Supreme Court of India
Supreme Court of India
Sarbananda Sonowal vs Union Of India on 5 December, 2006
Author: S Sinha
Bench: S Sinha, P Balasubramanyan
CASE NO.:

Writ Petition (civil) 117 of 2006

PETITIONER:

Sarbananda Sonowal

RESPONDENT:

Union of India

DATE OF JUDGMENT: 05/12/2006

BENCH:

S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:

J U D G M E N T

With

Writ Petition (Civil) No. 119 of 2006

Charan Chandra Deka & Ors. ...Petitioners

Versus

Union of India & Anr. ...Respondents

S.B. SINHA, J.

1. The validity of two pieces of subordinate legislation, one amending the Foreigners (Tribunal) Order, 1964 and the other, the Foreigners (Tribunal) for Assam Order, 2006 in the context of an earlier decision rendered by this Court is the question involved in these Writ Petitions filed under Article 32 of the Constitution of India by the petitioners.

2. Sarbananda Sonowal filed WP (C) No. 131 of 2000 under Article 32 of the Constitution of India against Union of India and others for declaring some of the provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 (for short "the IMDT Act") as unconstitutional, null and void and a consequent declaration that the Foreigners Act, 1946 (for short 'the 1946 Act') and the Rules made thereunder would apply to the State of Assam. The pleas raised in the said writ petition found favour with a 3-Judge Bench of this Court in the decision reported in [(2005) 5 SCC 665]. The said decision is hereinafter referred to as Sonowal I. It was directed therein:

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

(1) The provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 and the Illegal Migrants (Determination by Tribunals) Rules, 1984 are declared to be ultra vires the Constitution and are struck down.

(2) The Tribunals and the Appellate

Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall cease to function.

(3) All cases pending before the Tribunals under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall stand transferred to the Tribunals constituted under the Foreigners (Tribunals) Order, 1964 and shall be decided in the manner provided in the Foreigners Act, the Rules made

thereunder and the procedure prescribed under the Foreigners (Tribunals) Order, 1964.

(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.

(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."

The Court while issuing the aforementioned directions considered the provisions of the IMDT Act in great detail vis-`-vis, the duties and functions of the Central Government and other States in terms of Article 355 of the Constitution of India and the problem of illegal migration of citizens of Bangladesh inter alia into the State of Assam and the threat posed by it to the security of the nation.

3. This Court opined that there was absolutely no reason why the illegal migrants coming into the State of Assam should be treated differently from those who had migrated to the other parts of the country having regard to the provisions of the Citizenship Act, 1955 and the Foreigners (Tribunals) Order 1964 (for short "the 1964 Order").

4. Subsequent to the said decision, instead of implementing the directions therein, the Central Government in exercise of its power under Section 3 of the 1946 Act made an Order known as "the Foreigners (Tribunal) Amendment Order, 2006" (for short "the 2006 Order"), which was published in the Official Gazette dated 10th February, 2006. On 10th February, 2006, the Central Government amended the 1964 Order principally making the same inapplicable to the State of Assam. Clause 2 of the said Order reads thus: "In the Foreigners (Tribunal) Order, 1964:-

(a) paragraph 1 shall be

renumbered as sub-paragraph

(1) thereof and after sub-

paragraph (1) as so renumbered

the following sub-paragraph

shall be inserted, namely:-

"(2) This Order shall apply to

the whole of India except the

State of Assam."

Thus by way of a subordinate legislation the directions issued by this Court in the earlier binding decision to get all pending cases relating to alleged immigrants decided by the Tribunal under the 1964 Order is sought to be nullified. It is done in spite of the reasoning in Sonowal I leading to the directions issued therein. It must be noted that the parent Act stands unamended.

5. Instead of obeying the mandamus issued by this Court essentially in the interests of national security and to preserve the demographic balance of a part of India, that is Bharat, and implementing the 1964 Order in Assam in letter and spirit, the Authorities that be, have chosen to make the 1964 Order itself inapplicable to Assam. Whether the authority that should be interested in the welfare of the nation, its security and integrity, can do so in the light of the facts noticed and relied on in Sonowal I is the question? In the reply filed on behalf of the Union of India, after stating that some steps have been taken to implement the directions of this Court in the earlier writ petition, it is stated: "In the meantime, Representations were received by the Government of India from various organizations of Assam for providing safeguards for genuine Indian citizens either by framing a new law or by amending the existing provisions. Apprehensions of

trouble/victimization of genuine citizens at the hands of the specified authorities in the name of detection and deportation of foreigners was expressed."

