

(1999) 09 CAL CK 0003

In the Calcutta High Court

Case No : Writ Petition No's. 13898 (W) /98, 13949 (W) /98, 13823 (W) /98, 15691 (W) /98, 16772 (W) /98, 22905 (W) /98, 138904 (W) /98 and 15545 (W) /98

Mansur Molla and Others

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 22-09-1999

Acts Referred:

Constitution of India, 1950 — Article 21
Foreigners Act, 1946 — Section 9(iii)

Citation : 104 CWN 245

Hon'ble Judges : Samaresh Banerjee, J

Bench : Single Bench

Advocate : B.R. Bhattacharya, Shanti Das and P.K. Chatterjee, for the Appellant; S.B. Mukherjee A.S.G. of India and R.K. Lala, for Union of India, Balai Chandra Roy, for Director General of Police, West Bengal, S.B. Hossain for the State, R.V. (sic) Govt. Header Bombay High Court, K.R. Belosay, Asstt. Govt. Pleader Bombay High Court, P.R. Mondal, Balakrishna Joshi and Rajiv Paul for Respondents Nos. 5 to 9 and Samaraditya Pal Amicus Curiae, for the Respondent

Judgement

Samaresh Banerjee, J.—Common question of law and fact being involved in all the present writ petitions, the same have been heard analogously and will be governed by the same judgment. All the writ petitioners claiming themselves to be permanent residents of different parts of West Bengal and Bihar and citizens of India and claiming to have been residing at Mumbai in the State of Maharashtra for pursuing their different avocation of life, have challenged the action of the Deputy Commissioner of Police. Mumbai in seeking to deport the petitioners to Bangladesh on the allegation that the petitioners are foreigners and Bangladeshis as also the action of the West Bengal to keep the petitioners in custody for the purpose of executing the orders of deportation and sending the petitioners to Bangladesh on the ground that such action has been resorted to arbitrarily without holding any proper enquiry and in violation of the right to life and liberty of the petitioners as guaranteed under Article 21 of the Constitution

of India.

2. In course of hearing the following very grave and important questions of law have come up for determination for the court: (i) Foreigners Act admittedly being applicable to foreigners only and the expression "Foreigners" having been defined negatively in Section 2(a) of the said Act by providing that foreigner means a person who is not a citizen of India, whether it is necessary for the Central Government before passing an order of deportation of a person as a foreigner u/s 3 of the said Act to determine whether the concerned person is not a citizen of India and therefore a foreigner? (ii) If yes, what would be the procedure for such determination. Is the appropriate authority required to form an opinion in respect thereof on the basis of some materials or whether appropriate authority can merely proceed on suspicion? (iii) Section 9 of the Foreigners Act having placed the onus upon a person who is treated as a foreigner by the Central Government to prove that he is not a foreigner, how the person who has been served with the order of deportation will have the opportunity to discharge such onus and to prove that he is not a foreigner and before which forum?

3. Is the person who is sought to be deported as a foreigner entitled to a reasonable opportunity to establish before the appropriate authority either before passing of the order of deportation or thereafter that he is not a foreigner and if yes then what should be the procedure for giving such opportunity to the person concerned.

4. All these questions have come up for consideration before this court inter (sic) in view of the fact that all the petitioners have alleged, without holding any proper enquiry they were (sic) all taken into custody by the police by arresting them in the night from their places of residence and thereafter were forcibly boarded into a train and were taken to West Bengal and were handed over to the West Bengal Police for the purpose of deporting them to Bangladesh notwithstanding the fact that they are permanent residents of West Bengal and Bihar but went to Mumbai for pursuing their different avocation of life.

5. In W. P. No. 13898(W) of 1998, Mansur Molla along with 5 other writ petitioners jointly moved the writ petition claiming themselves to be citizens of India challenging such order of deportation. All of them claim themselves as permanent residents of Howrah in West Bengal and complain of such alleged arbitrary action on the part of the Deputy Commissioner of Police, Special Branch(1), CID. Mumbai contending inter alia, that deportation is sought to be made without holding any proper enquiry into the question whether they are citizens of India or not.

6. In W. P. 22905(W) of 1998, Tojibur Rahaman and two other writ petitioners who claimed themselves to be permanent residents in the District of Malda and Uttar Dinajpur respectively in West Bengal complain inter alia, that all of them were residing in Mumbai for pursuing their different avocation of life and the

order of deportation has been passed mala fide in colorable exercise of power, mechanically and without complying with the principle of equity, fair play and rules of natural justice. It has also been alleged that since they belong to minority community they have been subjected to such harassment by the ruling political party in Maharashtra. They have claimed compensation against the Government and police of Maharashtra for such alleged harassment meted out to them.

7. In both the abovementioned two writ petitions the writ petitioners have annexed various documents to the writ petitions like Ration Card, Certificate from Panchayat Pradhan, Certificate from Local M.L.A. entry in the voter list in the Parliamentary Constituency etc. in support of their contention that they are citizens of India.

8. In W. P. No. 15691(W) of 1998. Kalu Sheikh along with 16 other writ petitioners have challenged the order of deportations and the action of the West Bengal police in detaining them for the purpose of their deportation inter alia, on the ground that the order of deportation was not based on any material or records, the same was passed in colourable exercise of power and mechanically, arbitrarily and without holding proper enquiry. It has also been alleged by the said petitioner as they belong to minority community, they are sought to be harassed and victimised by the Maharashtra police and are sought to be deported without giving opportunity of hearing to the petitioners.

9. Out of total 17 writ petitioners the writ petitioner Nos. 1-12 and of the District of 16 and 17 claim themselves to be (sic) (sic) Birbhum in West Bengal and further claim were that they (sic) in Mumbai for pursuing their different avocation of life. The petitioner Nos. 13, 14 and 15 claimed themselves to be permanent resident of Sahebganj in the police station (sic) in the State of Bihar and their contention is same as that of the other petitioners.

10. In the present petition also the petitioners have annexed various documents like ration card, certificate from Vice-chairman of Municipality, registered Deed of Conveyance, Affidavit, Certificate from Local M.L.A., and Gram Panchayat, Identity Card issued by the Election Commissioner of India, copies of Patta. Bank Pass Book. etc. in support of their claim that they are all citizens of India.

11. In W.P. No. 16772(W) of 1998. Raj Kumar Mondal who claims himself to be a permanent resident of Birbhum in West Bengal has also challenged the order of deportation on similar grounds. He has also annexed different documents like ration card, identity card issued by the Election Commissioner of India, certificate from local M.L.A., affidavit, certificate from the Pradhan of local Gram Panchayat, copy of the registered Deed of Sale etc. in support of his contention that he is the citizen of India.

12. In C.R. No. 16804(W) of 1998 Sh. Md. Ayub Ali @ Ayub Ali Mallick, who claims himself to be permanent resident of P.S. Bangaon. Dist. 24 Pgs.(N) in West Bengal and citizen of India complain of arbitrary action of Maharashtra

police in seeking to deport the petitioner without proper enquiry and without giving proper opportunity for hearing the writ petitioner. It has been alleged that although he and his wife were picked up by Maharashtra Police" and his wife was released subsequently, he was not released but was boarded in a train and then was handed over to the West Bengal police: He has also annexed photo identity card, etc. in support of his claim that he is citizen of India.

13. In W. P. No. 15545(W) of 1998, Muktar Khan claims himself to be citizen of India and permanent resident in the District of Burdwan in West Bengal and he has challenged the order of deportation on similar grounds. He has also claimed that he is a bonafide citizen of India and he has annexed documents like ration card, voter list, in support of his claim that he is citizen of India.

14.(sic). No. 13823(W) of 1998, Asraj Ali Khan and two other writ petitioners claim themselves to be permanent residents of the District of Howrah in West Bengal and have challenged the order of deportation on similar grounds.

