THE GAUHATI HIGH COURT AT GUWAHATI

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

WP(C) Nos.2099/2018, 2601/2018, 4610/2018, 8491/2018, 8493/2018, 822/2019, 2239/2019, 8189/2019, 8253/2019, 1816/2020, 3514/2021

1. WP(C) 2099/2018

Sital Mandal,
Son of late Mangal Mandal,
Village- Bidyapur, Ward No.2,
P.S.- Nalbari, District-Nalbari,
Assam, PIN-781335.

……*Petitioner*

-Versus-

1. The Union of India,
   Represented by the Secretary to the Government of India,
   Department of Home Affairs, New Delhi.
2. Election Commission of India, New Delhi.
3. Coordinator, N.R.C., Assam, Guwahati.
4. The State of Assam,
   Represented by the Commissioner and Secretary,
   Home and Political (B) Department,
   Dispur-781006.
5. The Foreigners Tribunal 1, Nalbari,
   District -Nalbari, PIN-781335.
6. The Superintendent of Police (Border), Nalbari,
   Assam, PIN-781335.
7. The Deputy Commissioner, Nalbari,
   Assam, PIN-781335.

8. The Officer-in-charge,
Nalbari Police Station, District- Nalbari
Assam, PIN-781335.

…… *Respondents*.

2. WP(C) 2601/2018

Musstt. Jahera @ Jahura Khatoon,
Wife of Md. Samsul Hoque,
Village-Kashimpur, P.S.- Nalbari,
District- Nalbari, Assam,
PIN-781341.

……*Petitioner*

-Versus-

1. The Union of India,
Represented by the Secretary to the Government of India,
Department of Home Affairs, New Delhi.
2. Election Commission of India, New Delhi.
3. Coordinator, N.R.C., Assam, Guwahati.
4. The State of Assam,
Represented by the Commissioner and Secretary,
Home and Political (B) Department,
Dispur-781006.
5. The Foreigners Tribunal 1, Nalbari,
District -Nalbari, PIN-781335.
6. The Superintendent of Police (Border), Nalbari,
Assam, PIN-781335.
7. The Deputy Commissioner, Nalbari,
Assam, PIN-781335.

……
Respondents.

3. <u>WP(C) 4610/2018</u>

Md. Chand Miah @ Chan Miah
Son of Lt. Fakir Chan,
Resident of Village- Goroimari Satra,
P.S.- Chhaygaon, District- Kamrup (R),
Assam, PIN-781124.

……*<u>Petitioner</u>*

-Versus-

1. The Union of India,
   Represented by the Secretary to the Government of India,
   Ministry of Home Affairs, Shastri Bhawan,
   Tilok Marg, New Delhi-1.

2. The State of Assam,
   Represented by the Commissioner and Secretary,
   Home Department, Dispur,
   Guwahati-6.

3. The Superintendent of Police (B), Kamrup,
   Amingaon, Assam, PIN-781031.

4. The Deputy Commissioner, Kamrup,
   Amingaon, Assam, PIN-781031.

5. The Election Commission of India, New Delhi-1.

6. The State Co-ordinator of N.R.C.,
   Bhangaghar, Guwahati-5.

…… *<u>Respondents</u>*.

4. <u>WP(C) 8491/2018</u>

Nurjahan Begum,
Wife of Ali Hussain,
Daughter of Late Kazimuddin,
Village- Ward No.2, Kheroni Basti, Rangapara,
P.S.- Rangapara, District- Sonitpur, Assam.

……*Petitioner*

-Versus-

1. The Union of India,
   Represented by the Secretary to the Ministry of Home Affairs,
   Govt. of India, Shastri Bhawan, Tilok Marg,
   New Delhi-1.

2. The State of Assam,
   Represented by the Commissioner & Secretary
   to the Govt. of Assam,
   Department of Home, Dispur,
   Guwahati-06.

3. The Election Commissioner of India,
   through its Secretary, Nirbachan Bhawan,
   New Delhi-1.

4. The State Co-Ordinator,
   National Register of Citizens (NRC),
   Assam, Bhangagarh, Guwahati-5.

5. The Deputy Commissioner of Sonitpur,
   P.O, P.S. & Dist.- Sonitpur, Assam,
   PIN-784001.

6. The Superintendent of Police (B), Sonitpur,
   P.O. & Dist.- Sonitpur, Assam,
   PIN-784001.

…… *Respondents*.

5. WP(C) 8493/2018

Nurjahan Begum,
Wife of Ali Hussain,
Daughter of Late Kazimuddin,
Village- Ward No.2, Kheroni Basti, Rangapara,

P.S.- Rangapara, District- Sonitpur, Assam.

……*Petitioner*

-Versus-

1. The Union of India,
   Represented by the Secretary to the Ministry of Home Affairs,
   Govt. of India, Shastri Bhawan, Tilok Marg,
   New Delhi-1.

2. The State of Assam,
   Represented by the Commissioner & Secretary
   to the Govt. of Assam,
   Department of Home, Dispur,
   Guwahati-06.

3. The Election Commissioner of India,
   Through its Secretary, Nirbachan Bhawan,
   New Delhi-1.

4. The State Co-Ordinator,
   National Register of Citizens (NRC),
   Assam, Bhangagarh, Guwahati-5.

5. The Deputy Commissioner of Sonitpur,
   P.O, P.S. & Dist.- Sonitpur, Assam,
   PIN-784001.

6. The Superintendent of Police (B), Sonitpur,
   P.O. & Dist.- Sonitpur, Assam,
   PIN-784001.

…… *Respondents*.

6. WP(C) 822/2019

Mativan Nessa,
Daughter of Lt. Jashimuddin,
Wife of Jabbar Ali,
Resident of Village- Chalcholia,
P.S.-Sorbhog, District- Barpeta, Assam.

……*Petitioner*

-Versus-

1. The Union of India,
   Represented by the Secretary to the Govt. of India,
   Ministry of Home Affairs,
   Shastri Bhawan, Tilok Marg,
   New Delhi-01.

2. The State of Assam,
   Represented by the Commissioner & Secretary
   to the Govt. of Assam,
   Home Department, Dispur,
   Guwahati-06.

3. The Superintendent of Police (Border), Barpeta,
   P.O. & District- Barpeta,
   Assam, PIN-781352.

4. The Deputy Commissioner, Barpeta,
   P.O. & District- Barpeta,
   Assam-781352.

5. The Election Commissioner of India,
   Through its Secretary,
   Nirbachan Bhawan,
   New Delhi-01.

6. The State Co-Ordinator,
   National Register of Citizens (NRC), Assam,
   Bhangagarh, Guwahati-05.

…… *Respondents*.

7. WP(C) 2239/2019

Nadim Ali @ Nadim Badsa,
Son of Late Ifaruddin Sk. @ Ifaruddin Ali,
Village- Jhakuwapara, P.O.- Kopati,
P.S.- Rowta, District- Udalguri, BTAD,

PIN-784509.

……*Petitioner*

-Versus-

1. The Union of India,
   Represented by its Secretary, Govt. of India,
   Ministry of Home Affairs, New Delhi-110001.

2. The State of Assam,
   Represented by the Commissioner & Secretary
   to the Govt. of Assam, Home Department,
   Dispur, Guwahati-6.

3. The Election Commission of India, New Delhi-110001.

4. The Deputy Commissioner, Udalguri,
   PIN-784509.

5. The State Coordinator,
   National Registrar of Citizens, Assam,
   Guwahati-781005.

6. The Superintendent of Police (B), Darrang,
   District- Darrang, PIN-784125.

7. The Officer-in-Charge,
   Rowta Police Station,
   District- Udalguri, PIN-784509.

…… *Respondents*.

8. WP(C) 8189/2019

Ator Ali @ Rahman,
Son of –Khalilur Rahman @ Khalil,
Resident of Village- Dhorasap, Sataribori,
P.S. Mikirbheta, P.O.-Habibarongbari,
District- Morigaon, Assam,

PIN-782108.

……*Petitioner*

-Versus-

1. The Union of India,
   Represented by the Secretary to the Govt. of India,
   Ministry of Home Affairs, New Delhi.

2. The Chief Election Commissioner,
   Election Commission of India,
   Ashoka Road,
   New Delhi-110001.

3. The State of Assam,
   Represented by its Secretary, Govt. of Assam
   Home Department,
   Dispur, Guwahati-06.

4. The Director General of Police, Assam,
   Ulubari, Guwahati-07.

5. The State Coordinator,
   O/O The State Coordinator of
   National Registrar of Citizen (NRC), Assam,
   1st Floor, Achyut Plaza,
   G.S. Road, Bhangagarh, Guwahati-05.

6. The Deputy Commissioner, Morigaon
   District- Morigaon, Assam.

7. The Superintendent of Police (B), Morigaon,
   District- Morigaon, Assam.

…… *Respondents*.

9. WP(C) 8253/2019

Smti. Phul Banu @ Phulbanu Begum,
Wife of Intaz Ali,

Resident of Village: Lakhi Nepali Bosti,
P.S. Jonai, District- Dhemaji,
Assam.

……*Petitioner*

-Versus-

1. The Union of India,
   Represented by its Secretary, Government of India,
   Ministry of Home Affairs, New Delhi-110001.

2. The State of Assam,
   Represented by the Commissioner & Secretary
   to the Govt. of Assam, Home Department,
   Dispur, Guwahati-6.

3. The Director General of Police (Administration),
   Assam, PIN-787060.

4. The District Magistrate cum Deputy Commissioner,
   Dhemaji, District- Dhemaji, Assam, PIN-787060.

5. The Superintendent of Police (Border), Dhemaji,
   District- Dhemaji, Assam, PIN-787060.

6. The State Coordinator, National Registrar of Citizens (NRC),
   Guwahati, Assam, Guwahati-5.

7. The Election Commission of India,
   Nirvachan, Sadan, Ashoka Road,
   New Delhi-110001.

…… *Respondents*.

10. WP(C) 1816/2020

Sahera Khatun,
Daughter of Anju Miah @ Amzad Ali,
Wife of Abdul Bakki,
Village-Rowmari, P.S. Tarabari,
District- Barpeta, Assam.

……*Petitioner*

-Versus-

1. The Union of India,

Represented by the Ministry of Home Affairs,
Govt. of India, New Delhi-110001.

2. The Election Commissioner of India,
   Govt. of India, New Delhi-110001.

3. The State of Assam,
   Represented by the Commissioner & Secretary
   to the Govt. of Assam, Home Department,
   Dispur, Guwahati-781006.

4. The State Coordinator,
   National Registrar of Citizens (NRC),
   Bhangagarh, Guwahati-05.

5. The Deputy Commissioner, Barpeta,
   District- Barpeta, Assam,
   PIN-781301.

6. The Superintendent of Police (B), Barpeta,
   District- Barpeta, Assam, PIN-781301.

…… *Respondents*.

11. WP(C) 3514/2021

Nal Mia @ Lal Mia,
Son of Late Mamud Ali,
Resident of Village- Bamunpara,
P.S.-Mankachar, District- South Salmara Mankachar,
Assam.

……*Petitioner*

-Versus-

1. The Union of India,
   Represented by its Secretary, Government of India,
   Ministry of Home Affairs, New Delhi-110001.

2. The State of Assam,
   Represented by the Commissioner & Secretary

to the Govt. of Assam, Home Department,
Dispur, Guwahati-6.

3. The Director General of Police (Administration),
Assam, PIN-07.

4. The District Magistrate cum Deputy Commissioner,
Kamrup (Metro) at Guwahati,
District- Kamrup (M), Assam,
PIN-781001.

5. The Deputy Commissioner of Police (Border), Kamrup (M) at
Guwahati, District- Kamrup (M), Assam,
PIN-781001.

6. The State Coordinator,
National Registrar of Citizens (NRC),
Guwahati, Assam, Guwahati-5.

7. The Election Commission of India,
Nirvachan, Sadan, Ashoka Road,
New Delhi-110001.

…… *Respondents*.

BEFORE

HON'BLE MR. JUSTICE N. KOTISWAR SINGH

HON'BLE MR. JUSTICE NANI TAGIA

For the Petitioner in WP(C) Nos.2099, 2601/2018	:	Mr. B.C. Das, Adv.
For the Petitioner in	:	Mr. A.R. Sikdar, Adv.
WP(C) No.4610/2018	:	Mr. A. Mannaf, Adv.
	:	Md. A.S. Ali, Adv.
For the Petitioner in	:	Mr. A.R. Sikdar, Adv.
WP(C) No.8491/2018	:	Mr. H.A. Ahmed, Adv.
	:	Md. A. Ali, Adv.
For the Petitioner in	:	Mr. A.R. Sikdar, Adv.
WP(C) No.8493/2018	:	Mr. H.A. Ahmed, Adv.

	:	Md. A. Ali, Adv.
For the Petitioner in	:	Mr. A.R. Sikdar, Adv.
WP(C) No.822/2019	:	Mr. N. Ahmed, Adv.
	:	Md. A. Ali, Adv.
	:	Mr. S.I. Talukdar, Adv.
For the Petitioner in	:	Mr. H.R.A. Choudhury, Sr. Adv.
WP(C) No.2239/2019	:	Mr. F.U. Barbhuiya, Adv.
	:	Ms. S. Das, Adv.
	:	Mr. I.U. Choudhury, Adv.
	:	Mrs. S. Islam, Adv.
For the Petitioner in WP(C) No.8189/2019	:	Mr. K.M. Hassan, Adv.
For the Petitioner in	:	Mr. M. Khan, Adv.
WP(C) No.8253/2019	:	Mr. J. Rahman, Adv.e
	:	Ms. K. Devi, Adv.
For the Petitioner in	:	Mr. H.R.A. Choudhury, Sr. Adv.
WP(C) No.1816/2020	:	Mr. H. Ali, Adv.
	:	Mr. J.M. Sulaiman, Adv.
For the Petitioner in	:	Mr. M. Khan, Adv.
WP(C) No.3514/2021	:	Mr. J. Rahman, Adv.
	:	Mr. R. Islam, Adv.

.....*Advocates*

For the Respondents	:	Mr. A. Kalita.
	:	Mr. J. Payeng. Special Counsel, Foreigners Tribunal.
	:	Mr. A.I. Ali,
	:	Mr. A. Bhuyan Standing Counsel, ECI.

: Ms. L. Devi,
: Mr. P.S. Lahkar,
Standing Counsel, NRC.

: Ms. U. Das,
Addl. Senior Govt. Adv., Assam.

: Mr. H. Gupta, CGC.
: Mr. A.K. Dutta, CGC.

.....*Advocates*

Dates of Hearing : 23.03.2022, 29.03.2022 & 06.04.2022

Date of Judgment : 28.04.2022

JUDGMENT AND ORDER (CAV)

[***N. Kotiswar Singh, J.***]

Heard Mr. B.C. Das, learned counsel for the petitioners in WP(C) No.2099/2018 and WP(C) No.2601/2018; Mr. A.R. Sikdar, learned counsel for the petitioner in WP(C) Nos.4610/2018, 8491/2018, 8493/2018, 822/2019; Mr. F.U. Barbhuiya, learned counsel for the petitioner in WP(C) No. 2239/2019; Mr. K.M. Hassan, learned counsel appearing for the petitioner in WP(C) No.8189/2019; Mr. M. Khan, learned counsel appearing for the petitioners in WP(C) No.8253/2019 & WP(C) No.3514/2021 and Mr. H. Ali, learned counsel for the petitioner in WP(C) No.1816/2020.

Also heard Mr. A. Kalita and Mr. J. Payeng, learned Special Counsel, Foreigners Tribunal for the State respondents; Mr. A.I. Ali,

learned Standing Counsel, ECI; Ms. U. Das, learned Additional Senior Govt. Advocate, Assam; Mr. A.K. Dutta, learned Central Government Counsel and Ms. L. Devi, learned Standing Counsel, NRC.

2. The common theme which runs through this batch of writ petitions is the applicability of the principle of *res judicata*.

The petitioners contend based on the decision in ***Abdul Kuddus Vs. Union of India, (2019) 6 SCC 604*** **[Abdul Kuddus** for short**]** that the subsequent proceedings before the Foreigners Tribunals challenged in these petitions are barred by *res judicata*. Though many such petitions have been already allowed by this Court on the basis of the decision in **Abdul Kuddus**, learned Special Counsel for the Foreigners Tribunal submits that the law laid down by this Court in ***Amina Khatoon Vs. Union of India, (2018) 4 Gau LR 643*** **[Amina Khatoon** for short**]** in which it was held that *res judicata* is not applicable in the proceeding before the Foreigners Tribunal will continue to hold the field, as the said decision has not yet been overruled by the Hon'ble Supreme Court till date. Neither it has been challenged before the Hon'ble Supreme Court so far.

3. The contention of the Special Counsel is based on the following premises.

3.1. It has been submitted that the issue before the Hon'ble Supreme Court in **Abdul Kuddus** was about the perceived conflict between sub-para (2) to Para 3 and Para 8 of the Schedule to the Citizenship (Registration of Citizens and Issue of National Identity Cards)Rules, 2003 (2003 Rules for short) which related to denial of registration by the NRC authorities and not relating to any decision of the Tribunal declaring any procedee to be a foreigner, and as such any observation

by the Hon'ble Supreme Court about *res judicata* is merely an *orbiter dicta* and the decision in **Abdul Kuddus** will be confined to the facts of the case.

It has been submitted that in the said case before the Hon'ble Supreme Court, no decision of the Foreigners Tribunal declaring a person to be a foreigner was challenged. On the other hand, the issue of *res-judicata* was pointedly decided by this Court in **Amina Khatoon** that *res-judicata* is not applicable in the proceedings before the Foreigners Tribunals. Further, applicability of *res judicata* before the Foreigners Tribunal was not the specific issue raised nor considered in **Abdul Kuddus.**

It has been also submitted that the judgment of **Amina Khatoon** was neither challenged nor brought to the notice of the Hon'ble Supreme Court. Thus, the decision in **Amina Khatoon** has remained unchallenged and as such, will continue to be binding and hold the field.

3.2. It has been further submitted that a Special Leave to Appeal No.19253 of 2018 was filed before the Hon'ble Supreme Court against a decision of this Court in ***Shahjahan Ali Vs. Union of India & Ors*****, [Writ Petition No. 3362 of 2018]** relying on the decision **Amina Khatoon** that the principle of *res judicata* is not applicable in a proceeding before the Foreigners Tribunal. The Hon'ble Supreme Court dismissed the said SLP. According to the learned Special Counsel, dismissal by the Hon'ble Supreme Court of the SLP preferred against decision in **Shahjahan Ali** (supra) affirms the decision rendered in **Amina Khatoon** that *res-judicata* is not applicable.

3.3. Further, relying on the decision of Hon'ble Supreme Court in ***Canara Bank vs. N.G. Subbaraya Setty and Anr. [(2018) 6 SCC 228]***, it has been submitted by Mr. Kalita that on many occasions, the Tribunals had erroneously given the opinions without proper application of mind and as such, the principle of *res judicata* will not apply in the subsequent proceedings.

3.4. It has been also contended by Mr. Kalita, based on the decision of Hon'ble Supreme Court in ***V. Rajeshwari (Smt) Vs. T.C. Saravanabava, [(2004) 1 SCC 551]*** that if the plea of *res judicata* is not raised at the first instance before the Foreigners Tribunals, the said plea cannot be allowed to be taken subsequently before this Court.

3.5. Ld. Special Counsel in submitting that *res judicata* is not applicable in a proceeding before the Foreigners Tribunal has reiterated the reasons on which this Court held in **Amina Khatoon** that the principle of *re judicata* is not applicable, including that the opinion of the Tribunal is merely an opinion which does not have a binding effect, that the Tribunal is not a Court and in view of the overarching public policy to detect and deport foreigners, such a public policy shall prevail over the principle of *res judicata.*

4. On the other hand, the learned counsel for the petitioners have forcefully argued that principle of *res judicata* are applicable relying on a number of decisions, apart from **Abdul Kuddus.** It has been submitted that the decision in **Amina Khatoon** is plainly contrary to several decisions of the Hon'ble Supreme Court and as such, cannot have a binding effect.

Some of the decisions relied upon by the counsel for the petitioners are as follows:

(i) ***Indian National Congress (I) Vs. Institute of Social Welfare***, (2002) 5 SCC 685.

(ii) ***Hope Plantations Ltd. Vs. Taluk Land Board Peermade & Anr.***, decided on 03.11.1998.

(iii) ***Satyadhyan Ghosal and Ors. Vs. Smst. Deorjin Debi and Anr***., AIR 1960 SC 941.

(iv) ***Sheodan Singh Vs. Daryao Kunwar (Smt),*** (1966) 3 SCR 300 : AIR 1966 SC 1332 ***Jaswant Singh and Anr. Vs. Custodian of Evacuee Property, New Delhi***, (1985) 3 SCC 648

(v) ***Jahir Ali Vs. Union of India and Ors.,*** 2021 (2) GLT 596

5. As we proceed to examine the rival contentions of the contesting parties, we would like to clarify that we are not undertaking any exercise of review of the order passed in **Amina Khatoon**. The decision in **Amina Khatoon** remains undisturbed as it is from our side.

It is the stand of the Special Counsel, Foreigners Tribunals that **Amina Khatoon** continues to hold the field and on the other hand, it is the contention of the petitioners that in view of the decision in **Abdul Kaddus** and other judgments of the Hon'ble Supreme Court, **Amina Khatoon** is not a good law any longer to be followed.

In order to examine whether the submission of the Ld. Special Counsel has merit or not, as to whether the law laid down by this Court in **Amina Khatoon** will continue to be applicable in proceedings before the Foreigners Tribunals, in spite of the order passed **Abdul Kuddus**, we will try to understand the decisions in **Amina Khatoon** and **Abdul Kuddus** in proper perspective.

While doing so, we have to examine the effect of **Abdul Kuddus**. If, on consideration of **Abdul Kuddus,** it is found that it is binding on us under Article 141 of the Consitution of India being a

decision rendered by the Hon'ble Supreme Court, it may not be necessary to refer to the various judgements relied upon by the petitioners.

Only when it is found that **Abdul Kuddus** does not decide the applicability of the principle of *res judicata* in the proceedings before the Foreigners Tribunals, the question of reassessing the applicability of the decision in **Amina Khatoon** may arise as claimed by the learned counsel for the petitioners, whether by way of review or by referring it to a larger Bench.

6. Decision in *Amina Khatoon* :

6.1. The specific issue framed in **Amina Khatoon** was whether an opinion rendered by a Foreigners Tribunal in respect of the same proceedee would be binding on another Foreigners Tribunal or the same Foreigners Tribunal following further or fresh reference made by the State.