Adequate facts, nay, no fact, is pleaded to justify such apprehension. It is not explained how Indian citizens would suffer if the 1964 Order is enforced. On the other hand, it is stated in the reply itself in paragraph 2:

"In exercise of the powers conferred by Section 3 of the Foreigners Act, 1946, Foreigners Tribunals ("Tribunals") were set up in the 1960s under the Foreigners (Tribunal) Order, 1964 in the State of Assam only though the Foreigners (Tribunal) Order 1964 has all India application and Tribunals can be set up in other parts of the country. Under the Foreigners (Tribunal) Order, 1964, the procedure provided for disposal of questions referred to the Tribunals was that the Tribunal would serve upon the person, to whom the question relates, a copy of the main grounds on which the person is alleged to be a foreigner and reasonable opportunity was provided for making a representation and producing evidence in defence. Such a person was also to be afforded personal hearing if so desired."

Nothing was also shown at the time of arguments to persuade us to come to a conclusion that the 1964 Order worked harshly on anyone who was sought to be proceeded against under the Foreigners Act and under that Order. The present exercise is therefore seen to be not a commendable attempt to evade the directions issued by this Court in the earlier round. That too, by way of subordinate legislation. Though, we would normally desist from commenting, when the security of the nation is the issue as highlighted in Sonowal I, we have to say that the bona fides of the action leaves something to be desired. Although bona fides on the part of authority vested with power to make delegated legislation ordinarily is not a relevant factor, the question is whether the manner in which it is sought to be done is sufficient in law to get rid of the judgment of this Court in Sonowal I. After thus removing the 1964 Order from the scene, the new Order of 2006 has been issued. Here also, except the reason already set out, no particular reason is given for making a departure from the

existing procedure. It is stated in paragraph 2(I) of the reply: "On consideration of the representations, provisions of the Foreigners Act, 1946 and the peculiar situation of Assam, it was considered necessary to have a separate procedure for the Foreigners Tribunals in the State of Assam. It is pertinent to note that a separate procedure for detection of foreigners has already been in existence in Assam for the last 40 years."

No facts or details are furnished in support. What is the peculiar situation other than what is noticed in Sonowal I is not explained.

6. Paragraph 2 of the 2006 Order provides for constitution of tribunals in the following terms:

"2. Constitution of Tribunals:- (1) The Central Government or any authority specified in this regard shall, by order, refer the question as to whether a person is or is not foreigner within the meaning of he Foreigners Act 1946 (31 of 1946) to a Tribunal to be constituted for the purpose, for its opinion.

(2) The registering authority appointed under sub-rule (1) of rule 16F of the Citizenship Rules, 1956 shall refer to the Tribunal the question whether a person of Indian origin complies with any of the requirements under sub-section (3) of Section 6A of the Citizenship Act, 1955 (57 of 1955).

(3) The Tribunal shall consist of such number of persons having judicial experience as the Central Government may think fit to appoint.

(4) Where the Tribunal consists of two or more members, one of them shall be appointed as the Chairman thereof.

(5) Till any Tribunal is constituted under sub-paragraph (1), the Tribunal constituted under the Foreigners (Tribunal) Order, 1964 shall be deemed to be Tribunals for the purposes of this Order."

Paragraph 3 refers to the procedure for disposal of questions arising.

"3. Procedure for disposal of questions:- (1) The Tribunal upon receipt of a reference under sub- paragraph (1) of paragraph 2, shall consider whether there is sufficient ground for proceeding and if the Tribunal is satisfied that basic facts are prima facie established, it shall serve on the person to whom the question relates, a copy of the main grounds on which he is alleged to be a foreigner and give him a reasonable opportunity of making a representation and producing evidence in support of his case and after considering such evidence as may be produced and after hearing such persons as may desire to be heard, the Tribunal shall submit its opinion to the officer or authority specified in this behalf in the order of reference.

(2) The Tribunal shall, before giving its opinion on the question referred to in sub-paragraph (2) of paragraph 2, give the person in respect of whom the opinion is sought, a reasonable opportunity to represent his case.

(3) Subject to the provisions of this Order, the Tribunal shall have power to regulate its own procedure."

The Tribunal in terms of paragraph 4 of the 2006 Order shall have the powers of a Civil Court while trying a suit under the Code of Civil Procedure in respect of (i) summoning and enforcing the attendance of any person and examining him on oath; (ii) requiring the discovery and production of any document; and (iii) issuing commissions for the examination of any witness.

