

(2012) 02 MAD CK 0295
In the Madras High Court
Case No : Writ Petition No. 27221 of 2011

G. Karunairaj

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 29-02-2012

Acts Referred:

Constitution of India, 1950 — Article 13, 21, 22(4), 258, 32
Evidence Act, 1872 — Section 9
Extradition Act, 1962 — Section 33, 34(A)
Foreigners Act, 1946 — Section 14, 16, 2, 3, 3(1)
Foreigners Laws (Amendment) Act, 1957 — Section 10, 11, 12, 13, 15
Madras City Police Act, 1888 — Section 65
Passports (Entry into India) Act, 1920 — Section 3
Penal Code, 1860 (IPC) — Section 109, 120(B), 147, 148, 149

Citation : (2012) 02 MAD CK 0295

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : M. Sreedhar, for the Appellant; N. Srinivasan, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice V. Ramasubramanian

1. The petitioner has come up with the above writ petition challenging an order passed by the Government, in exercise of the powers conferred u/s 3(2)(e) of the Foreigners Act, 1946, directing the petitioner to reside in the Special Camp for Foreigners at Chengalpet. I have heard Mr.M.Sreedhar, learned counsel for the petitioner and Mr.N.Srinivasan, learned Additional Government Pleader for the respondents.

2. The case of the petitioner is

(i) that on 21.8.2010, he came to Chennai along with his wife and three children and stayed at a hotel;

(ii) that at about midnight, a team of plain clothes police officers entered into the hotel room and took the family to Coimbatore;

(iii) that several cases were foisted on him at the instance of the then Commissioner of Police, Coimbatore;

(iv) that the petitioner had lodged several complaints to various Authorities, including Home Department and the CBI and had also lodged private complaints against the said officer;

(v) that the petitioner secured bail in various cases, none of which was for any offence under the Foreigners Act or the Citizenship Act or the Extradition Act; and

(vi) that after his release on bail in all cases, he had been declared as a foreigner and lodged in the Special Camp by the Government at the instigation of the said Police Officer, without even following due process of law despite voluminous records to show that he is a citizen of India.

3. The first respondent has filed a counter contending inter alia

(i) that four different complaints had been registered against the petitioner in Cr. Nos. 38, 55, 77 and 83 of 2010;

(ii) that after investigation, charge sheets have been filed in all the four cases before the Courts of Judicial Magistrate Nos. 3, 6 and 7, Coimbatore;

(iii) that during the investigation in C.C.B.Cr.No. 55 of 2010, the Investigating Officer sent the finger prints of the petitioner to the Narcotics Control Bureau/ INTERPOL, Malaysia;

(iv) that after comparison, the Narcotics Control Bureau/INTERPOL, Malaysia sent a report to the effect that the finger prints of the petitioner tallied with a Malaysian fugitive offender by name Michael, s/o Susai;

(v) that the petitioner is a Malaysian with Identity Card No. 630308-07-5073 and Passport No. A11314136;

(vi) that the Consulate General of Malaysia sent a letter to the Commissioner of Police on 15.4.2011 enclosing the death certificate of one Michael Susai, with National Identity Card No. 630308-07-5073 and Passport No. A11314136;

(vii) that the said death certificate of Michael Susai was not a genuine one;

(viii) that since the certificate of death had been obtained by one Mr.Kumaresan, a complaint was registered against him in Cr.No. 1365 of 2010;

(ix) that during investigation in C.C.B.Cr.No. 55 of 2010, the petitioner confessed voluntarily on 3.9.2010 that he is a Malaysian citizen, born at Penang;

(x) that the petitioner has multiple pan cards and driving licences in different names and addresses with different dates of birth, all carrying the photograph of the petitioner;

(xi) that all these documents are found to be forged or fraudulently obtained;

(xii) that in these circumstances, the Investigating Officer arrived at the conclusion that the fugitive offender Michael and the petitioner are one and the same;

(xiii) that therefore, a charge sheet was filed under Sections 420, 109, and 468 of the Indian Penal Code read with Section 14 of the Foreigners Act, 1946, Section 3 of the Passport (Entry Into India) Act, 1920 and Section 65 of the Tamilnadu City Police Act;