6.2. In examining the said issue in **Amina Khatoon**, the Division Bench of this Court considered the argument in favour of applicability of *resjudicata* that, though section 11 of the Code of Civil Procedure, 1908 ('the Code') may not be strictly applicable to a proceeding before a Foreigners Tribunal, the spirit or principle underlying section 11 would govern a proceeding before a Foreigners Tribunal. It was submitted that principle of *res judicata* is based on public policy which has been recognized by the Hon'ble Supreme Court as held in ***Burn & Co.* v. *Employees*, AIR 1957 SC 38, *Workmen* v. *Straw Board Manufacturing Company*, (1974) 4 SCC 681** etc., in which it was held that it is a well-recognised principle in law that a decision once

rendered by a competent court on a matter in issue between the parties after a full enquiry should not be permitted to be re-agitated. It is on this principle, which is founded on sound public policy, that the rule of *res judicata* enacted in section 11 of the Code is based. It was observed that this principle is of universal application.

Another plea was also taken that, under paragraph 4 of the Foreigners (Tribunals) Order, 2006 (Foreigners Order), a Foreigners Tribunal has the power of a civil court in respect of summoning and enforcing attendance of any person and examining him on oath; requiring discovery and production of any document; and issuing commission for examination of any witness. Therefore, provisions of the Code would be applicable to a proceeding before a Foreigners Tribunal. Thus, principle of *res-judicata* as contained in the Code will be applicable.

6.3. The opposing submission of the State considered by the Division Bench of this Court in **Amina Khatoon** was that under section 3 of the Foreigners Act, 1946, power is vested on the Central Government to detect and deport foreigners. For administrative exigencies, Central Government delegated this power to the Superintendents of Police and deportation is executed by the Central Government. Under the Foreigners (Tribunals) Order, 1964 [Foreigners Order 1964 for short], the Superintendents of Police only seek an opinion from the Foreigners Tribunals. The ultimate decision *vis-a-vis* an illegal foreigner is taken by the referral authority, i.e., the Superintendents of Police and deportation is executed by the Central Government. A Foreigners Tribunal only renders an opinion. Therefore, it would be wrong to say that the Central Government or for that matter, Superintendents of

Police would be bound by the opinion of the Foreigners Tribunal. It was thus contended that a reference made to a Foreigners Tribunal is neither a *lis* nor a controversy; consequently, opinion rendered by a Foreigners Tribunal cannot be construed as a judgment.

Further, though the principle of *res judicata* may be based on public policy, detection and declaration of foreigners illegally residing in India concerns national security and is, therefore, a higher public policy. Thus, on the ground of higher public policy, principle of *res judicata* cannot be invoked to prevent the State from acting against an illegal foreigner notwithstanding an adverse opinion previously rendered by a Foreigners Tribunal.

6.4. On consideration of the aforesaid submissions, the Division Bench in **Amina Khatoon** observed that what discernible is that firstly, the principle of *res judicata* as engrafted in section 11 of the Code is operative in a court. Secondly, it relates to a suit or an issue between the same parties litigating under the same title; and thirdly, the suit or issue between the same parties was heard and finally decided by the court of competent jurisdiction. Section 11 of the Code is, *stricto senso*, applicable to a court trying a suit or an issue which was directly and substantially in issue in a former suit between the same parties litigating under the same title and which was finally heard and decided by the competent court.

6.5. The Division Bench in **Amina Khatoon** thereafter, proceeded to analyse the provisions of the Foreigners Act and held that under section 3 of the Foreigners Act, the power to deal with foreigners including the decision to remove a foreigner vests in the Central Government. As a matter of fact, citizenship, naturalization and aliens; admission into and

immigration and expulsion from India; passports and visas are subjects having entries in List-I, i.e., Union List under 7th Schedule to the Constitution of India. It was accordingly, held that for all intent and purpose, it is the Central Government which is the authority to deal with illegal migrants and issues relating to them, such as, detection and deportation.

6.6. It was also held that a proceeding before a Foreigners Tribunal is summary in nature as a Foreigners Tribunal is only required to render its opinion on the reference made to it as to whether the proceedee is a foreigner or not.

6.7. The Division Bench also noted that a proceeding before a Foreigners Tribunal is neither civil nor criminal notwithstanding the fact that for attendance of any person or examination of witnesses it has the powers of a civil court under the Code of Civil Procedure, 1908 and for issuing warrant of arrest against a proceedee for default, it has the powers of a Judicial Magistrate First Class. Therefore, it may not be wrong to say that a proceeding before the Foreigners Tribunal is *sui generis*.

6.8. The Division Bench further observed that a plea to transfer from one Foreigners Tribunal to another Foreigners Tribunal was rejected on the ground that it is not a Court, and provisions of section 24 of the Code of Civil Procedure, 1908 was not applicable**[*Mainul Haque* v. *Union of India*, 2018 (1) GLT 777].**

6.9. Referring to ***Bahaluddin Sheikh (Mohd.)* v. *Union of India*,** 2013 (3) GLT 264, it was also observed that jurisdiction of the civil court stands ousted.

6.10. The Division Bench also made a reference to the observations made in the Full Bench decision in ***State of Assam v. Moslem Mondal, 2013 SCC OnLine Gau 1 : (2013) 3 GLR 402 : 2013 (1) GLT 809*****,** that even if a finding is recorded in a writ petition in favour of a person who was declared an illegal migrant by the IMD Tribunal, State will not be precluded from proceeding afresh against such a person under the provisions of the Foreigners Act and the Foreigners (Tribunals) Order, 1964. The Division Bench accordingly, observed that the principle of *res judicata* would not be applicable in such situations.

6.11. The Division Bench in **Amina Khatoon** held that a reference made by a referral authority to a Foreigners Tribunal is neither a *lis* nor a controversy. And in contradistinction, an opinion rendered by a Foreigners Tribunal upon a reference made to it by the referral authority under paragraph 2(1) of the Foreigners Tribunals Order remains an opinion even after the Central Government acts on it and takes steps for expulsion of the declared foreigner under section 3 of the Foreigners Act based on such opinion. It does not change its character from opinion to judgment upon execution. It was also observed that as held in ***Mainul Hoque*** (*supra*), a Foreigners Tribunal assigned the task of rendering an opinion on a reference made to it by the Superintendent of Police (Border) is not a court. Therefore, a Member of Foreigners Tribunal is not a judge.

6.12. The Division Bench in **Amina Khatoon**, thus, held that an opinion rendered by a Foreigners Tribunal is not a judgment. Foreigners Tribunal is only to render an opinion on the reference made to it but the ultimate decision rests with the Central Government under section 3 of the Foreigners Act. If the Central Government or the

delegated authority, which in the case of Assam is the Superintendent of Police (Border), finds that the negative opinion rendered was contrary to the materials on record or there was no proper appreciation of the materials on record or if new materials emerge against a suspect or if the opinion of a Foreigners Tribunal is palpably wrong, the Central Government or the Superintendent of Police (Border) cannot be debarred from seeking a fresh opinion from a Foreigners Tribunal.

6.13. The Division Bench in **Amina Khatoon**, accordingly, took the view that having regard particularly to the fact that State of Assam is facing external aggression and security and integrity of the nation has been threatened on account of large scale illegal migration of foreigners from Bangladesh into Assam, to hold that principle of *res judicata* would be applicable to a proceeding under the Foreigners Act and the Foreigners (Tribunals) Order would be self-defeating and against the overarching public policy, i.e., to ensure national security and to protect the integrity of the nation.

6.14. It was, accordingly, held in **Amina Khatoon** that though the principle of *res judicata* is based on public policy, the same will stand subsumed under the overarching public policy governing a sovereign nation while dealing with illegal foreigners under the Foreigners Act and the Foreigners (Tribunals) Order.

7. Before us, the Ld. Special Counsel has reiterated the grounds on which the Division Bench in **Amina Khatoon** held that principle of *res judicata* is not applicable in proceedings before the Foreigners Tribunals, giving emphasis on the grounds that as the Foreigners Tribunals merely give "opinions" and not "judgments" and these are not legally binding on any authority. Thus, the "opinions" of the

Foreigners Tribunals, not being judgments, and since the Foreigners Tribunals are not "courts", this principle of *res-judicata* cannot be imported to the proceedings of the Foreigners Tribunals.

It has been also emphasised that influx of illegal immigrants from the neighbouring country being a cause of internal disturbance which virtually amounts to external aggression, as also noted by the Hon'ble Supreme Court in ***Sarbananda Sonowal v. Union of India, (2005) 5 SCC 665*****,** such legal principle should not come in the way of detection and deportation of foreigners.

8. Keeping the aforesaid in mind, we would examine what was decided by the Hon'ble Supreme Court in **Abdul Kuddus** as regards the issue of applicability of *res judicata* in the proceedings before the Foreigners Tribunals, and in what way **Abdul Kuddus** would be binding on us.

9. Decision in *Abdul Kuddus*:

9.1. Background and Issues involved:

The plea taken by the appellants in **Abdul Kuddus** was that a person declared a foreigner by a Foreigners Tribunal and whose name is also included in the citizenship registrar should be allowed to file an appeal against an adverse order by the NRC authority under Paragraph 8 of the Schedule to the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003, hereinafter referred as the "2003 Rules" denying registration.

9.2. Before we proceed, it may be apposite to refer briefly to the background of the special provisions of law applicable in the State of Assam relating to foreigners as relevant for our consideration.

9.3. Because of the peculiar historical reasons which led to a massive immigration of foreigners to Assam without proper and valid documents, it led to an unprecedented upheaval in the State of Assam protesting against illegal immigrants and demanding detection and deportation of illegal immigrants especially from the erstwhile East Pakistan and the present day Bangladesh popularly known as Assam Agitation. This resulted in inking of a landmark agreement between the Government of India and those spearheading the Assam Agitation for identification of foreigners and those who could be granted Indian citizenship and those who would be declared as foreigners who would be liable to be deported. This agreement led to the amendment of the Citizenship Act, 1955 by incorporating Section 6-A providing special provisions as to the citizenship of persons covered by the Assam Accord.

Without dwelling in detail of the provisions of Section 6-A, the salient features of the same may be noted.

Section 6-A identified broadly three categories of foreigners who entered Assam (India) in different periods of time, giving different status to them as follows.

> *Firstly,* those of Indian origin who came to Assam on or before the 1st day of January, 1966 to Assam from the "specified territory", i.e., territories included in Bangladesh (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 date of their entry into

Assam shall be deemed to be citizens of India as from the 1st day of January, 1966.

Secondly, such person of Indian origin who 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 has since the date of his entry into Assam, been ordinarily resident in Assam; and has been detected to be a foreigner, shall register with such authority.

Such a person from the date on which he has been detected to be a foreigner till the expiry of a period of ten years from that date, have the same rights and obligations as a citizen of India 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. He however, 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.

Thirdly, as regards those who enter Assam on or after 25th day of March, 1971, there is no such privilege granted, thereby, indicating that such persons will be declared illegal migrants or foreigners who would be liable to be deported.

9.4. Section 6-A (1) (e)of the Citizenship Act, 1955 provides that 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.

Explanation to Section 6-A (3) attaches great importance to the opinion of the Tribunal as regards the status of such persons. It provides that 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, if such opinion contains a finding with respect to such other requirement, decide the question in conformity with such finding of the Foreigners Tribunal and 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.

9.5. Apart from these special provisions relating to migrants coming to Assam and about citizenship, there are other statutory provisions relating to registration of citizens, as the 2003 Rules. In these 2003 Rules also, special provisions have been made for the State of Assam, by incorporating Rule 4-A.

Under Rule 4-A, the Central Government shall, for the purpose, of the National Register of Indian Citizens in the State of Assam, cause to carry out throughout the State of Assam for preparation of the National Register of Indian Citizens in the State of Assam by inviting applications from all the residents, for collection of specified particulars relating to each family and individual,

residing in a local area in the State including the citizenship status based on the National Register of Citizens 1951, and the electoral rolls up to the midnight of the 24th day of March, 1971.

Schedule to the aforesaid 2003 Rules lays down the modalities to deal with the applications so received from the persons seeking inclusion in the NRC, providing that those persons who had been declared as illegal migrants or foreigners by the competent authority shall not be eligible to be included in the consolidated list.

Paragraph 7 provides for publication of supplementary list for inclusion or deletion of names before the Registrar General of Citizens Registration publishes the final National Register of Indian Citizens in the State of Assam.

There is a provision for appeal under paragraph 8 that if any person is not satisfied with the outcome of the decisions of the claims and objections under paragraph 7, such a person can prefer an appeal before the designated Tribunal constituted under the Foreigners (Tribunals) Order, 1964.

9.6. From the above, what is evident is that the role of the Foreigners Tribunals come into play in two situations, one, under sub-para (2) of Para 3 of the Schedule to the 2003 Rules and secondly, under Para 8 of the Schedule to the aforesaid Rules, where the opinions of the Foreigners Tribunals become critical and decisive.

As discussed above, a person who enters Assam during the period of 01.01.1966 and 25.03.1971, against whom the Foreigners Tribunal has given an "opinion" of being a foreigner is entitled to get himself/herself registered with the competent authority and will become an Indian citizen of ten years of detention as a foreigner. Such

opinion is rendered by the Foreigners Tribunal on a reference being made by the competent authority.

It may be noted that as provided under Order 2 of the Foreigners (Tribunals) Order, 1964, the Central Government or the State Government or the Union territory administration or the District Collector or the District Magistrate may, by order, refer the question as to whether a person is a foreigner or not within the meaning of the Foreigners Act, 1946 to a Tribunal constituted for the said purpose, for its opinion.

Further, the registering authority appointed under sub-rule (1) of Rule 19 of the Citizenship Rules, 2009 may also 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.

It has been further provided under sub-order (1B) of Order 2 that any person referred to in paragraph 8 of the Schedule to the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 may prefer an appeal, on the terms and conditions specified therein, before the designated Tribunal constituted under this Order.

9.7. Thus, the aforesaid dual role of the Foreigners Tribunals is to be found in sub-para(2) of para 3 and para 8 of Schedule to the 2003 Rules.

Sub-para (2) of para 3 of the Schedule reads as follows:

> "3. Scrutiny of applications—
>
> (1) The scrutiny of applications received under sub-paragraph (3) of paragraph 2 shall be made by comparing the information stated in the application form with the official records and the persons, of whom the information is found in

> order, shall be eligible for inclusion of their names in the consolidated list.
>
> (2) The names of persons who have been declared as illegal migrants or foreigners by the competent authority shall not be included in the consolidated list:
>
> Provided that the names of persons who came in the State of Assam after 1966 and before the 25th March, 1971 and registered themselves with the Foreigner Registration Regional Officer and who have not been declared as illegal migrants or foreigners by the competent authority shall beeligible to be included in the consolidated list."

In the above referred sub-para (2), the reference to the "competent authority" is to the Foreigners Tribunal which is constituted under Foreigners (Tribunals) Order, 1964,to give its opinion when reference is made to it as to whether a person is a foreigner or not.

Para 8 of the Schedule to the 2003 Rules reads as follows:

> "8. Appeal—Any person, not satisfied with the outcome of the decisions of the claims and objections under paragraph 7, may prefer appeal, before the designated Tribunal constituted under the Foreigners (Tribunals) Order,1964, within a period of sixty days from the date of such order, and or the disposal of appeal by the Tribunals the names shall be included or deleted, as the case may be, in the National Register of Indian Citizens in the State of Assam."

Under Para 8 of the Schedule to the 2003 Rules, the said Foreigners Tribunal constituted under Foreigners (Tribunals) Order, 1964 has been identified as the appellate forum to consider any order that may be passed by the registering authority under Paragraph 7 of the Schedule.

9.8. Thus, the Foreigners Tribunal discharges original jurisdiction under sub-para (2) of Paragraph 3 of the Schedule to the 2003 Order, and under Paragraph 8 of the Schedule it discharges the function of an appellate authority. However, irrespective of the nature of the

jurisdiction whether original or appellate, the Foreigners Tribunal discharges similar functions.

Under sub-para (2) of Paragraph 3 of the Schedule to the 2003 Order, the function of the Foreigners Tribunal is to determine whether the person against whom reference is made, is a foreigner or not.

On the other hand, under Paragraph 8 of the Schedule Foreigners Tribunal, while discharging the function of an appellate tribunal, it decides whether the order passed by the registering authority in including or excluding the person in the consolidated list of citizens under the National Register of Indian Citizens in the State of Assam is correct or not. Since, a person who is a foreigner cannot be included in the said list, the finding by the Foreigners Tribunal in the form of the opinion is critical and determinative of the rights of the persons concerned to be included in the list.

Thus, though the Foreigners Tribunal discharges apparently different functions, in essence the function is of similar nature that is, to ascertain whether the person concerned is a foreigner or not.

9.9. It was in that context, the Hon'ble Supreme Court observed in Abdul Kuddus in the opening paragraph that the "order decides perceived conflict between sub-paragraph (2) of paragraph 3 and paragraph 8 of the Schedule to the Citizenship(Registration of Citizens and Issue of National Identity Cards)Rules, 2003 ("the 2003 Rules" for short)

9.10. In the said judgment of **Abdul Kuddus** (supra), the other issue considered by the Hon'ble Supreme Court was the alternative argument and suggestion of the appellants that the Hon'ble Supreme Court should by way of a judicial pronouncement and in exercise of Civil

Appeal arising out of SLP (C) No. 23127 of 2018 power under Article 142of the Constitution of India provide and create an appellate forum for deciding disputes regarding the citizenship status of persons residing in the State of Assam. However, we are not concerned with this second issue in the present proceeding.

10. Consideration by the Hon'ble Supreme Court in *Abdul Kuddus*:

10.1. The Hon'ble Supreme Court referred to the various provisions relating to citizenship, viz., Articles 5 to 9 of the Constitution. Hon'ble Supreme Court also referred to Section 14-A of the Citizenship Act which provides for compulsory registration of every citizen of India and issuance of national identity card. Thereafter, the Hon'ble Supreme Court examined the scope of Section 6-A of the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 Citizenship Act which dealt the methodology of registration which debars registration of those who are found or declared to be foreigners by the Foreigners Tribunals.

In that context, the Hon'ble Supreme Court observed in paras 11 and 12 of **Abdul Kuddus** that,

> **" 11.** It is obvious to us that the persons covered by sub-para (2) to Para 3 of the Schedule i.e. persons who have been declared to be illegal migrants or foreigners by the Competent Authority fall in a separate and distinct class and in such cases, no enquiry or investigation is required to be conducted in terms of sub-para (4). Such persons cannot, in terms of the specific language used in sub-para (2) to Para 3 of the Schedule, be included in the National Register of Citizens. The reason as is evident is that their citizenship status has already been determined by the Competent Authority. A person once declared an illegal migrant or a foreigner cannot claim or put forth a claim to the citizenship of India on the basis that he/she has been residing in the State of Assam.

> **12.** …… We would, however, reiterate that the said list(s) would not include name of the persons who have been declared illegal migrants or foreigners by the Competent Authority in terms of sub-para (2) to Para 3 of the Schedule. In other cases i.e. cases not covered by sub-para (2) to Para 3, the Local Registrar after considering the objections and claims has to prepare a supplementary list to be published under Para 7 of the Schedule for inclusion and deletion of names, as the case may be, and thereafter, a final list of National Citizens in the State of Assam."

10.2. The Hon'ble Supreme Court, thereafter, examined the provisions of Foreigners (Tribunals) Order, 1964 issued under Section 3 of the Foreigners Act, 1946 and the Foreigners Tribunals constituted under these Orders to decide whether a person is a foreigner or not within the meaning of Foreigners Act. The Hon'ble Supreme Court thereafter referred to the two decisions in ***Sarbananda Sonowal* v. *Union of India*** **[*Sarbananda Sonowal* v. *Union of India*, (2005) 5 SCC 665]** ("***Sonowal (1)***", for short), wherein it was held that the procedure prescribed for the Tribunals constituted under the 1964 Order was just, fair and reasonable and struck down provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 ("the IMDT Act", for short) as ultra vires the Constitution of India, primarily on the ground that the offending Act did not contain any provision similar to Section 9 of the Foreigners Act which stipulates that the burden of proof as to whether any person is or is not a foreigner lies upon the said person notwithstanding anything contained in the Indian Evidence Act, 1872.

The Hon'ble Supreme Court also noted the observation made in ***Sonowal (1)*** about the large scale influx in the State of Assam dubbing it to be an external aggression and causing internal disturbance.

10.3. After the IMDT Act was struck down, the Central Government made the Foreigners (Tribunals) Amendment Order, 2006 which however, was struck down in ***Sarbananda Sonowal (2)*** **v.** ***Union of India*****, [(2007) 1 SCC 174]** ["***Sonowal (2)***", for short] on the ground that it suffered from similar defects as were found in the IMDT Act and as a consequence, Foreigners (Tribunals) Order, 1964 was revived and proceedings against the suspected foreigners began to be examined by the Foreigners Tribunals constituted under the 1964 Order and by following the procedures laid thereunder.

10.4. The Hon'ble Supreme Court then referred to Para 3 of the amended 1964 Order, viz., the Foreigners (Tribunals) Amendment Order, 2012, which provides for procedure for disposal of question, on which basis, it was urged by the appellants that an order of the Foreigners Tribunal is an executive order which merely renders an opinion, which cannot be equated with a judgment. It was also submitted that the opinion formed by the Foreigners Tribunal being an executive order would not operate as *res judicata*.

It was also submitted that there were instances where persons who had been declared foreigners under the Foreigners Act have been included in the draft National Register of Citizens for the State of Assam, while other siblings and close blood relations of such persons have been named in the draft National Register of Citizens. Under such circumstances, it was contended that an aggrieved person should be entitled to invoke the appellate provision under Para 8 of the Schedule to the 2003 Rules to challenge such orders passed by the registering authority and also the opinion of the Foreigners Tribunals.

In that context, the Hon'ble Supreme Court observed as follows under para 21:

> **"21.** Referring to the above amended provisions, it is urged on behalf of the appellants that an order of the Foreigners Tribunal is an executive order which renders an opinion and therefore, it cannot be equated with a judgment. Summary opinion of the Foreigners Tribunal, it is submitted, is not a detailed order and hence, is not a decision or judgment. Based on the said submission, it is argued that the opinion formed by the Foreigners Tribunal is not an order of the Competent Authority for the purposes of sub-para (2) to Para 3 of the Schedule to the 2003 Rules. Further, the opinion formed by the Foreigners Tribunal being an executive order would not operate as res judicata. It is highlighted that in some cases, persons who have been declared to be a foreigner under the Foreigners Act have been included in the draft National Register of Citizens for the State of Assam, while in others siblings and close blood relations of such persons have been named in the draft National Register of Citizens. It is averred that in these cases of contradictions, an aggrieved person should be entitled to take recourse to Para 8 of the Schedule to the 2003 Rules."

10.5. The Hon'ble Supreme Court rejected those contentions and held that the Competent Authority referred to in sub-para (2) to Para 3 of the Schedule would be, without a doubt, be the Tribunal constituted under the Foreigners Act i.e. the 1964 Order.

