene or fails to comply with any order or direction given under Section 20 or harbours any such person shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine, which shall not be less than two thousand rupees. The proviso to the Section G empowers the Court to impose lesser sentence or fine for adequate and special reasons.

23. In exercise of powers conferred by Section 28 of the IMDT Act, the Central Government has made the Illegal Migrants (Determination by Tribunals) Rules, 1984 (hereinafter referred to as 'the Rules"). Rule 2(ii) defines a H "competent authority" which means the Central Government and includes,

where a State Government or any officer subordinate to Central Government or a State Government is empowered by notification under Section 21 to exercise and discharge the powers and duties of the Central Government under Section 8(1) and Section 8-A(1), such State Government or officer. Rule 3 requires that for the purpose of making the reference in relation to any person under Section 8(1) or Section 8-A(1) to the Tribunal, the competent authority seized of the matter shall require the Superintendent of Police to direct an officer not below the rank of a Sub-Inspector of Police to make an inquiry. Rules 4 to 7 lay down that the inquiry officer who has been directed to make an inquiry shall call upon that person (alleged illegal migrant) to give information as regards the particulars mentioned in Form-I. He may elicit information from any other person who may be acquainted with the facts and circumstances of the case. The details of the inquiry have to be entered day by day in a diary kept for the purpose setting forth the time at which any information reached him, the time at which he began and closed his enquiry and the place or places visited by him and the statement of the circumstances ascertained through such enquiry and then he has to submit a report, in Form-II with the diary, to the immediate superior officer who shall endorse the comments thereon and submit it to the Screening Committee. Rule 8 provides for constitution of a Screening Committee at every sub-divisional level where the Tribunals are established and shall consist of two members, one of whom shall be Sub-divisional Magistrate and other a police officer not below the rank of a Deputy Superintendent of Police in the sub-division concerned. The Screening Committee after scrutiny of the information contained in Form II has to then make its recommendations to the Superintendent of Police as to whether the person mentioned in the report is or is not an illegal migrant. Rule 9 provides that if on recommendations of the Screening Committee and such further information as the competent authority may call for, it appears to that authority that the question arises as to whether any person is or is not an illegal migrant, that authority shall make a reference to the Tribunal for its decision thereon, along with the diary, report of inquiry officer containing the endorsement of his immediate superior officer, recommendation of the Screening Committee and any other further information. So a discretion has been conferred upon the Competent Authority whether to make a reference to the Tribunal or not. If the Competent Authority chooses not to make a reference, there is no right of appeal and the alleged illegal migrant remains untouched. He can then safely reside in Assam. Rules 10 and 10-A provide that the application to the Tribunal under Section 8(2) shall be in Form III and to the Central Government under Section 8-A(2) in Form V. Rule 13 provides that the Superintendent of Police shall, as far as may be, follow the procedure as

A B C D E F G H

A specified in Rules 3 to 8 while making an inquiry in respect of a notice issued to him by the Tribunal under Section 11(1). Rules 14 to 19 lay down the procedure for filing appeals to the Appellate Tribunal which has to be in Form IV, the fee to be paid and also the contents of the Memorandum of Appeal etc. The Rules, thus, contain a very stringent and time consuming procedure for holding of preliminary enquiry.

B

24. In view of Section 3(1)(c) of the IMDT Act, an illegal migrant is a person with respect to whom all the three conditions, namely, (i) has entered India on or after 25th March, 1971; (ii) is a foreigner which means he is not a citizen of India; and (iii) has entered India without being in possession of

C a valid passport or other travel documents or any other lawful authority in this behalf, are satisfied. Therefore, if a foreigner has entered India on or after 25th March, 1971, he would be dealt with under the IMDT Act, while as a foreigner who has entered any part of India including Assam before 25th March, 1971, would be dealt with under the Foreigners Act. Section 4 of the IMDT Act is an overriding provision which lays down that the IMDT Act or

D the Rule or order made therein shall have effect notwithstanding anything contained in the Foreigners Act, 1946 or the Immigrants (Expulsion from Assam) Act, 1950 or the Passport Act or any Rule or Order made thereunder. Section 8(1) confers power on the Central Government to make a reference for its decision to the Tribunal whether any person is an illegal migrant or not.

E This reference can also be made on a representation made by an illegal migrant against any order passed against him under the Foreigners Act not to remain in India. This provision gives special advantage to an illegal migrant in Assam, which is not available to any foreigner in rest of India. Section 8(2) provides that any person may make an application to the Tribunal whether any person whose name is given in the application is or is not an illegal

F migrant but the *proviso* to this sub-section imposes a restriction that such an application can be given only by a person who lives within the jurisdiction of the same police station in which the alleged illegal migrant is found or resides. Section 8(3) imposes some further conditions and restrictions, namely, that the application shall be accompanied by affidavits sworn by not less than

G two persons residing within the jurisdiction of the same police station in which the alleged illegal migrant is found or is residing and a Court Fee of Rs. 10 has to be paid. Section 8-A lays down that any person may make an application to the Central Government for decision by a Tribunal as to whether the person whose name and other particulars are given in the application is or is not an illegal migrant. In view of sub-section (2) of this Section, the

H application has to be accompanied by a declaration by another person residing

within the jurisdiction of the same revenue sub-division in which the applicant resides and further conditions are imposed that no person shall make more than ten such applications or more than ten such declarations. The Central Government may, after making such inquiry, as it deems fit, reject the application on the ground that it is frivolous or vexatious. In view of the language used in Section 14 there is no right of appeal against such an order as right of appeal is conferred only against an order passed by the Tribunal under Section 12. The order of rejection of the application will enure to the benefit of the alleged illegal migrant and there being no right of appeal it will attain finality making him safe and secure. If the Central Government makes a reference it will only initiate the proceedings before the Tribunal causing no immediate prejudice to the illegal migrant and if the Tribunal ultimately holds against him, he will have a right of appeal to the Appellate Tribunal.

25. It is very important to note here that IMDT Act does not contain any provision similar to Section 9 of the Foreigners Act, 1946 regarding burden of proof. On the contrary it is conspicuously silent about it. In such circumstances a very heavy burden is cast upon the authorities of the State or the applicant to establish that a person is an illegal migrant as defined in Section 3(1)(c) of IMDT Act and is liable for deportation.

26. Rule 4 requires an inquiry officer to elicit information and particulars from the alleged illegal migrant on the points mentioned in Form I. Item No.5, 10, 11, 12 of this Form are as under:-

5. Address in the country of origin (village, police station, district and country).

10. Does the person hold any passport issued by any foreign country ? If so furnish particulars.

11. What are the reasons for leaving the person's country of origin ?

12. If the person has entered into India without a passport, how the person entered India ?

(Name of village, District from which the person entered). Date of entry.