(xiv) that the Malaysian National Dr.G.K.Raj (a) Karunahraj (a) G.K. Rajasekaran (a) Dharmadevan (a) Michael Raj (a) Micheael Susai, S/O Gnanamuthu is concerned in the following cases :

- a. Coimbatore C.C.B.Cr.No. 38 of 2010 u/s 420 IPC;
- b. Coimbatore C.C.B.Cr.No. 55 of 2010 u/s 420 IPC;
- c. Coimbatore C.C.B.Cr.No. 77 of 2010 u/s 420 IPC;
- d. Coimbatore C.C.B.Cr.No. 83 of 2010 u/s 420 IPC (a) 120(B), 420 and 109 IPC;
- e. Cheyyur P.S. (Kancheepuram District) Cr.No. 609 of 2004 under Sections 147, 148, 364, 417, 302, 201, 120(B) IPC read with 149 IPC;
- f. Chennai Airport P.S.Cr.No. 284 of 2004 under Sections 365 and 420 IPC;
- g. Krishnagiri District HUDCO P.S.Cr.No. 251 of 2009 u/s 420 IPC;
- h. Karnataka Mangalore South P.S.Cr.No. 9 of 2008 under Sections 406 and 420 IPC; and
- i. Karnataka Uduppi P.S.Cr.No. 19 of 2008 under Sections 406 and 420 read with 34 IPC.

(xv) that the petitioner -Karunairaj was also involved in the following cases in Malaysia :

- a. Report No. Jalan Bandar : 4803/2000 Section 420 Penal Code Offences : Cheating Status : wanted;
- b. Report No. Jalan Bandar : 28845/2000 Section 379 Penal Code Offences : Theft Status : wanted;
- c. Report No. Section 11: 527/2001 Section 467 Penal Code Offences : Forgery Status : wanted;
- d. Report No. SG Way: 1589/2001 Section 420 Penal Code Offences : Cheating Status : wanted;
- e. Report No. Puchong : 5169/2003 Section 506 Penal Code Offences : Criminal Intimidation Status : wanted; and

f. Report No. Puchong : 13761/2003 Section 506 Penal Code Offences : Criminal Intimidation Status : wanted.

(xvi) that after the petitioner was released on bail from the Central Prison, Puzhal on 8.11.2011, a proposal was sent to the Government by the Inspector General of Police -Intelligence (Internal Security), Chennai on 8.11.2011;

(xvii) that the Government issued orders on 9.11.2011 directing the petitioner to be lodged in the Special Camp;

(xviii) that he was accordingly lodged in the Special Camp on 9.11.2011 and the impugned order was served on him on 11.11.2011;

(xix) that the lodging of a person in a Special Camp for Foreigners will not amount to confinement;

(xx) that the validity of similar orders have been upheld in several cases, both by this Court and by the Supreme Court; and

(xxi) that a direction that a foreigner should be detained in a Special Camp cannot be considered as detention or confinement as envisaged u/s 3(2)(g) of the Act.

4. Though the petitioner has made several allegations against a particular Police Officer without even impleading him as a party, those allegations need not be enquired into, for testing the correctness of the impugned order for various reasons. First of all, the petitioner has not assailed the impugned order exactly on the ground of mala fides, though he could have done so by impleading the said Police Officer as a party. As a matter of fact, if he had done so, the said Officer would have had many things to explain to this Court, in view of the manner in which even the children of the petitioner including an adolescent daughter was dealt with by the Police, when that officer was at the helm of affairs at Coimbatore. Anyway, since the petitioner himself has spared me of the necessity to go into these allegations by not challenging the impugned order on the ground of mala fides and also not impleading that officer as a party to the writ petition, I shall leave all these allegations apart, so that the correctness of the impugned order could be tested on purely legal grounds.

5. As pointed out earlier, the impugned order has been passed under the Foreigners Act, 1946. The Act is a colonial legislation passed in the year 1946 to enable the Government to exercise certain powers in respect of the entry of foreigners into the country, their presence and departure. Like colonial mindset that could not be driven away, the Act also came to stay along with similar enactments of the pre-independence era. As is obvious from the scheme of the Act, the Act applies only to foreigners.

