



WHITE BLACK
LEGAL
LEGAL

VOLUME 2 : ISSUE 5

|| September 2020 ||

Email: editor@whiteblacklegal.co.in

Website: www.whiteblacklegal.co.in

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal

– The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published,

White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

EDITORIAL TEAM

EDITOR IN CHIEF

Name - Mr. Varun Agrawal

Consultant || SUMEG FINANCIAL SERVICES PVT.LTD.

Phone - +91-9990670288

Email - whiteblacklegal@gmail.com

EDITOR

Name - Mr. Anand Agrawal

Consultant|| SUMEG FINANCIAL SERVICES PVT.LTD.

EDITOR (HONORARY)

Name - Smt Surbhi Mittal

Manager || PSU

WHITE BLACK
LEGAL

EDITOR(HONORARY)

Name - Mr Praveen Mittal

Consultant || United Health Group MNC

EDITOR

Name - Smt Sweety Jain

Consultant||SUMEG FINANCIAL SERVICES PVT.LTD.

EDITOR

Name - Mr. Siddharth Dhawan

Core Team Member || Legal Education Awareness Foundation

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

WHITE BLACK LEGAL: THE LAW JOURNAL

SARBANANDA SONOWAL V. UNION OF INDIA & ANR ON

12 JULY, 2005

WRIT PETITION (CIVIL) 131 OF 2000

Author : Sanya Shah

“There is a thin line between nationalism and xenophobia- besides, hatred of the foreigner could later turn into hatred of Indians different from oneself”.

- **Rabindranath Tagore**

CHAPTERS IN THE CONSTITUTION

- **PART III : FUNDAMENTAL RIGHTS : ARTICLE 14, 19(1)(e), 21, 29(1), 32**

Part III is one of the important pillars of the Constitution in order to achieve the goal of justice, liberty, equality, fraternity and dignity of an individual. Articles 12 to 35 have been articulated herein which majorly include the right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights and the right to Constitutional remedies. They differ from ordinary rights in the sense that they are inevitable. Chief Justice Subba Rao in the case of *Golak Nath v. State of Punjab*¹ stated that *“Fundamental rights are the modern name for what have been traditionally known as natural rights”*.

- **PART XVIII : EMERGENCY PROVISIONS: ARTICLE 355**

According to the Black’s Law Dictionary², *“Emergency is a situation which requires quick action and immediate notice as such a situation causes a threat to the life and property in the nation. It is a failure of the social system to deliver reasonable conditions of life”*. Under the advice of the cabinet of ministers, the President can overrule many provisions of the Constitution, which guarantees Fundamental Rights to the citizens of India. The emergency provisions are contained in Part XVIII of the Constitution of India, from Article 352 to 360. These provisions enable the Central government to meet any abnormal situation effectively. The rationality behind the incorporation is to safeguard the sovereignty, unity, integrity and security of the country, the democratic political system and the Constitution. The concept of

¹ 1967 SCR (2) 762.

² Black’s Law Dictionary, 2nd Edition.

emergency was borrowed from the Weimar Constitution of Germany. The Constitution stipulates three types of emergencies:

- (i) National Emergency
- (ii) Constitutional Emergency
- (iii) Financial Emergency

RELEVANT ARTICLES

ARTICLE 14

Article 14 guarantees to every citizen right to equality before law equal protection of the laws. The former implies the absence of any special privilege in any individual. While the latter directs that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favour or discrimination. The purpose of the two expressions is to give Article 14 the widest ambit possible. However, equality before law or equal protection does not mean the same treatment to everyone. Since no two humans are equal in all respects, the same treatment to them in every aspect would result in unequal treatment. Therefore, equal's should be treated equally while unequal's must be treated differently. This exercise is known as reasonable classification. Furthermore, the classification made should be valid and reasonable and rest upon some real and substantial distinction in relation to the needs or purpose in respect of which the classification is made. In simple terms, in order to pass the test for permissible classification, to conditions must be fulfilled, namely:

1. The classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group; and
2. The differential must have a rational relation to the objects or to be achieved by the statute in question.