7. Apart from the provisions of the Constitution of India, the matter relating to determination of the question as to whether a person is a foreigner or not is provided under the 1946 Act. The Central Government, in exercise of its power conferred under the said Act, made an Order known as the Foreigners (Tribunals) Order, 1964.

Section 9 of the 1946 Act 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."

Rule 3 of the 1964 Order provided the procedure for disposal of the question. The 1964 Order has now been made inapplicable to the State of Assam. Despite a clear direction in Sonowal I in regard to strict implementation of the equality clause amongst the migrants from Bangaldesh, the Central Government made the 2006 Order which is applicable to the State of Assam only.

8. The factual position that obtains is that as on 31st December, 2005, 14,947 cases were pending before the Foreigners Tribunals functioning in Assam and 29,429 persons who came to Assam between 1st January, 1966 and 24th March, 1971 were identified as foreigners. As far as the Tribunals set up under the IMDT Act were concerned, as on 12th July, 2005, 88,770 cases were pending and 12,846 persons who came into Assam after 25th March, 1971 were declared as illegal migrants.

9. We shall first consider the validity of the amendment to the 1964 Order by notification No. GSR 57 (E) dated New Delhi, the 10th February 2006 so as to make it inapplicable to the State of Assam in the context of prayer (A) in W.P. (C) No. 119 of 2006. It has already been held in Sonowal I that the special treatment sought to be meted out to Assam is not justified and the extending of a special Act to that territory alone is discriminatory. The same reasoning applies on all fours to the removing of the 1964 Order from the scene. Such removal or such making of the Order of 1964 inoperative to the State of Assam alone is discriminatory and is violative of Article 14 of the Constitution.

10. We have already pointed out that no reasons are given to justify such exclusion. It was all the more necessary to do so in the light of the reasoning in Sonowal I and the directions issued therein. It is hence found that the notification making the 1964 Order inapplicable to Assam by amending Clause 2 of the said Order is unreasonable and arbitrary, violating Article 14 of the Constitution of India.

11. In making the 1964 Order inapplicable to Assam alone, when the other States having boundaries with Bangladesh, are still expected to apply that Order, the respondents have acted arbitrarily and have not kept in mind the interests of the country as highlighted in Sonowal I. No rational reason has been put forward to justify such a separate treatment for Assam especially in the context of the report of the then Governor of Assam and the other facts discussed in the earlier decision and the earlier decision itself. Therefore, the amendment brought about to the 1964 Order by Notification G.S.R. 57 (E) dated New Delhi, the 10th February 2006 issued by the Government of India has to be held to be violative of Article 355 and Article 14 of the Constitution. The said Notification is struck down in terms of prayer (a) in W.P. (Civil) No. 119 of 2006.

12. It is also seen to be an attempt by way of a piece of subordinate legislation to nullify the mandamus issued by this Court. The parent Act remains in force and applicable. It is not open to the authority concerned to nullify the directions of this Court by way of subordinate legislation by making the very 1964 Order inapplicable to the State of Assam, especially in the light of the reasoning in Sonowal I.

13. Thus, if the Order making the 1964 Order to the State of Assam inapplicable is found invalid, there is no question of the 2006 Order being promulgated to replace the 1964 Order. The attempt has to be held to be still born especially in the context of Sonowal I and the reasoning therein. The field continues to be occupied by the 1964 Order and the 2006 Order cannot operate parallelly. Moreover, the 2006 Order will fall on the basis of the reasoning in Sonowal I.

14. Though this is the position, out of deference to the arguments raised before us, we will consider the challenge to the 2006 Order independently.

15. A comparative chart showing the changes brought about in paragraphs 2 and 3 of the 1964 Order by reason of the 2006 Order may be noticed as under: Clause

Foreigners (Tribunals)

Order 1964

Foreigners (Tribunals

for Assam) Order 2006

2(1)

Constitution

of Tribunals

The Central

Government may by

order, refer the

question as to

whether a person is

or is not a foreigner

within the meaning of

the Foreigners Act,

1946 (31 of 1946) to a

Tribunal to be

constituted for the

purpose, for its

opinion.

The Central

Government or any

authority specified in

this regard shall, by
order, refer the
question as to whether
a person is or is not a
foreigner within the
meaning of the
Foreigners Act, 1946
(31 of 1946) to a
Tribunal to be
constituted for the
purpose for its
opinion.
3(1)
Procedure
for disposal
of questions
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 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.
The Tribunal upon
receipt of a reference
under sub-paragraph
(1) of paragraph 2,
shall consider whether
there is sufficient
ground for proceeding
and if the Tribunal is
satisfied that basic
facts are prima facie
established, it shall
serve on the person to

whom the question relates, a copy of the main grounds on which he is alleged to be a foreigner and give him a reasonable opportunity of making a representation and producing evidence in support of his case and after considering such evidence as may be produced and after hearing such persons as may desire to be heard, the Tribunal shall submit its opinion to the officer or authority specified in this behalf in the order of reference.