6. The word "foreigner" is defined u/s 2(a) of the Act to mean a person, who is not a citizen of India. Section 3(1) of the Act empowers the Central Government, by order, to make provision, either generally or with respect to all foreigners or

with respect to any particular foreigner or any prescribed class or description of foreigners. The order may be either for prohibiting or regulating or restricting the entry of foreigners into the country or their departure or presence/continued presence in the country. Sub-Section (2) of Section 3 lists out various types of orders that could be passed by the Government u/s 3(1). The orders that could be passed u/s 3(1), listed in Section 3(2) are

- i. an order prohibiting the entry or restricting the entry to such times and to such route and such port and subject to the observance of such conditions;
- ii. an order for the departure from India or for the departure at such times, by such route and from such port and subject to the observance of such conditions;
- iii. an order directing the foreigner to remain in India or in any prescribed area therein;
- iv. an order directing the payment of the cost of disposal, cost of removal from India and cost of maintenance, if such foreigner is ordered not to remain in India;
- v. an order to remove himself to such area or to remain in such area as may be prescribed;
- vi. an order directing such foreigner to comply with prescribed or specified conditions, relating to residence, restriction of movements, production of proof of identity, allowing himself to be photographed and his finger prints, handwriting and signatures taken, to be submitted to medical examination, etc.
- vii. An order directing him to enter into a bond with or without sureties for the observance of the prescribed or specified restrictions or conditions; and
- viii. An order to be arrested and detained or confined.

7. Section 3A(1) of the Act empowers the Central Government to declare by order, that any or all of the provisions of the Act or of any order made thereunder shall not apply or shall apply in such circumstances or with such exceptions or modifications in relation to the citizens of any such Commonwealth Country as may be specified. But any order passed u/s 3A(1) is liable to be placed on the table of both Houses of Parliament.

8. Section 4 deals with the obligations of the foreigners in respect of whom an order made u/s 3(2) is in force. Section 5 deals with change of name of foreigners. Section 6 deals with obligations of Masters of Vessels. Section 7 deals with obligation of Hotel Keepers to furnish particulars. Section 7A confers power upon the prescribed authority to control places frequented by foreigners. Section 8 deals with the determination of the nationality of a foreigner, whose nationality is either uncertain or who appears to be a national of more than one foreign country.

9. Section 9 deals with burden of proof and it reads as follows :

If in any case not falling u/s 8 any question arises with reference to this Act or

any order made or direction given thereunder, whether any person is or is not a foreigner or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person.

10. Section 10 empowered the Central Government to exempt any individual foreigner or any class or description of foreigners from the application of the provisions of the Act. But this section was deleted by the Amendment Act 11 of 1957. Section 11 confers powers upon an Authority empowered by the Act to give effect to the orders and directions issued under the Act. Section 12 speaks of delegation. Sections 13 and 14 deal with the contravention of the provisions of the Act and the penalty for the same. Section 15 gives immunity to a person acting under this Act, from any suit, prosecution or other legal proceedings, in respect of anything done in good faith. Section 16 declares that the provisions of this Act shall be in addition to the provisions of the Registration of Foreigners Act, 1939 and the Indian Passport Act, 1920.

11. Though the Foreigners Act, 1946 empowers only the Central Government to pass orders under the Act, the Ministry of Home Affairs, Union of India appears to have issued a Notification in S.O.No. 590, dated 19.4.1958, in exercise of the powers conferred by Clause (1) of Article 258 of The Constitution, entrusting to the State Governments of Andhra Pradesh, Assam, Bihar, Bombay, Jammu and Kashmir, Kerala, Madhya Pradesh, Madras (Tamilnadu), Mysore (Karnataka), Orissa, Punjab, Rajasthan, Uttar Pradesh and West Bengal, the functions of the Central Government. Therefore, the Government of Tamilnadu itself is competent to pass an order u/s 3(2) of the Act, despite the fact that the Act uses the expression "Central Government".