It is elementary that a person who has illegally come from Bangladesh to India and is residing here for his better economic prospects or employment etc. would never disclose that he has come from Bangladesh but would assert

A that he is an Indian national and resides in India. There is no question of his telling his date of entry or giving any information on the aforesaid points. According to Rules 7 and 8 of the Rules, the inquiry officer has to submit a report in Form II and Item No.5, 10, 11 and 12 are exactly identical to that in Form I. Rules 10, 10-A and 10-B lay down that an application to the Tribunal under Section 8(2) shall be made in Form III, an application to the B Central Government under Section 8-A(2) shall be made in Form V and a declaration under Section 8-A(2) shall be made in Forms V and VI. Curiously enough Column No.6 of Form III requires the applicant to furnish the following information regarding the alleged illegal migrant: -

C (a) whether he entered India on or after 25th March, 1971;

(b) date of his entry into India;

(c) whether he is a foreigner; and

(d) whether he entered India without being in possession of a valid passport or travel document or lawful authority in that behalf.

D

The contents of the application (form III) have to be affirmed by the applicant that what is stated in the application is true to the best of his information and belief. The application to the Central Government has to be made in Form V which contains a similar Column 6 with two further additions, namely;

E (i) the approximate distance between the place of residence of the applicant and the alleged illegal migrant;

(ii) since when the alleged illegal migrant is staying at the said place.

In Column 7 the applicant has to give details of (a) documentary; and (b) oral F evidence in his possession. The application has to be affirmed that the facts stated are true to the best of his information and belief and that he has not made more than 10 such applications. It contains a further clause to the following effect :

> "I am aware that in the event of this application being found as G false or made with a view to cause vexation to the person named in this application or any member of his family, I am liable to be proceeded against in accordance with law for giving false evidence."

Form VI which is a declaration to be made under Section 8-A(2) by another person in corroboration of the application contains a similar affirmation H clause and also the clause quoted above regarding prosecution in the event

the facts mentioned are found to be false. A

27. To give the exact date of entry into India of a Bangladeshi national, who has illegally and surreptitiously crossed the international border, is not only difficult but virtuously impossible. A citizen doing his duty towards nation of pointing out the presence of a Bangladeshi national to the authorities of the State is put under threat of criminal prosecution, if the contents of the B application are found to be false. This is bound to have a cascading effect on citizens who will prefer to remain a quiet spectator to the continued influx of illegal migrants from Bangladesh rather than to take initiative in their detection or deportation.

28. The analysis of the provisions of IMDT Act and the Rules made C thereunder clearly demonstrate that the provisions thereof are very stringent as compared to the provisions of Foreigners Act, 1946 or Foreigners (Tribunals) Order, 1964, in the matter of detection and deportation of illegal migrants. It is far more easier to secure conviction of a person in a criminal trial where he may be awarded a capital punishment or imprisonment for life than to D establish that a person is an illegal migrant on account of extremely difficult, cumbersome and time consuming procedure laid down in the IMDT Act and the Rules made thereunder. The Act does not contain any provision for constitution of a screening committee which has been done under the Rules and has been conferred a very wide power of rejecting complaints against which no appeal lies. The figures supplied in the initial affidavit filed by the E State of Assam show that more than eighty five per cent enquiries initiated were rejected and no reference was made to the Tribunal. Similarly, the restrictions imposed on an applicant, a citizen of India doing a national duty of pointing out the presence of an illegal migrant in Assam, that he should be resident of same police station or same sub-division where the illegal F migrant resides or is found does not carry any sense as these migrants keep moving. The requirement regarding application being accompanied by affidavits of two persons who are residents of same police station or being accompanied by declaration of another person who is resident of same sub-division or that not more than ten such applications can be filed or ten such declarations made do not serve any purpose except to create hurdles in the matter of G identification and deportation of illegal migrants. Not every person feels that he owes a duty towards the nation and he should initiate proceedings for deportation of an illegal migrant. The applicant also incurs risk to his own security and safety besides spending time and energy in prosecuting the matter. Similarly, there is hardly any sense in making a provision for mentioning H

A the time and date of visit to a place by an enquiry officer in a diary. A deep analysis of the IMDT Act and the Rules made thereunder would reveal that they have been purposely so enacted or made so as to give shelter or protection to illegal migrants who came to Assam from Bangladesh on or after 25th March, 1971 rather than to identify and deport them.

B 29. The learned Additional Solicitor General and Shri K.K. Venugopal have laid great stress on the submission that the IMDT Act provides a very fair procedure for determining whether a person is an illegal migrant or not as the said question is decided by a Judicial Tribunal consisting of two members, who are or have been Additional District Judges or District Judges. C Similarly, the Appellate Tribunal consists of two members, who are or have been Judge of a High Court. The argument overlooks the fact that the Screening Committee does not consist of any judicial member but is manned by the executive. The same is the case with the Competent Authority. But the Screening Committee or the Competent Authority have the power to reject an enquiry at the threshold by not making a reference to the Tribunal. The D figures supplied in the affidavits show that more than 85 per cent of the enquiries were rejected in this manner. It means that an order in favour of an alleged illegal migrant, which is not even appealable, can be passed by the executive but an order declaring a person to be illegal migrant must necessarily be passed by a Judicial Tribunal with a further right of appeal to the Appellate E Tribunal. This shows how one-sided the provisions of the IMDT Act are. They have been so made that they only result in giving advantage and benefits to an illegal migrant and not for achieving the real objective of the enactment, namely, of detection and deportation of a Bangladeshi national who has illegally crossed the border on or after 25th March, 1971.

F 30. The State of Assam in its affidavit filed on 24.8.2000 has pointed out some practical problems in the implementation of the IMDT Act due to which the Act has not become effective and the results are extremely poor, which are as under: -

"(i) The onus of proof as illegal migrants lies on the prosecution G under IMDT Act which is opposed to the Foreigners Act, 1946 under which the onus is on the suspected foreigners.

(ii) There is no provision in IMDT Act for compelling the suspect to furnish particulars required in Form No. I of IMDT Rules and a corresponding penal provision to deal with such suspect in H case of their refusal to furnish information as required in Rule 5.

(iii) There is no provision for compelling suspect witness to furnish information or statement to Police Officers making enquiries and as such taking recourse to action under Section 176 IPC is difficult in case of refusal.

(iv) The Enquiry Officer is not empowered to search home/premises of the suspects nor can he compel the suspects to produce documents to give necessary information.

(v) Prosecution witnesses do not appear before the Tribunal for want of necessary allowances.

(vi) Once the Tribunals declares a person as an illegal migrant, he/she becomes untraceable either before the notice is served or during the grace period of 30 days.

(vii) Notice/summons issued by the Tribunals cannot easily be served due to frequent changes of address by the illegal migrants in unknown destinations.

(viii) The expulsion orders cannot be served as the illegal migrants, with frequent change of address, merge with the people of similar ethnic origin.