The learned Solicitor General appearing on behalf of the Union of India and Mr. K.K. Venugopal, learned senior counsel appearing on behalf of the State of Assam submitted that the provisions of the 2006 Order had been brought into existence only with a view to give effect to the judgment of this Court in Sonowal I. It was contended that given the higher degree of incursion of illegal migrants into Assam when compared to other States of the Union and in view of the special features, such a provision had to be brought in. It was urged that whereas under the 1964 Order the Central Government might or might not refer a matter to the Tribunal, the same has been made mandatory under the 2006 Order. According to the learned counsel, the Central Government earlier had an option to refer a matter, but now it did not have. Once, however, a reference is made to the Tribunal without making any enquiry whatsoever, it would be for the Tribunal, which has a quasi-judicial function to perform, to determine the question as to whether a prima facie case has been made

out for issuance of a show-cause notice having regard to the sufficiency or otherwise of the grounds which can be found out from the material placed before it. By reason thereof, the burden of proof as specified under the 1946 Act is not diluted. The provisions of Article 21 of the Constitution of India being applicable to a person who had already set his feet in India he would be entitled to claim compliance of the principles of natural justice which may not be necessary in respect of a person who has yet to enter the Indian territory.

16. Articles 5, 6 and 11 of the Constitution of India read as under:

"5. Citizenship at the commencement of the Constitution. At the commencement of this Constitution every person who has his domicile in the territory of India and (a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years preceding such commencement,

shall be a citizen of India.

6. Rights of citizenship of certain persons who have migrated to India from

Pakistan. Notwithstanding anything in article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if

(a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and

(b) (i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefore to such officer before the commencement of this Constitution in the form and manner

prescribed by that Government:

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

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

17. The matter relating to illegal migration to Assam finds place in clause (3) of Article 6-A of the Citizenship Act. It reads as under:

"(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 (c) of this sub- section and if any question arises as to whether such person complies with any other requirement under this sub-section, the registering authority shall,

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

(ii) if such opinion does not contain a finding with respect to such other

requirement, refer the question to a Tribunal constituted under the said

Order 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."

The Foreigners Tribunal, it is said, has not been set up in any other part of India except the State of Assam. A different regime, therefore, exists in Assam from the rest of the country. If no tribunal has been established in the rest of the country, foreigners are identified by the executive machinery of the State. Thus, the province of Assam only has been singled out for adopting a different procedure. The problem in regard to illegal migration faced by Assam is also faced by other States including the States of West Bengal, Tripura, etc. It is, therefore, not in dispute that two different procedures have been laid down by the Central Government by issuing two different notifications on the same day.

18. This Court in Sonowal I pointed to: (i) the Governor's report mentioning a large influx of Bangladeshis;

(ii) the failure of the IMDT Act especially because of the burden of proof on those who alleged that a resident of Assam was a foreigner;

(iii) the disinclination of the Government, for political reasons, to wholeheartedly embark upon identification and deportation of Bangladeshis from Assam; and (iv) devising an Act which had no teeth and which, instead of helping the identification, was intended to defeat identification.

This Court opined:

(i) Section 9 of the 1946 Act regarding burden of proof is basically on the same lines as the corresponding provision is in UK 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.

(ii) Noting that the IMDT Act does not contain any provision similar to Section 9 of the 1946 Act as regards burden of proof and after analysis of the provisions of the IMDT Act and the Rules made thereunder, this Court was of the view that the provisions thereof are very stringent as compared to the provisions of the 1946 Act or the 1964 Order. (iii) The IMDT Act and the Rules made thereunder negate the constitutional mandate contained in Article 355 of the Constitution of India and must be struck down. (iv) There being no provision like Section 9 of the 1946 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 1946 Act may have been passed, if he is in any part of India other than the State of Assam. (v) The provisions of the 1946 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. (vi) 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 of India and is liable to be struck down on this ground also.

(vii) The procedure under the 1946 Act and the 1964 Order is just, fair and reasonable and does not offend any constitutional provision.