ARTICLE 21

Article 21 confers on every person the fundamental rights to life and personal liberty and has become an inexhaustible source of many rights. These rights are as much available to non-citizens as to citizens and to those who citizenship is unknown. Courts have time and again assigned to this right a paramount position among the

other rights. It was stated in the case of State of H.P. v. Umed Ram Sharma³ that “*The right to life embrace is not only physical existence of life but also the quality of life*”. The right to life includes weather and the time it wide variety of many other rights, the right to privacy being an essential ingredient of the same. It basically includes the right to live with human dignity and all that goes along with it, near me, the Bare Necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, free moving about and mixing and commingling with fellow human beings⁴.

- **ARTICLE 29(1)**

Clause 1 of Article 29 gives the right to every section of the citizens which has a distinct language, script or culture to conserve the same. Perhaps, residence of a state having different script, language or culture may also object to illegal migration from a neighbouring country resulting in an adverse impact on the language grit or culture of that state.

- **ARTICLE 32**

This article, unlike other rights is remedial and not substantive in nature. It is not any less important than the other right rather has been called as the heart and soul of the constitution. In the words of Dr. Ambedkar, “*If I was asked to name any particular article in the constitution as the most important - an article without which the constitution would be a nullity, I could not refer to any other article except this one. It is the very soul of the constitution and the very heart of it*”. It is a fundamental right to approach directly the highest court of the country. Therefore, it can be appropriately described as the cornerstone of the democratic edifice raised by the constitution. It is hence the protector and guarantor of all other fundamental rights.

- **ARTICLE 355**

This article, imposes to duties on the union of India:

1. To protect every state from external aggression and internal disturbance
2. To ensure that the government of every state is carried on in accordance with the provisions of the constitution.

³ AIR 1986 SC 847.

⁴ *Ibid.*

The Constitution provides for two sets of government, which is the union and the states each vested with specified powers where in, neither of them could intervene into the powers of the other unless expressly provided in the constitution. In virtue of its duty to ensure that the government of every state is carried on in accordance with the provisions of the constitution, if the Union of India finds the government of the state is not being carried on in accordance with the provisions of the constitution, one way is to impose the President's rule under Article 356. However, short of taking action on article 356 other ways are open to deal with the situation by virtue of article 355.

OUTLINE

The problem of influx of illegal migrants into India has been long standing. Prior to 1983, their detection and eviction was done by the Foreigners Act, 1946. However, due to underlying difficulties like the problem of furnishing proof of citizenship which was cast upon the accused, unbridles powers to the authorities under the act, mainly the police who could detect and deport foreigners, the Parliament enacted the Illegal Migrants (Determination by Tribunals) Act, 1983 which essentially suggested the setting up of judicial tribunals to determine the citizenship of a person. Therefore, the present case is a writ petition filed by way of a public interest litigation to declare certain provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 as ultra vires of the Constitution of India along with declaring the Illegal Migrants (Determination by Tribunals) Rules, 1984 as ultra vires the Constitution of India. Subsequently, it seeks the the application of the Foreigners Act, 1946 and the Rules thereunder to the State of Assam.

The issues raised in the petition concerned the citizens of Assam whose rights had been gravely prejudiced by the operation of the Illegal Migrants (Determination by Tribunals) Act (IMDT Act) in the state. This was because, as contended by the petitioner, the provisions of the said Act were wholly arbitrary and unreasonable and discriminated against a class of citizens of India. This grievance stemmed from the fact that the Foreigners Act, 1946 which facilitated the detection and deportation of illegal migrants, was applicable to all the foreigners throughout India except the State of Assam. The IMDT Act which was subsequently introduced even failed to meet the standards prescribed by the Foreigners Act, 1946. Furthermore, the provisions in the IMDT Act which were inculcated to ensure protection to genuine Indian citizens were not properly implemented due to political considerations. The influx of non-Indians who entered the country surreptitiously, without

passports or with forged passports led to a change in the cultural and ethnic composition of that area and a massive rise in the population of Assam as compared to the other parts of the country.