The Hon'ble Supreme Court thereafter, examined the scope of the procedure prescribed by the post 2012 amendment under the 1964 Order,noting that it complies with the principles of natural justice, by referring to provisions for reasonable opportunity to be given to the proceedee and to produce evidence, including by way of examination of witnesses. The Hon'ble Supreme Court while noting that the Rules do not require that an opinion of the Tribunal to be a detailed judgment, nevertheless, held that it must indicate the facts and reasons for coming to such conclusions.

The Hon'ble Supreme Court then held that such an opinion of the Foreigners Tribunals is a decision and an order. It was also held that the opinion by the Foreigners Tribunal is a quasi-judicial order and not an administrative order as the determination by it has civil consequences. In that regard, the Hon'ble Supreme Court referred to the decision in ***Indian National Congress (I)*** **v.** ***Institute of Social Welfare,*** **(2002) 5 SCC 685**, wherein it was held that when any body of persons has a legal authority to determine questions affecting the rights of subjects and a duty to act judicially, such body of persons constitute a quasi-judicial body and decision given by them is a quasi-judicial decision. It was held that it is not only when a *lis* between two contesting parties is decided, but also when the decision prejudicially affects the subject as against the authority, provided that the authority is required by the statute to act judicially, it can be considered to be a quasi-judicial body. The Hon'ble Supreme Court then distinguished between an administrative act from the quasi-judicial act by clarifying that a quasi-judicial body is required to make an enquiry before arriving at a conclusion. In addition, an administrative authority is the one which is dictated by policy and expediency whereas a quasi-judicial authority is required to act according to the rules. [See Para 23 of **Abdul Kuddus**].

11. Conclusion and decision of the Hon'ble Supreme Court in ***Abdul Kuddus*****:**

11.1 The Hon'ble Supreme Court then proceeded to observe that the opinion of the Foreigners Tribunal would operate as *res judicata*, in the following words,

> **"24.** The opinion/order of the Tribunal, or the order passed by the Registering Authority based upon the opinion of the Foreigners

> Tribunal, as the case may be, can be challenged by way of writ proceedings. Thus, it would be incorrect to hold that the opinion of the Foreigners Tribunal and/or the consequential order passed by the Registering Authority would not operate as res judicata. Both the opinion of the Tribunal and the order of the Registering Authority result in determination of rights/status under the statute and by an authority after a contest on the merits which would necessarily operate as a bar to subsequent proceedings before the same authority for redetermination of the same issue/question. This Court in *Ujjam Bai* v. *State of U.P.* [*Ujjam Bai* v. *State of U.P.*, AIR 1962 SC 1621] has held that the principles of res judicata equally apply to quasi-judicial bodies. Whenever a judicial or quasi-judicial tribunal gives a finding on law or fact, its findings cannot be impeached collaterally or in a second round and are binding until reversed in appeal or by way of writ proceedings. The characteristic attribute of a judicial act or decision is that it binds, whether right or wrong. Thus, any error, either of fact or law, committed by such bodies cannot be controverted otherwise by way of an appeal or a writ unless the erroneous determination relates to the jurisdictional matter of that body."

11.2. Having held that the principle of *res judicata* are applicable, the Hon'ble Supreme Court rejected the contention of the appellants therein that a person is entitled to go for a second round of litigation before the Foreigners Tribunals in spite of an earlier opinion to the contrary in the following words,

> **"26.** When we apply general principles of res judicata, the contention of the appellants that the person concerned should be permitted to double-dip and be entitled to a second round of litigation before the Foreigners Tribunal notwithstanding the earlier opinion expressed by the Foreigners Tribunal is far-fetched, and completely unacceptable. The plea is fallacious and has no merit. This contention therefore must be rejected and fails."

11.3. However, as regards the differing views of the Foreigners Tribunals in cases of near family members, the Hon'ble Supreme Court held that principle of *res judicata* would not apply to separate proceedings even if against two closely related but different persons, as each case has to be strictly decided on the facts and evidence on

record. Further, an aggrieved person would have liberty to invoke writ jurisdiction, or if necessary, review jurisdiction before the High Court or this Court to ensure that no injustice is done. The Hon'ble Supreme Court also clarified that any order passed in case of close family members, subsequent to adjudication order determining the citizenship status of a person, would be a material evidence which can be duly taken note of and considered while deciding a writ petition or a review application. [See para 28 of **Abdul Kuddus**].

11.4. The Hon'ble Supreme Court thus affirmed that where the Tribunal constituted under the 1964 Order has already adjudicated upon and decided the issue as to whether the person is an Indian National or a foreigner, an appeal would not be maintainable under Para 8 of the Schedule to the 2003 Rules. The determination by the Foreigners Tribunal would be final and binding on the Registering Authority and the Local Registrar under the Schedule. It was held that Para 8 does not envisage and provide for a second round of litigation before the same authority i.e. the Foreigners Tribunal constituted under the 1964 Order on and after preparation of the final list. It was clarified that provisions of Para 8 of the Schedule to the 2003 Rules will apply when there has not been an earlier adjudication and decision by the Foreigners Tribunal.

In our view, the Hon'ble Supreme Court has, thus, authoritatively decided that once a Foreigners Tribunal constituted under Order 1964 has determined the nationality status of a person, that would be final and decisive and it cannot be re-agitated through another round of litigation even when seeking to challenge an adverse order under Paragraph 8 of the Schedule to the 2003 Order before the

Foreigners Tribunal, which also acts as the appellate forum. The earlier determination by the Foreigners Tribunal on the issue of being a foreigner of person will be binding in subsequent proceedings and cannot be reopened.

11.5. The findings and conclusions of the Hon'ble Supreme Court are recorded in paragraph no. 29 of **Abdul Kuddus** which are reproduced herein below.

> "**29.** In view of the aforesaid findings, it has to be held that Para 8 of the Schedule to the 2003 Rules which gives a right to appeal before the Tribunal under the 1964 Order would apply only if and, in those cases, where the Tribunal constituted under the 1964 Order has not already adjudicated upon and decided the issue as to whether the person is an Indian National or a foreigner. In other words, where the issue and question of nationality has already been determined under the 1964 Order, an appeal would not be maintainable under Para 8 of the Schedule to the 2003 Rules. The determination would be final and binding on the Registering Authority under the Schedule and the Local Registrar. Para 8 does not envisage and provide for a second round of litigation before the same authority i.e. the Foreigners Tribunal constituted under the 1964 Order on and after preparation of the final list. Provisions of Para 8 of the Schedule to the 2003 Rules will apply when there has not been an earlier adjudication and decision by the Foreigners Tribunal."

12. It is to be noted that when the Hon'ble Supreme Court rendered the aforesaid judgment, the decision rendered by this Court in **Amina Khatoon** was not brought to the notice of the Hon'ble Supreme Court. This, however, in our view, will not make any difference in as much as the decision of the Hon'ble Supreme Court on any question of law will prevail over any decision of the High Court on the same issue.

13. In ***Jigya Yadav v. CBSE*, (2021) 7 SCC 535**, certain issue arose regarding the power and jurisdiction of the High Courts in directing statutory bodies like the Central Board of Secondary Education (CBSE) to make corrections in the certificates issued by the Board, in

which regard, there were different views expressed by the Hon'ble Supreme Court and the High Court of Kerala. In that context it was held by the Hon'ble Supreme Court that the view of the Hon'ble Supreme Court will prevail over any decision of the High Court.

It was held (in *Jigya Yadav*) as follows:

> "187. Before proceeding further, we must briefly note that the dictum of this Court in *Mohd. Sarifuz Zaman* [*Board of Secondary Education of Assam* v. *Mohd. Sarifuz Zaman*, (2003) 12 SCC 408 : 5 SCEC 432] has been relied upon by the Board to contend that it prohibits any change in contravention of the bye-laws as it does not recognize any legal right to claim such changes beyond the prescribed conditions. It has also been asserted that *Mohd. Sarifuz Zaman* [*Board of Secondary Education of Assam* v. *Mohd. Sarifuz Zaman*, (2003) 12 SCC 408 : 5 SCEC 432] and *Subin Mohammed* [*Subin Mohammed S.* v. *Union of India*, 2015 SCC OnLine Ker 39731 : (2016) 1 KLT 340] contradict each other. Whether the two judgments are in conflict with each other is an examination that is not called for. For, we have not placed any reliance upon *Subin Mohammed* [*Subin Mohammed S.* v. *Union of India*, 2015 SCC OnLine Ker 39731 : (2016) 1 KLT 340] for deciding this case and also because *Mohd. Sarifuz Zaman* [*Board of Secondary Education of Assam* v. *Mohd. Sarifuz Zaman*, (2003) 12 SCC 408 : 5 SCEC 432] is a judgment of this Court as against *Subin Mohammed* [*Subin Mohammed S.* v. *Union of India*, 2015 SCC OnLine Ker 39731 : (2016) 1 KLT 340] is a judgment of the Kerala High Court. It requires no reiteration that even if a conflict exists, the judgment of this Court must prevail under all circumstances unless there is another judgment of larger Bench of this Court which takes a different view."
>
> (emphasis added)

14. Thus, the view of the Hon'ble Supreme Court on the issue of *res judicata* will prevail over the view of this High Court.

We will examine this aspect from another perspective.

As far as the decision of this Court in **Amina Khatoon** is concerned, on the issue of *res judicata*, it is quite clear that, this Court held that this principle is not applicable in the proceedings before the Foreigners Tribunals. But the question is, whether it can still be a good

law in the light of the decision of the Hon'ble Supreme Court in **Abdul Kuddus.** Thus, we may examine as to what is the ratio decidendi of the decision in **Abdul Kuddus** which will be binding on us as a precedent and with regard to the law under Article 141 of the Constitution, so as to override the decision of our High Court in **Amina Khatoon.**

15. As to what is ratio decidendi and what amounts to precedents have been explained in ***Dalbir Singh v. State of Punjab*, (1979) 3 SCC 745** in the following words:

> **"22.** …… According to the well-settled theory of precedents every decision contains three basic ingredients:
>
> "(*i*) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;
>
> (*ii*) statements of the principles of law applicable to the legal problems disclosed by the facts; and
>
> (*iii*) judgment based on the combined effect of (*i*) and (*ii*) above."
>
> For the purposes of the parties themselves and their privies, ingredient (*iii*) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredient (*ii*) is the vital element in the decision. This indeed is the ratio decidendi. [R.J. Walker & M.G. Walker : The English Legal System. Butterworths, 1972, 3rd Edn., pp. 123-24] It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of *Qualcast (Wolverhampton) Ltd*. v. *Haynes* [LR 1959 AC 7 43 : (1959) 2 All ER 38] it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts of an earlier case

appear to be identical to those of the case before the court, the judge is not bound to draw the same inference as drawn in the earlier case."

15.1. This doctrine of precedence and the ratio decidendi of a case have been also elucidated in ***Krishena Kumar v. Union of India*, (1990) 4 SCC 207** as follows:

> **"19.** The doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain "propositions wider than the case itself required". This was what Lord Selborne said in *Caledonian Railway Co.* v. *Walker's Trustees* [(1882) 7 App Cas 259 : 46 LT 826 (HL)] and Lord Halsbury in *Quinn* v. *Leathem* [1901 AC 495, 502 : 17 TLR 749 (HL)] . Sir Frederick Pollock has also said : "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision."
>
> **20.** In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th edn., Vol. 26, para 573)
>
> > "The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio

decidendi of the case. If more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi."

15.2. In similar lines, how to ascertain ratio decidendi of a judgment has been explained in ***Arasmeta Captive Power Co. (P) Ltd. v. Lafarge India (P) Ltd.*, (2013) 15 SCC 414** as follows:

> "**31.** At this juncture, we think it condign to refer to certain authorities which lay down the principle for understanding the ratio decidendi of a judgment. Such a deliberation, we are disposed to think, is necessary as we notice that contentions are raised that certain observations in some paragraphs in *SBP* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] have been relied upon to build the edifice that latter judgments have not referred to them.
>
> xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
>
> **35.** In *State of Orissa* v. *Mohd. Illiyas* [(2006) 1 SCC 275 : 2006 SCC (L&S) 122] it has been stated thus: (SCC p. 282, para 12)
>
> > "*12.* … According to the well-settled theory of precedents, every decision contains three basic postulates: (*i*) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (*ii*) statements of the principles of law applicable to the legal problems disclosed by the facts; and (*iii*) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment."
>
> **36.** In *Islamic Academy of Education* v. *State of Karnataka* [(2003) 6 SCC 697] the Court has made the following observations: (SCC p. 719, para 2)
>
> > "*2.* … The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. *In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment*."

(emphasis supplied)

16. Keeping in mind the above principles, if we examine carefully the decision in **Abdul Kuddus,** it can be noticed that the plea raised before the Hon'ble Supreme Court was that the Foreigners Tribunal is an administrative body and the order of the Foreigners Tribunals is an executive order and cannot be equated with a judgment and as such it cannot operate as *res judicata*. It was, accordingly, contended that even if a person had been declared a foreigner by the Foreigners Tribunal and if a person has not been included in the draft National Register of Citizens by an order passed by the registering authority under Paragraph 7 of the Schedule, any such aggrieved person can file an appeal under Paragraph 8 of the Schedule before the Foreigners Tribunal challenging the earlier opinion of the Foreigners Tribunal.

As discussed above, the Hon'ble Supreme Court after considering the various facets of the relevant and special provisions of law relating to citizenship in the State of Assam, including Section 6-A of the Citizenship Act, 1955, Section 3 of the Foreigners Act, 1946, Foreigners (Tribunals) Order, 1964, National Register of Citizens, 1951, Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003, etc. rejected such contentions by holding that the Foreigners Tribunal is a quasi-judicial body and the order passed by the Foreigners Tribunals is "quasi-judicial order" which is a verdict in writing which determines and decides contesting issues and question by a forum other than a court and the determination has civil consequences.

The Hon'ble Supreme Court further referring to the decision in **Ujjam Bai** (supra) held that principle of *res judicata* equally apply to

quasi-judicial bodies and when such finding is rendered by a quasi-judicial body, such a decision cannot be challenged collaterally or in a second round and are binding until reversed in appeal or by way of writ proceedings.

It may be also mentioned that the Hon'ble Supreme Court while deciding **Abdul Kuddus,** extensively discussed the provisions of Foreigners (Tribunals) Order, 1964 under which the Foreigners Tribunals are constituted and render their opinions on references being made. The opinion of the Foreigner Tribunal is critical for considering the claim of such persons who have entered Assam during the period of 01.01.1966 and 25.03.1971 who are given the benefit of registration to be treated as Indian citizens.

The Hon'ble Supreme Court also held that opinion/decision of the Foreigners Tribunal in terms of the *Explanation* to Section 6-A of the Citizenship Act is final and binding and such decisions have to be given primacy.

The Hon'ble Supreme Court also made it clear that the "Competent Authority" mentioned in sub-para (2) to Para 3 of the Schedule to the 2003 Order is the Tribunal constituted under the Foreigners Act, i.e., 1964 Order.

17. Thus, according to us, there cannot be any iota of doubt that the Foreigners Tribunals whose opinion is binding and in respect of which *res judicata* will be applicable as held in **Abdul Kuddus** is the same Foreigners Tribunal whose attributes were considered by this Court in **Amina Khatoon.**

In our view, most of the grounds on which this Court in **Amina Khatoon** held that *res judicata* will not apply have been rendered otiose by the reasons given in **Abdul Kuddus.**

18. As discussed above, the Division Bench in **Amina Khatoon** took the view that a proceeding before a Foreigners Tribunal is neither civil nor criminal and a reference made by a referral authority to a Foreigners Tribunal is neither a *lis* nor a controversy. Further, an opinion rendered by a Foreigners Tribunal upon a reference made to it by the referral authority under paragraph 2(1) of the Foreigners Tribunals Order remains an opinion even after the Central Government acts on it and takes steps for expulsion of the declared foreigner under Section 3 of the Foreigners Act based on such opinion. It does not change its character from opinion to judgment upon execution. The Division Bench, accordingly, held that an opinion rendered by a Foreigners Tribunal is not a judgment.

The Hon'ble Supreme Court has however, taken a contrary view as discussed above, that the Foreigners Tribunal is a quasi judicial body and even though there may not be a *lis* between two contesting parties, nevertheless, its decision can prejudicially affect the subject as against the authority and the Tribunal is required to act judicially. Hence its opinion is a decision and an order which is final and binding. This view effectively demolishes the view of the High Court that the opinion of the Foreigners Tribunals is merely an opinion and remains so even after it is acted upon. The quintessential characteristic of an opinion is its non bindingness. According to the Division Bench in **Amina Khatoon**, opinion of the Foreigners Tribunal is not binding on the authorities. The authorities may or may not accept it. On the other

hand, the Hon'ble Supreme Court in **Abdul Kuddus** discarded the said view by ascribing finality on the opinion. It held that such opinion is final and binding [**See** para 22].

The Hon'ble Supreme Court, accordingly, held that the principle of *res judicata* will be applicable to the proceedings before the Tribunal.

The aforesaid view of the Hon'ble Supreme Court was arrived at after an exhaustive discussion of the relevant law governing the powers and functions of the Tribunals and other authorities who are to act on such opinions.

19. In our view the ratio decidendi of **Abdul Kuddus** is that principle of *res judicata* will be applicable to the proceedings before the Foreigners Tribunals and as such, the contrary decision of this Court in **Amina Khatoon** will no more be good law and such view will be denuded of its precedential value will be deemed to be oversaid by **Abdul Kuddus** and we will be bound by the decision in **Abdul Kuddus** and not by **Amina Khatoon** on issue**.**

20. There is yet another reason why the Division Bench of this Court in **Amina Khatoon** held that the principle of *res judicata* will not be applicable. Emphasising that the State of Assam is facing external aggression and security and integrity of the nation has been threatened on account of large scale illegal migration of foreigners from Bangladesh into Assam, the Division Bench held that to hold that the principle of res judicata would be applicable to a proceeding under the Foreigners Act and the Foreigners (Tribunals) Order would be self-defeating and against the overarching public policy, i.e., to ensure national security and to protect the integrity of the nation.

In this regard, one may also note that the Hon'ble Supreme Court was also conscious of this historical fact and made a specific reference to this serious problem in paragraph 16 of the judgment in **Abdul Kuddus.** It was observed as follows:

> **"16.** Referring to the factual data reflecting discernible illegal migration threatening the demographic structure of the area, resultant outbreak of insurgency in Assam and other concomitant dimensions that had greatly undermined the national security, duty of the Union Government under Article 355 of the Constitution to protect the State against external aggression and internal disturbance, it was held that the word "aggression" is a word of very wide import and would include influx of foreigners who had illegally migrated. Reference was also made to the Memorandum of Settlement between the Government of India and All India Students Union and the State of Assam. In para 33 in *Sarbananda Sonowal (1)* [*Sarbananda Sonowal* v. *Union of India*, (2005) 5 SCC 665] acknowledging the role of the Tribunals constituted under the 1964 Order, it was observed: (SCC p. 697)……."

20. The Hon'ble Supreme Court though cognisant of the aforesaid problem did not apply any such doctrine of overarching value subsuming other values as invoked by the High Court in **Amina Khatoon**. The Division Bench of this Court held that though the principle of res judicata is based on public policy, the same will stand subsumed under the overarching public policy governing a sovereign nation while dealing with illegal foreigners under the Foreigners Act and the Foreigners (Tribunals) Order.

Though, we are not reviewing the order passed by a co-ordinate Bench of this Court in **Amina Khatoon** nor are we sitting in appeal against it but revisiting it in the light of the decision in **Abdul Kuddus,** which in our opinion overrules the ratio in **Amina Khatoon**, we can make only a passing observation that if any public policy is judicially

determined to be of overarching nature so as to override other equally well established judicial norms, it can lead to serious consequences. In our view, the judiciary is perhaps not well suited to determine which particular policy will have an overarching value over others. Such an approach can best be adopted by the law making authority or the legislature. We are aware of many changes made in the well-established principles of law. Presumption of innocence forms the bedrock of our criminal justice system and burden of proof is always on the prosecution to establish the guilt of the accused. Yet departures to this principle have been made by making necessary changes in law, viz., Section 304B IPC under which, where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Thus, in such circumstances, the burden is shifted to the accused to prove that he did not cause her death. Similarly, under Section 35 of the NDPS Act, there is a presumption of culpable mental state and under Section 54, there is also a presumption unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of offences mentioned therein.

Section 29 of the POCSO Act provides that when a person is prosecuted for committing an offence of sexual assault against a minor, the Special Court trying the case shall presume the accused to be guilty. The accused then has to rebut the presumption.

In the Foreigners Act, 1955, Section 9 of the statute requires that the burden of proof that a person is not a foreigner is on the person charged and not on the prosecution.

Therefore, it would be understandable, if such overriding effect is ordained by statute and by the legislature, rather than by a judicial order as sought to be done in **Amina Khatoon** that principle of *res judicata* will not be applicable to the proceedings before the Foreigners Tribunal. In our opinion, such eclipse of the well-established principle of law would lie within the domain of the legislature by make appropriate laws in that regard. Thus, the principle of *res judicata* which is well entrenched and has taken a firm root in our jurisprudence could be denuded of its applicability to Foreigners Tribunals by a legislation only, if at all permissible.

21. There is yet another issue which would require certain clarification. It has been submitted by the learned Special Counsel that an SLP filed against a decision of this Court in **Shahjahan Ali** (supra) based on the decision **Amina Khatoon** (supra) that principle of *res-judicata* is not applicable in a proceeding before the Foreigners Tribunal was dismissed by the Hon'ble Supreme Court thus affirming the decision rendered in **Amina Khatoon** (supra) that *res judicata* is not applicable.

22. We have gone through the order dated 02.08.2018 passed in the SLP, which is a non-speaking order, which reads as follows:

> "Heard the learned counsel for the petitioner and perused the relevant material.
>
> Application for exemption from filing OT is allowed.
>
> We find no ground to interfere.
>
> The Special Leave Petition is accordingly dismissed."

23. As to the effect of dismissal of the special leave petition *in limine*, it has been held by the Hon'ble Supreme Court that it does not mean that the reasoning of the judgment of the High Court against which the special leave petition has been filed before the Hon'ble Supreme Court stands affirmed.