(ix) It is provided in the Act that for filing complaint against a suspected person to determine as to whether he is an illegal migrant, two persons living within the same Police Station are required to file the complaint with filing of affidavit and an amount of Rs.10.00 which was originally Rs.25.00 is to be deposited with the application. This provision of the Act puts a severe restriction in filing any complaint against an illegal migrant.

(x) The Tribunals after observing a long drawn procedure declare a person as illegal migrant who is to be deported from India but such deportation becomes very difficult as the illegal migrants change their residence and shift to some other areas.

(xi) There are instances of strong resistance to the Enquiry Officer conducting enquiries against the illegal migrants in Char areas (riverain areas) and other locations where there is heavy concentration of immigrant population."

31. Section 25 of the IMDT Act provides that contravention or non-compliance of any order made under Section 20 shall be punishable with

A imprisonment for a term which may not be less than one year but which may extend to three years and with fine, which shall not be less than two thousand rupees. The *proviso* to this section says that the Court may for special and adequate reasons to be recorded impose the sentence of imprisonment for a term of less than one year or a fine of less than two thousand rupees. Section 14 of the Foreigners Act (after amendment by Act No.16 of 2004) provides B for imprisonment which may extend to five years and fine. Section 14-A and 14-B of the Foreigners Act provide punishment for a term which shall not be less than two years but may extend to eight years and also fine which shall not be less than ten thousand rupees but may extend to fifty thousand rupees. Section 14-C provides the same punishment for abetment of any one C of the above offences. Thus, the punishment provided under the Foreigners Act is more severe than under the IMDT Act.

32. The foremost duty of the Central Government is to defend the borders of the country, prevent any trespass and make the life of the citizens safe and secure. The Government has also a duty to prevent any internal D disturbance and maintain law and order. Kautilya in his masterly work "The Arthashastra" has said that a King had two responsibilities to his state, one internal and one external, for which he needed an army. One of the main responsibilities was *Raksha* or protection of the state from external aggression. The defence of the realm, a constant preoccupation for the king, consisted E not only of the physical defence of the kingdom but also the prevention of treachery, revolts and rebellion. The physical defensive measures were the frontier posts to prevent the entry of undesirable aliens and forts in various parts of the country. (Arthashastra by Kautilya translated by Shri L.N. Rangarajan, who was in Indian Foreign Service and ambassador of India in several countries published by Penguin Books 1992 Edn. page 676). The very F first entry, namely, Entry 1 of List I of the Seventh Schedule is "Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination of effective demobilization". In fact entries 1 to 4 of List I of Seventh Schedule mainly deal with armed forces. Article 355 of the Constitution of India reads as under :-

G

> 355. *Duty of the Union to protect States against external aggression and internal disturbance.*—It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution."

H

The word "aggression" is a word of very wide import. Various meanings to the word have been given in the dictionaries, like, "an assault, an inroad, the practice of setting upon anyone; an offensive action or procedure; the practice of making attacks or encroachments; the action of a nation in violating the rights especially the territorial rights of another nation; overt destruction; covert hostile attitudes." A B

The word "aggression" is not to be confused only with "war". Though war would be included within the ambit and scope of the word "aggression" but it comprises many other acts which cannot be termed as war. In *Kawasaki* v. *Bantahm S.S. Company,* (1938) 3 All ER 80, the following definition of "war" as given in Hall on International Law has been quoted with approval :- C

> "When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant." D

In Introduction to International Law by J.G. Starke (Chapter 18) it is said that the war in its most generally understood sense is a contest between two or more states primarily through their armed forces, the ultimate purpose of each contestant or each contestant group being to vanquish the other or E others and impose its own conditions of peace. With the passage of time, the nature of war itself has become more distinctly clarified as a formal status of armed hostility, in which the intention of the parties, the so-called animus *belligerendi* may be a decisive factor. The modern war may involve not merely the armed forces of belligerent states but their entire population. In F Essays on Modern Law of War by L.C. Green the author has said that in accordance with traditional international law, "war is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.". The framers of the Constitution have consciously used the word "aggression" and not "war" in Article 355. G

33. Article 1 of Chapter 1 of the Charter of the United Nations gives the purposes of the United Nations and the first is to maintain international peace and security, and to that end : to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of H acts of aggression or other breaches of peace, and to bring about by peaceful

means, and in conformity with the principles of justice and international law, adjustments or settlement of international disputes or situations which might lead to a breach of peace. On account of use of expression "acts of aggression" it was thought necessary to define "aggression" and explain what it exactly means. The International Law Commission defined the term "aggression" as any act of aggression including the employment of armed forces by a State against another State for any purpose other than national or collective self-defence or any decision by a competent organ of the United Nations. But at the 1954 Assembly, there was opposition to this definition. In his book Conflict through Consensus by Julius Stone (1977 Edn.), the author has described in great detail how after twenty years of discussion by a Special Committee on "aggression" a consensus was arrived at and an agreed definition was approved by the United Nations Assembly on 12th April, 1974 vide Resolution No.3314 (XXIX). The Soviet Union pressed for inclusion of "ideological aggression" and also "the promotion of the propaganda of fascist-nazi views, racial and national exclusiveness, hatred and contempt for other peoples." Iran pressed for inclusion of "indirect aggression, of intervention in another State's internal or foreign affairs", including "direct or indirect incitement to civil war, threats to internal security, and incitement to revolt by the supply of arms or by other means.". Many States wanted the definition to include "economic aggression". Shri M. Jaipal of India advocated that in view of "modern techniques of coercion" the definition of aggression should have included "economic pressures" and "interventionary and subversive operations." (See page 97 of the book) Julius Stone has quoted the following comments of Charles de Visscher, on the notion of aggression : "aggression, in the present state of international relations, is not a concept that can be enclosed in any definition whatsoever : the finding that it has occurred in any concrete case involves political and military judgments and a subjective weighing of motives that make this in each instance a strictly individual matter." Rapporteur Spiropoulos explained to the International Law Commission that a determination of aggression "can only be given in each concrete case in conjunction with all constitutive elements of the concept of the definition". According to the author what needs also to be kept in mind is that this is precisely because the "aggression" notion is a fact value complex of such vast range. (See pages 108-109 of the book). Therefore, "aggression" is a word of very wide import having complex dimensions and would to a large extent depend upon fact situation and its impact.