(viii) All cases pending before the Tribunals under the IMDT Act shall stand transferred to the Tribunals constituted under the 1964 Order and shall be decided in the manner provided in the 1946 Act, the Rules made thereunder and the procedure prescribed under the 1964 Order.

(ix) The Union of India is directed to constitute sufficient number of Tribunals under the 1964 Order to effectively deal with cases of foreigners, who have illegally come from Bangaldesh or are illegally residing in Assam.

19. Whereas in terms of the 1964 Order the Central Government alone could exercise its jurisdiction in the matter of reference of the question as to whether a person is or is not a foreigner, in terms of the 2006 Order, any other authority specified in this behalf will also be entitled to do so. It may be true that in terms of the 1964 Order whenever a complaint is received or if any material is collected by an authority of the Central Government, an investigation therefor could have been initiated. Only upon making such investigation or inquiry, the Central Government was required to form a prima facie opinion for reference of the said question to the Tribunal. The Tribunal on receipt of such a reference shall issue notice upon the proceedee whereafter the burden of proof would lie upon him. It may be true that by reason of paragraph 2 of the 2006 Order, the Central Government is now bound to refer the question as to whether a person is or is not a foreigner. But, it may not be correct to contend that only because it is bound to make such reference, it would act merely as a post office. The Central Government or the authorities specified in this behalf by reason of the provisions of the 2006 Order are not precluded from making an investigation or inquiry into a complaint received. It may receive a complaint that a large number of persons whose names have been disclosed, are foreigners. But, there cannot be any doubt whatsoever that a preliminary inquiry which may not be as intrusive as was necessary in terms of the 1964 Order must be held so as to form an opinion as to whether there is any truth or substance in the allegations made in the complaint.

20. The learned Solicitor General does not state before us that the Central Government in the changed scenario acts merely as a post office. It would, therefore, be necessary that some sort of application of mind would be necessary on the part of the authorities of the Central Government.

21. Even in terms of the 1964 Order, keeping in view the provisions of the Constitution of India, the Citizenship Act and the 1946 Act as interpreted by this Court in Sonowal I, it was the solemn duty of the Central Government to make a reference. A discretionary jurisdiction, however, was granted to the Central Government only for the purpose of arriving at a subjective satisfaction.

22. By reason of the 2006 Order, the requirement to arrive at such satisfaction on the part of the Central Government, cannot be said to have been taken away, in view of the fact that expressions "by order" and "refer the question" still exist in the statute and, thus, appropriate meaning thereto should be assigned. Before a statutory authority passes an order or makes a reference to a Tribunal indisputably, therefor a satisfaction is to be arrived at. Whenever such a satisfaction is to be arrived at, which must be reflected in the order of reference, the same may be subject to the principles of the judicial review. Such a decision for the purpose of making a reference is to be arrived at on the basis of the available materials. To that extent, therefore, application of mind is necessary.

23. In The Barium Chemicals Ltd. and Another v. Sh. A.J. Rana and Others [(1972) 1 SCC 240], it was held: "14. The words "considers it necessary" postulate that the authority concerned has thought over the matter deliberately and with care and it has been found necessary as a result of such thinking to pass the order. The dictionary meaning of the word "consider" is "to view attentively, to survey, examine, inspect (arch), to look attentively, to contemplate mentally, to think over, meditate on, give heed to, take note of, to think deliberately, bethink oneself, to reflect" (vide Shorter Oxford Dictionary). According to Words and Phrases Permanent Edition Vol. 8-A "to consider" means to think with care. It is also mentioned that to "consider" is to fix the mind upon with a view to careful examination; to ponder; study; meditate upon, think or reflect with care. It is therefore, manifest that careful thinking or due application of the mind regarding the necessity to obtain and examine the documents in question is sine qua non for the making of the order. If the impugned order were to show that there has been no careful thinking or proper application of the mind as to the necessity of obtaining and examining the documents specified in the order, the essential requisite to the making of the order would be held to be non-existent.

15. A necessary corollary of what has been observed above is that mind has to be applied with regard to the necessity to obtain and examine all the documents mentioned in the order. An application of the mind with regard to the necessity to obtain and examine only a few of the many documents mentioned in the order, while there has been no such

application of mind in respect of the remaining documents, would not be sufficient compliance with the requirements of the statute. If, however, there has been consideration of the matter regarding the necessity to obtain and examine all the documents and an order is passed thereafter, the Court would stay its hand in the matter and would not substitute its own opinion for that of the authority concerned regarding the necessity to obtain the documents in question."