The Hon'ble Supreme Court in ***Fuljit Kaur v. State of Punjab*, (2010) 11 SCC 455** held that,

> **"7.** There is no dispute to the settled proposition of law that dismissal of the special leave petition in limine by this Court does not mean that the reasoning of the judgment of the High Court against which the special leave petition has been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that this Court did not consider the case worth examining for the reason, which may be other than merit of the case. Nor such an order of this Court operates as res judicata. An order rejecting the special leave petition at the threshold without detailed reasons therefore does not constitute any declaration of law or a binding precedent. [Vide *Workmen* v. *Cochin Port Trust* [(1978) 3 SCC 119 : 1978 SCC (L&S) 438 : AIR 1978 SC 1283] , *Ahmedabad Mfg. & Calico Printing Co. Ltd.* v. *Workmen* [(1981) 2 SCC 663 : 1982 SCC (L&S) 36 : AIR 1981 SC 960] , *Indian Oil Corpn. Ltd.* v. *State of Bihar* [(1986) 4 SCC 146 : 1986 SCC (L&S) 740 : AIR 1986 SC 1780] , *Hon'ble Supreme Court Employees' Welfare Assn.* v. *Union of India* [(1989) 4 SCC 187 : 1989 SCC (L&S) 569 : AIR 1990 SC 334] , *Yogendra Narayan Chowdhury* v. *Union of India* [(1996) 7 SCC 1 : 1996 SCC (L&S) 362 : AIR 1996 SC 751] , *Union of India* v. *Sher Singh* [(1997) 3 SCC 555 : AIR 1997 SC 1796] , *V.M. Salgaocar & Bros. (P) Ltd.* v. *CIT* [(2000) 5 SCC 373 : AIR 2000 SC 1623] , *Saurashtra Oil Mills Assn.* v. *State of Gujarat* [(2002) 3 SCC 202 : AIR 2002 SC 1130] , *Union of India* v. *Jaipal Singh* [(2004) 1 SCC 121 : 2004 SCC (L&S) 12] and *Y. Satyanarayan Reddy* v. *Mandal Revenue Officer* [(2009) 9 SCC 447 : (2010) 1 SCC (Cri) 1] .]"

24. Further, it also well settled that an order rejecting the special leave petition at the threshold without detail reasons does not

constitute any declaration of law or binding precedent under Article 141 of the Constitution.

In this regard one may refer to the following decisions.

(i)*Punjab v. Davinder Pal Singh Bhullar*, (2011) 14 SCC 770

> **"113.** A large number of judicial pronouncements made by this Court leave no manner of doubt that the dismissal of the special leave petition in limine does not mean that the reasoning of the judgment of the High Court against which the special leave petition had been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that this Court did not consider the case worth examining for a reason, which may be other than the merit of the case. An order rejecting the special leave petition at the threshold without detailed reasons, therefore, does not constitute any declaration of law or a binding precedent."

(ii) *State of Orissa v. Dhirendra Sundar Das*, (2019) 6 SCC 270

> **"9.27.** It is a well-settled principle of law emerging from a catena of decisions of this Court, including *Hon'ble Supreme Court Employees' Welfare Assn.* v. *Union of India* [*Hon'ble Supreme Court Employees' Welfare Assn.* v. *Union of India*, (1989) 4 SCC 187, paras 22 and 23 : 1989 SCC (L&S) 569] and *State of Punjab* v. *Davinder Pal Singh Bhullar* [*State of Punjab* v. *Davinder Pal Singh Bhullar,* (2011) 14 SCC 770, paras 112 and 113 : (2012) 4 SCC (Civ) 1034 : (2012) 4 SCC (Cri) 496 : (2014) 1 SCC (L&S) 208] , that the dismissal of an SLP *in limine* simply implies that the case before this Court was not considered worthy of examination for a reason, which may be other than the merits of the case. Such *in limine* dismissal at the threshold without giving any detailed reasons, does not constitute any declaration of law or a binding precedent under Article 141 of the Constitution."

25. Further, it may be noted that the order dismissing the SLP was passed on 02.08.2018, whereas the reasoned decision of the Hon'ble Supreme Court in **Abdul Kuddus** was rendered subsequently on

17.05.2019. Therefore, there cannot be an iota of doubt that the subsequent reasoned decision will hold the field.

26. For the reasons discussed above, there is absolutely no merit in the contention of the Special Counsel for the State that since the decision in **Amina Khatoon** has not been challenged nor overruled by the Hon'ble Supreme Court, it will continue to hold field as regards applicability of principle of *res judicata*, as the decision of the Hon'ble Supreme Court in **Abdul Kuddus** will hold the field which is binding on us, as the law under Article 141 of the Constitution and any decision this High Court or for that matter any other High Court to the contrary, can no longer be a good law.

Principle of *res judicata* will be applicable to the proceedings before the Foreigners Tribunals where the same person has been proceeded again. However, in other cases, where there may be conflicting opinions of the Foreigners Tribunals in respect of family members, the Hon'ble Supreme Court clarified that such opinions could be material evidences for considering the claims as observed in para 28 of **Abdul Kuddus,** as reproduced below:

> **"28.** It was highlighted that there could be contradicting decisions/opinions of the Foreigners Tribunal even in cases of near family members, albeit contradictions can be avoided when "family tree hearings" are held as is now being undertaken. In the absence of joint decisions, conflict is possible as the principle of res judicata would not apply to separate proceedings even if against two closely related but different persons, as each case has to be strictly decided on the facts and evidence on record. Secondly, there is a possibility that some/one of the near family members may have migrated to India prior to midnight of 24-3-1977 and, therefore, fall in a different category. Any such conflict, however, would not compel us to take a different view, in terms of the clear statutory provisions. In a given case, the person aggrieved would have liberty to invoke writ jurisdiction, or if necessary, review

> jurisdiction before the High Court or this Court to ensure that no injustice is done. Any order passed in case of close family members, subsequent to adjudication order determining the citizenship status of a person, would necessarily be a material evidence which can be duly taken note of and considered while deciding a writ petition or a review application."

27. As regards the contention of Mr. Kalita that many a times the Tribunals erroneously give opinions without proper application of mind and without assigning any reasons and as such the principle of *res judicata* will not applicable, we do not find any merit for the reason that if the opinion of the Tribunal suffers from such defects, the Union/State Government can always challenge the same before the High Court under Article 226, as the aggrieved persons have done.

28. As far as the contention of Mr. Kalita that if the plea of *res judicata* is not raised before the Tribunal at the first available instance, such a plea cannot be raised before the High Court, there cannot be any dispute about the said proposition of law. The proceedee if already declared an Indian by a Tribunal should bring to the notice of the Tribunal in the subsequent proceeding about any such earlier opinion given by the Tribunal. If the person is already declared not a foreigner, the need to proceed against such a person again does not arise and if done, the same can be disallowed. On the other hand, we wonder why any proceedee should not mention about any earlier opinion given in his favour before the Tribunal.

Nonetheless, it has to be also kept in mind that after the decision was rendered by this Court on 19.04.2018 in **Amina Khatoon,** which specifically held that principle of res judicata will not be applicable in the proceedings before the Foreigners Tribunal, if any proceedee had not taken this plea before the Tribunal in any

proceedings after 19.04.2018, the proceedee cannot be faulted for not raising the plea before the Tribunal as he could not have raised such a plea because of **Amina Khatoon.** Thus, he will be entitled to raise this plea even if it is for the first time before this Court.

29. Accordingly, all these petitions will be considered and disposed of in the light of the law laid down in **Abdul Kuddus** and not on the basis of the decision rendered in **Amina Khatoon** as it is no more a good law.

30. WP(C) 2099/2018 [Sri Sital Mandal Vs. The Union of India and 7 Ors.]

30.1. In this petition [**WP(C) No.2099/2018]**, the petitioner, Sri Sital Mandal, aged 58 years, son of late Mangal Mandal of village- Bidyapur, Ward No.2, P.S. Nalbari, District- Nalbari, Assam, PIN-781335 has challenged the impugned order dated 14.03.2018 passed by the learned Foreigners Tribunal-1, Nalbari in F.T. (Nal) Case No. Case No.664/2011 [S.P. Reference No.278/09] by which the learned Tribunal declared the petitioner a foreigner by holding that the O.P has not been successful to prove his citizenship from the relevant period and the petitioner is found to be in India illegally after 25th March, 1971.

30.2. Before that opinion was rendered, the petitioner was earlier proceeded in F.T. (Nal) Case No.(N)3784/06 [Police Reference No.909/2002] in which the learned Foreigners Tribunal, Nalbari vide opinion dated 12.03.2012 had held that the petitioner is not a foreigner.

Therefore, to examine the plea of the petitioner that principle of *res judicata* will apply, we have to first ascertain as to whether the present petitioner is the same person who was proceeded earlier in F.T. (Nal) Case No.(N)3784/06 since the issues before the learned Tribunal in both the proceedings are same, i.e., whether the proceedees are foreigners or not.

30.3. From the records, what we have seen is that in the earlier proceeding in F.T.(Nal) Case No.(N) 3784/06, the proceedee was "Sri Sital Mandal, son of Late Mangal Borai, Vill- Vidyapur, Ward No.2, P.S.- Nalbari, District Nalbari".

In the order **12.03.2012** passed in the said proceeding, the learned Tribunal observed that Sri Sital Mandal is not a foreigner, which reads as follows,

> "……
>
> As the name of the O.P.'s mother is enlisted in the voter list of 1966. So, O.P's mother Rukma Bala Baroi is a citizen of India as per Provision of Section 6(i)(a)(ii) of the Citizenship Amendment Act, 1985 and being the son of Rukma Bala O.P. Sri Sital Mandal is also a citizen of India as per above mentioned Provision of law.
>
> Considering the above, I am of the opinion that O.P. Sri Sital Mandal is not a foreigner."

30.4. In the present case, it has been contended that the petitioner Sital Mandal had specifically pleaded before the learned Foreigners Tribunal-1, Nalbari in the subsequent proceeding in F.T.(Nal) Case No.(N) 664/2011 that he was earlier proceeded in F.T.(Nal) Case No.(N)3784/06 by learned Foreigners Tribunal, Nalbari in which he was declared not to be a foreigner.

30.5. In the subsequent proceeding in F.T.(Nal) Case No.(N) 664/2011, the proceedee has been described as "Sri Sital Mandal, son of Late Mangal Mandal, Vill. Bidyapur, Ward No.2, P.S. Nalbari, District-Nalbari (Assam)."

In the subsequent impugned opinion and order dated 14.03.2018 rendered in F.T.(Nal) Case No.(N) 664/2011, in para Nos.7, 8, 9, 10 it has been observed that

> "7. On appreciation of the evidence on record, it transpires that though the same O.P./Proceedee was suspected to be a Foreigner and in a reference F.T.(N) 3784/06 Case this Tribunal had declared him as not a Foreigner by judgment and order dated 12.03.2012 (Ext.14] but in the instant case he has not been able to prove his linkage with Rakmabala Baroi daughter of/wife of Late Mangla Baroi of Village-Abhayapuri Town, Ward No.4(Ext.1). He is also failed to produce any document after 1966 and before 1980. I, therefore, respectfully differ from the judgment and order dated 12.03.2012.
>
> 8. Net result of the above discussion is that the Proceedee/O.P. has miserably failed to establish his linkage to an Indian parent or grand parent relatable to a period prior to 25.3.1971 which is cut of date for identification of foreigners in the State of Assam as per Section 6A of the Citizenship Act, 1955 as amended. The version of the Proceedees suffers from multiple material contradictions rendering the same highly improbable. In such circumstances, it cannot be presumed that the Proceedee has discharged his burden as required under Section 9 of the Foreigners Act, 1946.
>
> 9. I am, therefore, of the opinion that the O.P. has not been successful to prove his Citizenship from the relevant period. He is found to be in India illegally on or after 25th March, 1971.
>
> 10. This reference stands disposed of by answering the question in negative holding that the O.P. is a Foreigner."

30.6. Thus, from the above, it transpires that the learned Tribunal-1, Nalbari though did not doubt the identity of the present proceedee as the same person who was declared not a foreigner by an earlier opinion dated 12.03.2012 in F.T. (Nal) Case No.(N)3784/06, yet,

declared him to be a foreigner on the ground that in the subsequent proceeding, the petitioner was not able to prove his linkage with Rukmabala Baroi, wife of Late Mangla Baroi and thus, the learned Tribunal differed from the judgment and order dated 12.03.2012.

30.7. In our opinion, if the earlier opinion of the learned Foreigners Tribunal, Nalbari dated 12.03.2002 passed in F.T.(Nal) Case No.(N)3784/06 had attained finality and not challenged by anyone including the State and if the present petitioner is the same proceedee who was proceeded in the said F.T.(Nal) Case No.(N) 3784/06, in view of the decision of the Hon'ble Supreme Court rendered in **Abdul Kuddus,** the principle of *res-judicata* will apply, in which event, the impugned order dated 14.03.2018 passed in F.T. (Nal) Case No.(N) 664/2011 [S.P. Reference No.278/09] cannot be sustained in law.

30.8. Accordingly, for our own satisfaction, we have examined the credentials of the present proceedee, Sri Sital Mandal who claims to be the same proceedee in the earlier proceeding. In the earlier proceeding in F.T.(Nal) Case No.(N)3784/06, the particulars of the proceedee is "Sri Sital Mandal, son of Late Mangal Baroi, Village- Vidyapur, Ward No.2, P.S. Nalbari, District- Nalbari" and in the second proceeding, the proceedee is "Sri Sital Mandal, son of Late Mangal Mandal, Vill. Bidyapur, Ward No.2, P.S. Nalbari, District- Nalbari (Assam)".

Thus, as far as the particular details of the identity of the present petitioner and the proceedee in the earlier proceeding are concerned, these appear to be same.

Further, the learned Foreigners Tribunal No.1, Nalbari in opinion dated 14.03.2018 has also mentioned in para No.7 that on appreciation

of evidence on record, it transpires that though the same O.P./Proceedee was suspected to be a foreigner the Tribunal had declared him not a foreigner by judgment and order dated 12.03.2012, yet, in the instant case he was held to be a foreigner as he was not able to prove his linkage with Rukmabala Baroi wife of Late Mangla Baroi.

30.9. From the above, we are satisfied that the present petitioner Sital Mangal was the same person who was proceeded earlier in F.T.(Nal) Case No. (N)3784/06.

The State had never taken the plea that the present petitioner is not the same person who was the proceedee in the earlier proceeding. Neither it had tried to rebut the claim of the petitioner also. In our view, it would be too much of a coincidence that the two persons, having similar names having similar father's name also in the same village can exist.

We have also kept in mind that in a proceeding before the Tribunal, the standard of the proof required is preponderance of probability. Thus, we have no doubt that in all probability in the light of the evidence mentioned above, the present petitioner is the same person who was proceeded earlier.

30.10. Accordingly, we allow this petition by setting aside the impugned order dated 14.03.2018 passed by the learned Foreigners Tribunal-1, Nalbari in F.T.(Nal) Case No.(N)664/2011 [S.P. Reference No.278/09]. Consequently, the earlier opinion dated 12.03.2012 passed in F.T.(Nal) Case No.(N)3784/06 will continue to hold the field as far as citizenship of the petitioner is concerned.

In other words, the present petitioner, in terms of the earlier opinion dated 12.03.2012 passed in F.T.(Nal) Case No.(N)3784/06 [S.P. Reference No.909/2002], is to be treated as an Indian and not a foreigner.

30.11. With the above observations and directions, the present petition is allowed.

31. <u>WP(C) 2601/2018 [Jahera @ Jahura Khatoon Vs. The Union of India and 5 Ors.</u>]

31.1. In this petition [**WP(C) No.2601/2018]**, the petitioner, Musstt. Jahera @ Jahura Khatoon, aged 41 years, wife of Md. Samsul Hoque, Village- Kashimpur, P.S.-Nalbari, District- Nalbari, Assam, PIN-781341 has challenged the impugned order dated 14.12.2017 passed by the learned Foreigners Tribunal No.1, Nalbari in F.T.(Nal) Case No.(N)1627/06 [S.P. Reference No.1317/2003] by which the learned Tribunal declared the petitioner a foreigner.

31.2. In this petition, the petitioner also claims that she was earlier proceeded in F.T.(Nal) Case No.(N)2116/06 [Police Reference No.815/2001] and was declared as not a foreigner by learned Foreigners Tribunal, Nalbari vide order dated 04.04.2012 threin.

31.3. It has been contended that the petitioner had taken the aforesaid plea before the learned Foreigners Tribunal in the subsequent proceeding in F.T.(Nal) Case No.(N) 1627/06 but the learned Tribunal held that it transpires that the proceedees in F.T.(Nal) Case No.1627/06 and Case No.2116/06 and 4395/06 might be different.

31.4. Mr. Das, learned counsel for the petitioner, however, submits that the aforesaid opinion dated 14.12.2017 rendered by the learned Tribunal in the subsequent proceeding in F.T.(Nal) Case No.(N) 1627/06 is contrary to record and the opinion that the present petitioner might be a different person is *ex-facie* wrong and unsustainable in law as the proceedee is the same person.

31.5. In the earlier proceeding in F.T.(Nal) Case No.(N)2116/06, the proceedee was "Musstt. Jura Khatoon, Wife of Md. Samsul Haque, Village- Kashimpur, P.S. Nalbari, District- Nalbari (Assam)".

In the subsequent proceeding in F.T.(Nal) Case No.(N) 1627/06, the proceedee has been described as "Musstt. Jahura Khatun @ Begam, Wife of Md. Samsul Haque, Vill-Kasimpur, P.S.-Nalbari, District-Nablari (Assam)".

Thus, from the descriptions of the aforesaid proceedees, it appears that the identities of both the proceedees appear to be similar being the wife of same person i.e. Md. Samsul Haque residing in same village under the same Police Station Kasimpur and District Nalbari.

There is a difference in the name "Jura" and "Jahura" which, however, appears to be insignificant, if other particulars and evidences point that these refer to the same person.

31.6. We have gone through the earlier opinion dated 04.04.2012 passed in F.T.(Nal) Case No.(N) 2116/06 in which it has been clearly mentioned that the pleaded case of the proceedee therein was that Musstt. Jura Khatun was born in village Bareigaon under Sarthebari Police Station. Though she could not remember her date of birth, she mentioned her father's name as Late Iman Ali. It was also mentioned

that in the voters list of 1966 (Ext.1), her father's name was included at Serial No.228, House No.44 in respect of No.53 Sarukhetri Legislative Assembly Constituency. In the voters list of 1970 (Ext.2), the name of petitioner's father was recorded at Serial No.336 with the same House No.44 of Part No.11 in respect of the same No.53 Sarukhetri Legislative Assembly Constituency. In the voters list of 2008, her father's name was enlisted in respect of village Bareigaon at Serial No.1279, Hosue No.108 of Part No.14 of the same LAC.

31.7. Thus, as far as, the aforesaid particulars of the petitioner's father as mentioned in the voters lists of 1966, 1970 and 2008 are concerned, these are same. These voters lists were relied on by the petitioner in the earlier proceeding in F.T.(Nal) Case No. (N) 2116/06 in which the opinion was rendered on 04.04.2012 that the said proceedee Jura Khatoon alias Jahura Khatoon who was the daughter of Iman Ali was not a foreigner but a citizen of India.

31.8. In the earlier proceeding, the learned Tribunal categorically gave the following finding,

> "As the name of O.P.'s father Iman Ali is enlisted in the voter list of 1966. So, O.P.'s father Iman Ali is a Citizen of India as per provision of Section 6(i)(a)(ii) of the Citizenship Act, 1985 and being the daughter of Iman Ali O.P. Musstt. Jura Khatoon alias Jahura Khatun is also a citizen of India as per above mentioned Provision of law.
>
> Considering the above, I am of the opinion that O.P. Musstt. Jura Khatoon alias Jahura Khatun is not a foreigner."

31.9. We have also noted from the records requisitioned from the learned Tribunal that the present petitioner has relied on the same

voters lists of 1966, 1970 and 2008, where her projected father's name Iman Ali appears with the same description of the particulars.

Thus, as far as the identity of the petitioner's father is concerned, it appears same.

31.10. In the voters list of 1966 and 1970 which were exhibited as Ext.2 and 3, the name of Iman Ali appeared at serial No. 228 under House No.44 and his name again appeared in the voters list of 1970 relating to the 53 Sarukhetri Legislative Assembly Constituency at Serial No.336, House No.44.

31.11. These are the same voters lists relied upon in the earlier proceeding in F.T.(Nal) Case No.(N)2116/06 where a favourable order was passed on 04.04.2012 on the basis of which the learned Tribunal held that the proceedee being the daughter of said Iman Ali is an Indian.

31.12. Petitioner has also annexed additional documents.

31.13. However, in the subsequent opinion dated 14.12.2017, the learned Tribunal observed as regards the particulars of the proceedee and proceedee's father as follows,

> "…….
>
> 8. As per Police Enquiry Report Musstt. Jahera Khatun daughter of Iman Ali and wife of Samsul Haque a resident of Village-Kasimpur, Police Station and District- Nalbari, Assam aged about-35 years as on 26.8.2003, was suspected to be an illegal migrant coming from Village-Kaliakur, Police Station-Basail, District Dacca of Bangaldesh. Safura Khatun aged about 6 years was her daughter. In the Police Enquiry Report of F.T. Case No.2116/06 Musstt. Jura Khatoon aged about 24 years as on 15.9.2001 daughter of Iman Ali, wife of Samsul Haque, place of origin Village-Napona, Police Station-Shusungdurgapur, District- Mymansingh, Country- Bangladesh and the name of her sons-

Jaber Ali, Jiyayul Haque and Fajar Ali were written. In Police Enquiry Report of F.T. Case No.4395/06- Jahura Khatun, daughter of Iman Ali, wife of Samsul Haque aged about 22 years as on 28.8.01 place of origin Village- Kharasahur, Police Station- Tarail, District- Mymansingh, Country- Bangladesh and sons-Jiyayul Haque, Fajar Ali are written.

9. In all three cases the Police Report reveal that the name of father of the suspect O.P. was Iman Ali and name of husband was Samsul Haque. However, the place of origin and the age of the O.P. in all the Cases were different. In F.T. No.2116/06 and F.T. No.4395/06 Jiyayul Haque and Fajar Ali are names of her children. Though in F.T. Case No.2116/06 Jaber Ali is also written as her eldest son. But in F.T.(Nal) Case No.1627/06 Safura Khatun is her only children.

10. On careful scrutiny of the above, it transpires that F.T.(Nal) Case NO.1627/06 i.e. the Case in hand might be of different O.P. than the Case No.2116/06 and 4395/06. I, therefore, proceed to appreciate the evidence in the instant case independently. The name –Jahura Khatun relation name- Samsul appeared in India for the first time in 1997 at village-Kasimpur, Police Station and District- Nalbari, Assam (Ext.4). Though a certificate issued by Village Head-man was exhibited as Ext.6 as a link document for her linkage with Iman Ali son of Jasimuddin of Village-Bharegaon, District- Barpeta, Assam but the Certificate and its contants were not proved by appropriate authority and so this exhibit is not admitted. In absence of any other evidence showing the relation of O.P. with Iman Ali, son of Jasimuddin of Vilalge-Bharegaon, District- Barpeta, Assam. I am of the view that the later is not related with the O.P. and is a different person than the father of the O.P.