34. There was a large scale influx of persons from the then East Pakistan into India before the commencement of December 1971 Indo-Pak war. On 3rd

November, 1971, one month before the actual commencement of the war, Dr. Nagendra Singh, India's representative in the Sixth Committee of the General Assembly on the Definition of Aggression, made a statement, wherein he said:-

> ".....The first consideration, in the view of the Indian Delegation, is that aggression must be comprehensively defined. Though precision may be the first virtue of a good definition, we would not like to sacrifice the requirement of a comprehensive definition of aggression at any cost. There are many reasons for holding this view. Aggression can be of several kinds such as direct or indirect, armed in nature or even without the use of any arms whatsoever. There can be even direct aggression without arms..... We would accordingly support the categorical view expressed by the distinguished delegate of Burma, the U.K. and others that a definition of aggression excluding indirect methods would be incomplete and therefore dangerous.
>
> .....
>
> .....
>
> For example, there could be a unique type of bloodless aggression from a vast and incessant flow of millions of human beings forced to flee into another State. If this invasion of unarmed men in totally unmanageable proportion were to not only impair the economic and political well-being of the receiving victim State but to threaten its very existence, I am afraid, Mr. Chairman, it would have to be categorized as aggression. In such a case, there may not be use of armed force across the frontier since the use of force may be totally confined within one's territorial boundary, but if this results in inundating the neighbouring State by millions of fleeing citizens of the offending State, there could be an aggression of a worst order..... What I wish to convey, Mr. Chairman, is the complexity of the problem which does not permit of a four-line definition of aggression much less an ad-interim declaration on it."
>
> (See Vol. 11 (1971) Indian Journal of International Law p. 724)

This shows that the stand of our country before the U.N.O. was that influx of large number of persons from across the border into India would be

A an act of aggression.

35. In the later part of nineteenth century large number of Chinese labour had started going to U.S.A. The U.S. Congress passed legislations to restrict and then to totally stop their entry in the country. One such Chinese labourer who had earlier worked there for over ten years and had a certificate
B to that effect came back after a visit to his home in China but was detained in the ship in San Francisco port. His habeas corpus petition was dismissed by the circuit court and then an appeal was taken to U.S. Supreme Court. Certain observations made in the judgment, which is reported in 130 U.S. 581 (*Chae Chan Ping* v. *United States*), are very illuminating and are being
C reproduced below: -

> *"To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and*
D *encroachment come,* whether from the foreign nation acting in its national character *or from vast hordes of its people crowding in upon us.* The Government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its
E determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the Government of the United States, through its legislative department, *considers the presence of foreigners of a different race in the country,* who will not assimilate with us to be *dangerous to its peace and security, their exclusion is not to be stayed because at the*
F *time there are no actual hostilities with the nation of which the foreigners are subjects.* The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist and the same authority which adjudges the necessity in one case must also
G determine it in the other."

(Emphasis supplied)

China is not contiguous to U.S.A. The journey from a port in China to San Francisco, as the facts of the case show, used to take about a month and
H having regard to the expenses involved and the carrying capacity of a ship in those days (1870-90) the number of Chinese labour coming to U.S.A. would

have been miniscule compared to the influx of people from Bangladesh. Yet the U.S. Supreme Court viewed it as "aggression" and the presence of such foreigners as "dangerous to peace and security of the nation". A

36. Lord Denning in his book "The Due Process of Law" has written an "Introduction" to Part Five "Entrances and Exits" (page 155) and the opening paragraph thereof reads as under : B

> "In recent times *England has been invaded* - not by enemies nor by friends but by those who seek England as a haven. In their own countries there are poverty, disease and no homes. In England there is social security a national health service and guaranteed housing all to be had for the asking without payment and without working for it. C Once here, each seeks to bring his relatives to join him. So they multiply exceedingly."
>
> (Emphasis supplied)

Thus, one of the most respected and learned Judges of the recent times D has termed the influx of persons from erstwhile colonies of Britain into Britain as "invasion". The word "aggression" is, therefore, an all comprehensive word having very wide meaning. Its meaning cannot be explained by a straight jacket formula but will depend on the fact situation of every case.

The definition of "aggression" as adopted by UN General Assembly E Resolution 3314 (XXIX) was, however, for a limited purpose, namely, where the Security Council or the United Nations Organization could interfere and adopt measures in the event of an aggression by one nation against another and the acts enumerated therein which may amount to aggression cannot restrict or curtail the meaning or the sense in which the word "aggression" F has been used in Article 355 of the Constitution.

37. The very first sentence of the Statement of Objects and Reasons of the IMDT Act says "the influx of foreigners who illegally migrated into India across the borders of the sensitive Eastern and North-Eastern regions of the country and remained in the country poses a threat to the integrity and G security of the said region." It further says that "continuance of these persons in India has given rise to serious problems." The Preamble of the Act says that "the continuance of such foreigners in India is detrimental to the interests of the public of India." The Governor of Assam in his report dated 8th November, 1998 sent to the President of India has clearly said that unabated H

A influx of illegal migrants of Bangladesh into Assam has led to a perceptible change in the demographic pattern of the State and has reduced the Assamese people to a minority in their own State. It is a contributory factor behind the outbreak of insurgency in the State and illegal migration not only affects the people of Assam but has more dangerous dimensions of greatly undermining our national security. Pakistan's I.S.I. is very active in Bangladesh supporting B militants in Assam. Muslim militant organizations have mushroomed in Assam. The report also says that this can lead to the severing of the entire landmass of the north-east with all its resources from the rest of the country which will have disastrous strategic and economic consequences. The report is by a person who has held the high and responsible position of Deputy Chief of C the Army Staff and is very well equipped to recognize the potential danger or threat to the security of the nation by the unabated influx and continued presence of Bangladeshi nationals in India. Bangladesh is one of the world's most populous countries having very few industries. The economic prospects of the people in that country being extremely grim, they are too keen to cross over the border and occupy the land wherever it is possible to do so. The D report of the Governor, the affidavits and other material on record show that millions of Bangladeshi nationals have illegally crossed the international border and have occupied vast tracts of land like "Char land" barren or cultivable land, forest area and have taken possession of the same in the State of Assam. Their willingness to work at low wages has deprived Indian citizens E and specially people in Assam of employment opportunities. This, as stated in the Governor's report, has led to insurgency in Assam. Insurgency is undoubtedly a serious form of internal disturbance which causes grave threat to the life of people, creates panic situation and also hampers the growth and economic prosperity of the State of Assam though it possesses vast natural resources.

F

38. This being the situation there can be 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 Union of India to take all measures for protection of the G State of Assam from such external aggression and internal disturbance as enjoined in Article 355 of the Constitution. Having regard to this constitutional mandate, the question arises whether the Union of India has taken any measures for that purpose.