The said principle has been reiterated in Kaiser-I- Hind (P) Ltd. v. National Textile Corpn. (Maharashtra North) Ltd., [(2002) 8 SCC 182] in the following terms: "14. In view of the aforesaid requirements, before obtaining the assent of the President, the State Government has to point out that the law made by the State Legislature is in respect of one of the matters enumerated in the Concurrent List by mentioning entry/entries of the Concurrent List and that it contains provision or provisions repugnant to the law made by Parliament or existing law. Further, the words "reserved for consideration" would definitely indicate that there should be active application of mind by the President to the repugnancy pointed out between the proposed State law and the earlier law made by Parliament and the necessity of having such a law, in the facts and circumstances of the matter, which is repugnant to a law enacted by Parliament prevailing in a State. The word "consideration" would manifest that after careful thinking over and due application of mind regarding the necessity of having State law which is repugnant to the law made by Parliament, the President may grant assent "

Yet again in State (Anti-Corruption Branch), Govt. of NCT of Delhi and Another v. Dr. R.C. Anand and Another [(2004) 4 SCC 615], as regards necessity for application of mind for grant of sanction, this Court opined:

"The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence including the transcript of the tape

record have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all relevant facts were considered by the sanctioning authority. (See Jaswant Singh v. State of Punjab and State of Bihar v. P.P. Sharma)"

Submission of the learned counsel to the effect that the Central Government could reject a large number of applications which would render the entire process ineffective cannot be accepted. The bounden duties of the Central Government are replete in the Constitution of India and the statutory provisions, reference whereto has been made in detail by this Court in Sonowal I.

24. It may be true that while interpreting the provisions of the Act, the changes made in the expression will have to be taken into consideration; but, while doing so, the burden of the Central Government cannot, in our opinion, be thrown on the Tribunal.

25. In Sonowal I, this Court has noticed the lack of will on the part of the Central Government to proceed against the foreigners.

26. The Central Government may not for the said purpose retain a discretion in its own hands but by reason thereof it cannot also refuse to perform its duties to make investigation in the matter for the purpose of rendition of proper assistance to the Tribunal for determining the question. After all the duty to protect the State and the nation from aggression rests with the Central Government.

27. Even assuming that it is imperative on the part of the Central Government to refer the question without making an investigation, the Order does not debar the said authority to place its view point while referring a matter to the Tribunal.

28. There is an inherent danger if it is to be concluded that the Central Government would act as a post office. For the said purpose, we may consider the question from a different angle.

29. If a complaint is made and the Central Government merely forwards it, there will be no material before the Tribunal on the basis of which it would be able to determine whether sufficient ground for proceeding with the matter exists or not. If on the basis of such a complaint, the Tribunal comes to a conclusion that there is no sufficient ground, it will have no other option having regard to the phraseology used in paragraph 3 of the 2006 Order to dismiss the same. But, if the Tribunal is formulating the ground so as to enable it to communicate the same to the alleged foreigner, the Tribunal would be able to proceed methodologically.

30. It is not in dispute that whereas in terms of the 1964 Order the entire burden was on the alleged foreigner; by reason of the 2006 Order, the proceeding before the Tribunal would be in two parts. Firstly, the Tribunal will have no other option but to apply its mind to the materials on record to enable itself to arrive at a conclusion as to whether there exists any sufficient ground for proceeding in the matter. For the said purpose, not only a satisfaction is required to be arrived at by the Tribunal but the basic facts in respect thereof are required to be prima facie established. The statute is silent as to on what basis such basic facts are required to be established. No criterion has been laid down therefor. At that juncture, the Tribunal may not have any assistance of any other authority. Ex facie, the Tribunal would have to take the entire burden upon itself.

31. It is one thing to say that a statutory Tribunal before issuing a notice must satisfy itself as regards the existence of a prima facie case but it is another thing to say that before it issues a notice the basic facts have to be prima facie established. The expression "establish" has a definite connotation.

In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd edition, it has been observed:

"For the purpose of Art. 30(1) the word 'establish' means "to bring into existence."

Such establishment of basic facts ex facie would be contrary to the provisions of Section 9 of the 1946 Act.

32. The procedure laid down in paragraph 3 of the 1964 Order ensures that the burden of proving that he was a citizen was on the alleged illegal immigrant. Section 9 of the 1946 Act is based on a sound principle of law. It is also recognized by the Indian Evidence Act in the form of Section 106 thereof. The evidence required for deciding as to whether a person is or is not a foreigner are necessarily within the personal knowledge of the person concerned.