12. But, it should also be noted that the Notification dated 19.4.1958 issued by the Union of India entrusting to the various State Governments, the functions of the Central Government under the Foreigners Act, 1946 and Foreigners Order, 1948, is of a limited scope. It is limited to the orders of the nature specified in Clauses (c), (cc), (d), (e) and (f) of Section 3(2) of the Act. The exercise of these functions is also circumscribed by two conditions, namely (i) that while exercising that function, the State Government shall comply with such general or special directions as the Central Government may issue; and (ii) that notwithstanding the entrustment, the Central Government could still exercise any of the functions. It is only on account of such entrustment made by the Union of India that the order impugned in this writ petition has been passed by the State Government.

13. Before proceeding further, it is important to take note of Section 3A of the Act. As we have seen above, Section 3A(1) empowers the Central Government to declare by order that the provisions of the Act shall not apply to citizens of any Commonwealth Country. In exercise of the power conferred by the section, the Central Government issued the Foreigners (Exemption) Order, 1957, which came

into effect on 19.1.1957. By virtue of paragraph 2 of the said Order, the provisions of the Foreigners Act, 1946 and Foreigners Orders 1948 do not apply to or in relation to the citizens of Australia, Barbados, Botswana, Canada, Ceylon, Cyprus, Gambia, Ghana, Guyana, Jamaica, Kenya, Lesotho, Malawai, Malaysia, Malta, New Zealand, Nigeria, Sierra Leone, Singapore, Trinidad and Tobago, Uganda, United Kingdom, United Republic of Tanzania, Zambia and Republic of Ireland. However, by virtue of paragraph 3 of the said Order, the Central Government is entitled to pass any order u/s 3, in respect of a person who is protected by paragraph 2, if it is satisfied that it is necessary to do so (i) in the interests of the Defence of India or the Security of India; (ii) in the interests of friendly relations with any country; and (iii) in the interests of general public of India.

14. The Extradition Act, 1962 which contains elaborate provisions for the extradition of fugitive criminals, the return of fugitive criminals of Foreign States with whom there are extradition arrangements and the surrender of accused or convicted persons from Foreign States, does not have overriding effect upon the Foreigners Act, 1946. Section 33 of the Extradition Act declares that nothing contained in the Act shall affect the provisions of the Foreigners Act, 1946 or any order made thereunder. Therefore, it is clear that the provisions of the Foreigners Act, 1946 shall prevail over the Extradition Act. Moreover, the Central Government is empowered u/s 34A of the Extradition Act to prosecute a fugitive criminal in India, if it is of the opinion that he cannot be surrendered or returned pursuant to a request for extradition.

15. Keeping the above statutory provisions in mind, if we get back to the facts of the case, it is seen from para 14 of the counter affidavit filed by the first respondent -Government that the petitioner was released on bail from the Central Prison on 8.11.2011 and that in order to restrict his movements in the State till the disposal of the criminal cases pending against him, a proposal was sent to the Government by the Inspector General of Police, Intelligence (Internal Security), Chennai on 8.11.2011 and that accordingly, the Government issued the impugned order dated 9.11.2011.

16. In other words, within a span of less than 24 hours, the file has moved on fast-track resulting in the impugned order being issued. Therefore, obviously the petitioner never had an opportunity to contest the claim that he is a foreigner. It is true that u/s 9 of the Foreigners Act, 1946, the onus of proving is on the petitioner to show that he is not a foreigner. But that onus can be discharged by him only if an opportunity had been given to him.

17. If an opportunity had been given to the petitioner, there are two things that he could have proved. They are (i) that he is an Indian national and not a foreigner; and (ii) that by virtue of para 2 of the Foreigners (Exemption) Order, 1957, the provisions of the Act would not apply to him as he is alleged to be a citizen of Malaysia, which is a Commonwealth Country. If the petitioner had been able to prove that he is an Indian citizen, there are a host of fundamental rights

that flow out of such proof and in such an event, an order like the one impugned in the writ petition could not have been passed at all. Alternatively, even if the petitioner had not been able to prove that he is an Indian citizen, he could have at least shown that the Act itself is not applicable to a person who is stated to be a national of one of the Commonwealth Countries. Therefore, the affording of an opportunity to the petitioner, before the imposition of the order on him was very sacrosanct.