15. In W. P. 13949(W) of 1998, Sk. Zakir Hossain and Saifulamal claiming themselves to be permanent resident of Howrah and Murshidabad respectively in West Bengal, have challenged the order of deportation, on similar grounds, namely, such order of deportation was passed by the Maharashtra police without proper enquiry, without proper application of mind, mala fide. Number of documents like ration card, certificate from Pradhan of Gram Panchayat, voter list etc. have been annexed to the writ petition in support of their claim that they are the citizens of India.

16. It is not disputed that all the writ petitioners along with other deportees were taken to West Bengal from Mumbai by the Maharashtra police and were handed over to the West Bengal police for the purpose of pushing them back to Bangladesh and for the aforesaid purpose all the petitioners were detained by the West Bengal police in jail, when they moved the present writ applications.

17. Before going into the merits of the case it is first of all necessary to record that Mr. Gavilkar, the learned Government pleader, Maharashtra, who appeared for the Government of Maharashtra and the Deputy Commissioner of Police, Mumbai opposing the writ petitions first of all raised a preliminary objection as to the lack of territorial jurisdiction of the Calcutta High Court to entertain and try the petitions. It has been contended that order of deportation having been passed in Mumbai and the same having been also served upon all the petitioners at Mumbai, Calcutta High Court has no territorial jurisdiction to entertain and try the writ petition as no part of the cause of action has arisen within the territorial jurisdiction of this court.

18. I am, however, unable to accept the contention of Mr. Gavilkar. It is true that the order of deportation was passed by the Deputy Commissioner of Police, Intelligence Branch at Mumbai. But there is dispute as to the place where such orders were served upon the present petitioners.

19. While it has been contended by the respondent that the order was also served at Mumbai, most of the petitioners have alleged either that no order have been served upon them or the orders were served in West Bengal after they were taken to West Bengal from Mumbai for the purpose of such deportation.

20. In the matter of determining whether a cause of action or even a part thereof has arisen within the territorial jurisdiction of the Court, the Court has to go by pleadings of the petitioner without making a detail investigation as to the correctness of the same. The petitioners allege that the deportation orders were not served upon them at all at Mumbai but in West Bengal after they were handed over to the West Bengal Police. In that event part of the cause of action certainly has arisen within the territorial jurisdiction of this court.

21. That apart even assuming the orders of deportation were served at Mumbai, even then in my view a part of the cause of action very much has arisen within the territorial jurisdiction of this court for the following reasons. The petitioners have challenged the order of deportation as also their alleged unlawful detention by West Bengal Police for executing the order of deportation by pushing them back to Bangladesh.

22. Admittedly after passing of the orders of deportation the petitioners have been brought to West Bengal by Maharashtra Police and have been handed over to the West Bengal Police for execution of the orders of deportation and for the aforesaid purpose the petitioners were being detained in the jail of West Bengal. Such orders of deportation are thus sought to be executed within the territorial jurisdiction of Calcutta High Court and that too by West Bengal Police.

23. In such view of the matter a part of the cause of action very much arises within the territorial jurisdiction of Calcutta High Court. 25. Coming back now to the merits of the writ petitions it is pertinent to note that although the petitioners have annexed various documents in the writ petitions in support of their claim that they are citizens of India and the respondents in their affidavit have specifically challenged the authenticity of some of such documents as also the sufficiency of such document as proof of Indian citizenship of the petitioners, it is not really necessary for this court to go into such question in detail. In view of the decision of the Supreme Court in the case of Union of India vs. Ghous Mohammad, reported in AIR 1961 SC 1526 that whether a person is a citizen of India or not is really a question on fact which can be determined on evidence and in such view the writ court will not be an appropriate forum for the aforesaid purpose. I am not inclined to go into such questions and whether the petitioners are citizens of India or not is not being determined by this court.

25. In view of the allegation of the writ petitioners that the orders of deportation were passed arbitrarily and mala fide without any materials and without holding enquiry, and without giving reasonable opportunity of hearing to the petitioners, the scope of enquiry in the present writ applications are limited to such questions.

26. The* enquiry in the present writ petition is also limited to the question

whether the right of the petitioners to life and liberty as guaranteed under Article 21 of the Constitution of India, which is available even to a foreigner has been violated because of alleged arbitrary action of the respondent in passing of order of deportation without proper enquiry and without giving a reasonable opportunity of hearing to the petitioners and for following a procedure which is neither fair nor proper.

27. The obvious question therefore which first of all comes up for determination of this Court in the instant writ proceedings is whether the Central Government being appropriate authority before passing an order of depo(sic) u/s 3 of the Foreigners Act, 1946, is required to (sic) whether the concerned person is not a citizen of India and th(sic)re a foreigner and whether in the matter of passing such an order of deportation can merely proceed on suspicion or is required to form (sic) n respect thereof on the basis of proper materials.

28. The (sic) provisions of the Foreigners Act, 1946, the object of the said Act as also the very scheme of the Act leave no manner of doubt that the provision of the said Act can be made applicable only to foreigners and not to an Indian citizen. The object of the said Act provides that the said Act was enacted as it was found expedient to provide for the exercise by the Central Government of certain powers in respect of the entry of for (sic) into India. their presence therein and their departure therefrom. Section the said Act empowers the. Central Government to make provisionors generally or with respect to all or any particular foreigners for prohibiting, regulating or restricting of entry of a foreigner into India or their departure therefrom or their presence or continued presence therein. Sub-section (2) of Section 3 provides that the order as referred to u/s 1 may provide for the following :

Sec. 3 : Power to make order - (2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner.

(a) shall not enter India or shall enter India, only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed;

(b) shall not depart from India, or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed;

(c) shall not remain in India or in- any prescribed area therein;

(cc) shall if he has been required by order under this section not to remain in India, meet from any resources, at his disposal the cost of his removal from India and of his maintenance therein pending, such removal:

(d) shall remove himself to; and remain in, such area in India as may be prese(sic).

(e) shall comply with such conditions as may be prescribed or specified :

(i) requiring him to reside in a particular place,

(ii) imposing any restrictions on his movements

(iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such, time and place as may be prescribed or specified,

(iv) requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his hand-writing and signature to such authority and at such time and place, as may be prescribed or specified;

(v) requiring him to submit himself to such medical examination by such authority and at such time and place as may be prescribed or specified,

(vi) prohibiting him from association with persons of a prescribed or specified description;

(vii) prohibiting him from engaging in activities of a prescribed or specified description;

(viii) prohibiting him from using or possessing prescribed or specified articles;

(ix) otherwise regulating his conduct in any such particular as may be prescribed or specified;

(f) shall enter into a bond with or without sureties for the due observance of or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions;

(g) shall be arrested and detained or confined, and may make provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters as may, in the opinion of the Central Governments, be expedient or necessary for giving effect to this Act.

All other provisions as contained in the Act clearly indicate the same are all related to foreigners and appropriate orders can be passed only against foreigners "and not against citizens of India.

29. Section 2(a) of the Act defines the expression "foreigner" negatively by providing that foreigner means a person who is not a citizen of India. That being the position of the said Act, can the Central Government pass an order of deportation of a person treating such a person as a foreigner without first of all determining that he is not a citizen of India unless the person concerned is admittedly a foreigner.

30. The answer obviously has to be in the negative. As pointed out hereinbefore the provisions of the Foreigners Act being applicable to the foreigners only and foreigners having been defined negatively in the Act by providing that foreigner

means a person who is not a citizen of India, before deporting a person as a foreigner by passing order u/s 3 of the Act, the Central Government obviously has to determine first that the concerned person is not a citizen of India. That can be the only reasonable interpretation of the aforesaid Section.