33. We may notice that this Court categorically opined that the procedure under the 1946 Act and the Rules were just and fair and did not offend any constitutional provision, while issuing a direction that the Tribunals under the IMDT Act would not function and the matter should be adjudicated upon in terms of the provisions of the 1946 Act and the Rules thereunder. By reason of the impugned Order the Central Government has created tribunals only for Assam and for no other part of the country.

34. It may be true that different procedure has to be applied in regard to a person who is still in the foreign soil and those who are in the Indian territory as has been held in [Shaughnessy, District Director of Immigration and Naturalization v. United States ex rel. Mezei, 345 US 206 and Supreme Court of the United States Kestutis Zadvydas v. Christine G. Davis and Immigration and Naturalization Service, 533 US 678], whereupon Mr. Venugopal placed strong reliance, but the said question does not arise in the instant case.

35. Principle of Natural Justice, indisputably is required to be complied with before a Tribunal passes an order of deportation. The 1946 Act and the Orders framed thereunder contain inbuilt procedure. The procedures laid down therein are fair and reasonable. Only because, the burden of proof is on the proceedee, the same by itself would not mean that the procedure is ultra vires; the provisions of Article 21 of the Constitution of India. Article 21 would not be offended if the procedure is fair and reasonable.

36. In Sonowal I, a singular contention based on applicability of Article 21 of the Constitution of India has been negatived by this Court stating:

"73. 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 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 1-1-1966 and 24-3-1971 in view of the language used in Section 6-A of the Citizenship Act. It is, therefore, not open to the Union of India or the 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."

37. Another aspect of the matter cannot also be lost sight of. The 2006 Order is a subordinate legislation. It cannot, thus, violate a substantive law made by the Parliament.

In Kerala Samsthana Chethu Thozhilali Union v. State of Kerala & Ors. [(2006) 3 SCALE 534], this Court observed :

"A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by the Parliament or the State Legislature."

It was further stated :

"The Rules in terms of sub-section (1) of Section 29 of the Act, thus, could be framed only for the purpose of carrying out the provisions of the Act. Both the power to frame rules and the power to impose terms and conditions are, therefore, subject to the provisions of the Act. They must conform to the legislative policy. They must not be contrary to the other provisions of the Act. They must not be framed in contravention of the constitutional or statutory scheme.

In Ashok Lanka and Another v. Rishi

Dixit and Others [(2005) 5 SCC 598], it was held:

" We are not oblivious of the fact that framing of rules is not an executive act but a legislative act; but there cannot be any doubt whatsoever that such

subordinate legislation must be framed strictly in consonance with the legislative intent as reflected in the rule-making power contained in Section 62 of the Act."

In Bombay Dyeing & Mfg. Co. Ltd. v.

Bombay Environmental Action Group & Ors. [2006 (3) SCALE 1], this Court has stated the law in the following terms:

"A policy decision, as is well known, should not be lightly interfered with but it is difficult to accept the submissions made on behalf of the learned counsel appearing on behalf of the Appellants that the courts cannot exercise their power of judicial review at all. By reason of any legislation whether enacted by the legislature or by way of subordinate legislation, the State gives effect to its legislative policy. Such legislation, however, must not be ultra vires the Constitution. A subordinate legislation apart from being intra vires the

Constitution, should not also be ultra vires the parent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in

consonance with the legislative policy as also give effect to the purport and object of the Act and in good faith."

In Craies on Statute Law, 7th edition, it is stated at page 297:

"The initial difference between

subordinate legislation (of the kind dealt with in this chapter) and statute law lies in the fact that a subordinate law-making body is bound by the terms of its

delegated or derived authority, and that courts of law, as a general rule, will not give effect to the rules, etc., thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled. The validity of statutes cannot be canvassed by the courts, the validity of delegated legislation as a general rule can

be. The courts therefore (1) will require due proof that the rules have been made and promulgated in

accordance with the statutory authority, unless the statute directs them to be judicially noticed; (2) in the absence of express statutory provision to the

contrary, may inquire whether the rule- making power has been exercised in

accordance with the provisions of the statute by which it is created, either with respect to the procedure adopted, the form or substance of the regulation, or the sanction, if any, attached to the regulation : and it follows that the court may reject as invalid and ultra vires a regulation which fails to comply with the statutory essentials."

[See also Vasu Dev Singh & Ors. v. Union of India & Ors., 2006 (11) SCALE 108]

38. In Sonowal I, referring to R. v. Oliver, (1943) 2 All ER 800 and Williams v. Russel, (1993) 149 LT 190, it was noticed

"30. In R. v. Oliver the accused was charged with having sold sugar as a wholesale 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 the learned Judge observed as follows: (All ER p. 715 D)

"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."