18. In *Louis De Raedt and Others Vs. Union of India and others*, the Supreme Court reiterated that even a foreign national is entitled to the fundamental right to life and liberty guaranteed under Article 21 of The Constitution. While holding so, the Supreme Court also dealt with the question of the right to be heard, of a person on whom an order u/s 3(2)(c) of the Foreigners Act was slashed. It was held in para 13 of the report that there cannot be any hard and fast rule about the manner in which a person concerned has to be given an opportunity to place his case. As a matter of fact, that case arose out of an order rejecting the request of the petitioners to grant extension of the period of stay in India. It is in such circumstances that the contention of the petitioners regarding the deprivation of an opportunity of being heard was rejected, after finding that the petitioners never claimed that they could have produced some relevant material if an opportunity had been given. Therefore, it is clear that an opportunity of being heard was recognised even in cases where request for extension of stay in India was rejected.

19. As a matter of fact, the Central Government had issued an order known as The Foreigners (Tribunals) Order, 1964, in exercise of the power conferred by Section 3 of the Foreigners Act, 1946. Under para 2 of the said Order, the Central Government may, by order, refer the question as to whether a person is or is not a foreigner within the meaning of the Foreigners Act, 1946, to a Tribunal constituted for the purpose, for its opinion. Under para 3 of the said Order, the Tribunal is obliged to serve upon the person to whom the question relates, a copy of the main grounds on which he is alleged to be a foreigner and give him a reasonable opportunity of making a representation and producing evidence in support of his case. By paragraph 4 of the Order, the Tribunal is vested with the powers of the Civil Court in terms of the Code of Civil Procedure.

20. The aforesaid Foreigners (Tribunals) Order, 1964 was amended by the Foreigners (Tribunal) Amendment Order, 2006 vide Notification No. G.S.R. 57(E) dated 10.2.2006. The Amendment Order, 2006 brought forth three amendments to the 1964 Order. They are (i) the order was made inapplicable to the State of Assam, by virtue of para 1(2); (ii) sub-paras (2) and (3) of para 2 which contemplated the Tribunal to be a multi member body were deleted; and (iii) sub-para (2) of para 3 which enabled the Tribunal to regulate its own procedure was also deleted.

21. In other words, the enabling provision contained in para 2(1), enabling the Central Government to refer to the Tribunal, the question as to whether a person

is a foreigner or not was retained by the 2006 Amendment Order. The requirement to give a reasonable opportunity of making a representation and of producing evidence, contained in para 3(1) is also retained by the 2006 Order.

22. But the difficulty with this Foreigners (Tribunals) Order, 1964 as amended in 2006, is that the Tribunal assumes jurisdiction to decide the question only upon a reference made by the Central Government. Assuming that this power has also been delegated (as the power u/s 3 of the Foreigners Act) to the State Government, the basic requirement that the Tribunal would assume jurisdiction upon a reference made by the Government (Central or State) still remains. Therefore, the petitioner cannot be expected to go to the Tribunal as there is no reference to the Tribunal by the State Government and the Tribunal is also not constituted as an Appellate Authority against the orders of the Government issued u/s 3(2).

23. It may be interesting to note that the 2006 Amendment to the Foreigners (Tribunals) Order, is a fall out of a judgment of the Apex court declaring as ultra vires, an Act known as "Illegal Migrants (Determination by Tribunals) Act, 1983". This Act was enacted by the Parliament to curtail the entry of illegal migrants into India through the State of Assam. The validity of the Act, which was specially made applicable only to the State of Assam, was challenged in a writ petition in Sarbananda Sonowal Vs. Union of India (UOI) and Another, . The prayer in the writ petition, filed by way of public interest litigation, was not only to declare the said Act unconstitutional, but also for a declaration that the Foreigners Act, 1946 would apply to the State of Assam.

24. While striking down the provisions of the Act as unconstitutional, the Supreme Court issued certain directions, in its order dated 12.7.2005. Instead of complying with those directions, the Union of India amended the Foreigners (Tribunals) Order, 1964 by the Amendment Order 2006, inserting sub-para (2) under para 1, making the said Order inapplicable to the State of Assam. Simultaneously another Order known as "Foreigners (Tribunals for Assam) Order, 2006" was also issued. Both of them came to be challenged in another writ petition under Article 32 and this case came to be known as Sarbananda Sonowal II.