31. I am not oblivious of the fact that Section 9 of the Act provides that when a question arises whether any person is foreigner or not, the onus is on the persons concerned to prove that he is not a foreigner.

32. But the aforesaid provisions as contained in Section 9 does not vest the Central Government with an arbitrary power to treat any person and even if a citizen of India as a foreigner according to its whims and caprice. Such interpretation of the said provision of the Act would be an antithesis to rule of law and against the very basic structure of the Constitution and therefore cannot be accepted. Such interpretation will also be wholly contrary to right to life and liberty as guaranteed under Article 21 of the Constitution which is available not only to an Indian citizen but to all persons including a foreigner who are residing in India.

33. If the order u/s 3 of the Act including an order of deportation cannot be passed without first of all determining whether the person concerned is a citizen of India or not, obvious consequence would be that an opinion has to be formed by the Central Government based on relevant materials that the person concerned is not a citizen of India and therefore a foreigner. and to make a determination of the question after holding a proper enquiry and giving a reasonable opportunity of hearing to the concerned person.

34. It has been rightly contended by Mr. Samaraditya Pal, the learned counsel who was engaged by the court as Amicus Curiae that precondition of any order u/s 3 is the satisfaction that the person in respect of whom the order is made is a foreigner and such satisfaction has to be final and not prima facie in view Of Section 11 and Section 14 of the said Act. Section 11 of the Act empowers the appropriate authority to give any direction or to exercise any other power in addition to any other action expressly provided for in the Act, to take such steps and use such force as may in its opinion reasonably necessary for securing compliance with such direction or for preventing or rectifying any breach thereof or for the effective exercise of such power as the case may be. Section 14 provides for penalty if any person contravenes the provisions of the Act or any order made thereunder or any direction given in pursuance of the Act or such order. Unless such opinion or satisfaction is formed or derived on relevant materials by the appropriate authority which are pre-conditions of passing any order u/s 3. there cannot be any scope of making provisions in the Act for enforcement of an order u/s 11 and for penalising u/s 14 the of an order or direction. But neither such opinion can be formed, nor any satisfaction can be derived from any material unless the appropriate authority holds an enquiry giving a reasonable opportunity of hearing to the person concerned.

35. It is now the consistent view of the Supreme Court that all State actions must be free from arbitrariness and must be informed with reasons.

36. The provisions of such enquiry and giving reasonable opportunity of hearing to the person concerned have to be read as implied in the Act although the Act is silent in respect thereof. As held by the Supreme Court in its decision reported in AIR 1978 SC 597 and (1993)3 SCC 259, natural justice is now a facet of Article 14 of the Constitution, the provisions of which are available not only to the citizens of India but to all persons residing in India. The principle of natural justice is also a part and parcel of rule of law. Even assuming Article 14 of the Constitution is not available in such a case, the right to life and liberty as guaranteed under Article 21 of the Constitution is available to all persons residing in India whether citizens or foreigners and therefore the procedure to take away such right has to be fair and proper, but no such procedure can be fair or proper unless reasonable opportunity is given to person concerned to prove that he is not a foreigner, but Indian.

37. The answer to the second and third question therefore as framed hereinabove namely whether before passing an order u/s 3 of the Act including an order of deportation it is necessary for Central Government to hold a proper enquiry for the purpose of finding out whether a person concerned is a citizen of India or not and for the aforesaid purpose whether the concerned person is entitled to a reasonable opportunity of hearing must be answered in the affirmative.

38. In my view the fact that holding of such enquiry and giving reasonable opportunity of hearing to the person concerned is implied in the Foreigners Act, 1946 will also appear from Section 9 of the Act. Although the Act does not indicate what is the procedure to be followed by the appropriate authority before treating a person as a foreigner and passing appropriate order for deportation u/s 3 of the Act, Section 9 of the Act provides that in a case, not falling u/s 8 of the Act if a question arises with regards to the act or any order made or direction given thereunder that a person is or is not a foreigner. the onus to prove the same will lie on the person concerned notwithstanding the provisions of Evidence Act.

39. The very fact that the legislature in its wisdom in aforesaid Section 9 of the Act places the onus of proving the same upon the person concerned implies that the affected person can question the order passed u/s 3 of the Act treating him as a foreigner, although it is for him to prove that he is the citizen of India. But how the affected person would prove that he is not a foreigner but he is a citizen of India unless he gets a reasonable opportunity in respect thereof.

40. It may be recorded in this connection that Mr. Gavilkar the learned counsel appearing for the respondent No. 3 and 4 also does not dispute such propositions of law, but submits that reasonable opportunity was given to the petitioners.

41. Such being the position in law and there being complaint by the petitioners of

denial of such opportunity and of violation of their right to life and liberty as guaranteed under Article 21 of the Constitution, it is certainly open to this court to examine in exercise of its writ jurisdiction whether such right of the petitioners have been violated and whether the order of deportations have been passed after holding proper enquiry giving a reasonable opportunity of hearing to the writ petitioners.

42. Although the writ petitioners have alleged without giving any opportunity to the petitioners they are sought to be deported, it is the specific case of the respondents that each of the petitioners was given opportunity to prove that he is a citizen of India by issuing each of them with show-cause notice and calling upon each of them to produce valid documents to prove that he is Indian citizen.

43. In W. P. No. 13898(W) of 1998. the deponent in his affidavit affirmed on behalf of the respondent Nos. 5, 6 and 7 has specifically pleaded that the petitioners were arrested and show-cause notice was served upon the petitioners after getting information from reliable sources that the petitioners are illegal immigrants from Bangladesh or are Bangladesh Nationals. Similar stand has been taken in all the writ petition.

A copy of one of such show-cause notices is spended hereinbelow :

"I" Branch. S.B.(I), C.I.D. Mumbai Date : 10.7.1998

To

Mr. Hasan Bun Ali Rashid

Subject: Submission of proof of birth. Domicile and nationality.

Sir/Madam.

Reference your arrest on 10/7/98 by this office U/Sec. 3(a) 6(a) of the passport (Entry into India) Rules, 1950 r/w Sec. 14 of the Foreigners Act 1946.

You are hereby requested to furnish the following documents within 7 days from today i.e. on 10/7/98

- a) Your birth certificate in original.
- b) Your father's Birth certificate.
- c) Your and your father's domicile certificate.
- d) Your ration card in original.
- e) Your passport.
- f) Any other documents to prove your national status.
- g) Your photographs.

If you fail to produce the documents referred above action as deemed fit will be

taken against you under the provision of the Foreigners Act 1946 and other relevant laws.

Yours faithfully.

Inspector of Police,

"I" Branch. SB(I). CID. Mumbai.

Before me.

Sub-Inspector of Police Signature/thumb impression of accused.

"I" Branch S.B.(1). CID Mumbai.