11. I am, therefore, of the opinion that the O.P. has not been successful to prove her Citizenship from the relevant period. She is found to be in India illegally on or after 25th March, 1971.

12. This reference stands disposed of by answering the question in negative holding that the O.P. is a Foreigner.

..... "

31.14. Thus, in the present case, the learned Tribunal disbelieved the present petitioner on various grounds including that the petitioner's name appeared along with Samsul for the first time in 1997 in Village-Kasimpur and the learned Tribunal also did not believe the other documents. Further, in the absence of evidence showing the relation of

the O.P./Proceedee with her father Iman Ali, the learned Tribunal held that the present petitioner is a different person.

31.15. The learned Tribunal also by relying on the Police Enquiry Report as mentioned in para No.9 of the impugned order dated 14.12.2017, observed that in the Police Report, it has been shown that the name of the suspect O.P. was Iman Ali and name of the husband was Samsul Haque and the place of origin and the age of the O.P. in all the cases were different.

31.16. We fail to understand how the Police Enquiry Reports could have been acted upon in absence any proof of these. The said Police Enquiry Report had not been proved by the State in course of the proceeding. No evidence was led. No witness was examined. These police reports were good only for the purpose of making a reference, but the contents of these could not be used without proving the same. If there are different findings in the Police Enquiry Reports, it is for the State to substantiate the same and ask the proceedee to explain the same. However, in the present proceeding, none appeared for the State to prove the Enquiry Reports nor the petitioner was questioned on the same.

31.17. We have noted that the reasons for disbelieving by the Tribunal that the petitioner Musstt. Jajura Khatun @ Begam is not the same person in the two proceedings was on the grounds amongst others, that the petitioner could not remember the name of her grandmother and also that there were some discrepancies in the name of the father as mentioned in the police reports and that the petitioner had failed to establish the linkage with her projected father Iman Ali which conclusions do not appear to be sound in law and on facts.

31.18. Be that as it may, we are satisfied on the basis of the aforesaid evidences that the present petitioner is the same person who was proceeded in earlier proceeding in F.T.(Nal) Case No.(N)2116/06 as well as in F.T.(Nal) Case No.4395/06 wherein she was declared as an Indian.

31.19. Accordingly, we hold that the subsequent proceeding in F.T.(Nal) Case No.(N) 1627/06 [S.P. Reference No.1317/2003] in which impugned order dated 14.12.2017 was rendered, is hit by principle of *res judicata* as it relates to same person, and as such it may not be necessary to go in detail and examine the merit of the case as regards appreciation of evidence by the learned Tribunal in the impugned order.

31.20. Since, we are satisfied that the present petitioner is the same person who was proceeded in earlier two proceedings, we allow this petition by setting aside the impugned order dated 14.12.2017 passed in F.T.(Nal) Case No.(N) 1627/06 [S.P. Reference No.1317/2003].

Resultantly, the petitioner Jahera @ Jahura Khatoon is to be declared an Indian in terms of the order/opinion dated 04.04.2014 passed in F.T.(Nal) Case No.(N)2116/06.

32. WP(C) No.4610/2018 [Md. Chand Miah @ Chan Miah vs. The Union of India & Ors.]

32.1. In this petition, the petitioner, Md. Chand Miah @ Chan Miah, aged about 53 years , son of Late Fakir Chan, resident of Village-Goroimari Satra, P.S.-Chhaygaon, District-Kamrup(R), Assam has challenged the impugned order dated 30.06.2018 passed by the Foreigners Tribunal, Kamrup(R) No.1 at Guwahati in GFT (R) Case

No.1049/2017 by which the Tribunal had declined to take up the plea of *res judicata* on the ground that in view of the decision taken by this Court in **Amina Khatoon** the plea of the petitioner that he was already declared an Indian by the Foreigners Tribunal No.2, Kamrup (Rural), Boko in BFT Case No.683/2016 vide opinion dated 24.04.2017 could not be considered.

32.2. It is the specific plea of the petitioner that when the petitioner in his written statement took the plea to discontinue and close the proceeding in GFT (R) Case No.1049/2017 which was pending before the Foreigners Tribunal, Kamrup(R) No.1 at Guwahati, in the light of the earlier opinion dated 24.04.2017 passed in BFT Case No.683/2016 by the Foreigners Tribunal No.2, Kamrup (Rural), Boko whereby the petitioner was declared an Indian, the Foreigners Tribunal, in the subsequent proceeding refused to entertain the said plea on the ground above mentioned.

32.3. We have already held that **Amina Khatoon** is not more a good law in view of the decision of the Hon'ble Supreme Court in **Abdul Kuddus**. Accordingly, if the petitioner has taken a specific plea that he was earlier proceeded by the Foreigners Tribunal No.2, Kamrup (Rural), Boko which gave a favourable opinion that he is an Indian and not a foreigner, in the subsequent proceeding, the Foreigners Tribunal, Kamrup(R) No.1 at Guwahati is to first examine as to whether the principle of *res judicata* will be applicable in subsequent proceeding or not.

Thus, the Tribunal shall first examine as to whether the present petitioner namely, Md. Chand Miah @ Chan Miah, aged about 53 years

, Son of Late Fakir Chan, resident of Village-Goroimari Satra, P.S.-Chhaygaon, District-Kamrup(R), Assam is the same person who was proceeded earlier in BFT Case No.683/2016 before the Foreigners Tribunal No.2, Kamrup (Rural), Boko and if it is found that the petitioner is the same person who was proceeded in BFT Case No.683/2016 by the Foreigners Tribunal No.2, Kamrup (Rural), Boko, the present proceeding shall immediately be concluded in favour of the petitioner on the basis of the earlier order passed on 24.04.2017 in BFT Case No.683/2016 where the petitioner was declared an Indian citizen, as there would be no need to examine the matter afresh.

If, however, the Tribunal comes to a decision that the present petitioner is not the same person who was procedded in BFT Case No.683/2016, the proceeding will continue as per law.

32.4. With the above observations and directions, the present petition i.e. WP(C) No.4610/2018 is disposed of by setting aside the order dated 30.06.2018 passed by the learned Foreigners Tribunal, Kamrup (R) No.1 at Guwahati in GFT (R) Case No.1049/2017 as the principle of *res judicata* is applicable.

Accordingly, the petitioner will appear before the Foreigners Tribunal, Kamrup(R) No.1 at Guwahati after 1 (one) month from today.

32.5. The LCR be remitted to the concerned Tribunal immediately.

33. WP(C) No. 8491/2018 [Nurjahan Begum Vs. The Union of India & 3 Ors. and WP(C) No.8493/2018 [Nurjahan Begum Vs. The Union of India and 5 Ors.]

WP(C) No.8491/2018 [Nurjahan Begum Vs. The Union of India & 3 Ors.]

33.1. These two petitions, WP(C) No.8491/2018 and WP(C) No.8493/2018 are clubbed together as these two writ petitions are preferred by the same petitioner, namely, Nurjahan Begum though against two different orders of the learned Foreigners Tribunals.

33.2. In WP(C) No.8491/2018, the petitioner has challenged the opinion dated 04.09.2018 passed by the learned Foreigners Tribunal, 7th Sonitpur, Balipara in Case No.FTDC 644/16 [TZP(B)/1240/07 dtd.29.03.07] declaring the petitioner as a foreigner of post 25.03.1971 stream.

In WP(C) No.8493/2018, the petitioner has challenged another opinion dated 08.10.2018 passed by the learned Foreigners Tribunal, 7th Tezpur, Chariduar at Balipara in Case No.DC 556/2016 [Ref. Case No.TZP/B/98/468] by which the petitioner was declared a foreigner of post 25.03.1971 stream.

33.3. In both these two petitions, the background facts appear to be same.

It is the case of the petitioner that there was a reference earlier against her vide Ref. Case No.TZP/B/98/468, dated 17.07.98, which was also the *first* reference following which, a case was registered under Case No.DC556/2016 before the learned Foreigners Tribunal 7th Tezpur, Chariduar at Balipara in which an opinion was rendered on 08.10.2018 declaring the petitioner a foreigner of 25.03.1971 stream which has been challenged in second Writ Petition, WP(C) No.8493/2018.

The authority also made another reference, being the *second* one, under S.P.(B)-765 dated 25.05.2006 following which another proceeding was initiated against her under F.T. Case No.150/15 before the learned Foreigners Tribunal, Tezpur-7th Chariduar at Balipara and in the said proceeding the petitioner had been declared not to be a foreigner vide order dated 22.03.2016.

However, a *third* reference was made against the petitioner vide TZP(B)/1240/07 dated 29.03.2007 following which, Case No.FTDC 644/16 was registered and an opinion dated 04.09.2018 was passed declaring the petitioner to be a foreigner of post 25.03.1971 stream which has been challenged in WP(C) No.8491/2018.

Apart from the aforesaid three references, the *fourth* reference was made against the petitioner under S.P.(B)235 Dated, 08.02.08 Case No.886/07 following which F.T. Case No.156/16 was registered in which vide order dated 17.11.2016, the petitioner was declared not to be a foreigner by the learned Foreigners Tribunal, Tezpur-7, Chariduar at Balipara.

33.4. From the above, what appears is that 4 (four) references made. 4(four) opinions were rendered by the learned Foreigners Tribunals in respect of these references giving different opinions, but not in chronological order, viz.,

1. 1st Reference dated 17.07.1998 No.TZP/B/98/468 resulting in F.T. Case No.DC556/2016 in which opinion was rendered on **08.10.2018** declaring the petitioner as **a foreigner**.
2. 2nd Reference dated 25.05.2006 No.SP(B)765 resulting in F.T. Case No. 150/15 in which opinion was rendered on **22.03.2016** declaring the petitioner as **not a foreigner**.

3. 3rd Reference dated 29.03.07 No. TZP(B)1240/07 resulting in Case No.FTDC 644/16 in which opinion was rendered on **04.09.2018** declaring the petitioner as **a foreigner**.
4. 4th Reference dated 08.02.08 No.SP(B)-235 resulting in Case No.886/07-F.T. Case No.156/16 in which opinion was rendered on **17.11.2016** declaring the petitioner as **not a foreigner.**

Thus, from the above we have noted is that, in respect of the *second* and *fourth* references, opinions were rendered earlier on 22.03.2016 and 17.11.2016 declaring the petitioner not to be a foreigner. On the other hand in the remaining proceedings, opinions were later on given, declaring the petitioner as a foreigner.

33.5. Since the issue of *res judicata* has been raised in this two writ petitions, WP(C) No.8491/2018 and WP(C) No.8493/2018 aring out of the two subsequent opinions, it would be necessary to examine as to whether the petitioners in these two writ petitions were the same and one person who was proceeded in other two proceedings where the proceedees were declared not to be foreigners by earlier two opinions dated 22.03.2016 and 17.11.2016.

33.6. Accordingly, it would be necessary to first examine whether the identity of the present petitioners in these two petitions is same as the identity of the proceedees in above two referred proceedings where favourable opinions were rendered.

In the favourable opinion given earliest on 22.03.2016 in F.T. Case No.150/15, the proceedee has been described as follows:

"Musstt. NurJahan, Wife of Md. Ali Hussain, Village- Kherani Basti, Police Station- Rangapara, District- Sonitpur, Assam.

Coming to the second favourable opinion dated 17.11.2016 passed in F.T. Case No.156/16, the proceedee has been described as,

"Musstt. Nurjahan Begum, Wife of Lt. Hazimuddin, Village: No.2 Ward Kheroni basti, Police Station- Rangapara, District- Sonitpur, Assam."

33.7. In the subsequent opinion dated 04.09.2018 rendered in Case No.FTDC 644/16 where the proceedee was declared a foreigner has been described as,

"Musstt. Nurjahan Begum, W/O- Md. Ali Hussain, Vill- Ward No.2 Rangapara, P.S.- Rangapara, District- Sonitpur, Assam"

In the last opinion dated 08.10.2018 passed in Case No.DC556/2016 where the proceedee has been declared a foreinger has been described as,

33.8. From the above, it is seen that the names of the proceedees in all these proceedings except in the second opinion appear to be similar. The villages, Police Stations and Districts are also same. There appears to be a slight difference in the name of the husband of the proceedee in one proceeding. While in three proceedings, the name of the husband of the proceedee has been mentioned as Md. Ali Hussain, in the order/opinion dated 17.11.2016 passed in F.T. Case No.156/16, the name of the husband of the proceedee has been shown as Lt. Hazimuddin. It may, however, be noted that in the said proceeding where the favourable opinion was passed, the proceedee had taken a

specific plea as also mentioned in the opinion dated 17.11.2016 that the opposite party in her evidence had deposed that, in the reference case in Memo No.-Tjp(B)/08/235/, Dtd.08.02.08, her husband's name was incorrectly written as Lt. Hajimuddin in place of Ali Hussain. At the same time in one page of the case diary, her father's name- Lt. Kajimuddin has been incorrectly shown as her husband, but in the rest of the pages of the case diary including her statement recorded by police, her husband's name and her father's name had been correctly written as Ali Hussain and Lt. Kajimuddin respectively. Thus, it appears that misdescription of the name of the husband of proceedee Musstt. Nurjahan Begum in F.T. Case No.156/16 appears to have been clarified and accepted by the learned Tribunal.

Therefore, it can be inferred that the name of the husband of the proceedee in all these proceedings is Md. Ali Hussain and not Lt. Hazimuddin as initially wrongly recorded in one of the proceedings (F.T. Case No.156/16) referred to above.

33.9. We are thus, satisfied with the identity of the proceedees in all these proceedings appears to be same. The evidences relied upon in the aforesaid proceedings also clearly support this view.

In the two proceedings where favourable opinions had been rendered the proceedees are same.

In the first favourable opinion dated 22.03.2016 passed in F.T. Case No.150/15, the proceedee had taken the specific plea that she was born and brought up at village-Kadong, P.S..- Baghbar, District-Kamrup, now Barpeta, Assam. She also claimed that she had landed property in the said village and her father's name is Kajimuddin and he was a permanent resident of village- Kadong and his father's name

appeared in the voters list of 1966 and 1970 of 51- Jonia Legislative Assembly Constituency at Serial No.137, House No.39 and Serial No.156, House No.39 respectively which were duly exhibited. She also stated that her father died about 30 years ago.

She also stated that she got married to one Md. Ali Hussain @ Ali Hussain of Village- Kheranibasti, Rangapara, about 25/30 years ago and since then she has been living with him. She also exhibited her land holding certificate issued by the Circle Officer, Baghbar Revenue Circle Office. She also exhibited the voters list of 1966 and 1970 where her father's name appear.

On the basis of the evidences so led by the proceedee, and since there was no rebuttal evidence led by the State, the learned Tribunal held that the proceedee, namely, Musstt. Nurjahan is not a foreigner.

33.10. In the second favourable opinion dated 17.11.2016 passed in F.T. Case No.156/16, it was the pleaded case of the proceedee that she was born and brought up at village- Kadong, P.S. Baghbor, District- Kamrup now Barpeta, Assam and she had landed property in the said village and her father's name is late Kajimuddin and he was a permanent resident of village- Kadong. She also stated that her father's name appeared in the voters lists of 1966 and 1970 under 51- Jonia Legislative Assembly Constituency at Serial No.137, House No.39 and Serial No.156, House No.39 respectively. She also stated that her husband's name was incorrectly written as Lt. Hajimuddin in place of Ali Hussain and her father's name is Late Kajiumuddin which was incorrectly shown as her husband's name in the case diary but in the rest of the pages of the case diary including her statement taken by police, her husband's name and her father's name had been correctly

written as Ali Hussain and Lt. Kajimuddin respectively. She also stated that she was married to one Md.Ali Hussain @ Ali Hussain of village-Kheranibasti, Rangapara about 25/30 years back and since then she had been living with him.

She also stated that she possessed land and exhibited the land holding certificate. She also exhibited the voters lists of 1966 and 1970 where the name of her father appeared.

In the said proceeding no rebuttal evidence was led by the State.

The learned Tribunal on the basis of the evidences so adduced declared the proceedee, namely, Musstt. Nurjahan Begum not a foreigner.

33.11. From the above first 2(two) favourable opinions dated 22.03.2016 and 11.06.2016 passed in two different proceedings, it is clear that the proceedees were the same i.e. Musstt. Nurjahan Begum, wife of Md. Ali Hussain.

33.12. Now, we have to examine whether the proceedees in the two proceedings [F.T. Case No.DC556/2016 and Case No.FTDC 644/16] where contradictory orders were passed subsequently on 08.10.2018 and 04.09.2018 holding the proceedees to be a foreigner, are the same person who was proceeded in the other two proceedings where favourable opinions were passed earlier.

33.13. Case No. FTDC 644/16 where the impugned order dated 04.09.2018 was passed arose apparently after the proceedee therein, namely, Musstt. Nurjahan Begum was suspected to be a "Doubtful" voter.

In the said proceeding, the proceedee had filed a number of documents and adduced evidence. In the said proceeding, earlier order 22.03.2016 passed in F.T. Case No.150/15 was also relied upon with a prayer to close the proceeding. The leaned Tribunal, however, made the observation that he was not convinced with the finding in the said F.T. Case No.150/15 as it was a foreigners case and the onus is upon the proceedee to discharge her burden as required under Section 9 of the Foreigners Act, 1946 and merely because of non rebuttal of the evidence led by the proceedee, no favourable order could have been passed. Accordingly, the learned Tribunal declined to accept the order passed in F.T. Case No.150/15.

33.14. Similarly, the other favourable opinion dated 17.11.2016 passed in F.T. Case No.156/16 was also ignored by the learned Tribunal as evident from the following paragraph of the impugned order dated 04.09.2018,

> "**Exihibit 4** : Is the copy of the Order F.T. Case No.150/15, in this Order passed by this Tribunal on 22.03.2016 is keenly perused, it is seen on Order that the Proceedee was declared Indian for the non rebuttal of the evidence by the state, therefore, the learned Member of this Tribunal Mr. A.K. Sharma did not find or nothing to disbelieved the evidence adduced by the Proceedee, but, I am not conceded with his findings as this case is foreigners case contemplated under section 9 of the foreigners act 1946, under section 9 of the foreigners act is a exceptional provision as burden of proof lies entirely on the Procedee not upon the state of Assam. The state has very megre role and non rebuttal of the evidence does not cause to be declaring Indian which is applied in the other civil case. The Present principle of not rebuttal cause the favourable order in the other party that principle of civil case cannot be applied in the foreigners case, so, I have no hesitation to deny to accept this Order. In the same way the **Exhibit 5** is the copy of the Order F.T. Case No.156/16 passed on 17.11.2016 declaring Indian. These orders are not accepted."

33.15. Thus, from the above what can be understood is that the learned Foreigners Tribunal in Case No.FTDC 644/16 declined to accept the earlier favourable orders passed on 22.03.2016 in F.T. Case No.150/15 and opinion dated 17.11.2016 passed in F.T. Case No.156/16 primarily on the ground that the State did not adduce any rebuttal evidence in those/earlier proceedings.

33.16. However, on perusal of the aforesaid favourable orders it can be seen that it was not merely because of failure of the State to adduce rebuttal evidene that the favourable opinions were passed. In both the proceedings in F.T. Case No.150/15 and F.T. Case No.156/16, the proceedee had given credible evidences to show that she is the daughter of one Late Kajimuddin whose name was already entered in the voters lists of 1966 and 1970 and as such, her father was very much present in the State of Assam before 1966 with supporting documents and since the aforesaid specific plea had remained unrebutted, the learned Tribunal could not be faulted for giving favourable orders to the proceedee.

33.17. We are of the view that the reason assigned by the learned Tribunal in the impugned order dated 04.09.2018 in ignoring the favourable orders can be considered to be correct in law.

33.18. What we have also noted that in the impugned order it is mentioned that the proceedee, i.e. Musstt. Nurjahan Begum had stated in the proceeding that her father's name is Kajimuddin and his name appeared in the voters lists of 1966 and 1970 in respect of No.51 Jonia Legislative Assembly Constituency, under serial Nos.137 and 139 and in same House No.39. It was also stated that she was born at Village

Kadang, Barpeta. However, all these details have been ignored by the learned Tribunal.

The relevant portion of the order wherein the learned Tribunal has given the reasons for rejecting the plea of the petitioner reads as follows,

> "**REASON**- .....**..**
>
> **No** 1 she has not adduced any birth certificate and did not stated where and when she was born in the W/S. So, the deposition that she was born at Vill- Kadang gaon, Dist.- Barpeta is not beyond doubt. **No-2** the voter list of 1994 is not mentioned in the W/S but, mentioned in her evidence which is also beyond W/S, so, her present existent in Assam is not estaboished. **No-3** the voter list of 1966 and 1970 in the name of Projected father Kajimuddin is not recently issued, so, it is doubtful. **No.-4** If the voter list of 1966 is construed to be true then she should have exhibited loinkage document linking to her purported father Kajimuddin, but, that link certificate is not exhibited. **No-5** B the land certificate is a post 25.03.1971 or 01.01.1966 document and it is not proved. **No-6** the exhibit 5 and 6 order of this Tribunal in FT case No.150/15 and 156/16 declaring the Proceedee Nurjhan begum as India are not accepted. Because, of section 9 of the foreigners act 1946, from this above noted reasons, I have no option but to declare the Proceedee as foreigner on or after 25.03.1971., hence this reference is answered as affirmative."

The learned Tribunal rejected the plea of the petitioner on the following grounds,

Firstly, that the petitioner did not adduce any birth certificate and also did not mention in the Written Statement where and when she was born.

Secondly, that the petitioner did not mention the voters list of 1994 in the Written Statement. However, she mentioned the same in her evidence which is beyond the Written Statement and accordingly, the petitioner's existence in Assam is not established.

Thirdly, that the voters lists of 1966 and 1970 issued in the name of the Projected father of the petitioner Kajimuddin were not recently issued and accordingly, these were doubtful.

Fourthly, that if the voter list of 1966 is construed to be true, the petitioner should have exhibited the linkage certificate linking to her purported father. According to the Tribunal, however, the petitioner had not exhibited the link certificate.

Fifthly, that the Land certificate was a post 25.03.1971 or 01.01.1966 document which was not proved.

Sixthly, the order of the the Tribunal passed in F.T. Case No.150/15 and 156/16 declaring the petitioner to be India could not be accepted because of Section 9 of the Foreigners Act, 1946.

Accordingly, for the aforesaid reasons, the learned Tribunal declared the petitioner as foreigner of post 15.03.1971 stream.

33.19. We are, however, unable to accept the said approach of the learned Foreigners Tribunal in the present case i.e. Case No.FTDC 644/16 as the learned Tribunal could not have ignored the sameness in the identity of the proceedees. Once, it is seen that the proceedee is the same person who was proceeded earlier, there was no need to rerappreciate the evidences on record, except for the purpose of establishing the identity of the proceedee.