25. In Sarbananda Sonowal Vs. Union of India (UOI), the Supreme Court considered in para 29 of the report, the role to be played by the Central Government while exercising power under the 1964 Order. After pointing out in para 28 of the report that it was held in Sarbananda Sonowal I that the procedure under the 1946 Act and the 1964 Order is just fair and reasonable, the Court went on to hold in para 29 that while making a reference in terms of para 2 of the 2006 Order, the Central Government cannot act as a mere post office. Even for making a reference to the Tribunal, the Court held that there should be some application of mind. In paras 31 and 32, the Court pointed out that before a Statutory Authority passes an order or makes a reference to a Tribunal, indisputably a satisfaction is to be arrived at and that such satisfaction must also

be reflected in the order of reference, making the same subject to the principles of judicial review.

26. More importantly, the Supreme Court held in para 50 of the report in Sarbananda Sonowal II, as follows :

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

27. Taking a leap forward, the Supreme Court also held in paragraphs 55 and 56 of the report in Sarbananda Sonowal II, as follows :

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

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

28. Before concluding, the Supreme Court also noted the distinction between burden of proof and onus of proof, as pointed in Anil Rishi Vs. Gurbaksh Singh, . While onus of proof relates to the right of a party to begin, burden of proof is used in three ways, namely (i) to bring forward evidence in support of a proposition; (ii) to establish a proposition as against all counter evidence; and (iii) to an indiscriminate use in which it may mean either or both.

29. Section 9 of the Foreigners Act, 1946 places the onus of proof on the foreigner. This expression assumes significance, in view of the vast difference between onus proof and burden of proof. In Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another, the Supreme court pointed out that burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In as much as section 9 uses the expression "onus of proof" and not "burden of proof," there was a necessity for the government to give an opportunity to the petitioner.

30. I am conscious of the fact that in Hans Muller of Nurenborg Vs.

Superintendent, Presidency Jail, Calcutta and Others, a Constitution Bench of the Supreme Court held that the power of the Central Government to expel foreigners from India, is absolute and unfettered or unrestricted. But, two things must be remembered, namely (a) that after the aforesaid decision in 1955, much water has flown with regard to human rights; and (ii) that in any case, such an unfettered right vested with the Government, is only in relation to foreigners. Therefore, when a most fundamental question arises as to whether a person is a foreign national or not, the determination of that question cannot also be considered to be at the unfettered discretion of the Central Government. In the case on hand, based upon the driving licence, voters' list, pan card, credit cards and bank accounts, the petitioner claims to be an Indian citizen. According to the Police, all these documents are fabricated and forged. If they are in fact fabricated and forged, it is only then that the petitioner can be presumed to be a foreigner. Only after it is so presumed that the Government would get an unfettered discretion under the 1946 Act. In the impugned order, there is not even a finding that the documents relied upon by the petitioner are forged and fabricated.

31. It must be remembered that an order of expulsion of a foreigner stands on a different footing than the determination of the most essential question as to whether such a person is a foreigner at all or not. In cases of orders of deportation, the Courts appear to have taken the view that the principles of natural justice are inapplicable.

32. In *Ananda Bhavani (a) Geethanando, Ananda Ashram, Pondicherry Vs Union of India* 1991 MLW (Cri.) 393, a Division Bench of this Court relied upon *Hans Muller of Nuremberg* and negated the contention that an order of deportation passed without affording an opportunity to the person concerned was in violation of the principles of natural justice. But to come to the said conclusion, the Division Bench had no doubt in its mind that the person concerned in that case was a foreigner.

33. In *Gilles Pfeiffer Vs. Union of India and others*, a French citizen admittedly holding a French passport and having obtained a residential status only upto a particular period of time, sought extension of stay in India. That was rejected and an order directing him to leave the country within 15 days was served on him. The challenge to the said order was rejected by a learned Judge of this Court following the decision of the Division Bench cited above. But this was also a case where the nationality of the person concerned was never in doubt.