44. After considering the respective submissions of the parties and all the materials on records including the purported show-cause notice, it appears that neither the petitioners were given reasonable opportunity to satisfy the appropriate authority that they are Indian not Bangladeshis nor had there been proper enquiry by the respondents before issuing the order of deportation. In this connection, it is necessary to refer to the affidavit affirmed by Sr. R.M. Kedari, the Deputy Commissioner of Police. Respondent No. 7 who passed the impugned order of deportation, affirmed in W. P. No. 13898(W) of 1998 (Mansur Mullah and Ors. vs. Union of India and Ors.) The relevant portion of paragraph 4 of the said affidavit is quoted hereunder wherein the said Deputy Commissioner of Police has stated the procedure followed by him before passing by him before passing the impugned order of deportation:

45. "I say and submit that this is to place on record that there is sufficient material on the basis of which the order of deportation dated 20th July, 1998 was passed by me. On 10th July, 1998 through reliable sources, information was received that the petitioners are illegal immigrants from Bangladeshi and they are Bangladeshi Nationals. They were immediately arrested on 10th July, 1998. The petitioners were served on 10th July, 1998 with a show-cause notice as they were charged under offences under Rule 3 Clause (a), 6(a) of the passport (Entry into India) Rules, 1950 r/w Section 14 of the Foreigners Act, 1946. On the same day, 10th July, 1998, the petitioners were produced before the learned Additional Chief Metropolitan Magistrate, 37th Court, Mumbai. In pursuance to the show-cause notice, they were called upon to produce the relevant and authenticated documents pertaining to their claim of being Indian citizens. I say and submit the within the stipulated period of 7 days, the petitioners were required to produce the necessary relevant and authenticated documents to establish their claim as Indian citizens. However, as they failed to produce the said documents within the stipulated period of time, on 20th July, 1998 an application was moved for obtaining permission from the court pertaining to their deportation. I further say and submit that the learned Additional Chief Metropolitan Magistrate. 37th Court. Mumbai was pleased to grant permission on 20th July, 1998 to deport the petitioners. I say and submit that in pursuance to the said permission, granted by the learned Metropolitan Magistrate, the order of

deportation was passed by me. I further say and submit that between 10th July, and 20th July, 1998 the petitioners in pursuance to the show-cause notice failed and neglected to produce any authenticated documents by establishing their claims to be Indian citizens."

46. It will thus appear from the said affidavit itself that according to the said Deputy Commissioner of Police himself, the petitioners were arrested and kept in custody on the receipt of an information through reliable source that they illegally entered from Bangladesh and. being charged with offence committed under the Rule 3(a), 6(a) of the passport (Entry into India) Rules, 1950 read with Section 14 of the Foreigners Act. The petitioners thus while kept in such custody were served with the purported show-cause notice calling upon them to produce authenticated documents to prove that they are Indian citizens. Admittedly, they were given only 7 days time to prove that they are Indian citizens.

47. When admittedly the petitioners were in custody because of such arrest, it is not understood how it could have been physically possible for them to produce any material within 7 days to prove that they are Indian citizens and not foreigners when they claim that they are all permanent residents of different parts of West Bengal and have gone to Mumbai for pursuing their different avocation of life.

48. In my view, the very fact that the petitioners were given such a short time to prove the same and that too when they remained in custody of the police making it almost impossible to produce any such document within such a short time, amounted to denial of reasonable opportunity to the petitioners to prove their citizenship by producing relevant materials.

49. It may be recorded that one of the submissions of Mr. Gavilkar before the court as to the documents which have now been disclosed by the petitioners in the writ petition in support of their claim of Indian citizenship that these documents were never produced before appropriate authority at the time when they were called upon to do so. But it has not been clarified by Mr. Gavilkar to the court despite specific submissions of the petitioners as to the denial of reasonable opportunity to the petitioners to prove their case, as to how it could have been possible for the petitioners by producing the materials asked for from them in the show-cause notice within 7 days when admittedly they were in custody. Admittedly, the Deputy Commissioner of Police, Mumbai did not contact the West Bengal Police for the purpose of enquiring the correctness of the claim of the petitioners as to their permanent residence in the different districts of West Bengal.

50. In this connection, the decision of the Supreme Court in the case of Lal Baba Hossain & Ors. vs. Electoral Registration Officer & Ors., reported in AIR 1995 SC 1189, relied upon by the petitioners may be referred to. I accept the contention of Mr. Bikash Ranjan Bhattacharyya, the learned counsel appearing for the

petitioners that although the Supreme Court was considering in the said case a different situation, the principles laid down therein will also apply in the present proceedings. In the said case, the Supreme Court inter alia was considering the situation where a large number of inhabitants of certain constituencies in Bombay and Delhi were treated as suspected foreigners and enumerators were appointed to find out if persons residing in certain polling stations were not citizens; the police were employed for the aforesaid purpose and they issued as many as 1.67 lakhs notices calling upon the addresses to produce birth certificates, Indian Passports, if any. citizenship certificate and/or extracts of entry made in the registry of citizenship. The time given for the aforesaid purpose was short and requests for extension of time were refused presumably because the work had to be completed within a given time frame. No other document save and except mentioned in the show-cause notice were entertained. It was held by the Supreme Court that there was a mockery of the requirement giving reasonable opportunity of being heard contemplated under Representation of the People Act and 1960 Rules. The Supreme Court accordingly quashed the proceedings and directed fresh consideration inter alia holding the reasonable opportunity of hearing was denied to the petitioners in the said case.

51. It was also held by the Supreme Court in paragraph 6 of the judgment in the context of the Citizenship Act that the provisions of the Constitution and the Citizenship Act makes it clear that whenever any authority is called upon to decide even the limited purpose of another law whether a person is or is not a citizen of India, the authority must carefully examine the question in the context of the Constitutional provision and the provision of Citizenship Act.

52. It is true that the such observations of the Supreme Court were made in the context of the aforesaid case where electoral roll was sought to be revised keeping in mind Article 324 of the Constitution and Section 9 of the Citizenship Act will not be applicable. But the fact that while following the procedure in the matter of determination whether they are citizens or not the action of the appropriate authority in the said case to give such a short time to produce materials to prove that they are Indian citizens was held to be a mockery of reasonable opportunity of hearing, is indeed, relevant and applicable in the instant case.

53. Even the purported show-cause notices issued to the petitioners in the instant cases can hardly be said to be show-cause notice at all. The very purpose of issuing a show-cause notice in consonance of principles of natural justice is to clearly indicate the allegations or the charge against the person concerned and the proposed action sought to be taken on such allegations or charge to enable the person concerned to effectively reply to the same.

54. It is rightly contended by Mr. Pal, learned Amicus Curise that the letter dated 10.7.1998 annexed to the supplementary affidavit affirmed on behalf of the respondent Nos. 5, 6, 7 in W. P. No. 13898(W) of 1998 and the other writ petitioners appear more to be a request for production of certain documents than

a show-cause notice.

55. In the said letter after giving reference to the arrest of each of the petitioners under Sections 3(a), 6(a) of the Passport (Entry into India) Rules, 1950 read with Section 14 of the Foreigners Act, the petitioners were requested to furnish within 7 days (sic) 10.7.1998 the birth certificate in original, father's birth certificate, the petitioners and their father's domicile certificate, ration card in original, passport and any other document to prove his national status and his photograph. It is not stated, however, clearly in the said notice what will be the consequences if the petitioners fail to produce the documents asked for and what specific action is proposed to be taken against the petitioners. It is nowhere stated that in case of failure to produce such documents, the petitioners will be deported as Bangladeshi Nationals. It has merely been stated that in case of failure to produce the documents actions as deemed fit will be taken under the Foreigners Act, although under the Foreigners Act, various actions can be taken against the foreigners including steps for prosecution. It is not even clearly stated in the said notice that on receipt of some information, the appropriate authority has come to know that the petitioners are Bangladeshi Nationals and illegally staying in Bombay and therefore they are required to produce such documents to show that they are Indian citizens and not foreigners. Reference has no doubt been made in the said notice as to the arrest of the petitioners under Sections 3(a), 6(a) of the Passport (Entry into India) Rules, 1950 and Section 14 of the Foreigners Act, 1946. but it is not disputed that all the petitioners belong to the weaker sections of the community and most of them are absolutely illiterate. If the notice is judged in the aforesaid context, it will not be clear to such a person who is so arrested as to why such documents have been asked for and for what purpose and what will be the consequences of non-production of the same. That apart, reference to Section 14 of the Foreigners Act, 1946, creates more confusion than clarification as Section 14 of the Foreigners Act provides for penalties when a person contravenes the provision of the Act either by way of imprisonment for a term to the extent of 5 years and fine and forfeiture of bond. There is nothing to show also that the contents of the said notices were explained to the petitioners, most of whom are illiterate, either in their mother tongue or otherwise.