On the basis of the evidences on record, we are satisfied that Musstt. Nurjahan Begum, the proceedee in Case No.FTDC 644/16 is the

same person who was proceeded earlier in F.T. Case No.150/15 and F.T. Case No.156/16, in whose favour favourable opinions were rendered by the learned Foreigners Tribunal vide opinion dated 22.03.2016 and 17.11.2016 that she is not a foreigner and since principle of *res judicata* will be applicable, the subsequent opinion dated 04.09.2018 passed in Case No. FTDC644/2016 is set aside.

33.20. Accordingly, we allow the writ petition, WP(C) No.8491/2018 and declare the petitoenr Nurhajan Begum, wife of Ali Hussain, daughter of Late Kazimuddin, Village- Ward No.2, Kheroni Basti, Rangapara, P.S.- Rangapara, District- Sonitpur and declare her as an Indian.

34. WP(C) No.8493/2018 [Nurjahan Begum Vs. The Union of India and 5 Ors.]

34.1. This second petition filed by the same person, Nurjahan Begum.

We have also noted that impugned order dated 08.10.2018 was passed by the learned Foreigners Tribunal, Chariduar at Balipara in Case No.DC 556/2016 [Ref. Case No.TZP/B/468 dated 17.07.98] on similar grounds as in Case No.FTDC 644/16 which has been challenged in WP(C) No.8493/2018.

In the impugned order dated 08.10.2018, the learned Tribunal had also ignored the favourable orders [opinion dated 22.03.2016 rendered in Case No.F.T.150/15 and opinion dated 17.11.2016 passed in Case No.FT 156/16] as evident from the impugned order dated 08.10.2018, relevant portions of which read as follows,

"…….

Exhibit 4 & Exhibit 5, Exhibit 4 is the certified copy of the Foreigners' Tribunal Order vide case No.FT 150/15 passed on 22.03.2016 and **Exhibit 5** is the certified copy of the Foreigners' Tribunal Order vide case No.F.T. 156/16, passed on 17.11.2016. the Proceedee was declared as Indian in both cases. On perusal of these order it is found that the proceedee declared by the Tribunal as not foreigner on ground not rebuttal of evidence by the states.

The foreigners case is somewhat exception for section 9 of the foreigners act 1946, under provision entire burden of prove lies on the proceedee the roll of the state is very negligible, therefore, the mere non rebuttal of evidence does not ispofecto determined that the Proceedee is not a foreigner in my consideration, besides the foreigner case is not barred by LAW of res-judicata, therefore, the order copy is not accepted and case to be decided independently.

From the above noted discussion of documents and it is crystal cleared that the Proceedee has not exhibited any link certificate related to his purported father documents of 1966 and 1970 which is prior to cut of mark of 25.03.1971. She has not produced any birth certificate and nor any residential certificate to give relief under sec 3 of the citizenship act 1955. The evidence of the Proceedee is vitiated by multiple of omission as discussion noted above. Resultantly the Proceedee could not discharge her burden having regard to the mandate of sec 9 of the foreigners act 1946. Therefore, I am compelled to declare the Proceedee is a foreigner came to Assam on or after 25.03.1971.

....."

34.2. We are of the view that the said approach adopted by the learned Foreigners Tribunal in Case No.DC 556/2016 is not in consonance with law.

We have noted that in the said proceeding, the proceedee, namely, Musstt. Nurjahan Begum had filed her written statement stating that her father's name is Kajimuddin and her father's name was recorded in the Electoral Rolls of 1966 and 1970 along with his family members under 51 No. Jania Legislative Assembly. She also stated that she got married to one Md. Ali Hussain, son of Late Ramjan Ali of

Kheroni Basti, P.S. Rangapara, District, Sonitpur, Assam and she possessed landed property at village-Kadamgaon, Mouza Jania, District-Barpeta, Assam. She also stated that she was already declared as Indian by the leaned Foreigners Tribunal in earlier proceedings in F.T. Case No.156/16 and F.T. Case No.150/15.

34.3. Learned Tribunal observed, referring to the written statement, that it was found that the petitioner's father name is Kajimuddin and the petitioner was a resident of Village Kheronibasti of Sonitpur and though the petitoner's father's name was enrolled in the voters lists of 1966 and 1970 of 51 Jania Legislative Assembly Constituency, but in her written statement, the petitioner had not stated regarding her date of birth nor annexed any supportive document. Learned Tribunal observed that the proceedee had not stated about her date of birth as well as place of birth and also about her mother nor of the brother and sisters.

34.4. We have noted that the petitioner had deposed herself as DW1 by stating that her parents' names were Lt. Kajimuddin and Lt. Rahetun Nessa and that she was born at Kadang Village of Barpeta district and she got married to one Md. Ali Hussain and after her marriage she was residing at Kheronibasti. She also stated that her father cast vote in the year 1966 and 1970 in 51 No. Jania Legislative Assembly Constituency at village Kadang gaon and his name was entered in the aforeisaid voters lists under Serial No.137 and 156, Part No.66 and 67 and House No. 39 respectively. She also stated that her mother's name was recorded in both the voters lists. The proceedee cast her vote in the year 1994 in 78 No. Rangapara Legislative Assembly Constituency and her name was included in the voters list of 1994 under part No.9 Serial

No.959 and House No.12 at Barjuli Bagan. She also stated that she has landed property at Village Kadang Gaon under Jania Mouza. She also stated that prior to this proceeding, two foreigner cases had been registered against her before the same Tribunal, vide FT Case No.F.T.150/15 and F.T.156/16 and in both the cases she was declared as a citizen of India vide opinions dated 22.03.2016 and 17.11.2016.

34.5. Petitioner had exhibited the voters list of 1966 of No.51 Jania Legislative Assembly Constituency showing the name of her father Kajimuddin at Serial No.137, House No.39, Part No.67 in respect of No.51 Jania Legislative Assembly Constituency, village- Kadang, Mouoza- Jania, P.S. Baghbar, District- Kamrup, Assam.

34.6. Petitioner also exhibited the voters list of 1970 showing the name of her father at Serial No.156 with the same House No.39 and Part No.67 in No.51 Jania Legislative Assembly Constituency of village- Kadang, Mouza- Jania, P.S. Baghbar, District- Kamrup, Assam.

Petitioner also exhibited the photocopy of the Mutation certificate issued by Baghbar Revenue Circle.

Petitioner also exhibited the certified copies of the orders passed in F.T. Case No.150/15 and F.T. Case No.156/16.

34.7. Considering the evidences adduced by the petitioner, the learned Tribunal observed that the proceedee did not exhibit any link certificate related to his purported father's documents of 1966 and 1970, prior to cut of mark of 25.03.1971, and also observed that the petitioner had not produced any birth certificate and nor any residential certificate so as to give relief under Section 3 of the Citizenship Act, 1955.

Accordingly, the learned Tribunal held that the evidence of the Proceedee/petitioner is vitiated by multiple omissions. Consequently, learned Tribunal held that the proceedee could not discharge her burden under Section 9 of the Foreigners Act, 1946 and declared the petitioner as a foreigner who came to Assam on or after 25.03.1971.

34.8. In our opinion, the view of the learned Tribunal that as the petitioner failed to produce the birth certificate or residentaial certificate, she could not produce any link certificate can not be said to be correct. Though existence of these documents could have strengthened the claim of a proceedee, failure to produce these documents cannot be a reason to declare a proceedee a foreigner if there are, otherwise, credible evidences to show that the proceedee is an Indian.

34.9. We are of the view that the said approach adopted by the learned Foreigners Tribunal in Case No.DC 556/2016 in which the impugned opinion has been passed is not in accordance with law as the petitioner was already declared as not a foreigner in the earlier proceedings in F.T. Case No.150/15 and F.T. Case No.156/16 vide opinions dated 22.03.2016 and 17.11.2016.

In our view, the approach of the learned Tribunal ought to have been to first ascertain whether the present proceedee is the same person who was proceeded in the earlier two proceedings in which favourable orders were passed. If it is found that the present proceedee is the same person, then because of principle of *res judicata*, the learned Tribunal should have closed the proceeding.

However, instead of doing so, the learned Tribunal re-appreciate the evidences on record by ignoring that the similar evidences had

been relied in the earlier two proceedings in which favourable orders were passed. The learned Tribunal thereafter, held that the proceedee had failed to establish her linkage with the projected father.

34.10. In the present case, in the light of the evidences adduced, we are satisfied that the proceedee in Case No.DC 556/2016, namely, Musstt. Nurjahan Begum is the same person who was proceeded earlier in F.T. Case No.150/15 as well as F.T. Case No.156/16. In that view of the matter, because of the applicability of the principle of *res judicata*, the impugned order dated 08.10.2018 cannot be sustained in law.

34.11. Accordingly, the present petition, WP(C) No.8493/2018 is allowed by setting aside the impugned order dated 08.10.2018 passed in Case No.DC556/2016 [Ref.Case No.TZP/B/98/468, Dtd-17.07.98] rendered by learned Foreigners Tribunal, 7th Tezpur, Chariduar at Balipara.

35. WP(C) No.822/2019 [Mativan Nessa vs. The Union of India & Ors.]

35.1. In this petition, the petitioner, namely**,** Mativan Nessa, aged about 46 years , daughter of late Jashimuddin and wife of Jabbar Ali, Village-Chalcholia, P.S.-Sorbhog, District-Barpeta, Assam has challenged the impugned order dated 04.09.2018 passed by the Foreigners Tribunal No.11th, Barpeta in Case No.(Bpt/11th) F.T.784/2016, by which the Tribunal declared the petitioner a foreigner of post 25.03.1971 stream.

35.2. It is the grievance of the petitioner that thought the petitioner had pleaded before the Foreigners Tribunal No.11th, Barpeta that she

was already declared an Indian vide impugned order dated 08.10.2015 passed in F.T. Case No.01/2015 (new) F.T. Case No.851/2011 (old) arising out of Ref. IM(D)T Case No.14/2009 by the Foreigners Tribunal No.8th, Barpeta, Assam, yet, the learned Tribunal took the view that the present petitioner Motivan Nessa, aged about 46 years, daughter of late Jashimuddin and wife of Jabbar Ali, Village-Chalcholia, P.S.-Sorbhog, District-Barpeta, Assam and Matibhanu Nessa, wife of Jabbar Ali, Village-Chalchalia, Mouza-Rupsi, P.S.-Sarbhog, Dist-Barpeta, Assam, who was proceeded in the earlier proceeding in F.T. Case No.01/2015 (new) F.T. Case No.851/2011 (old) arising out of Ref. IM(D)T Case No.14/2009 before the Foreigners Tribunal No.8th, Barpeta, is not the same and one person.

35.3. Accordingly, the Tribunal held that the petitioner failed to discharge the burden to prove that she is not a foreigner and accordingly, declared her a foreigner of post 1971 stream.

35.4. Before we examine the correctness of the aforesaid finding of the Tribunal, we would like to ascertain the identity of the proceedees in both the cases.

In the first proceeding i.e. in F.T. Case No.01/2015 (new) F.T. Case No.851/2011 (old) arising out of Ref. IM(D)T Case No.14/2009 before the Foreigners Tribunal No.8th, Barpeta, the proceedee has been described as "Mati Bhanu Nessa, wife of Jabbar Ali, Village-Chalchalia, Mouza-Rupsi, P.S. Sarbhog, District-Barpeta, Assam", whereas in the second proceeding i.e. in Case No.(Bpt/11th) F.T.784/2016 before the Foreigners Tribunal No.11th, Barpeta, the proceedee has been

described as "Motivan Nessa, wife of Jabbar Ali, Village-Chalcholia, P.S.-Sorbhog, Dist-Barpeta".

Thus, there are striking similarities in the identities of the aforesaid two proceedees like their names, the names of their husbands and their addresses, though there is a slight variation in the names of the proceedees. Whether this slight variation is indeed significant or not can be ascertained from the remaining evidences.

35.5. In F.T. Case No.01/2015 (new) F.T. Case No.851/2011 (old), the proceedee therein took the plea that the names of her parents are Late Jasimuddin and late Joynab Khatoon. In the second proceeding i.e. in Case No.(Bpt/11th) F.T.784/2016, the petitioner also had taken the specific plea that her father's name is Joshimuddin @ Jashimuddin Mandal and her mother's name is Joynab Khatun and the grandfather's name is Samad Ali @ Samed Ali Mandal and grandmother's name is Esa Bhan.

As such, in both the proceedings there are similarities in the names of the proceedee's parents.

35.6. In the first proceeding the proceedee stated that in the year 1965 the father of the proceedee had purchased a plot of land in the village-Jamadarbari, Mouza-Kharija, Bijni, P.S. Sorbhog under the then district Kamrup. In the subsequent proceeding also the proceedee stated that in the year 1965 her father along with her paternal uncle purchased a plot of land covered by Dag No.133, 271, PP No.19 Kheraji situated at Villge Jamadarbori, Under Kharija, Bijni Mouza P.S. Sorbhog and one revenue paying receipt dated 17.07.1984 issued in favour of

the petitioner's father Jasimuddin and her paternal uncle Bakkaz Uddin. Thus, as far as the factum of purchase of land in the year 1965 by the father of the proceedee is concerned, there is similarity in the claim in the both the proceedings.

35.7. In the earlier proceeding it is also mentioned that the name of the petitioner's paternal uncle Bakas Uddin had appeared in the voters lists of 1970 under SL No.161, Part No.38, House No.35 at Village-Jamadarbar, Sorbhog Legislative Assembly Constituency. In the present proceeding also the proceedee has mentioned about her paternal uncle, namely, Bakajuddin, whose name appeared in 1970 voters list in the same Constituency of Sorbhog Legislative Assembly Constituency. Thus, the aforesaid claims as regards the particulars of her uncle also appear to be same in both the proceedings.

35.8. It has been mentioned that the name of the proceedee's father appeared in the 1951 NRC with House no.61, Holding No.46 of Village-Jamadarbari, Mouza-Kharija, Bijni, P.S.-Sorbhog of the then Dist.-Kamrup, Assam and in the second proceeding also the proceedee claimed that her father's name appeared in the 1951 NRC along with other 8 (eight) persons pertaining to Vill-Jamadarbori under Sorbhog P.S.

35.9. In the first proceeding the proceedee claimed that her name appeared in the voters lists of 1989 and 2005 under Village-Chalchalia, P.S.-Sorbhog, Dist.-Barpeta under No.44 Jania LAC and in the second proceeding also the petitioner had mentioned that her name appears in the 1989 voter list under SL No.756, House No.301 under village

Chalchalia, Mouza-Rupsi, P.S.-Sorbhog, Dist.-Barpeta of 44 No. Jania LAC.

35.10. In the earlier proceeding the petitioner examined herself and also one Jalil Mondal, brother of the proceedee, as D.W.2, who testified about the relevant facts. In the present proceeding also we have noted that the petitioner has examined herself and one Jalil Mondal, whom the petitioner claims to be her elder brother who testified about the relevant facts as mentioned by the proceedee. The said Jalil Mandal during the cross-examination stated that his father also the father of the proceedee Jashimuddin was also known as Jashim @ Jasimuddin Mandal and he also clearly mentioned that his mother's name is Jainab Khatun and his father had two brothers, namely, Sahabuddin and Bakaruddin.

Jalil Mondal, D.W.2 also clearly mentioned that he has 4 (four) sisters, out of which one is dead and the proceedee, Motibhan Nessa is his younger sister. He also mentioned about one Amina Khatun who is his step mother. He also mentioned about the purchase of land by his father Jasimuddin in village Jamadarbori.

35.11. From the above what can be seen is that the documents produced by the proceedee and the witnesses who were examined are same in both the proceedings which would not be possible if the proceedees are not the same person. It cannot be possible that two different persons will use same and similar documents in respect of two different proceedings. In fact, in course of the cross-examination nothing had been suggested that the present petitioner and her brother

who were examined, were different from those who testified in the earlier proceedings.

35.12. Under such circumstances, apart from the minor differences which have been stated by the Tribunal in the impugned opinion dated 04.09.2018 as also noted by us as above, we are satisfied that the present petitioner, namely, Mativan Nessa wife of Jabbar Ali and Matibhanu Nessa, wife of Jabbar Ali, who was proceeded in F.T. Case No.01/2015 (new) are one and same person.

35.13. In the impugned opinion dated 04.09.2018 passed by the Foreigners Tribunal No.11th, Barpeta in Case No.(Bpt/11th) F.T.784/2016 the Tribunal had given certain reasons for not agreeing that the two proceedees are the same and one person. It has been mentioned in the impugned opinion dated 04.09.2018 that the Jabbar Ali's (proceedee's husband) parentage is not known.

35.14. Normally, in a proceeding before the Foreigners Tribunal, the emphasis is given on the lineage tracing through the father or mother of the proceedee but not through the husband. Thus, merely because the parentage of the petitioner's husband is not described, more so, when it was not asked to the proceedee, it cannot be a ground to disbelieve the testimony of the proceedee.

Further, the Tribunal also has observed that though the proceedee had projected Jaynab Khatun as her mother, she had not filed any documentary evidence, which raised serious doubts about her mother's presence in Assam. In our view, the same cannot be a good ground to disbelieve the evidence of the petitioner for the reason that

the petitioner's elder brother Jalil Mandal had appeared and clearly mentioned in his deposition as well as in his cross-examination that Jaynab Khatun is his mother, in which event Jaynab Khatun will be also the mother of the petitioner. This statement was also not doubted by the State during the recording of evidence.

35.15. The Tribunal also made an observation that as per her own declaration, the petitioner's projected father late Jashimuddin, was a resident of village Chalchalia but she claimed that she was born in Village-Jamadarbori in her paternal house. In our view this finding does not appear to be based on evidence.

No plea was ever earlier taken by the petitioner that her father was a resident of Chalchalia. Throughout, it has been stated that her father was a resident of Jamadarbari.

35.16. As regards the observation of the Tribunal that the proceedee was 36 years old and her son Majibur Ali is 28 years old in the year 2008 voter list and as such, the difference of age does not support the claim of their relationship as mother and son. In our view, it is not a good ground to disbelieve her evidence only because of the minor age gap between mother and son as shown in the voters list, since the age reflected in the voters list is not highly reliable. Since, there are credible evidences of the relationship of the proceedee with her father, this aspect regarding age can not be a ground to disbelieve her testimony.

35.17. It is also observed by the learned Tribunal that though the petitioner's projected mother Jaynab Khatun died in the year 1983, her

name did not appeare in the Exhibit-1. However, non-mentioning in our view is not fatal.

Further, the Tribunal has also found certain discrepancies regarding the age of the petitioner's elder brother Abdul Jalil.

We are of the view that such discrepancies cannot be a ground to disbelieve other evidences because such discrepancies are very common in the voters lists. We have also noted that at the time of cross-examination no question was asked about such discrepancies of age either to the proceedee or to the D.W.2.

35.18. Accordingly, for the reasons discussed above, we cannot disbelieve that the proceedees in the both the cases do not refer to the same person. There are sufficient and cogent evidences on record to substantiate the claim of the petitioner that she is the same person who was proceeded earlier where a favlurable opinion was given.

We are thus, satisfied that because of the similarities in the documents and in the plea taken in both the proceedings, there cannot be any doubt that the present petitioner is the same person who was proceeded in F.T. Case No.01/2015 (new) F.T. Case No.851/2011 (old) arising out of Ref. IM(D)T Case No.14/2009 before the Foreigners Tribunal No.8th, Barpeta.

35.19. Accordingly, for the reasons discussed above, we allow this writ petition by setting aside impugned order 04.09.2018 passed by the Foreigners Tribunal, Barpeta 11th, Assam in Case No.(Bpt/11th) F.T.784/2016 and declare the petitioner an Indian in the terms of the

earlier opinion dated 08.10.2015 passed in F.T. Case No.01/2015 (new) F.t. Case No.851/2011 (old) arising out of Ref.IM(D)T Case No.14/2009.

36. WP(C) No. 2239/2019 [Nadim Ali @ Nadim Badsa Vs. The Union of India and 6 Ors.]

36.1. In this petition, [WP(C) No.2239/2019], the petitioner, Nadim Ali @ Nadim Badsa, aged -59 years, son of Late Ifaruddin Sk. @ Ifaruddin Ali, of village- Jhakuwapara, P.O.- Kopati, P.S.-Rowta, District-Udalguri, BTAD has challenged the impugned judgment and order dated 30.01.2019 passed by the learned Foreigners Tribunal (2nd), Darrang, Mangaldai in F.T.(2nd) Case No.5893/2011 [Ref-IM(D)T Case No.1306/98] by which the petitioner was declared as a foreigner of post 25.03.1971 stream.

36.2. In the proceeding in F.T. (2nd) Case No.5893/2011 [Ref.-IM(D)T Case No.1306/98], the petitioner had taken the plea before the learned Foreigners Tribunal (2nd), Darrang, Mangaldai that he was already declared not to be a foreigner vide opinion dated 27.09.2016 passed in Case No.F.T.(2)9/2016 by learned Foreigners Tribunal (Second), Darrang. However, the learned Tribunal did not examine the said plea of the petitioner on the ground that each reference has to be decided on its merit and previous opinion may be considered if it is found to be genuine and proved and the learned Foreigners Tribunal, accordingly, proceeded to examine the matter again on merit and

declared the petitioner to be not a citizen of India and declared him a foreigner of post 25.03.1971 stream.

36.3. Mr. F.U. Borbhuiya, learned counsel for the petitioner submits that the aforesaid approach of the learned Foreigners Tribunal is faulty inasmuch as there are sufficient materials on record to show that the present proceedee/petitioner is the same person who was proceeded earlier in Case No.F.T.(2) 9/2016 and the learned Tribunal was required only to ascertain whether the present proceedee is the same person who was proceeded earlier in F.T.(2) Case No.9/2016 and if it is found that the present petitioner is the same person, the learned Tribunal could not have proceeded to examine the matter on merit.

36.4. We are also of the view that as and when such a plea is taken by a proceedee that he had been declared Indian in an earlier proceeding, it was incumbent upon the learned Tribunal to examine whether the present proceedee is the same person or not who was proceeded earlier, based on the evidence that may be adduced and accordingly, if it is found that the present proceedee is the same person who was proceeded earlier, the learned Tribunal is not required to go into the other issues and aspects and evidences, except for the purpose of satisfaction of the identity of the proceedee.

36.5. In the present proceeding in issue, it appears that the learned Tribunal, however, did not consider that aspect and proceeded to examine the matter on merit and declared the petitioner to be a foreigner.

36.6. We have gone through the earlier opinion dated 27.09.2016 passed in Case No.F.T.(2) 9/2016 [Corresponding to F.T. Case No.555/15] by the learned Foreigners Tribunal (Second), Darrang by

which the proceedee therein was declared to be not a foreigner. In the said proceeding, the proceedee was described as "Md. Nadim Ali, S/o Late Ifaruddin Sheikh, Vill.- Jhakuwapara, P/S.- Rowta, Dist.-Udalguri (BTAD), Assam".