39. We have considered the provisions of the Foreigners Act, Foreigners H (Tribunals) Order, 1964 and also the IMDT Act and the Rules made thereunder

in considerable detail in the earlier part of the judgment. They clearly demonstrate that the procedure under the Foreigners Act and also under the Foreigners (Tribunals) Order, 1964 is far more effective in identification and deportation of foreigners as compared to the procedure under the IMDT Act and the Rules made thereunder. There being no corresponding provision like Section 9 of the Foreigners Act which places the burden of proof upon the person concerned who claims to be an Indian citizen, which is absolutely essential in relation to the nature of inquiry being conducted regarding determination of a person's citizenship (where the facts on the basis of which an opinion is to be formed and a decision is taken are entirely within the knowledge of the said person) has made the task of the law enforcement agencies of the State not only difficult but virtually impossible. The IMDT Act has been so enacted and the Rules thereunder have been so made that innumerable and unsurmountable difficulties are created in the matter of identification and deportation of illegal migrants. No elaborate discussion on this aspect is required as the figures disclosed in the affidavits filed by the Union of India and the State of Assam speak for themselves. Though inquiries were initiated in 310759 cases under the IMDT Act but out of this only 10015 persons were declared as illegal migrants and finally only 1481 illegal migrants were physically expelled upto 30th April, 2000. This comes to less than half per cent of the cases initiated. In the State of West Bengal, where the Foreigners Act is applicable, 489046 persons were actually deported between 1983 and November 1998, which is a lesser period and even this result was termed as unsatisfactory in the counter affidavit filed by the Union of India. Thus, there cannot be even a slightest doubt that the application of the IMDT Act and the Rules made thereunder in the State of Assam has created the biggest hurdle and is the main impediment or barrier in identification and deportation of illegal migrants. On the contrary, it is coming to the advantage of such illegal migrants as any proceedings initiated against them under the said provision which, as demonstrated above, almost entirely ends in their favour, enables them to have a document having official sanctity to the effect that they are not illegal migrants. As already discussed, the presence of such a large number of illegal migrants from Bangladesh, which runs into millions, is in fact an "aggression" on the State of Assam and has also contributed significantly in causing serious "internal disturbances" in the shape of insurgency of alarming proportion making the life of the people of Assam wholly insecure and the panic generated thereby has created a fear psychosis. This has resulted in seriously hampering the growth of the State of Assam although it has vast natural resources as people from rest of the country have a general perception that it is a disturbed area and this factor has resulted

A in not generating any employment opportunity which has contributed to a large measure in giving rise to insurgency. The impact is such that it not only affects the State of Assam but it also affects its sister States like Arunachal Pradesh, Meghalaya, Nagaland; etc. as the route to the said places passes through the State of Assam.

B 40. The Parliament enacted the Immigrants (Expulsion from Assam) Act, 1950 and the Statement of Objects and Reasons thereof reads as under: -

> "During the last few months a serious situation had arisen from the immigration of a very large number of East Bengal residents into Assam. Such large migration is disturbing the economy of the Province, besides giving rise to a serious law and order problem. The Bill seeks to confer necessary powers on the Central Government to deal with the situation."

C

The Preamble to the aforesaid Act says: -

D

> "An Act to provide for the expulsion of certain immigrants from Assam."

Section 2 of this Act lays down that 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 E commencement of this Act, come into Assam and that the stay of such person or class of persons in Assam is detrimental to the interest of the general public of India or of any section thereof or of any Scheduled Tribe in Assam, the Central Government may by order direct such person or class of persons to remove himself or themselves from India or Assam and give F such further direction in regard to his or their removal from India. *Proviso* of this Section says that it will not 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 his place of residence in such area and who has been subsequently residing in Assam. Section 3 confers power on Central Government to delegate the powers and duties conferred upon it by G Section 2 to any officers subordinate to the Central Government. It may be noted that the reference to the word "East Bangal" in the Statement of Objects and Reasons of the aforesaid Act, which came into force on 1st March, 1950, meant East Pakistan, which is the present Bangladesh. Realising the serious law and order problem created by migration from East Pakistan H and the serious situation arising therefrom the said Act was enacted and

conferred very wide powers upon the Central Government to direct removal of any person outside India. However, on account of Section 4 of the IMDT Act the Immigrants (Expulsion from Assam) Act, 1950 has been superseded and the provisions of the said Act have ceased to apply to the State of Assam. Thus by enacting the IMDT Act the Parliament has divested the Central Government of the power to remove migrants from Bangladesh, whose presence was creating serious law and order problem, which fact had been realized by the Central Government as early as in 1950. The IMDT Act instead of maintaining peace has only revived internal disturbance.

41. Another important enactment, whose provisions have been superseded by Section 4 of the IMDT Act, is The Passport (Entry into India) Act, 1920. Sub-section (1) of Section 3 of this Act conferred power upon the Central Government to make rules requiring that persons entering India shall be in possession of passports and for all matters ancillary or incidental to that purpose. Sub-section (2) of this Section says that without prejudice to the generality of the powers conferred by sub-section (1), the rules may prohibit the entry into India or any part thereof of any person who has not in his possession a passport issued to him and also prescribe the authorities by whom passports must have been issued or renewed and the conditions which they must comply for the purposes of the Act. Sub-section (3) lays down that the rules made under this Section may provide that any contravention thereof or of any order issued under the authority of any such rule shall be punishable with imprisonment for a term which may extend to three months or with fine or with both. Section 4 says that any officer of police not below the rank of Sub-Inspector and any officer of the customs department empowered by a general or special order of the Central Government in this behalf may arrest without warrant any person who has contravened or against whom a reasonable suspicion exists that he has contravened any rule or order made under Section 3. Section 5 provides that the Central Government may, by general or special order, direct the removal of any person from India who, in contravention of any rule made under Section 3 prohibiting entry into India without passport, has entered therein, and thereupon any officer of the Government shall have all reasonable powers necessary to enforce such direction. By virtue of the power conferred by this Act, all such nationals of Bangladesh, who have entered India without a passport, could be arrested without a warrant by a police officer not below the rank of Sub-Inspector. The Central Government also had the power to direct removal of any such person who had entered India in contravention of a rule made under Section 3 prohibiting entry into India without a passport. However, Section 4 of the IMDT Act has stripped

A the Central Government of its power of removal of such person from India and also the power of arrest of such person without warrant possessed by a police officer of the rank of Sub-Inspector or above.

42. The above discussion leads to irresistible conclusion that the provisions of the IMDT Act and the Rules made thereunder clearly negate B the constitutional mandate contained in Article 355 of the Constitution, where a duty has been cast upon the Union of India to protect every State against external aggression and internal disturbance. The IMDT Act which contravenes Article 355 of the Constitution is, therefore, wholly unconstitutional and must be struck down.