34. In *R.I. Jebaraj Vs. Union of India (UOI) and The Bureau of Immigration*, this court was concerned with the case of a French citizen holding a French passport, who was deported upon arrival in India, though he had a valid visa. The reason was that the Government had earlier passed an order restricting his entry into India without prior permission of the Government. After getting a copy of that order by which the grant of visa to the concerned person without prior reference to the Government was rejected, it was challenged in a writ petition on several

grounds, one of which was the violation of the principles of natural justice. After taking note of Article 13 of the United Nations International Covenant on Civil and Political Rights, the import of Article 51 of The Constitution and the decision in Sarbananda Sonowal I, the learned Judge held that Hans Muller was decided before the full fledged development of human rights under International Covenants. Though the learned Judge did not take note of Sonowal II, he took note of Hasan Ali Aihany Vs Union of India 2006 (2) SCC (Crl.) 33 wherein it was held that a person who had a valid entry permit cannot be deported without a fair procedure. Therefore in the end, the learned Judge held that there is a necessity to follow the principles of natural justice.

35. The first respondent has relied upon two decisions of the Division Bench and one decision of the Full Bench of this Court. The first decision of the Division Bench relied upon by the Government was in Kalavathy vs. State of Tamil Nadu {1995 (2) LW (Crl.) 690. In that case, an order u/s 3(2)(e) of the Foreigners Act, 1946, was challenged as one of confinement. The said argument was rejected by a Division Bench. The second decision of the Division Bench was the one in Premavathi @ Rajathi vs. State of Tamil Nadu decided on 14.11.2003 in HCP No. 1038 of 2003. Even in this case, the challenge was to an order keeping certain Sri Lankan refugees in a special camp. By a judgment dated 14.11.2003, the Division Bench rejected the challenge, following the decision of the earlier Division Bench in Kalavathy.

36. It appears that another Division Bench of this Court took a view in Yogeswari vs. State of Tamil Nadu 2003 (1) LW (Crl.) 352 that the placement of a person in a special camp would amount to preventive detention. In view of the conflict between Kalavathy and Yogeswari, the question as to whether the placement in a special camp would amount to preventive detention was referred to a Full Bench in Sree Latha vs. The Secretary to Government 2007 (2) MLJ (Crl.) 1320. The Full Bench held that Kalavathy was correctly decided and that the view taken in Yogeswari was wrong.

37. But unfortunately for the respondents, all those cases viz., Kalavathy, Premavathy @ Rajathi, Yogeswari and Sree Latha, arose out of Habeas Corpus Petitions, where the main ground on which the placement in special camps was challenged, was that it amounted to preventive detention violating Article 22 (4) of the Constitution. In none of those cases, was any issue raised as to whether the petitioners concerned were foreign nationals or not. In none of those cases, was there any challenge to the orders passed u/s 3(2) of the Foreigners Act, 1946, on the ground of violation of principles of natural justice. Therefore, the decisions rendered in those cases are not applicable, inasmuch as the fundamental question as to whether a person is a foreign national or not and the next question as to the nature of the enquiry to be conducted before an order is passed under the 1946 Act, did not arise for consideration in those cases.

38. Apart from the fact that no opportunity was given to the petitioner even to discharge the onus placed on him u/s 9, before the Government passed the

impugned order, there is also a clear non-application of mind on the part of the Government. As per para 14 of the counter affidavit filed by the Government, the Inspector General of Police sent his recommendation for lodging of the petitioner in the Special Camp, only on 8.11.2011, immediately after the release of the petitioner on bail. The impugned order was issued within 24 hours on 9.11.2011. I do not know how it was possible for the Government to scan all the records within such a short span of time, considering the pace with which the machinery normally moves. Therefore, the first respondent appears to have passed the impugned order in haste. As held by the Supreme Court in *Sonowal II*, an order u/s 3(2) of the 1946 Act, should not only reflect application of mind, but also follow the principles of natural justice. In this case, both are absent. Therefore, the impugned order is liable to be set aside.