56. It has been rightly contended by learned Amicus Curiae that even if the said notice can be termed as show-cause notice the opportunity given therein does not appear to be real opportunity at all. It is true that the order passed u/s 3 of the Foreigners Act by the appropriate authority is an administrative order and not a judicial order or quasi judicial order. But it is also now settled beyond any doubt by the pronouncement of the Apex Court that an administrative order cannot also be passed arbitrarily but only fairly and reasonably and in consonance with principles of natural justice specially when the same visits a person with civil and adverse consequences. De Smith Woolf and Jowell in their celebrated Treatise on Judicial Review of Administrative Action 5th Edition opined (Pg. 432 para 9-004) procedural fairness generally requires that persons liable to

be directly affected by proposed administrative acts. decisions or proceedings be given adequate notice of what is proposed so that they may be in a position to make representation on their own behalf or to appear at a hearing or enquiry and effectively to prepare their own case and the answer of the case they have to meet. At page 434 paragraph 9-007 it has been further observed that as the reasons for imposing an obligation to give proper notice is usually to afford those who will be affected an opportunity to make representations, the notice must be served in sufficient time to enable representations to be made effectively, if charges are to be brought they should be specified with particularity. In the instant case, as stated hereinbefore, neither the charges against the petitioner was specified with particularity nor the consequences of failure to produce documents were mentioned nor sufficient time was given to produce the documents asked for.

57. To issue a notice in the manner aforesaid, therefore, in my view, not only is not in consonance with the principles of natural justice but in fact the same has resulted in denial of reasonable opportunity to the petitioners to establish their case. In this connection, following decisions may also be referred to :

- i) 1972(2) Queens" Bench 229;
- ii) 1949(1) AER 109;
- iii) 1974(2) AER 1219;
- iv) 1968(3) AER 506.

58. It cannot also be overlooked that the aforesaid notices which are new claimed by the respondents as show-cause notices, apart from the fact lacks particulars the charge and the consequences to be followed for non-production of documents, were not even issued by the Deputy Commissioner of Police, Mumbai who admittedly has passed the order of deportation u/s 3 of the Act as a delegate of the Central Government. The aforesaid notice has been issued by the Inspector of Police I-Branch, Mumbai who is not a delegate of the Central Government and therefore not the appropriate authority in passing an order u/s 3 of the Foreigners Act for deportation. No documents have been produced before this Court by the respondent Nos. 4 and 5 to show that any proceeding was initiated by the said Deputy Commissioner of Police being the appropriate authority u/s 3 of the Act for holding an enquiry on the basis of the police report that the petitioners were Bangladeshi Nationals and staying illegally in India, before passing the order of deportation. No show-cause notice has been produced before the court issued by the said appropriate authority initiating a proceeding for giving reasonable Opportunity to the petitioners.

59. Mr. Gavilkar learned counsel appearing for the respondent Nos. 4 and 5 has submitted that the petitioners were produced on two occasions before learned Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Mumbai where the petitioners had ample opportunity to prove that they are Indian citizens

which they, however, have miserably failed to do.

60. Such submission, however, cannot be accepted. It will appear from the documents annexed to the supplementary affidavit that the petitioners after their arrest for alleged violation of Section 9(a), 6(a) of the Passport (Entry into India) Rules, 1950 read with Section 14 of the Foreigners Act were produced before the learned Magistrate by the police when the sub-inspector of police prayed for remand of the said accused persons. It will appear from the annexure B to the supplementary affidavit that the prosecution case is that on a reliable information that some Bangladeshi immigrants are staying in different places, a raid was conducted in the jurisdiction of greater Mumbai when the accused persons were interrogated who voluntarily admitted that they are Bangladeshi nationals and have entered India through unauthorised route without travel documents and stayed in greater Mumbai illegally for which they have been put under arrest. It was also said in the remand application that the said accused persons were served with show-cause notice explaining that they should produce their birth certificate and any other relevant documents to prove their national status. It was also stated specifically in the remand application that investigation was in progress fix up their national status and as soon as the investigation will be completed, they will be deported to Bangladesh and on such ground prayer for remand was made to police custody which was granted by learned Magistrate. There is nothing on record to show that any prayer for bail was made by such accused persons. It is not, therefore, understood how in such a situation the petitioners could have any opportunity while they were still in custody to prove that they are citizens of India. It will further appear from another documents at page 9 of the said affidavit that even before 24.7.1998 till which date the learned Magistrate remanded the accused persons to police custody, they were produced before the learned Magistrate on 20.7.1998 by the police contending inter alia that the accused persons although issued with show-cause notice explaining to them they should produce birth certificate and any other relevant document to prove their national status, but till date they could not produce any such relevant document to prove their national status and as per the reliable source of the police they are Bangladeshi Nationals and as they are staying in Mumbai illegally, it was prayed before learned Magistrate by the police that in such view of the matter learned Magistrate may pass order for their deportation on 20.7.1998 and they may be handed over to the police on the said date. After considering such prayer, the learned Magistrate passed an order permitting such deportation as prayed for so far as the accused Nos. 1-11 and 13-25, but accused No. 12 was remanded to jail custody till 24.7.1998. On the said day either it does not appear any prayer for bail was made.

61. In such a proceeding before the learned Magistrate when initially the police were asking for remand the petitioners who are still in custody could not have any opportunity to prove that they are Indian citizens. Such opportunity perhaps the petitioners would have got at the trial if the police after completion of investigation against the petitioners as to the offence committed because of the

provisions of the said Passport (Entry into India) Rules and Foreigners Act had taken steps to prosecute the petitioners for such offence. The police authorities, however, did not chose to take recourse Lo such action and in fact did not take care even to complete the investigation as referred to in the first remand application being annexure B to the said supplementary affidavit, but to deport the petitioners even before completion of such investigation because of failure of the petitioners to pro(sic) documents within the time stipulated in the said notice. In fact from the affidavit of the said Deputy Commissioner of Police Mumbai discloses that the order of deportation was passed by him without holding proper enquiry as to the nationality of the petitioners and without, even himself coming to his independent satisfaction that information that the petitioners are Bangladeshi Nationals and they are laying illegally in Mumbai are correct. As pointed out hereinbefore in said paragraph 4 of the affidavit it has been stated inter alia by the 1 Deputy Commissioner of Police that on receiving an information from (sic)ible sources that the petitioners are illegal immigrants from Bangladesh i residing illegally in Bombay were arrested on 10.7.1998 and were produced before the learned Additional Chief Metropolitan Magistrate, 37th Court. Mumbai and by the show-cause notice they were called upon to produce the relevant and authenticated documents pertaining to their claim of being Indian Citizens and as they failed to produce the document within the stipulated period of time that is within 20.7.1998, on the same date an application was moved before the said learned Magistrate for obtaining permission from the court pertaining to the deportation whereupon the learned Magistrate was pleased to grant permission to deport the petitioners and pursuant to the said permission granted by the learned Magistrate, the order of deportation was passed by him. It will, therefore, clearly appear from the own saying of the said Deputy Commissioner of Police that he did not pass the order of deportation on his own satisfaction after holding proper enquiry that the petitioners were Bangladeshi Nationals, but as the petitioners failed to submit the documents within the time stipulated in the show-cause notice which were issued not by him at all but by the Inspector of Police, applications was made for granting permission for deportation and the learned Magistrate having granted such permission pursuant to such permission the order of deportation was passed. The learned Metropolitan Magistrate however was not the appropriate authority under the Foreigners Act to take the decision whether the persons are to be deported or not. but had the respondents continued with the prosecution of the petitioners, the learned Magistrate could have decided on evidence at the trial whether the writ petitioners are citizens of India or foreigners.