C 43. Shri Ashok Desai, learned senior counsel appearing for the writ petitioner, has submitted that the application of the IMDT Act to the State of Assam alone is wholly discriminatory and violates Article 14 of the Constitution as the classification made is not founded upon any intelligible differentia and there is no nexus between the basis of the classification and D the object of the IMDT Act. Reliance has been placed on a Seven Judge Bench decision of this Court in *Budhan Choudhry* v. *State of Bihar,* AIR (1955) SC 191 and some other cases in support of this submission. Shri Amarendra Saran, learned Additional Solicitor General and also Shri K.K. Venugopal, learned senior counsel appearing for the State of Assam, have submitted that the classification made on the basis of historical facts and/or E geographical criteria is a perfectly valid classification and the petitioner cannot complain of violation of Article 14 on the ground that the IMDT Act has been made applicable only to the State of Assam. It has been further urged that a classification made whereunder an Act is made applicable only to some of the Districts in a State or even to a part of a District on account of some F geographical consideration would be perfectly valid and would not offend Article 14 of the Constitution in any manner. In support of this submission, learned counsel have placed reliance on several decisions namely, *D.P. Joshi* v. *State of Madhya Bharat,* AIR (1955) SC 334, *Kishan Singh* v. *State of Rajasthan* AIR (1955) SC 795, *Gopi Chand* v. *Delhi Administration* AIR 1959 SC 609, *Kangshari Haldar* v. *State of West Bengal,* AIR (1960) SC 457 and G *Clarence Pais* v. *Union of India,* [2001] 4 SCC 325. We do not consider it necessary to refer to all the cases cited by learned counsel for the parties as the principle enunciated therein is basically the same and it will suffice to refer to only one such decision, namely, *Kangshari Haldar* (supra), where Gajendragadkar, J. (as His Lordship then was) held as under :

H "In considering the validity of the impugned statute on the ground

that it violates Article 14 it would first be necessary to ascertain the policy underlying the statute and the object intended to be achieved by it. In this process the preamble to the Act and its material provisions can and must be considered. Having thus ascertained the policy and the object of the Act the court should apply the dual test in examining its validity: Is the classification rational and based on intelligible differentia; and, has the basis of differentiation any rational nexus with its avowed policy and object? If both these tests are satisfied, the statute must be held to be valid; and in such a case the consideration as to whether the same result could not have been better achieved by adopting a different classification would be foreign to the scope of the judicial enquiry. If either of the two tests is not satisfied, the statute must be struck down as violative of Article 14."

44. Section 8(1) of the IMDT Act says that if any question arises as to whether any person is or is not an illegal migrant, the Central Government may, whether such question has arisen on a representation made by such person against an order under the Foreigners Act, 1946 requiring him not to remain in India or to any other effect or has arisen in any other manner whatsoever, refer such question to a Tribunal for decision. This provision gives very special and advantageous right to an illegal migrant. Even though an order may have been passed under the Foreigners Act against an illegal migrant, he gets a right to make a representation to the Central Government for making a reference to the Tribunal, which will then proceed in accordance with IMDT Act having a further right of appeal to the Appellate Tribunal. There being no provision like Section 9 of the Foreigners Act regarding burden of proof in the IMDT Act, the whole complexion of the case will change in favour of the illegal migrant. This right is not available to any other person similarly situate against whom an order under the Foreigners Act may have been passed, if he is in any other part of India other than the State of Assam.

45. As mentioned earlier, the influx of Bangladeshi nationals who have illegally migrated into Assam pose a threat to the integrity and security of north-eastern region. Their presence has changed the demographic character of that region and the local people of Assam have been reduced to a status of minority in certain districts. In such circumstances, if the Parliament had enacted a legislation exclusively for the State of Assam which was more stringent than the Foreigners Act, which is applicable to rest of India, and also in the State of Assam for identification of such persons who migrated

A from the territory of present Bangladesh between 1st January, 1966 to 24th March, 1971, such a legislation would have passed the test of Article 14 as the differentiation so made would have had rational nexus with the avowed policy and objective of the Act. But the mere making of a geographical classification cannot be sustained where the Act instead of achieving the B object of the legislation defeats the very purpose for which the legislation has been made. As discussed earlier, the provisions of the Foreigners Act are far more effective in identification and deportation of foreigners who have illegally crossed the international border and have entered India without any authority of law and have no authority to continue to remain in India. For satisfying the test of Article 14, the geographical factor alone in making a classification C is not enough but there must be a nexus with the objects sought to be achieved. If geographical consideration becomes the sole criteria completely overlooking the other aspect of "rational nexus with the policy and object of the Act" it would be open to the legislature to apply enactments made by it to any sub-division or district within the State and leaving others at its sweet will. This is not the underlying spirit or the legal principle on which Article D 14 is founded. Since the classification made whereby IMDT Act is made applicable only to the State of Assam has no rational nexus with the policy and object of the Act, it is clearly violative of Article 14 of the Constitution and is liable to be struck down on this ground also.

E 46. Shri Ashok Desai, learned senior counsel for the petitioner has also urged that the reports of the Governor and also the earlier counter affidavits filed by Union of India and State of Assam show that the whole demographic pattern of the State of Assam has undergone a change and the local people of Assam have been reduced to a minority in their own State on account of large influx of illegal migrants from Bangladesh. According to learned counsel, F this amounts to violation of the rights guaranteed under Article 29(1) of the Constitution as the people of Assam have a fundamental right to conserve their language, script or culture. Undoubtedly, Article 29(1) confers a fundamental right on all sections of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its G own to conserve the same and any invasion of this right would be *ultra vires*. The enforcement of the IMDT Act has no doubt facilitated to a very large extent the illegal migrants from Bangladesh to continue to reside in Assam, who on account of their huge number affect the language, script and culture of the local people. However, we do not wish to express any concluded opinion whether on the fact situation the IMDT Act can be thus said to be H violating Article 29(1) of the Constitution as the necessary factual basis for

determination of this question has not been laid in the pleadings. A

47. Shri Shanti Bhushan, learned senior counsel for the petitioners in Writ Petition No.7 of 2001 (*Jamiat Ulma-E-Hind and Anr.* v. *Union of India & Anr.*), wherein a prayer has been made to issue a direction to Union of India that the IMDT Act should be made applicable to whole of India, requested that he may be heard on the question of vires of the IMDT Act, as the B decision on the said point will have a serious impact on the writ petition in which he is appearing as counsel. We have, therefore, heard Shri Shanti Bhushan on the limited point regarding the constitutional validity of the IMDT Act. Learned counsel has submitted that though some of the Articles in Part III of the Constitution dealing with fundamental rights like Article C 19(1)(d) and (e) would not apply to a foreigner, yet he is entitled to the protection of Article 21 as the application of the said Article is not confined to citizens alone. Learned counsel has submitted that in view of the clear mandate of Article 21 that no person shall be deprived of his life or personal liberty except according to procedure established by law, there has to be a fair procedure for expulsion of foreigners. According to the learned counsel, D the IMDT Act lays down a fair procedure, namely determination by a judicial Tribunal of the question of citizenship of a person and his deportation. It has thus been submitted that the IMDT Act which seeks to achieve this object meets the requirements of Article 21 of the Constitution and thus its validity cannot be impugned. The learned Additional Solicitor General and Shri K.K. E Venugopal, during the course of their arguments, have also laid great stress on the fact that the IMDT Act has been enacted to give protection to genuine Indian citizens and to save their harassment.