In spite of the 'Assam Accord' signed between the All Assam Students' Union (AASU) and Union of India which gave several assurances to look into the difficulties voiced by the AASU regarding the implementation of the IMDT Act, no action was taken for quite a few years. The only action taken was the amendment of the Citizenship Act, 1955 to ensure that the detection of illegal migrants would be done through a central legislation, which is the Foreigners Act, 1946.

Various affidavits and counter affidavits were filed on behalf of the Union of India, the State of Assam and the petitioner. The provisions of the Foreigners Act, 1946 and the IMDT Act were analysed and the meaning of 'Aggression' under Article 355 was examined to determine if Assam was in a state of external aggression.

MAIN ISSUES

1. **WHETHER THE ILLEGAL MIGRANTS (DETERMINATION BY TRIBUNALS) ACT, 1983 IS CONSTITUTIONALLY VALID?**
 - i. Whether the Illegal Migrants (Determination by Tribunals) Act, 1983 and Illegal Migrants (Determination by Tribunals) Rules, 1984 negates the constitutional mandate under Article 355 of the Constitution of India?
 - ii. Whether the Illegal Migrants (Determination by Tribunals) Act, 1983, only applicable to the state of Assam is wholly arbitrary and discriminatory thus violative of Article 14 of the Constitution of India?
 - iii. Whether the change undergone with respect to the whole demographic pattern of the state of Assam amounts to violation of the rights guaranteed under Article 29(1) of the Constitution of India?
 - iv. Whether the present petition under Article 32 of the Constitution of India is maintainable?
 - v. Whether the procedure under the Foreigners Act, 1946 is violative of Article 21 of the Constitution of India?

KEY CONTENTIONS

PETITIONER

The key contentions from the side of the petitioner, that is Sarbananda Sonowal were:

1. The application of the IMDT Act to the State of Assam is wholly discriminatory and violates Article 14 of the Constitution as the classification made is not found upon any intelligible differentia and there is no nexus between the bases of the classification and the object of the arm IMDT Act.
2. 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, amounting to a violation of Article 29(1) of the Constitution as the people of Assam have a fundamental right to conserve their language, script or culture.

RESPONDENT

The key contentions from the side of the respondent, that is the State of Assam and Union of India were:

1. The classification made on the basis of historical facts and geographical criteria is a perfectly valid classification therefore not a violation of article 14 on the ground that it has been made applicable only to the State of Assam.
2. No fundamental right of the petitioner per se has been violated and therefore, the present petition under Article 32 of the Constitution is not maintainable.
3. The provisions of Article 21 apply to a foreigner as well. No person shall be deprived of his life or personal liberty except according to the procedure established by law. Therefore, there has to be a fair procedure for expulsion of foreigners. Since the procedure prescribed in the Foreigner's Act is not just, fair and reasonable, it is violative of Article 21.

EXAMINATION OF PRECEDENTS

1. Kangsahri Haldar v. State of West Bengal⁵

This precedent was used to ascertain the validity of the impugned statute on the grounds that it violates Article 14. Two things were considered necessary for the same, namely, **i)** the policy underlying the statute and **ii)** the object intended to be

⁵ AIR 1960 SC 457.

achieved by it. Having ascertained the policy and the object, the dual test should be applied to examine its validity. The dual test consists of two questions, namely, **i)** Is the classification rational and based on intelligible differentia; **ii)** Does the basis of differentiation have any rational nexus with its avowed policy and object? If the two tests are satisfied, the statute must be held to be valid. However, if either of the two tests is not satisfied, the statute must be struck down as violative of Article 14.

2. *Shambhu Nath Mehra v. The State of Ajmer*⁶

This precedent was referred to lay importance on the fact that the burden of proof to establish citizenship should be cast upon the accused and not the state. Section 106 of the Evidence Act states that when any fact is especially within the knowledge of any person, the burden of proving the same fact is upon him. therefore, the court held that Section 106 is an exception to Section 101 (general rule of placing the burden of proof on the prosecution). Section 106 is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish facts which are ‘especially’ within the knowledge of the accused and which he could prove without any difficulty or inconvenience.