36.7. We have also noted that in the present proceeding in issue, in F.T.(2nd) Case No.5893/2011 [Ref.IM(D)T Case No.1306/98], the proceedee has been described as "Nadim Ali, S/o- Effaruddin Ali, Vill-Jakuapara, P.S.-Rowta, Dist.-Udalguri (BTAD)".

Thus, there appears to be close resemblance as far as the descriptions of the proceedees are concerned. That apart, we have also examined what was stated in the earlier proceeding.

36.8. In the earlier proceeding in Case No.F.T.(2) 9/2016, the proceeded therein had taken a specific plea that he was born at Village Alikash, P.S. Dolgaon, District- Darrang. He also stated in the proceeding that his father Late Ifaruddin Sheikh was wrongly mentioned in the voters list of 1997 as Kereuddin instead of his actual name Eferuddin Sheikh along with his mother Late Aiton Nessa. Thereafter, O.P.'s parents shifted from village Alikash to Village Jhakuwapara, P.S. Rowta (earlier Dolgaon).

In the said proceeding, the proceedee had executed an affidavit to explain the discrepancy in the father's name which was also exhibited and proved.

36.9. The learned Tribunal in the earlier proceeding also considered the certificate issued by one Sri Juju Ram Basumatary, Govt. Gaonburah of village Jhajuabeel, Sialmari and Dhakuapara showing that the proceedee Nadim Ali is the son of Late Ifaruddin of Village Jhakuwapara, P.S. Rowta, District Udalguri, BTAD (Assam). Another

certificate issued by the Govt. Gaonburah of Village Ghansimuli & Alikash showing that the proceedee Nadim Ali is the son of Ifaruddin Sheikh and was a resident of village Alikash, P.S. Kharupetia, District Darrang (Assam) was also considered by the learned Tribunal.

Voters list of 2014 was also taken into consideration by the learned Tribunal in the earlier proceeding wherein the name of the proceedee, Nadim Ali, son of Ifaruddin and the name of his wife Fulmoti Nessa were shown in the said voters list under 68 Dalgaon L.A.C. against Serial Nos.199 and 200 respectively under House No.46.

In the earlier proceeding, the voters list of 1966 under 72 Mangaldai LAC was also produced in which the names of the petitioner's father appeared at Serial No.149 and the mother of the proceedee, Aitan Nessa appeared at Serial No.150 and the brother of the proceedee Abdul Karim appeared at Serial No.151 and another brother Abdul Rahim also appeared at Serial No.152 under the common House No.37.

36.10. We have also noted that in the present proceeding in F.T.(2nd) Case No.5893/2011, the petitioner/proceedee had taken a specific plea and relied on the same voters list of 1966 and similar Certificates issued by the Govt. Gaonburah.

36.11. However, the learned Foreigners Tribunal in the present proceeding ignored the voters list of 1966 on the ground that the petitioner had failed to explain why he could not furnish any other voters list of the projected parents and brothers prior or post 1966 voters list and what had happened to his projected father and mother and brother Abdul Rahim after 1966. The learned Tribunal also held that the petitioner has failed to prove the contents of the voters list of

1966 by producing of the primary evidence through custodian of the Electoral Roll of Mangaldai Constituency for the year 1966. We are unable to agree with the aforesaid reasons given by the learned Tribunal.

36.12. In the original record, the said voters list of 1966 has been exhibited as Ext.2 in which there is a remark by the Member, Foreigners Tribunal(2nd), Darrang, Mangaldai that it is *proved in original*. Further, the correctness of the contents of the said voters list of 1966 had not been questioned by the State.

36.13. Therefore, we are unable to agree with the finding arrived by the learned Tribunal that the proceedee failed to prove the contents of the said Ext.2 by producing the primary evidence through the custodian of the Electoral Roll of Mangaldai as there is no need to prove the contents of a public document which was produced in original.

Further, merely because the petitioner failed to furnish any other voters list of projected parents, brothers prior to or post 1966, cannot be a ground to disbelieve the testimony of the petitioner.

In any event, we are afraid and we cannot re-examine the genuineness, reliability, authenticity, credibility or adequacy of the evidences since these had been already examined by the learned Tribunal on earlier occasion referring to the same voters list and the Tribunal had taken into consideration the same while declaring the said proceedee Nadim Ali to be an Indian.

36.14. Further, we have also noted that Ext.3 and Ext.4, the certificates issued by the Govt. Gaonburah of Khajuabeel, Sialmari and Dhakuapara and Ghansimuli and Alikash Village were produced in original but not contested nor questioned by the State and such similar

certificates were also relied on by the proceedee in the earlier proceeding which were also taken into consideration by the learned Tribunal in earlier proceeding while giving its opinion that the proceedee therein Nadim Ali is not a foreigner.

In our view, the assessment of evidences and findings by the earlier Tribunal could not have been re-opened and re-examined in the subsequent proceeding as the subsequent Tribunal was not acting as the appellate or reviewing forum, even if there appears to be errors in the law and fact.

Any such irregularilty can be rectified and any opinion based on such alleged irregular finding of facts can be interfered by a comptent forum/higher authority and not by the same Tribunal. The State could have challenged any such irregular earlier order of a Tribunal, and certainly not by another Tribunal exercising the same jurisdiction.

In any event, once it is shown that the present proceedee is the same person who was proceeded earlier and favourable opinion was given, by applying the principle of *res-judicata*, the subsequent proceeding can not be sustained in law.

36.15. We have also examined the both the original records i.e. records of F.T.(2) Case No.09/2016 in which the petitioner was declared as not a foreigner vide opinion dated 27.09.2016 as well as the records of F.T(2) Case No.5893/11 wherein the present petitioner was declared to be a foreigner.

36.16. Having compared both the original records, we have noted that the documents relied on by the proceedee in the earlier proceeding in Case No.F.T.(2) 9/2016 appeared to be same and similar as in the subsequent proceeding.

36.17. Under the circumstances, we are of the view that the present petitioner, namely, Nadim Ali @ Nadim Badsa, son of Late Ifaruddin Sk. @ Ifaruddin Ali, Resident of Village- Jhakuwapara, P.O. Kopati, P.S.- Rowta, District Udalguri, BTAD, Assam is the same person who was proceeded earlier in F.T.(2)9/2016 in which event, the subsequent proceeding in F.T.(2nd) Case No.5893/2011 [Ref. IM(D)T Case No.1306/98] cannot lie in view of the decision of the Hon'ble Supreme Court in **Abdul Kuddus** as the principle of *res judicata* will be applicable and as such, it may not be necessary to go further to examine the reasons given by the learned Foreigners Tribunal (2nd), Darrang, Mangaldai in the subsequent proceeding in F.T.(2nd) Case No.5893/2011 in declaring the petitioner to be a foreigner and as such, the subsequent proceeding can not be sustained.

36.18. Accordingly, the present petition is allowed by setting aside the impugned order dated 30.01.2019 passed by the learned Foreigners Tribunal (2nd), Darrang, Mangaldai in F.T.(2nd) Case No.5893/2011 [Ref.IM(D)T Case No.1306/98].

36.19. The view taken by the learned Foreigners Tribunal (Second), Darrang, Mangaldai in Case No. F.T.(2)9/2016 vide opinion dated 27.09.2016 will prevail, in which event, the petitioner would be declared to be not a foreigner but an Indian.

37. <u>WP(C) No. 8189/2019 [Ator Ali @ Rahman Vs. The Union of India and 6 Ors.</u>]

37.1. In this petition, [WP(C) No.8189/2019], the petitioner, Ator Ali @ Rahman, Son of Khalilur Rahman @ Khalil, resident of Village

Dhorasap, Sataribori, P.S. Mikiarbheta, P.O. Habibarongabari, PIN:782108, District Morigaon, Assam has challenged the impugned order dated 30.08.2016 passed by the learned Foreigners Tribunal No.3rd, Morigaon in Case No.F.T.(D)121/2015 [Ref: D/N Case No.498/1997 dtd.10.11.1997] by which the learned Foreigners Tribunal held that the petitioner had miserably failed to satisfy the Tribunal as required under Section 9 of the Foreigners Act, 1946 and declared the petitioner a foreigner having entered India after the cut of date 24.03.1971.

37.2. In the present proceeding in Case No.F.T.(D) 121/05, the petitioner had taken a specific plea before the learned Foreigners Tribunal No.3rd, Morigaon that his father Md. Khalilur Rahman was proceeded on an earlier occasions before the learned Foreigners Tribunal, Nagaon in F.T. Case No.4731/88 as well as in Case No.F.T.(D) 114/09 before the learned Foreigners Tribunal No.2, Morigaon and in both the proceedings, his father was declared not to be a foreigner and as such, being the son of an Indian, the present petitioner is to be declared an Indian.

37.3. It has been submitted further that in the first proceeding in F.T. Case No.4731/88 before the learned Foreigners Tribunal, Nagaon, not only his father Md. Khalilur Rahman but the petitioner, Ator Ali himself was proceeded along with other family members and the learned Foreigners Tribunal declared all the proceedees therein not to be foreigners of the stream of 01.01.1966 and 25.03.1971 as alleged by the State.

37.4. In the subsequent proceeding only against his father Khalil @ Md. Khalilur Rahman before the learned Foreigners Tribunal No.2,

Morigaon in Case No.F.T.(D)114/09 his father was again declared not a foreigner by taking into consideration the earlier finding rendered by the learned Foreigners Tribunal, Nagaon vide opinion dated 07.07.1998 in F.T. Case No.4731/88.

37.5. Mr. Hassan, learned counsel for the petitioner submits that the learned Foreigners Tribunal No.3rd, Morigaon in Case No.F.T.(D)121/2015 did not consider the said two favourable opinions of the learned Foreigners Tribunal in the earlier two proceedings and declared the petitioner to be a foreigner vide impugned opinion dated 30.08.2016 passed in Case No.F.T.(D)121/2015.

37.6. Learned counsel for the petitioner submits that in one of the earlier two opinions, in F.T. Case No.4731/88 [opinion dated 07.07.1998] the petitioner was also a proceedee wherein the learned Tribunal had given the opinion that they are not foreigners. Thus, in view of the fact that the present petitioner is the son of the aforesaid Khalilur Rahman, there cannot be any doubt that the petitioner is also an Indian.

37.7. Mr. Kalita, learned counsel for the State, on the other hand has submitted that there is nothing wrong or illegal in the impugned order as the documents cannot be relied on as correctly held by the learned Tribunal.

37.8. In order to appreciate the rival contentions of the learned counsel for the parties, it may be apposite to refer to the earlier opinions.

In F.T. Case No.4731/88, the learned Foreigners Tribunal, Nagaon passed the following order on 07.07.1998,

"OFFICE OF THE MEMBER, FOREIGNERS TRIBUNAL, NAGAON

F.T. CASE NO.-4731/88

PRESENT:....., Member

FOREIGNERS TRIBUNAL, NAGAON

State Vs.
1. Md. Khalilur Rahman
2. Musstt. Rezina Khatoon (Begum)
3. Ator Ali (S) 4..... (S)
5. Miss Afia Khatoon
6. Miss Safia Khatoon

Date of hearing : 07/07/1998

Date of Order : 07/07/1998

O R D E R

Supdt. of Police, (B), Nagaon referred this case to the Tribunal to determine whether O.P.s are Foreigners of Stream 01-1-1996 and 25/3/1971. Necessary notices were issued O.P.s to file written statement and documents if any. In respect to notices O.P.s appeared submitted, written statement and documents. O.P. and Md. Khalilur Rahman examined himself as witnesses, state declined to adduce any witness.

Evidence of O.P.Khalilur Rahman is that he was born and brought up at village Chatoribari, P.S. Mikirbheta, district- Nagaon (Assam). Musstt. Rezina Begum is his wife and OP3 to 6 are sons and daughters who are born and brought up at Chatoribari gaon under Mikirbheta P.S., district- Nagaon. As he was a minor in 1966 his name did not find place in Electoral Roll of 1966 but his name appeared in 84 Lahorighat Assembly Constituency, 1971 (Ext-Kha) is the certified copy of the aforesaid Lahorighat Assembly Constituency 1971. His evidence is that he was minor in 1966 and his name did not appear in the Electoral Roll of 1966 but the name of his elder brother Mona Seikh appeared who was his elder brother. Ext. (Kha) is certified copy of 84 Lahorighat Assembly Constituency, village Chatoribari Part-85 of 84 Lahorighat Assembly Constituency, 1966. It seems that OP Khalilur Rahman was minor in 1966 and his name did not find place in 1966 Electoral Roll of Assembly Constituency. Chain of Electoral Roll of 84 Lahorighat Assembly Constituency it is clear that O.P.s are here before 1966.

They are not foreigners of stream of 01/1/1966 and 25/3/1971.

Inform all concern.

....."

37.9. As mentioned above in the said proceeding, the present petitioner, Ator Ali was also proceeded and was impleaded as respondent No.3 as the son of Md. Khalilur Rahman apart from other family members, namely, Musstt. Rezina Khatoon (Begum) mother of the present petitioner, his brother Mintu and two sisters Afia Khatoon and Safia Khatoon.

37.10. On perusal of the aforesaid order dated 07.07.1998, it can be seen that Md. Khalilur Rahman who the petitioner claims to be his father was born and brought up at village Chatoribari, P.S. Mikirbheta, district Nagaon (Assam). It was also stated that since the said Md. Khalilur Rahman was a minor in 1966, his name did not appear in the Electoral Roll of 1966 but his name appeared in the voters list of 1971 of 84 Lahorighat Assembly Constituency.

37.11. Learned Tribunal accepted the said plea and declared the proceedees therein i.e. the petitioner's father, the petitioner and his brother and two sisters as not foreigners of the stream 01.01.1966 and 25.03.1971 and thus, attained finality.

37.12. The said opinion dated 07.07.1998 passed in F.T. Case No.4731/88 has not been challenged.

Subsequently, there was another opinion rendered by the learned Foreigners Tribunal (2nd), Morigaon in Case No.F.T.(D) 114/09 initiated against Khalil @ Md. Khalilur who the petitioner claims to be his father.

In the said proceeding, which was disposed of on 12.12.2012, the said Khalil @ Md. Khalilur had stated that he was born at village Lachanabori and presently residing at Sotoribori. He stated that his

father's name appeared in the voters list of 1965 and also produced the earlier order dated 07.07.1998.

The said proceedee Khalilur also produced other documents to show that he is an Indian.

37.13. The learned Tribunal on consideration of the said documents including the earlier opinion dated 07.07.1998 passed in F.T. Case No.4731/88 declared the petitioner therein (petitioner's projected father) not to be a foreigner vide order dated 12.12.2012 passed in Case No.F.T.(D)114/09.

37.14. Before the learned Tribunal in Case No.F.T.(D) 121/2015 in the subsequent proceeding, the petitioner had examined himself as DW1 and his father Md. Khalilur Rahman also appeared before the learned Tribunal and examined as DW2.

The petitioner's father Khalilur Rahman (DW2) had testified that he had two sons, namely, Ator Ali and Abdul Rezek and two daughters namely, Safia Begum and Afia Begum but his eldest daughter Hushnara Begum expired 10 years back. He also stated that his wife is Rezia Begum. He also stated that he was born in Lochanebari under Lahorighat P.S. but thereafter, shifted to Sotoribari under Mikirbehta P.S. before permanently settling down at Dhorahap.

Before the learned Tribunal in the subsequent Case No.F.T.(D) 121/2015, the petitioner also took the plea that he is the son of Md. Khalil @ Khalilur Rahman and that the said Khalil @ Khalilur Rahman along with Musstt. Rejina Khatun (Begum), his mother, Ator Ali, the petitioner himself and his brother and two sisters were declared as Indian citizens by the learned Foreigners Tribunal in F.T. Case No.4731/88 and he also stated that his name appeared in the voters

list of 2004 in respect of Morigaon Legislative Assembly Constituency No.80 and as such, he is an Indian citizen.

37.15. However, as can be seen from the impugned order dated 30.08.2016 passed in Case No. F.T.(D) 121/2015, the learned Tribunal held that the petitioner and his father had suppressed material facts before the learned Tribunal by referring to the voters list of 1966. Learned Tribunal observed that in the proceeding before the learned Foreigners Tribunal, Nagaon in F.T. Case No.4731/88, the proceedee Khalilur Rahman had stated that since he was a minor in 1966 his name did not appear in the Electoral Roll of 1966 but the name of his elder brother Mona Seikh had appeared. On the other hand, in the deposition before the learned Tribunal in the instant proceeding, the said Khalilur Rahman had stated that his elder brother's name is Abdul Mannan and also the present petitioner had stated that his parental uncle is Mannan. Thus, the learned Tribunal took the view that the name of the petitioner's uncle who is the elder brother of petitioner's father Khalilur Ramman is shown differently as Monna Sk. and Abdul Mannan. According to the learned Tribunal it amounts to suppression of facts.

Unfortunately, we are not able to agree with the aforesaid inference drawn by the learned Tribunal for the reason that no question was asked during the cross-examination as to why there was a variation in the name of the petitioner's uncle, Abdul Mannan who was mentioned as Mona Sk. by his father in the earlier proceeding in F.T. Case No.4731/88 as a person can have a nick name also.

37.16. Therefore, if there was any such doubt, that could have been clarified during the cross-examination and only when the witness failed

to satisfactorily explain the discrepancy in the name, necessary adverse inference could have been drawn by the learned Tribunal. However, in the present case, what we have noted is that no such question was asked to the petitioner or his father as regards the alleged discrepancy in the name of the petitioner's uncle and as such, we are of the view that the learned Tribunal could not have drawn such an inference that the petitioner and his father had fraudulently obtained the favourable order from the learned Tribunal in F.T. Case No.4731/88.

We have taken this view as, we found that in respect of other evidences, these appear to be similar.

37.17. In the concluding part of the impugned opinion dated 30.08.2016 passed in Case No.F.T.(D)121/2015, the learned Tribunal made the following observation,

> "9. The present O.P have not exhibited the 1965 voter list in the name of Mafizuddin that was produced in F.T.(D) 114/2009. The voter list of 1966 that was exhibited as Ext."Kha" in F.T. Case No.4731/1988. Moreover, the name of the O.P's parental uncle/brother spelt out by the D.Ws do not tally with the name inscribed in F.T. Case No.4731/1988 as in the said Order the name of purported elder brother/parental uncle of the D.Ws is shown as Mona Sk. Whereas they have named Abdul Mannan as their brothr/parental uncle. Therefore document so submitted is engulfed with serious doubts about the genuinity of the documents as well as the person involved being projected and therefore considering the entire aspects of the materials on record as well as the evidence so recorded, I completely differ with the opinion rendered by my predecessor in F.T. No.4731/1988 and F.T.(D) 114/2009."

37.18. Apart from casting doubt on the identity of the petitioner's uncle, the learned Tribunal also held that he would differ from the

opinion rendered by his predecessor in F.T. Case No.4731/1988 and F.T.(D) Case No.114/2009.

37.19. In our view, the learned Tribunal could not have given such a finding in as much as the learned Tribunal was not sitting as an Appellate authority nor was reviewing the earlier orders. If there were any defect or irregularity or illegality in the earlier opinions in F.T. Case No.4731/88 and F.T.(D) Case No.114/2009, nothing prevented the State Government from challenging the same.

However, as noted above, the said two opinions were never challenged by the State and accordingly, have attained finality.

37.20. Under the circumstances, the learned Tribunal could not have taken the view that he completely differs from the opinions rendered earlier in F.T. Case No.4731/88 and F.T.(D) Case No.114/2009.

37.21. However, the issue before us is to ascertain as to whether the present petitioner, namely, Ator Ali @ Rahman is the same person who was proceeded earlier in F.T. Case No.4731/88 and is the son of the said Khalilur Rahman who was also proceeded in Case No. F.T.(D)114/09 in which the learned Tribunal had given the opinion that they were not foreigners.

37.22. We have noted from the order in F.T. Case No.4731/88 that the present petitioner Ator Ali was also one of the proceedees and the said Md. Khalilur Rahman, projected father of the petitioner had categorically stated about his children which included the present petitioner and the learned Tribunal gave the opinion that the proceedees therein (including the present petitioner) are not foreigners of the stream of 01.01.1966 and 25.03.1971.

37.23. In the subsequent proceeding in Case No.F.T.(D)114/2009, the learned Tribunal also gave the opinion that the said Khalil @ Md. Khalilur Rahman, the projected father of the petitioner is not a foreigner relying on the earlier opinion rendered in F.T. Case No.4731/88.

37.24. These two favourable opinions of the learned Foreigners Tribunal dated 07.07.1998 passed in F.T. Case No.4731/88 and dated 12.12.2012 passed in Case No.F.T.(D) 114/09 had been relied on by the present petitioner in present proceeding in Case No.F.T.(D)121/2015 and the petitioner's father Khalilur Rahman had himself appeared before the third proceeding in Case No. F.T.(D) 121/2015 and had given the testimony about the aforesaid facts.

37.25. We have also noted that the evidence of the present petitioner as well as his father have not been shaken.

The genuineness of the earlier two opinions have never been questioned by the State, and as such, we are satisfied that there are sufficient evidences on record to show that the present petitioner himself was proceeded in the earlier proceeding in F.T. Case No.4731/88 before the learned Foreigners Tribunal, Nagaon which was disposed of on 07.07.1998 declaring the present petitioner and other family members as not foreigners of the stream of 01.01.1966 and 25.03.1971.

Similarly, we have also noted the fact that the petitioner's projected father, Khalilur Rahman who had appeared and deposed before the learned Tribunal, was also declared not a foreigner in the subsequent proceeding in Case No.F.T.(D) 114/09.

37.26. Under the circumstances, we are of the view that apart from applicability of *res judicata* in view of the earlier opinion dated 07.07.1998 passed in F.T. Case No.4731/88, also because of the fact that the petitioner's father had been declared as not a foreigner but an Indian in another proceeding in Case No.F.T.(D) 114/09, the petitioner has been able to establish that he is an Indian and not a foreigner.

37.27. Accordingly, for the reasons discussed above, we are unable to agree with the conclusion arrived by the learned Foreigners Tribunal No.3rd, Morigaon, Assam in Case No.F.T.(D) 121/2015 vide order dated 30.08.2019 and accordingly, the same is set aside.

37.28. Resultantly, petitioner is to be considered an Indian in terms of the earlier opinion dated 07.07.1998 passed in F.T. Case No.4731/88 and as the son of an Indian, Md. Khalilur Rahman who was also declared not a foreigner in Case No.F.T.(D) 114/09 vide opinion dated 12.12.2012.