It is not possible to accept the submission made. The view taken by this Court is that in a criminal trial where a person is prosecuted and punished F for commission of a crime and may thus be deprived of his life or liberty, it is not enough that he is prosecuted in accordance with the procedure prescribed by law but the procedure should be such which is just, fair and reasonable. This principle can have no application here for the obvious reason that in the matter of identification of a foreigner and his deportation, he is not being deprived of his life or personal liberty. The deportation G proceedings are not proceedings for prosecution where a man may be convicted or sentenced. The Foreigners Act and the Foreigners (Tribunals) Order, 1964 are applicable to whole of India and even to the State of Assam for identification of foreigners who have entered Assam between 1st January, 1966 and 24th March, 1971 in view of the language used in Section 6-A of H

A Citizenship Act. It is, therefore, not open to Union of India or State of Assam or for that matter anyone to contend that the procedure prescribed in the aforesaid enactment is not just, fair and reasonable and thus violative of Article 21 of the Constitution. In our opinion, the procedure under the Foreigners Act and the Foreigners (Tribunals) Order, 1964 is just, fair and reasonable and does not offend any constitutional provision.

B

48. We consider it necessary here to briefly notice the law regarding deportation of aliens as there appears to be some misconception about it and it has been argued with some vehemence that aliens also possess several rights and the procedure for their identification and deportation should be

C detailed and elaborate in order to ensure fairness to them.

49. In Introduction to International Law by J.G. Starke (1st Indian re-print 1994) in Chapter 12 (page 348), the law on the points has been stated thus: -

D

> "Most states claim in legal theory to exclude all aliens at will, affirming that such unqualified right is an essential attribute of soverign government. The courts of Great Britain and the United States have laid it down that the right to exclude aliens at will is an incident of territorial sovereignty. Unless bound by an international treaty to the contrary, states are not subject to a duty under international law to

E admit aliens or any duty thereunder not to expel them. Nor does international law impose any duty as to the period of stay of an admitted alien."

Like the power to refuse admission this is regarded as an incident of the State's territorial sovereignty. International law does not prohibit the expulsion

F enmasse of aliens. (page 351). Reference has also been made to Article 13 of the International Covenant of 1966 on Civil and Political Rights which provides that an alien *lawfully* in the territory of a State party to the Covenant may be expelled only pursuant to a decision reached by law, and except where compelling reasons of national security otherwise require, is to be allowed to

G submit the reasons against his expulsion and to have his case reviewed by and to be represented for the purpose before the competent authority. It is important to note that this Covenant of 1966 would apply provided an alien is *lawfully in India,* namely, with valid passport, visa etc. and not to those who have entered illegally or unlawfully. Similar view has been expressed in Oppenheim's International Law (Ninth Edn. 1992 in paragraphs 400, 401 and

H 413). The author has said that the reception of aliens is a matter of discretion,

and every State is by reason of its territorial supremacy, competent to exclude aliens from the whole or any part of its territory. In paragraph 413 it is said that the right of States to expel aliens is generally recognized. It matters not whether the alien is only on a temporary visit, or has settled down for professional business or any other purposes on its territory, having established his domicile there. A belligerent may consider it convenient to expel all hostile nationals residing or temporarily staying within its territory; although such a measure may be very harsh on individual aliens, it is generally accepted that such expulsion is justifiable. Having regard to Article 13 of the International Covenant on Civil and Political Rights, 1966, an alien lawfully in a State's territory may be expelled only in pursuance of a decision reached in accordance with law.

50. In *Rex* v. *Bottrill,* (1947) 1 K.B. 41, it was said that the King under the Constitution of United Kingdom is under no obligation to admit into the country or to retain there when admitted, any alien. Every alien in the United Kingdom is there only because his presence has been licensed by the King. It follows that at common law the King can at will withdraw his license and cause the Executive to expel the alien, whether enemy or friend. For holding so reliance was placed on *Attorney-General for Canada* v. *Cain,* (1906) AC 542, where Lord Atkinson said: -

> "One of the rights possessed by the Supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests."

In *Chae Chan Ping* v. *United States,* (1930) U.S. 581, the United State Supreme Court held :

> "The power of exclusion of foreigners being an incident of sovereignty belonging to the Government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the Government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of Government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations

A of private interest. The exercise of these public trusts is not the subject of barter or contract."

This principle was reiterated in Fong *Yue Ting* v. *United States* 149 U.S. 698, where the court ruled: -

B "The government of each state has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation. The exercise of this right may be subjected, C doubtless, to certain forms by the domestic laws of each country; but the right exists none the less, universally recognized and put in force."

.....

D "The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority E and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual F punishments, have no application."

51. In *Nishimura Ekiu* v. *United States,* 142 US 652, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might entrust the final determination of G those facts to an executive officer, and that, if it did so, his order was due process of law and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. Thus according to United States Supreme Court the determination of rights of an alien even by Executive will be in compliance of due process of law. H

52. In *Louis De Raedt* v. *Union of India,* [1991] 3 SCC 554 the two foreign nationals engaged in missionary work had come to India in 1937 and 1948 respectively with proper documents like passport and visa etc. and were continuously living here but by the order dated 8th July, 1987 their prayer for further extension of the period of stay was rejected and they were asked to leave the country by 31st July, 1987. They then challenged the order by filing a writ petition. This Court held that the power of the Government of India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering its discretion and the executive government has unrestricted right to expel a foreigner. So far as right to be heard is concerned, there cannot be any hard and fast rule about the manner in which a person concerned has to be given an opportunity to place his case.

53. In *State of Arunachal Pradesh* v. *Khudi Ram Chakma,* [1994] Supp SCC 615, following *Louis De Raedt* (supra), it was held that the fundamental right of a foreigner is confined to Article 21 for life and liberty and does not include the right to reside and stay in this country, as mentioned in Article 19(1)(e), which is applicable only to the citizens of the country. After referring to some well-known and authoritative books on International Law it was observed that the persons who reside in the territories of countries of which they are not nationals, possess a special status under International Law. States reserve the right to expel them from their territory and to refuse to grant them certain rights which are enjoyed by their own nationals like right to vote, hold public office or to engage in political activities. Aliens may be debarred from joining the civil services or certain profession or from owning some properties and the State may place them under restrictions in the interest of national security or public order. Nevertheless, once *lawfully* admitted to a territory, they are entitled to certain immediate rights necessary to the enjoyment of ordinary private life. Thus, the Bangladeshi nationals who have illegally crossed the border and have trespassed into Assam or are living in other parts of the country have no legal right of any kind to remain in India and they are liable to be deported.