62. The decision for deportation is an administrative decision to be taken by the appropriate authority after holding due enquiry and giving reasonable opportunity of hearing to the persons concerned. The petitioners were produced before the learned Magistrate as accused on the allegation of violation of Sections 3(a), 6(a) of the Passport (Entry into India) Rules, 1950 and Section 14 of the Foreigners Act and therefore the said court was concerned at that stage

only with the question whether they should be remanded to police custody or jail custody. The decision whether they should be deported as foreigners was entirely beyond the scope and preview of the aforesaid proceedings at that stage where admittedly investigation was not even complete and therefore beyond the jurisdiction of the learned Magistrate. It appears to this court that the said Deputy Commissioner of Police as the appropriate authority passed the order of deportation without even proper application of mind.

63. If after such notice on the failure of the petitioner to produce the documents asked for, they would have been prosecuted by the Mumbai Police, perhaps the petitioners might have got an opportunity at the trial itself to satisfy the appropriate court that they were Indian citizens and not Bangladeshi Nationals. But admittedly such steps were not taken by the respondents.

64. The Union of India although in their affidavit-in-opposition has opposed the writ application and has supported the order of deportation passed by the Deputy Commissioner of Police, Mumbai, admitted in paragraph 5(a) of their affidavit that the Maharashtra Government was required to cause investigation and enquiry for determining the nationality of the suspected foreigner, although it has been alleged by the Union of India that such investigation and enquiry was made properly by the Maharashtra Government.

65. The Union of India has gone to the extent of contending in the aforesaid paragraph of the said affidavit that as the Central Government is vested u/s 9(2) of the Citizenship Act with exclusive jurisdiction to determine the question whether a person is a citizen of India, if such a question arises in such a proceeding, the court should stay the proceeding to enable the parties to obtain the determination of the Central Government u/s 9(2) of the Citizenship Act.

66. The merits of the aforesaid contention, however, will be examined subsequently. But the fact that it will be necessary for the appropriate authority to cause investigation and enquiry into the nationality of the suspected foreigner before passing an order of deportation is admitted in the said affidavit.

67. That if such contention is correct, the learned Magistrate should have stayed the proceeding for such determination by the Central Government.

68. In the said affidavit, the Union of India has disclosed a circular being No. 14011/8/96-FVI dated 6.9.1997 issued by the Ministry of Home Affairs to all State Governments and Union Territories in supersession of earlier circulars wherefrom also it will appear that the State Governments were directed inter alia to issue order of deportation u/s 3(2)(c) of the Foreigners Act only after holding a proper enquiry.

69. Clause II of the said circular inter alia provides that in case of Bangladeshi Nationals who are detected to be staying in India unauthorisely shall be taken by the concerned State Police and would be handed over to Border Security Force in West Bengal and they should be accompanied by appropriate order to be issued

by the competent authority of the State Government u/s 3(2)(c) of the Foreigners Act after proper enquiry. There cannot be any doubt therefore that an order of deportation u/s 3(2)(c) of the Act cannot be issued arbitrarily or whimsically but only after holding a proper enquiry and investigation and after giving reasonable opportunity of hearing to the suspected foreigners.

70. It is also interesting to note that the Union of India in their aforesaid affidavit has annexed the latest circular issued by the Central Government to all the State Governments prescribing the procedure to be followed before deportation of Bangladeshi Nationals to Bangladesh on review of the earlier procedures. In the said circular being No. 10411/8/96-FVI dated 9.1.1998 issued by the Ministry of Home Affairs, the Home Secretaries of all State Governments and Union Territories's administration, have been directed that before deportation of Bangladeshi Nationals staying illegally in India, the procedure prescribed in the said circular is to be followed. It has been laid down in the said procedure that while identifying and detecting Bangladeshi Nationals staying illegally, the State Governments would send details of residential address etc. as claimed by the suspected persons to the concerned State Government (where the said persons claims to hail from in case he claims to be an Indian) for verification and report within 30 days and during the said period of 30 days, the competent authority will ensure by obtaining permission of the court wherever necessary the detention of such persons to ensure physical availability at the time of deportation and if no report is received within such period, the competent authority may take necessary action to deport the suspected foreigners.

71. The aforesaid latest circular issued by the Central Government to all State Governments, thus clearly indicates that before deportation of a suspected foreigner, a proper enquiry and investigation is a must to find out if he is really a foreigner and in process of such enquiry and investigation it will be necessary to verify the claim of the suspected foreigner as to his residential address from the concerned State Government from where he claims to hail.

72. At this juncture it will be worthwhile to refer to the submission of Mr. Balai Chandra Roy, the learned Senior Counsel appearing for the Director General of Police, West Bengal.

73. It may be noted that such police authorities in West Bengal have been impleaded as respondent in the writ petition as admittedly all the writ petitioners after passing of order of deportation were brought to West Bengal and handed over to the West Bengal Police for giving effect to such order of deportation with the help of Border Security Force and whereupon the petitioners were kept in the custody of West Bengal police which is also under challenge in the present writ petitions.

74. Mr. Roy has submitted inter alia, that since the problem of illegal immigrants is very acute in West Bengal and the West Bengal police are trying their best to deport illegal immigrants they are very much interested in the result of the

present writ proceeding and want to participate in such proceedings as decisions on a number of points involved in the present writ petitions of this Court will also affect them in future. Elaborate submission has been made by Mr. Roy on some of the questions of law involved in the present proceedings.

75. It has been submitted inter alia, by Mr. Roy that in West Bengal unless an illegal immigrant is caught at the border itself who is deported forthwith, the normal procedure which has been followed for deportation of illegal immigrants is first of all to prosecute them before the Criminal Court either for violation of Passport Act/ (sic)ssport Rules or other relevant enactments and to pass an order of deportation after such an illegal immigrant is convicted.

76. It has been submitted by Mr. Roy as also on behalf of the petitioner that in the context of the present proceeding this court should decide what should be the procedure to be followed by the appropriate authority before passing an order u/s 3 of the Act as the Foreigners Act does not prescribe any procedure before passing an order u/s 3 of the Foreigners Act. for determining a person as a foreigner. It has been submitted that the same has become necessary, inasmuch as. upto now all the decisions of the Supreme Court and the different High Courts wherein the order of deportation were under challenged, the court had to consider a situation where a person sought to be deported either was a holder of foreign passport overstayed in India or holder el Pakistani Passport but claimed himself to be Indian and there is not a single reported case where a resident of India claiming to be citizen of India was sought to be deported on suspicion that he is a foreigner.

77. It is true that the situation in the present case with which this court is faced is different from the situation which Courts faced in the decisions of the Supreme Court and different High Courts referred to by both the parties.

78. Perhaps it is for the first time that the Court is facing a situation where all the petitioners claiming themselves to be Indians and permanent resident of West Bengal and few claiming to be permanent residents of Bihar and claiming to have been working in Mumbai are sought to be deported by Deputy Commissioner of Police, Mumbai on the allegation that they were all foreigners and Bangladeshi Nationals and entered India illegally.

79. The situations have become more complex in the instant case in view of the fact that some of writ petitioners have alleged that they are sought to be deported in the manner aforesaid by the Maharashtra Police although they are Indian citizens as they are Muslims and belong to the minority community.

80. The submission of West Bengal Police is that in case of illegal immigrants from Bangladesh it is indeed difficult to detect physically whether he is an Indian or a Bangladeshi as there is no difference in the language, culture, clothing or food and physical appearance.

81. It is also quite appreciable as submitted on behalf of the petitioners that

while there cannot be any doubt that illegal immigrants must be dealt with properly under the Foreigners Act, in the name of such deportation of illegal immigrants, no Indian citizen can be deported by branding him as a Bangladeshi arbitrarily and merely on suspension without caring to ascertain whether he is really a foreigner and therefore whether the Foreigners Act will be applicable to him and without giving an opportunity to such a person to establish that he is not a foreigner.