37.29. Accordingly, the present petition, WP(C) No.8189/2019 stands allowed.

38. <u>WP(C) No. 8253/2019 [Phul Banu @ Phulbanu Begum Vs. The Union of India and 5 Ors.</u>]

38.1. In this petition, [WP(C) No.8253/2019], the petitioner, Smti. Phul Banu @ Phulbanu Begum aged about 70 years, Wife of Intaz Ali, regisdent of Village- Lakhi Nepali Bosti, P.S. Jonai, District- Dhemaji, Assam has challenged the impugned order dated 27.02.2019 passed by the learned Foreigners Tribunal 3rd Dhemaji, Jonai, Assam in F.T.(3) Case No.FT(DV) 1275/16 [Ref.IM(DMJ)1780/98] by which the learned Foreigners Tribunal held that the petitioner had failed to adduce any

documents to prove herself as an Indian citizen and declared her as a foreigner who had entered Assam on or after 25.03.1971.

38.2. In this case also, the petitioner had taken a specific plea before the learned Foreigners Tribunal 3rd, Dhemaji, Jojai stating that she was proceeded earlier in Case No.FT/DMJ 1213/2007 and an opinion was rendered on 22.08.2013 declaring that she being the daughter of an Indian citizen Abdul Rahim is also an Indian citizen and not a foreigner. A copy of the said opinion dated 22.08.2013 passed by learned Foreigners Tribunal, Dhemaji in Case No.FT/DMJ-1213/2007 was exhibited before the learned Foreigners Tribunal 3rd Dhemaji, Jonai as Ext.5. However, the learned Foreigners Tribunal did not consider the said exhibit and proceeded to hold that the petitioner had failed to discharge her burden under Section 9 of the Foreigners Act, 1946 to prove that she was not a foreigner but a citizen of India and declared her to be a foreigner of post 15.03.1971 stream.

38.3. Mr. M. Khan, learned counsel for the petitioner has submitted that there are sufficient materials on record to show that the present petitioner Smti Phul Banu @ Phulbanu Begum, wife of Intaz Ali, daughter of Abdul Rahim, a resident of Village Lakhi Nepali Bosti, P.S. Jonai, District Dhemaji, Assam is the same person who was proceeded earlier in Case No.FT/DMJ-1213/2007 before the learned Foreigners Tribunal, Dhemaji.

38.4. In our view, it was necessary on the part of the learned Foreigners Tribunal to have examined whether the present petitioner is the same person who was proceeded earlier in Case No.FT/DMJ-1213/2007 and if it is found that the present petitioner is the same person who was proceeded in Case No.FT/DMJ-1213/2007 in which a

favourable opinion was rendered declaring the petitioner to be an Indian, the subsequent proceeding in F.T(3) Case No.FT(DV)1275/16 would not lie in view of the decision rendered in **Abdul Kuddus**.

38.5. Though the earlier opinion dated 22.08.2013 was a short one declaring the said proceedee Musstt. Fulbanu @ Phoolbanu Begum as an Indian, the learned Tribunal had rendered the opinion by accepting the plea considering the certified copy of the voters list of 1965 for No.84 Laharighat Legislative Assembly Constituency wherein the name of the claimed father of the petitioner Abdul Rahim was found at Serial No.114.

38.6. In the subsequent proceeding in F.T.(3) Case No.FT(DV) 1275/16, what we have noted is that the petitioner made a specific claim that she is daughter of one Abdul Rahim and also had exhibited the voters list of 1965 as Ext.2 wherein the name of the Petitioner's father Abdul Rahim appears at Serial No.114, House No.18 of village Solmarigaon, Part No.57, P.S.- Lahorighat, Nagaon, Assam.

38.7. We have also gone through the original records of both the proceedings before the learned Foreigners Tribunal.

38.8. In the written statement filed in the earlier proceeding in FT/DMJ 1213/2007, the petitioner had specifically stated that her name had appeared in the voters list of 2013, the petitioner has been shown as wife of Intaz Ali under 114 No. Jonai Legislative Assembly Constituency part No.26 at Serial No.1033, House No.434 in Village- Lakhi Nepali Bosti.

In the subsequent proceeding in F.T.(3) Case No.FT(DV)1275/16, the petitioner had relied on the voters list of 1997. In the voters list of 1997, the name of the petitioner appeared under

the same village Lakhi Nepali Basti, P.S. Jonai, under the same Dhemaji District and same Assembly Constituency i.e. 114 No.Jonai Legislative Assembly Constituency.

38.9. In both the proceedings, the same voters list of 1965 have been relied upon and on comparison it is found that the name of the projected father of the petitioner Abdul Rahim appears in the same serial No.114 and the same House No.18 in respect of the same village Solmarigaon, Part 57, P.S. Lahorighat, Nagaon, Assam in respect of the same 84 No. Lahorighat Legislative Assembly Constituency.

38.10. The earlier opinion rendered by the learned Foreigners Tribunal, Dhemaji in Case No.FT/DMJ-1213/2007 on 22.08.2013 has attained finality and not challenged by the State, though in the present proceeding, the petitioner has produced additional documents in terms of other voters lists. However, in our view the additional documents will not be necessary, once we are satisfied with the similarity of identity of the proceedees in the two proceedings, that is that, they are the same and one person.

38.11. In the present case, we are satisfied that the present petitioner is the same person who was proceeded earlier in Case No.FT/DMJ-1213/2007.

38.12. Under the circumstances, the present petition is allowed by setting aside the subsequent opinion dated 27.02.2019 rendered by the learned Foreigners Tribunal 3rd, Dhemaji, Jonai, Assam in F.T.(3) Case No.FT(DV)1275/16 [Ref: IM(DMJ) 1780/98].

38.13. As a result, the petitioner is to be declared not a foreigner but an Indian citizen in terms of the earlier opinion dated 22.08.2013

passed by the learned Foreigners Tribunal, Dhemaji in Case No.FT/DMJ-1213/2007.

39. WP(C) No.1816/2020 [Sahera Khatun vs. The Union of India & Ors.]

39.1. In this petition, the petitioner, Sahera Khatun, aged about 55 years , Daughter of Anju Miah @ Amzad Ali and wife of Abdul Bakki, Village-Rowmari, P.S.-Tarabari, District-Barpeta has challenged the impugned common order dated 21.01.2020 passed by the Foreigners Tribunal No.7th, Barpeta in F.T. Case No.69/2018 arising out of IM(D)T Case no.887/03 and F.T. Case No.432/2016 arising out of IM(D)T Case No.4882/1998 by which the Tribunal declared the petitioner a foreigner of post 25.03.1971 stream.

39.2. Learned counsel for the petitioner submits that the petitioner was already declared an Indian by birth vide impugned order dated 27.02.2015 passed in F.T.(2ND Tribunal) Case No.1419/2012 by the Foreigners Tribunal No.2nd, Barpeta. However, the Tribunal took the view that the issue in the aforesaid F.T. Case No.1419/2012 substantially is not the same with the issue in F.T. Case No.69/2018 and F.T. Case No.432/2016 and accordingly, on the basis of the evidence on record in the aforesaid subsequent F.T. Case No.69/2018 and F.T. Case No.432/2016 proceeded to pass the impugned order dated 21.01.2020 by declaring the petitioner to be a foreigner of post 25.03.1971.

39.3. It was observed by the learned Tribunal that since the petitioner failed to establish the linkage with her projected parents Anju Miah @

Amzad Ali and Kanchan Mala, the petitioner cannot take the benefit of the order dated 27.02.2015 passed in F.T.(2ND Tribunal) Case No.1419/2012 by the Foreigners Tribunal No.2nd, Barpeta.

39.4. In view of the above, before we examine the merit of the case on the basis of the evidence adduced in this proceeding, we will first examine whether the issues raised in the earlier opinion dated 27.02.2015 in F.T.(2ND Tribunal) Case No.1419/2012 before the Foreigners Tribunal No.2nd, Barpeta are different from the issue raised in F.T. Case No.69/2018 and F.T. Case No.432/2016 as observed by the learned Tribunal.

39.5. In the earlier proceeding i.e. in F.T.(2ND Tribunal) Case No.1419/2012 Barpeta, the issue was whether the proceedee therein, namely, Sahera Begum wife of Bakki Mia, resident of Village-Roumari Pather, P.S.-Tarabari, Dist.-Barpeta was an illegal immigrant. In the said proceeding, the said proceedee Sahera Begum testified and also examined other witnesses. The Foreigners Tribunal No.2nd, Barpeta, on the basis of the evidence adduced therein took the view that the proceedee Sahera Begum was born and brought up in the Village-Karagari, P.S. & Dist.-Barpeta, Assam and her father's name is late Anju Miah, whose name appeared in the voters lists of 1965 and 1970 under 48 No. Bhawanipur LACT, Village-Karagari. The learned Tribunal also noted that she was married to one Bakki Miah (Abdul Bakki) and her name appeared in the voter lists of 1989 under 41 No. Bhawanipur LACT, village-Chenglimari and later on, she shifted her residence to Village-Roumari Pather and her name also appeared in the voter lists of 1994. The Tribunal also observed that the said proceedee's father was

a permanent resident of village-Karagari, P.S. & Dist.-Barpeta, Assam before 1965.

Accordingly, the Tribunal took the view that she had been able to discharge her burden to prove that she is a citizen of this country and returned the reference in favour of the proceedee Sahera Begum.

We will accordingly, examine as to whether the present proceedee, namely, Sahera Khatun is the same who was the proceedee in the earlier proceeding in F.T. Case No.1419/2012 for the purpose of considering the applicability of the principle of *res judicata.*

39.6. The description of the proceedee in F.T. Case No.69/2018 arising out of IM(D)T Case No.887/03 and F.T. Case No.432/2016 arising out of IM(D)T Case No.4882/1998 which were before the Foreigners Tribunal No.7th, Barpeta in which the impugned opinion has been passed, is as follows: Sahera Khatun, aged about 55 years , Daughter of Anju Miah @ Amzad Ali and wife of Abdul Bakki, Village-Rowmari, P.S.-Tarabari, District-Barpeta**.**

39.07. In the first proceeding i.e. in F.T.(2ND Tribunal) Case No.1419/2012 before the Foreigners Tribunal No.2nd, Barpeta where the favourable order was passed, the description of the proceedee is as follows: Sahera Begum wife of Bakki Mia, resident of Village-Roumari Pather, P.S.-Tarabari, Dist.-Barpeta.

39.08. Thus, it appears that the descriptions of the proceedees in all the proceedings appear to be similar. However, as an abundant caution, we would like to examine as to whether there are other

similarities as regards the evidences adduced in the aforesaid 2 (two) proceedings for our satisfaction.

39.9. As discussed above, in the first round i.e. in F.T.(2ND Tribunal) Case No.1419/2012 the proceedee had relied upon the voters lists of 1965 and 1970 in which her father's name appeared as late Anju Miah. In the subsequent second round i.e. in F.T. Case No.69/2018 and F.T. Case No.432/2016 also it was the plea of the petitioner that her father is Anju Sheikh @ Anju Miah @ Amzad Ali and her mother's name is Kanchan Mala and Falani Begum is her step mother. In the voters list of 1965 which was exhibited as Exhibit B, the name of Anju Miah, the projected father of the petitioner the name Anju Miah appeared under 48 No. Bhawanipur LAC, Mouza-Bhawanipur, Village-Kargari, P.S.-Barpeta. Similarly, in the voters lists of 1970 which was exhibited as Exhibit-C before the Tribunal, the name of Anju Miah again appeared in the said voters list under the same village Karagari. But, in the voters list of 1989 which was exhibited as Exhibit-A the name of one Amjat Ali appeared under the 41 No. Bhawanipur LAC, Mouza-Bijni, Village-Chenglimari, P.S.-Barpeta Road and in the voters lists of 1997, which was exhibited as Exhibit-D, the names of said Amjad Ali appeared under the 46 No. Sarukhetri LAC, Mouza-Pakka, Village-Naligaon, P.S. & Dist.-Barpeta with the petitioner's projected step mother Falani Begum. The names of the petitioner/proceedee appeared along with her husband Abdul Bakki under 41 no. Bhabanipur LAC, Mouza-Bijni, Village-Chenglimari, P.S.-Barpeta.

In the earlier proceeding the said proceedee also stated that her family shifted to the residence to village-Roumari Pather and thereafter, her name appeared in the voters list of 1994.

39.10. In the second proceedings also i.e. in F.T. Case No.69/2018 and F.T. Case No.432/2016, the petitioner stated that she was born and brought up at village Karagari and then, she had shifted to village Chenglimari and thereafter, to village Roumari sometime in the year 1994 due to Bodo agitation and her name also appeared in the voters list of 1994.

39.11. The petitioner also filed additional documents in the second round of proceedings about her parents and other relatives.

39.12. From the perusal of the impugned order dated 21.01.2020 passed by the Foreigners Tribunal No.7th, Barpeta in F.T. Case No.69/2018 and F.T. Case No.432/2016, it is evident that the Tribunal was not convinced with the plea taken by the proceedee that she is the daughter of Anju Miah, primarily for the reason that while the name of her projected father was recorded in the voters lists of 1965 and 1970 as Anju Miah, it was recorded as Amjad Ali in the voters list of 1997 and as such, the Tribunal held that the petitioner failed to prove that she is the daughter of Anju Miah whose name was recorded in the voters lists of 1965 and 1970.

39.13. As regards the plea of *res judicata,* the Tribunal had given a categorical finding in Para-49 of the opinion dated 21.01.2020 by stating that the issue in F.T.(2ND Tribunal) Case No.1419/2012 is substantially different from the issue in F.T. Case No.69/2018 and F.T.

Case No.432/2016. For coming to such a conclusion the Tribunal observed that in the enquiry report the name of the father of the proceedee is shown as Amzad Ali though she claims that her father is Anju Miah as recorded in the voters lists of 1965 and 1970. The said opinion and finding in Para-49 is reproduced herein below:

> *"In this case, O.P. relied on the certified copy of the judgment dated 27.02.2015 passed in F.T. Case No.1419/2012 declaring O.P./2nd party Shera Khatun is an Indian citizen by birth. In that reference proceeding after perusal of the documentary evidence on record, the Tribunal rendered an opinin that Anju Miya name appears in the voter lists of 1965 and 1970 under 48 No. Bhabanipur LAC. Coming to the present reference, the Inquiry Officer in Form-I and Form-II recorded Sahera Begam father name is Amjad Ali. The issue in F.T. Case No.1419/2012 is substantially not the same issue in F.T. Case No.69/18 and 432/16. Having seen the said, that it has already been discussed and conclusively held that O.P. have failed to establish her linkage that she is the offspring of Anju Miya and as a result, the opinion dated 27.02.2015 would come to aid for O.P. only when O.P. can satisfactorily and conclusively demonstrate linkage with her projected parents Anju Miya and Kanchan Mala. Therefore, the linkage not having been established as required under the law, the O.P. cannot claim the benefit of the order dated 27.02.2015 passed in F.T. Case No.1419/2012."*

39.14. However, we are of the view that the aforesaid approach of the Tribunal is not correct. If the petitioner is able to demonstrate before the Tribunal that she is the same person who was proceeded in the earlier proceeding i.e. F.T.(2ND Tribunal) Case No.1419/2012, there would be no need to examine the subsequent proceeding on merit in view of the applicability of the principle of *res judicata*.

39.15. However, in the impugned order dated 21.01.2020 what appears to have been done is that rather than trying to ascertain as to whether the present proceedee is the same person who was proceeded in earlier proceeding i.e. F.T.(2ND Tribunal) Case No.1419/2012, the

Tribunal proceeded to examine the matter on merit and thereafter, held that the earlier opinion is not applicable as the issues were different.

39.16. It is not correct to say that the issue in the earlier first proceeding in F.T. (2nd Tribunal) Case No.1419/12 is different from the issue in the subsequent proceeding in Case No.F.T.69/2018, F.T.432/2016. In fact, these are same i.e. to find out whether the proceedees were foreigners or not. There is no difference in the issues. Further, it is also clearly seen from the evideneces on record that the proceedees in all these proceedings are same, in which event, the matter could be concluded by holding the view that the petitioner is not a foreigner in terms of the earlier opinion dated 27.02.2015 and the learned Tribunal could not have proceeded to examine as to whether the petitioner had been able to establish her linkage with the said Anju Miah. The issue of establishing her linkage with Anju Miah would arise only when the earlier opinion is held to be in respect of some other person and not the same. If it is the same person then the principle of res judicata will be applicable.

Accordingly, for the reasons discussed above, we allow this petition by setting aside the impugned order dated 21.01.2020 passed in Case No.F.T.69/2018, F.T.432/2016 by learned Foreigners Tribunal No.7, Barpeta, Assam.

Resultantly, the petitioner, Sahera Begum, daughter of Anju Miah @ Amzad Ali, wife of Abdul Bakki of village Rowmari, P.S.- Tarabari, District- Barpeta, Assam will be declared to be an Indian in

terms of earlier opinion dated 27.02.2015 passed in F.T.(2nd Tribunal) Case No.1419/12 which has attained finality and not challenged by the State.

40. WP(C) No. 3514/2021 [Nal Mia @ Lal Mia Vs. The Union of India and 6 Ors.]

40.1. In this petition [**WP(C) No.3514/2021]**, the petitioner, Nal Mia @ Lal Mia, aged about 36 years, son of Late Mamud Ali, resident of Village- Bamunpara, P.S.-Mankachar, District- South Salmara Mankachar, Assam has challenged the impugned order dated 26.04.2021 passed by the learned Foreigners Tribunal, Kamrup (M) No.2 at Guwahati in F.T. Case No.1448/2015 by which the learned Tribunal rejected the plea of the petitioner to drop F.T. Case No.1448/2015 and thereafter fixed the matter for filing written statement on 20.05.2021.

40.2. The petitioner submitted before the learned Foreigners Tribunal, Kamrup (M) 2nd, Guwahati in F.T. Case No.1448/2015 that the petitioner, Nal Mia @ Md. Lal Mia had already been declared as an Indian vide opinion dated 06.03.2017 passed in F.T. Case No.280/2015 and accordingly, prayed before the learned Tribunal to drop the proceeding in F.T. Case No.1448/2015 on the ground that the principle of *res judicata* is applicable as decided by the Hon'ble Supreme Court in **Abdul Kuddus**. However, vide impugned order dated 26.04.2021 passed in F.T. Case No.1448/2015, the learned Tribunal held that the case cannot be dropped merely based on the submission of the petitioner that he had been declared an Indian on earlier occasion and even there be similarity in name and address of the present petitioner

and the suspect of F.T. Case No.1448/2015, without examining documents and witnesses and it cannot be concluded that person named in the present F.T. Case No.1448/2015 is the same person who was declared as Indian vide order dated 06.03.2017 in F.T. Case No.280/2015, and accordingly, rejected the plea of the petitioner to drop the F.T Case No.1448/2015 and fixed the matter for written statement on 20.05.2021.

40.3. Vide impugned order dated 26.04.2021, the learned Tribunal while giving the aforesaid conclusion also made certain observations about the applicability of **Abdul Kuddus** in the light of dismissal of the SLP by the Hon'ble Supreme Court challenging the order passed by the Division Bench of this Court in ***W.P No. 3362/2018*** [***Shahjahan Ali Vs. Union of India and Ors.***]

40.4. We are of the view that it will not be necessary for the Tribunal to examine the said issue again based on the decision of this Court in **Shahjahan Ali (Supra)** in the light of our discussion made above. **Shahjahan Ali** was decided on the basis of **Amina Khatoon**, which is no more a good law, in view of the decision of **Abdul Kuddus** and as such, cannot be relied upon anymore.

We, accordingly, direct that whenever a proceedee takes the plea of applicability of *res judicata* on the ground that he had been already declared not a foreigner but an Indian by Foreigners Tribunal in an earlier proceeding. The Tribunal has to take up it as the preliminary issue before going into the merit of the case and the proceedee in the subsequent proceeding has to show that he is the same person who was proceeded earlier.

In the present proceeding, the Tribunal has to first determine whether the petitioner is the same person who was proceeded in the earlier proceeding. Thus, the scope of examination is confined only to the issue whether the petitioner is the same person who was proceeded earlier or not. For that purpose, there can be examination of evidences in the form of oral documents and evidences to arrive at such a satisfaction. If the Tribunal on such examination comes to a conclusion that the present proceedee is the same person who was proceeded in the earlier proceeding, there is no need to go into the merit of the case any further, by way of filling any written statement and documents etc.

40.5. Thus, if the learned Tribunal comes to conclusion based on the evidence that may be adduced by the present petitioner/proceedee relevant to the determination of the preliminary issue, that he is the same person who was proceeded earlier in the proceeding before the learned Foreigners Tribunal on the plea of applicability of *res judicata*, the subsequent proceeding shall be closed without any further examination, but on the basis of the earlier opinion declaring the person to be not a foreigner.

40.6. We would also like to remind the learned Tribunal that in spite of burden of proof cast on the proceedee as provided under Section 9 of the Foreigners Act, 1946, the standard of proof required is "preponderance of probability" and not proof beyond all reasonable doubts. Therefore, if the petitioner is able to establish on the basis of preponderance of probabilities that he is the same person who was proceeded earlier in whose favour a favourable opinion was rendered

that he is not a foreigner, the Tribunal has to close the present proceeding.

40.7. In the present case, the learned Tribunal has not yet decided this issue as to whether the present petitioner is the same person who was earlier proceeded in F.T. Case No.280/2015 in which the said proceedee was declared to be an Indian vide order dated 06.03.2017.

40.8. Accordingly, we dispose of this petition with the direction to the learned Foreigners Tribunal, Kamrup (M) 2nd, Guwahati to consider this plea as to whether the present petitioner, Nal Mia @ Md. Lal Mia is the same person who proceeded earlier in F.T. Case No.280/2015.

40.9. We have also noted that in the earlier proceeding in F.T. Case No.280/2015, the proceedee was described as Lal Mia @ Nal Mia, son of Mamud Ali Seikh, Resident of Bamunpara, P.S. Mankachar, District-Dhubri [P/A C/O Runu Ali, Birubari, P.S. Paltanbazar].

In the present proceeding in F.T. Case No.1448/2015, the proceedee has been described as Nal Mia @ Md. Lal Mia, Son of (Lt.) Mamud Ali Sk., village- Bamunpara, P.S.- Mankachar, District- South Salmara Mankachar, Hatsingimari, Assam and as such there is close resemblance as far as the identity of the both the proceedees are concerned.

40.10. Be that as it may, the learned Foreigners Tribunal, Kamrup (M) 2nd will examine this preliminary issue as to whether the present petitioner Nal Mia @ Lal Mia is the same person who was proceeded earlier in F.T. Case No.280/2015 and if the learned Foreigners Tribunal comes to a conclusion that he is the same person who was proceeded in F.T. Case No.280/2015, the subsequent proceeding in F.T. Case No.

1448/2015 shall be closed without any further enquiry as directed above. If the finidng is otherwise, the matter will be proceeded in accordance with law.

JUDGE **JUDGE**

Comparing Assistant