54. The learned Additional Solicitor General has also submitted that the vires of a special statute seeking to make some provisions or some defined object cannot be challenged by comparing its provisions with a general statute covering the field. In support of this proposition he has placed reliance on In re The Special Courts Bill, (1978) AIR (1979) SC 478 and *A.R. Antulay* v. *R.S. Nayak,* AIR (1988) SC 1531. In the former case, it was held that once a classification is upheld by the application of the dual test,

A subjection of harsher treatment or disadvantageous procedure loses its relevance, the reason being that for the purposes of Article 14 unequals cannot complain of unequal treatment. In our opinion, the proposition urged by the learned Additional Solicitor General has no application to the fact situation of the present case. The contention of the petitioner is not that merely because the provisions of the IMDT Act provide many safeguards to B an alleged illegal migrant in comparison to the Foreigners Act the IMDT Act is *ultra vires*. The contention is that as the Statement of Objects and Reasons show that the influx of foreigners who illegally migrated into India across the borders of the sensitive Eastern and North-Eastern regions of the country and have remained in the country, pose a threat to the integrity and security of C the said region and further their continuance in India has given rise to serious problems and also the clandestine manner in which these persons are trying to pass off as citizens of India has rendered their detection difficult and there being need for their speedy detection and the interest of general public, a classification was made on geographical basis whereby the Act was enforced only in the State of Assam in supersession to the Foreigners Act. But the D Act so made contains such provisions and prescribes such procedure that it has become virtually impossible to detect and deport a foreigner which is evident from the statistical data furnished by the respondent themselves. The basis of differentiation has thus no nexus with the object sought to be achieved and, therefore, the classification made for application of IMDT Act E to the State of Assam violates Article 14 and is consequently liable to be struck down.

55. Shri K.K. Venugopal has submitted that Section 8 of the IMDT Act is similar to Section 9 of the Citizenship Act and, therefore, the same interpretation should be placed upon Section 8. In our opinion it is not F possible to accept such a contention. Section 9 of the Citizenship Act applies to a situation where the question is whether an Indian citizen has lost his citizenship by acquiring the citizenship of a foreign country. Such a question can be decided only by the Central Government. We are concerned here with identification and deportation of such Bangladeshi nationals who have illegally crossed the international border and have taken up residence in Assam. The G question of loss of Indian citizenship on account of acquisition of citizenship of another country does not at all arise for consideration here.

56. The learned Additional Solicitor General has submitted that the present writ petition has been filed by way of public interest litigation and H seeks to achieve a political purpose. It is urged that the petitioner Shri

Sarbananda Sonowal was earlier an MLA of Assam Gana Parishad party and is now a Member of Parliament and what his party could not achieve politically, he wants to achieve by means of this public interest litigation. It is urged that as held in *S.P. Gupta* v. *Union of India,* [1981] Supp. SCC 87 and some other cases that a public interest litigation cannot be entertained where its object is to attain a political purpose, the present petition is liable to be dismissed. Shri K.K. Venugopal, learned senior counsel for the State of Assam, has in addition submitted that no fundamental right of the petitioner has been violated and, therefore, the present petition under Article 32 of the Constitution is not maintainable. We are unable to accept the submission made. It is the foremost duty of the Central Government to protect its borders and prevent trespass by foreign nationals. Article 51-A(d) of the Constitution says that it shall be the duty of every citizen of India to defend the country and render national service when called upon to do so. If an Act made by legislature has the disastrous effect of giving shelter and protection to foreign nationals who have illegally transgressed the international border and are residing in India and further the Act is unconstitutional, any citizen is entitled to bring it to the notice of the Court by filing a writ petition under Article 32 of the Constitution. There are any number of instances where such writ petitions have been entertained by this Court at the instance of citizens who were not themselves personally aggrieved in the sense that there was no direct invasion of their own fundamental right. In Dr. *D.C. Wadhwa* v. *State of Bihar,* AIR (1987) SC 579, the petitioner had filed writ petition under Article 32 of the Constitution challenging the action of the Governor of Bihar in promulgating ordinances from time to time under Article 213 of Constitution of India without getting them replaced by Acts of the Legislature. The Constitution Bench held that the petitioner has sufficient interest to maintain a petition under Article 32 even as a member of the public because it is the right of every citizen to insist that he should be governed by laws made in accordance with the Constitution and not law made by the executive in violation of the constitutional provisions. It was also held that if any particular ordinance was being challenged by the petitioner he may not have the *locus standi* to challenge it simply as a member of the public unless some legal right or interest of his is violated or threatened by such ordinance, but here what petitioner as a member of the public was complaining of is a practice which is being followed by the State of Bihar of repromulgting the ordinances from time to time without their provisions being enacted into Acts of the Legislature. The Court ruled that the petition had been filed for vindication of public interest and he must therefore be held to be entitled to maintain his writ

A B C D E F G H

A petitions. In *R.K. Garg* v. *Union of India,* AIR 1981 SC 2138 the constitutional validity of Special Bearer Bonds (Immunities and Exemptions) Ordinance and the Act of 1981 was challenged by Shri R.K. Garg, a senior advocate of Supreme Court, by filing a writ petition under Article 32 of Constitution, which was entertained and the validity of the Act was examined in great detail. Recently this Court entertained a petition under Article 32 of the Constitution
B at the instance of Prof. Yashpal, former Chairman of University Grants Commission by way of Public Interest Litigation and struck down the Act made by Chhattisgarh Legislature which enabled 112 Private Universities to be established, having no infrastructure whatsoever within a short span of two years. (See JT (2005) 2 SC 165)

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57. To sum up our conclusions, the provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 are *ultra vires* the Constitution of India and are accordingly struck down. The Illegal Migrants (Determination by Tribunals) Rules, 1984 are also *ultra vires* and are struck down. As a result, the Tribunals and the Appellate Tribunals constituted under the Illegal
D Migrants (Determination by Tribunals) Act, 1983 shall cease to function. The Passport (Entry into India) Act, 1920, the Foreigners Act, 1946, the Immigrants (Expulsion from Assam) Act, 1950 and the Passport Act, 1967 shall apply to the State of Assam. All cases pending before the Tribunals under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall stand transferred to
E 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. In view of the finding that the competent authority and the Screening Committee had no authority or jurisdiction to reject any proceedings initiated against any alleged illegal migrant, the orders of rejection passed by
F such authorities are declared to be void and non est in the eye of law. It will be open to the authorities of the Central Government or State Government to initiate fresh proceedings under the Foreigners Act against all such persons whose cases were not referred to the Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 by the competent authority
G whether on account of the recommendation of the Screening Committee or any other reason whatsoever. The appeals pending before the Appellate Tribunals shall be deemed to have abated.

58. In view of the discussion made above, the writ petition succeeds and is allowed with the following directions :

H

(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; A

(2) The Tribunals and the Appellate Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall cease to function; B

(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. C

(4) It will be open to the authorities to initiate fresh proceedings under the Foreigners Act against all such persons whose cases were not referred to the Tribunals by the competent authority whether on account of the recommendation of the Screening Committee or any other reason whatsoever. D

(5) All appeals pending before the Appellate Tribunal shall be deemed to have abated.

(6) The respondents are directed to constitute sufficient number of Tribunals under the Foreigners (Tribunals) Order, 1964 to effectively deal with cases of foreigners, who have illegally come from Bangladesh or are illegally residing in Assam. E

59. All the Interlocutory Applications are disposed of in terms of the above order. F

K.K.T. Petition allowed.