82. As I have already held hereinabove that such power under the Foreigners Act can only be exercised in case of a foreigner, an order of deportation certainly cannot be passed without holding an appropriate enquiry as to whether a person concerned is a foreigner and without giving him an opportunity to prove that he is not a foreigner but an Indian.

83. Since the provisions of the Foreigners Act does not lay down any procedure and such as opportunity to the concerned persons must be given, perhaps the procedure reportedly followed by the West Bengal Police would be ideal, namely to prosecute the suspected foreigner and deport him after his conviction by the court as in such a situation the concerned person will have, full opportunity to establish that he is not a foreigner but an Indian.

84. It has been submitted by Mr. Roy that normally before deportation, such procedure should be followed but for which there may be great danger to an innocent person as the police is not required to determine whether a person is really Indian before passing an order of deportation. Reference has been made in this connection to the Privy Council decision reported in AIR 1945 P.C. 18 (The Emperor vs. Yazir Ahmed) and AIR 1937 P.C. 253 and 247. 2nd. para and the decision of the Supreme Court reported in AIR 1992 SC 604.

85. But it will indeed be difficult for this court to hold the same should be the only procedure to be followed. There may be situation when the appropriate authority will be required to pass an order of deportation without following a procedure. For example, if an illegal immigrant is caught at the very border itself, it may not be necessary to follow the procedure of processing the illegal immigrants first and thereafter to deport him. Similarly, a holder of a foreigner passport overstaying the period of visa may certainly be deported without prosecuting him first. There may be other emergent situations which may not warrant following the procedure of prosecuting the suspected foreigner first

86. But whether a suspected foreigner is first of all prosecuted or not, the appropriate authority before deporting him applying the provisions of Foreigners Act. is certainly required to ascertain first after holding an appropriate enquiry whether he is a foreigner wherein a reasonable opportunity of hearing must be given to the person concerned to prove that he is Indian.

87. The fact that such an enquiry is a must will now be also borne out from the abovementioned circular issued by the Central Government laying down the guidelines to be followed by the appropriate authority before passing an order u/

s 3 of the Foreigners Act

88. I also accept the submission of Mr. Roy that procedure followed in the instant case by the Maharashtra Police in the matter of deportation of the present writ petitioners is a peculiar one.

89. As pointed out hereinbefore as per the documents disclosed by the said respondent in their affidavit on a secret information that the petitioners are Bangladeshi illegal immigrants were arrested for alleged violation of Section 9(a), 6(a) of the Passport (Entry Into India) Rules, 1950 and sought to be prosecuted u/s 14 of the Foreigners Act. The copy of the remand report annexed to their affidavit will bear ample testimony to such fact. It will appear from the first remand it was clearly stated there that investigation was still not complete and for the aforesaid specific purpose time was asked for by the police which was granted. But, thereafter the Maharashtra Police did not choose to complete such investigation in the matter of such prosecution of the petitioner or to take any further steps in the matter of such prosecution of the petitioner for alleged commission of such offence. On the contrary, even before expiry of the remand period permission was sought for from the learned Magistrate for deporting them on the ground of failure of the petitioners to produce the documents pursuant to the show-cause notice and in the affidavit it is now stated by the Deputy Commissioner of Police who is the appropriate authority that he passed such order u/s 3 of the Act, that is order of deportation pursuant to the permission granted by the learned Magistrate, although the learned Magistrate was not the appropriate authority to decide whether order of deportation should be passed. Mr. Roy appealing for the West Bengal Police has submitted by referring to the various provisions of Code of Criminal Procedure that admittedly steps for prosecuting the petitioners having been taken by the respondents and investigation having been started by the respondents In respect thereof, the same could not have been abandoned legally as it was done to the instant case by the Maharashtra Police. Referring to Section 2(a) of Cr.P.C., and Sections 156 and 157 and other Section of Chapter XII of Cr.P.C, it has been submitted that collection of evidence being the purpose of investigation, once the same is started, has to be concluded by submitting a report to the Magistrate and cannot be abandoned midway as it was done in the instant case.

90. It has been submitted by Mr. Gavilkar appearing for the respondent Nos. 4 and 5 that no illegality was committed in passing an order of deportation on the failure of the petitioners to satisfy the appropriate authority that they are Indian citizens by producing the documents Instead of completing the prosecution of the writ petitioners first.

91. It is, however, not really necessary for this court in the present proceeding to decide whether investigation started for prosecuting the petitioners and steps taken for prosecuting for the offender can be abandoned without completing the said process, as I am of the view for the reasons stated above that under the facts and circumstances of this case, the procedure followed by the Maharashtra

Police before deportation of the writ petitioners as aforesaid is not only peculiar but the same has resulted in denying reasonable opportunity to the petitioners to establish before the appropriate authority that they are Indian citizens and not Bangladeshi Nationals.

92. In case of complaint of violation of right to life and liberty guaranteed under Article 21 of the Constitution, it is certainly open to court to inquire whether life and liberty of the person concerned has been taken away a procedure established by law. It is now also well settled by the decisions of the Apex Court that such procedure established by law must be reasonable and fair. Reference may be made in this connection to the provision of the Supreme Court reported in AIR 1978 SC 597 (para 51, 4 and 64) and AIR 1980 SC 1579 (para 29, 30 and 31). Since the right (sic) life and (sic)ty guaranteed under Article 21 of the Constitution is (sic)suable to all residents to India even if they are not citizens of India and the petitioners in the Instant case have complained of violation of their aforesaid right to life and liberty by the impugned action, of the respondents. It is open to the court to examine whether the procedure allowed for taking away such right to life and liberty of the writ petitioners reasonable and fair. But examination of the admitted procedure followed the respondent in the matter of deportation of the petitioners by which their livelihood which is part and parcel of the right to life and their right to liberty are being taken away indicates, as pointed out hereinbefore, that, the same is neither reasonable nor fair as the petitioners did not have any reasonable opportunity to establish their case and the petitioners are sought to be deported as foreigners without proper enquiry. The impugned order of deportation and their consequent detention by the West Bengal Police for the purpose of their deportation cannot be sustained and are liable to be quashed.

93. It is, however not necessary for this court for exercising writ jurisdiction to decide whether the petitioners are citizens of India or not or whether the documents which are now being produced by the petitioners before this court are sufficient or insufficient in respect thereto. It is not, therefore, necessary for this court to refer to detail the submission of Mr. Gavtlkar that the documents produced before this court by the petitioners in support of their claim that the Indian citizens are not reliable or the same are not sufficient materials, in proving the citizenship of the petitioners.

94. But it is certainly open to this court to examine whether the order of deportation of the petitioners have been passed by the appropriate authority arbitrarily without proper enquiry and denying reasonable opportunity of hearing to the petitioners and in violation of right to life and liberty of the petitioners as guaranteed under Article 21 of the Constitution. It has been rightly contended by Mr. Bikash Bhattacharyya appearing for the writ petitioner that since the right/to life and liberty guaranteed under Article 21 of the Constitution is available even to a foreigner residing in India, a suspected foreigner cannot be thrown out of India arbitrarily or whimsically by the appropriate authority, but only after proper

enquiry and; giving reasonable opportunity of hearing to the person concerned; In this connection, it is worthwhile to refer to the decision of the Supreme Court in the case of *Liberty Oil Mills* reported in (1984) 3 SCC 465.