39. Before concluding, I must also bring on record certain disturbing features in this case. They are: (i) According to the petitioner, he was picked up from a hotel at Chennai on 22.8.2010 and taken to Coimbatore and remanded to judicial custody by the Judicial Magistrate-III, Coimbatore on 23.8.2010. In the Habeas Corpus Petition HCP No. 177 of 2011, filed by the petitioner, it was alleged that the petitioner's wife was also arrested and both of them along with their 3 children were taken to Coimbatore and the whereabouts of the children became unknown thereafter. The Commissioner of Police, Coimbatore City filed a counter affidavit in the Habeas Corpus Petition claiming that the children were sent to Don Bosco Anbu Illam at Pothanur, Coimbatore, on humanitarian considerations and that the same was also recorded in the remand report. The order passed by the Division Bench in the Habeas Corpus Petition shows that the children were aged 18 years, 6 years and 5 years respectively. The eldest child is a girl child and the petitioner has made very serious allegations of outraging the modesty of his adolescent daughter, against the police officials including the then Commissioner of Police, Coimbatore. There is no whisper in the counter affidavit filed by the first respondent as to whether any kind of enquiry was conducted by the Government on such allegations. Even if the petitioner is a foreign national, his children cannot be treated in the manner alleged by him and the first respondent owes a duty to conduct an impartial and independent enquiry into these allegations, to keep the image of the police unsullied. But this has not been done.

(ii) The manner in which the petitioner was lodged in the special camp for foreigners, as narrated in paragraph 14 of the counter affidavit itself, does not inspire the confidence of this Court. As per para 14 of the counter affidavit, the petitioner was released on bail from the Central Prison, Puzhal on 8.11.2011. The proposal to lodge him in special camp was sent by the Inspector General of Police on 8.11.2011 itself. The Government passed the impugned order on 9.11.2011. The petitioner was immediately lodged in the camp on 9.11.2011 itself at 19.00 hours. However, the order was served on him only on 11.11.2011 through the Inspector of Police in-charge of Chinglepet Special Camp. These admissions in para 14 of the counter affidavit would show that the impugned order was served

on the petitioner, only after 2 days of lodging him in the special camp. In other words, he was lodged in the special camp first and the impugned order served on him after 2 days. This shows that there was some anxiety on the part of the respondents not to allow the petitioner to enjoy the freedom that he gained on 8.11.2011 on account of the bail orders.

(iii) In the course of hearing of the above writ petition, a complaint was made by the learned counsel appearing for the petitioner on 16.2.2012. The complaint was that the petitioner was assaulted in the camp and admitted to the Chinglepet Medical College Hospital as an inpatient. Therefore, I passed an order on the same day viz., 16.2.2012, directing the Chief Judicial Magistrate, Chinglepet to visit the hospital, examine the petitioner and submit a report in a sealed cover, containing information regarding any external injuries on his body, the reasons for his admission in the hospital and the condition in which and the person by whom he was admitted in the hospital. In pursuance of the said order, the Chief Judicial Magistrate visited the hospital on 17.2.2012 at about 7.40 P.M., examined the petitioner, enquired the Senior Assistant Professor and submitted a report to this Court on 20.2.2012. The report discloses (a) that there were no external injuries; (b) that as per the Accident Register copy available in the hospital, the petitioner was assaulted by one policeman on 14.2.2012 at around 2.00 P.M., in the camp; and (c) that as per the statement given by the petitioner, he was assaulted by two unknown persons in the camp. Interestingly, the copy of the Accident Register forwarded by the Chief Judicial Magistrate shows that though no external injuries were reported, the petitioner had vomited blood. In the statement given by the petitioner to the Chief Judicial Magistrate, he had very clearly indicated the fact that the persons who assaulted him, did so in the name of the Inspector General of Police. All these facts go to show that the petitioner, who is lodged in the special camp, had been physically assaulted. But it appears that no first information report was lodged and no enquiry conducted. Special Camp is obviously a protected area and the Special Tahsildar has responsibility for ensuring the safety and security of the inmates. The fact that the petitioner was assaulted in the special camp is an indication that there is something more than what meets the eye. A Constitutional Court cannot turn a blind eye to such happenings. Therefore, I am of the view that necessary directions are to be given even while quashing the impugned order.

40. In view of the above, the writ petition is allowed, the impugned order is set aside and the respondents are directed to allow the petitioner to move out of the special camp. The first respondent shall look into the complaints made by the petitioner, in order to avoid an impression that serious allegations against higher officials would get wiped under the carpet. There will be no order as to costs. Consequently connected miscellaneous petition is closed.