31. In Williams v. Russel the learned Judge held as under:

"On the principle laid down in R. v. Turner and numerous other 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."

There cannot, however, be any doubt whatsoever that adequate care should be taken to see that no genuine citizen of India is thrown out of the country. A person who claims himself to be a citizen of India in terms of the Constitution of India or the Citizenship Act is entitled to all safeguards both substantive and procedural provided for therein to show that he is a citizen.

39. Status of a person, however, is determined according to statute. The Evidence Act of our country has made provisions as regards 'burden of proof'. Different statutes also lay down as to how and in what manner burden is to be discharged. Even some penal statutes contain provisions that burden of proof shall be on the accused. Only because burden of proof under certain situations is placed on the accused, the same would not mean that he is deprived of the procedural safeguard.

In Hiten Pal Dalal v. Bratindranath Banerjee [(2001) 6 SCC 16], this Court categorically opined :

" Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the

presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exist, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when,

"after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the

circumstances of the particular case, to act upon the supposition that it exists" Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the "prudent man"".

Moreover, there exists a difference between a burden of proof and onus of proof.

In Anil Rishi v. Gurbaksh Singh [2006 (5) SCALE 153], this Court observed :

"There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same."

40. Having regard to the fact that the Tribunal in the notice to be sent to the proceedee is required to set out the main grounds; evidently the primary onus in relation thereto would be on the State. However, once the Tribunal satisfied itself about the existence of grounds, the burden of proof would be upon the proceedee.

41. In Sonowal I, this Court clearly held that the burden of proof would be upon the proceedee as he would be possessing the necessary documents to show that he is a citizen not only within the meaning of the provisions of the Constitution of India but also within the provisions of the Citizenship Act.

It was stated:

"26. 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. Sometimes the place of birth of his grandparents 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 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."

The Court noticed that even in criminal cases, under certain statutes, the burden of proof would be on the accused.

42. For the aforementioned reasons also, in our opinion, the impugned subordinate legislation cannot be sustained as it does not the test of the reasoning in Sonowal I.

43. In the face of the clear directions issued in Sonowal I, it was for the Authority concerned to strength the Tribunals under the 1964 Order and to make them work. Instead of doing so, the 2006 Order has been promulgated. It is not as if the respondents have found the 1964 Order unworkable in the State of Assam; they have simply refused to enforce that Order in spite of directions in that behalf by this Court. It is not for us to speculate on the reasons for this attitude. The earlier decision in Sonowal, has referred to the relevant materials showing that such uncontrolled immigration into the North- Eastern States posed a threat to the integrity of the nation. What was therefore called for was a strict implementation of the directions of this Court earlier issued in Sonowal I, so as to ensure that illegal immigrants are sent out of the country, while in spite of lapse of time, the Tribunals under the 1964 Order had not been strengthened as directed in Sonowal I. Why it was not so done, has not been made clear by the Central Government. We have to once again lament with Sonowal I that there is a lack of will in the matter of ensuring that illegal immigrants are sent out of the country.

44. It appears that the 2006 Order has been issued just as a cover up for non implementation of the directions of this Court issued in Sonowal I. The Order of 2006, in our view, is clearly unnecessary in the light of the 1946 Act and the Orders made thereunder and the directions issued in Sonowal I. It does not serve the purpose sought to be achieved by the 1946 Act or the Citizenship Act and the obligations cast on the Central Government to protect the nation in terms of Article 355 of the Constitution of India highlighted in Sonowal. We have also earlier struck down the repeal of the 1964 Order as regards Assam. The 2006 Order is therefore found to be unreasonable and issued in an arbitrary exercise of power. It requires to be quashed or declared invalid.

45. We therefore allow these Writ Petitions and quash the 2006 order and the Foreigners (Tribunal) Amendment Order 2006 and direct the respondents to forthwith implement the directions issued by this Court in Sonowal I. No time limit for implementation was fixed in Sonowal I with the hope that the Central Government would implement the directions within a reasonable time. But now that it has not been done and we do not find adequate reasons for justifying the non- implementation of the directions issued in Sonowal I, we direct that the directions issued to the Union of India to constitute sufficient number of Tribunals under the 1964 Order to effectively deal with the cases of foreigners who have illegally come from Bangladesh or are residing in Assam, be implemented with a period of four months from this date.

46. The Writ Petitions are thus allowed with costs. Counsel's fees assessed at Rs. 25,000/-.