3. *D.C Wadhwa v. State of Bihar*⁷

This precedent was used to establish the fact that a writ petition can be filed by anyone even though there is no direct invasion of their fundamental right. The petitioner here had filed a writ petition challenging the action of the Governor of Bihar in promulgating ordinances from time to time under Article 213 of the Constitution without getting them replaced by the Acts of the legislature. It was held that since it is the right of every citizen to insist that he should be governed by laws made in accordance with the Constitution and not by laws made by the executive in violation of constitutional provisions, the petitioner had sufficient interest as a member of the public to maintain a petition under Article 32.

RATIO DECIDENDI

1. The first issue at hand was whether the IMDT Act violated Article 355 that cast upon the Union of India a duty to protect every State against external aggression and internal disturbance. The court while giving the word ‘aggression’ under Article 355 its true meaning concluded that the State of Assam due to the influx of illegal

⁶ AIR 1956 SC 404.

⁷ 1987 SCR (1) 798.

migrants was in a state of insurgency. Along with the demographic pattern of the State, it also posed a threat to the national security and therefore, it was undoubtedly facing 'external aggression and internal disturbance'.

- The Parliament had enacted the Immigrants (Expulsion from Assam) Act, 1950 which gave the Central government the power to direct any person, having been ordinarily a resident of any place outside India, who entered Assam and was detrimental to the interests of the general public or any section thereof or any Scheduled tribe in Assam to remove himself from the country and give directions for his removal thereon. However, the provisions of the IMDT Act divested the Central Government of the power to remove migrants from Bangladesh who were creating a serious law and order problem.
- The Parliament had enacted the Passport (Entry into India) Act, 1920 which conferred powers upon the Central government to make rules requiring people entering India to be in possession of passports. And in case of breach they had the power to impose punishment or even arrest without a warrant. However, the IMDT Act 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.
- Furthermore, the provisions of the Foreigners Act and the IMDT Act were analysed and compared. The court came to the conclusion that the process laid down under the Foreigners Act was far more effective in identification and deportation of foreigners as compared to the procedure under the IMDT Act and rules thereunder. Since there was no corresponding provision like the Foreigners Act which place the burden of proof upon the person concern who claims to be an Indian citizen it had made the task of the law enforcement agencies of the state virtually impossible. They relied on the figures given by the government report to conclude that the IMDT act had created unsurmountable difficulties in the identification and deportation of illegal migrants. They stated that it is becoming an advantage for the illegal migrants since any proceeding initiated against them under the provisions of the IMDT act entirely and in their favour. Therefore, the large number of illegal migrants is an aggression on the state of a song and has also contributed in causing internal disturbances, making the people of Assam him feel insecure in their own state. Not only has it hampered growth of a Assam but also affected the neighbouring states like Arunachal Pradesh, Meghalaya, Nagaland, etc.

- Therefore, the court held that the IMDT Act clearly negates the mandate of Article 355 and thus is wholly unconstitutional and should be struck down.
- 2. The second issue at hand concerned the application of the IMDT Act to the State of Assam as wholly arbitrary and discriminatory. The court held that the mere making of a geographical classification cannot be sustained where the act instead of achieving the objective of the legislation defeats the very purpose for which the legislation has been made. Furthermore, for satisfying the test of Article 14, the geographical factor alone in making a classification is not enough because it would then be open to the legislature to apply enactments made by it to any district with a state leaving others at its sweet will. This would then defeat the underlying spirit on which Article 14 is founded. Since the classification made whereby the IMDT Act what is made applicable only to the State of Assam had no rational nexus with the policy and the object of the act, it was held to be violative of article 14 and thus liable to be struck down.
- 3. The third issue at hand concerned the violation of Article 29(1) of the constitution owing to the change in the demographic pattern of the State of Assam. The court concurred with the fact that the IMDT Act has facilitated to a large extent the residence of illegal migrants in the State who have affected the language, culture and script of the local people. Furthermore, even 29(1) confers a fundamental right on all sections of the citizens residing in any territory of India to conserve their language, script and culture. However, the court did not express any conclusive opinion on the violation of Article 29(1) since the required factual basis for the determination of this issue had not been given in the pleadings.
- 4. The fourth issue at hand concerned the maintainability of the writ petition filed under Article 32 of the Constitution since no fundamental right of the petitioner had been violated. The court held that under Article 51-A(d) of the Constitution, it is 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 the legislature has the disastrous effect of giving shelter and protection to foreign nationals who have illegally transgressed the international borders and are residing in India and further on the act is unconstitutional, any citizen is entitled to bring it to the notice of the court by means of filing a writ petition.
- 5. The fifth issue at hand concerned the violation of Article 21 of the Constitution with respect to the provisions of the Foreigners Act and the Foreigners (Tribunals) Order,

1964. The court held that the Foreigners Act and the Foreigners (Tribunals) Order, 1964 is applicable to the whole of India including the State of Assam for identification of foreigners who have entered Assam between 1st January, 1966 and 24th March, 1971 and it is therefore not open to the Union of Indian or the State of Assam to contend that the procedure prescribed in the aforesaid enactment is not just, fair and reasonable and thus violative of the Constitution.

JUDGMENT

The writ petition in the present case was allowed, and succeeded with the following directions:

- i. The Illegal Migrants (Determination by Tribunals) Act, 1983 and Illegal Migrants (Determination by Tribunals) Rules, 1984 are ultra vires the Constitution and should be struck down.
- ii. The Tribunals and Appellate Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall cease to function.
- iii. All cases pending before the Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall be 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.
- iv. 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.
- v. All appeals pending before the Appellate Tribunal shall be deemed to have abated.
- vi. 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.

OPINION

According to the preamble of the IMDT Act, it was to be made applicable to the whole country whenever the government notified it for the purpose of determination and deportation of illegal migrants. Therefore, technically speaking, the Parliament did not lack legislative competence and thus there had been no discrimination against the state of Assam. Instead, there was a failure on the part of the executive to implement it in the whole country. In my opinion, instead of striking the whole act unconstitutional, directions could have been issues to get it rectified.

After analyzing and comparing the provisions of the IMDT Act and the Foreigners Act, the court stated that *“the IMDT Act and rules made thereunder reveal that they were purposely enacted to protect the illegal migrants who entered the state of Assam after 25th March, 1971 rather than identifying and deporting”*. However, in my opinion, the Act provided for a judicial remedy to any person being deported. Furthermore, if the problem was with the screening committee being given too much power for the purpose of examining complaints, directions could be issues to strike off that feature than striking off the entire act.

In my opinion, the meaning given to the word aggression under Article 355 was justified. Bangladeshi nationals migrated to the country which led to a sharp increase in the population of the state. Due to ethnic and cultural similarities, the genuine citizens could not preserve their culture and they became a minority in their own state. Further on, due to the provisions of the IMDT Act, other legislations which gave power to the Centre to intervene could not be exercised.

LATEST JUDGMENTS

There have not been any latest judgments on this issue per se. The final list stripping close to 1.9 million people of their citizenship has been released. 120 days were given to the people left off the list to appeal. A clear picture as to what happens next has not been provided. Detention centres have been set up for people who were excluded and currently the entire process is kept on hold due the pandemic.

CONCLUSION

The present case was not really a step forward. The IMDT Act was introduced to overcome problems that were faced due to the operation of the Foreigners Act. The issue took political turns in the middle until a petition was filed to declare the IMDT Act unconstitutional. The court relied upon the facts presented to them through a government report and delved deeper into the provisions of the Foreigners Act and the IMDT Act to conclude that the IMDT Act instead of expelling illegal migrants was introduced purposely to give them shelter. A lapse on the part of the executive to implement it in the whole country invoked Article 14 and the court declared it unconstitutional for violating the same without delving into the reasons for its non-implementation. It was also declared unconstitutional due to its violation of Article 355 of the Constitution since it divested the centre of its power to intervene. One of the other reasons was the inefficiency of its act as compared to West Bengal where the Foreigner Act was applicable. Bearing these contentions in mind, the court issued directions for the striking off of the IMDT Act and the rules thereunder for being ultra vires of the Constitution.