95. It is pertinent to note in this connection that the Constitution Bench of Supreme Court in the case of *State of Andhra Pradesh v. Abdul Kader* reported in AIR 1961 SC 1467 relied upon by both the parties held inter alia that the question whether a person is an Indian citizen or a foreigner is not one which is within the exclusive jurisdiction of the Central Government to decide and the court can decide such a question. In the said case the concerned criminal court although had such opportunity did not decide such question. In a subsequent decision in the case of *Union of India vs. Ghaush Mohammad*, reported in AIR 1961 SC 1467 the Supreme Court no doubt held that the court in exercise of its writ jurisdiction should not go into such question as the same will involve consideration of evidence and therefore the same best be left to the civil court where an aggrieved party may ask for declaration that he is an Indian citizen but it has not been held that the writ court cannot decide such question.

96. In the instant case when the present petitioners were sought to be prosecuted for alleged violation of the various provision of the Passport (Entry into India) Rules, the criminal court could have decided such question on evidence if the respondents would have continued with the prosecution of the petitioners before the criminal court;" but as the respondent did not choose to do so the criminal court also had no occasion to decide such question. In the aforesaid case of *Abdul Kader* the Supreme Court also held inter alia that there cannot be any conviction u/s 14 of the Foreigners Act unless it can be held on evidence that the person is a foreigner as he is not an Indian citizen within the meaning of Section 2(a) of the Foreigners Act. Consequently, no order can be passed u/s 3 of the Foreigners Act deporting a person unless he is a foreigner and therefore the provisions of Foreigners Act can be applicable only to a foreigner and not to others.

97. In the case of *Abdus Saktar vs. State of Gujarat* reported in AIR 1965 SC 810 the Constitution Bench of the Supreme Court set aside the conviction of the accused u/s 14 of the Foreigners Act as it was found by the Supreme Court that he was not given chance to prove that he is Indian citizen and not a foreigner.

98. The contention of the Union of India that the present writ applications are not maintainable as the writ petitioners are not citizens of India, is not tenable. The petitioners claim themselves to be citizens of India and dispute the allegations of the respondents that they are Bangladeshi Nationals and have challenged the attempt of the respondents to deport them on such an allegation inter alia on the ground of absence of proper enquiry and denial of opportunity of hearing and violation of Article 21 of the Constitution. They can maintain therefore the writ petitions. That apart, as held by the Supreme Court in the case of *State of Andhra Pradesh vs. Abdul Kader*, reported in AIR 1961 SC 1067, the question whether a person is an Indian citizen or a foreigner is not one which is within the

exclusive jurisdiction of the Central Government to decide, the court can also decide such a question.

99. It has also never been held by the Supreme Court that the writ court has no jurisdiction to decide such a question. What has been held in the Supreme Court decision in the case of Union of India vs. Ghaus Mohammad, reported in AIR 1961 SC 1526 is that the question whether the respondent is a foreigner is a question of fact and as there was great deal of dispute on the question which would require a detailed examination of evidence, a proceeding under Article 226 of the Constitution would not be appropriate for a decision on the question and the question best be decided by a suit.

100. That apart, even if the writ petitioners are treated as a foreigners even then the protection of Article 21 of the Constitution as to their right to life and liberty will be very much available to them, and therefore it will certainly be open to the petitioner to contend in the writ petition that the procedure followed by the respondents while taking away their livelihood and liberty by seeking to deport them as Bangladeshis was not reasonable, fair and proper, and they had no reasonable opportunity to satisfy the authorities that they are Indian citizens and not Bangladeshi.

101. It has rightly been submitted by Mr. Gavilkar appearing for the respondent Nos. 4 and 5 that in view of Section 9 of the Foreigners Act, the burden will be upon the writ petitioners to prove that they are Indian citizens and not foreigners, if a question arises whether they are foreigners or not and neither the provisions of Section 8 of the Foreigners Act nor the provisions of the Section 9 the Citizenship Act will be applicable. It was held by the Supreme Court in the aforesaid case of Union of India vs. Ghaush Mahammad AIR 1961 SC 1526 that when the question arises whether a person is a foreigner or not, against whom an order u/s 3 has been made under the Foreigners Act, it is for him to prove that he is an Indian citizen and not a foreigner u/s 9 of the Foreigners Act and neither the provisions of Section 8 of the Foreigners Act nor Section 9 of the Citizen Act will be applicable. It was held by the Supreme Court in the aforesaid case of Union of India vs. Ghaush Mahammad AIR 1961 SC 1526 that when the question arises whether a person is a foreigner or not, against whom an order u/s 3 has been made under the Foreigners Act, it is for him to prove that he is an Indian citizen and not a" foreigner u/s 9 of the Foreigners Act, neither the provisions of Section 8 of the Foreigners Act nor Section 9 of the Citizenship Act will apply.

102. In the aforesaid case, the Supreme Court set aside the Order of the High Court which quashed the order of deportation as on scrutiny it was found by the High Court that there was no material at all on the basis of which the appropriate authority could proceed to issue an order u/s 3(2)(c) of the Foreigners Act It was held by the High Court that there has been no prima facie material on the basis of which the authority can proceed to pass such an order.

103. Relying on the said decision it has also been submitted by Mr. Gavilkar that this court cannot proceed to examine whether there are sufficient materials before the appropriate authority in the instant cases on the basis of which the order u/s 3(2)(c) of the Foreigners Act would have passed. But this court has not examined whether material on which the orders were passed were proper and had sufficient materials. This court has examined whether the order of deportation was passed after holding proper enquiry and after giving reasonable opportunity to the will petitioners.

104. The Supreme Court has not held either in the said cases or in any other cases that the appropriate authority can pass an order u/s 3(2)(c) of the Act or for the matter of that any order under the Foreigners Act whimsically and arbitrarily in respect of any person even if he is citizen of India without any enquiry.

105. In the case of Union of India vs. Abdul Khader (supra) It was held by the Supreme Court that when a person is not a foreigner, no order can be made against him u/s 3(1)(c) of the "Foreigners Act

106. Consequently, except in a case where a person concerned is admittedly a foreigner, no order u/s 3(1)(c) of the Foreigners Act can be passed by the appropriate authority against the person without deciding that he is a foreigner after holding an enquiry and giving reasonable opportunity to the person concerned to prove that he is not a foreigner but a citizen of India, which has not been in the instant case.

107. In fact, it is also not disputed by Mr. Gavilkar that no order can be passed u/s 3 of the Foreigner Act against the person without deciding that he is a foreigner after giving reasonable opportunity of hearing to the person concerned to prove that he is not a foreigner. But he has submitted that such opportunity was given to the petitioners.

108. Mr. Gavilkar has also argued that the writ petitions should be dismissed as incorrect statements have been made by the writ petitioners in the writ petitions and they have also suppressed facts. It has been contended that they have suppressed the fact that they are sought to be deported under order of deportation which were served upon the writ petitioners at Mumbai and not in West Bengal after they were handed over to the West Bengal Police. It has further been stated that the writ petitioners have incorrectly alleged that despite production of relevant materials before the appropriate authority they are sought to be deported although it will appear from the documents disclosed in the writ petition that the same could not have been produced before the appropriate authority at Mumbai.

109. So far as the allegation of suppression of facts relating to service of the order of deportation it appears from the records produced by the respondents before the court that except in one case all bear the thumb impression of certain persons which is neither identified by any person nor the same bears any date.

Nothing is clear from the records therefore when and where such service was effected.

110. Mr. Gavilkar has produced the original records of the case. It appears from such records that the show-cause notices were apparently received by the deportee by putting thumb impression. In one or two cases it is apparently received by putting signature. In case of thumb impression, none has identified the thumb impression nor any date is there- In case where signature has been made, no date is there. So far as the order of deportation is concerned, on the left hand corner of the same, there appears to be some thumb impression. But nobody has identified the same as the thumb impression of the deportee. No date is also there. Some of the deportation orders apparently have been received by putting signature, but no date is there.

111. In view of such fact as aforesaid, it is not at all clear whether the order of deportation and the show-cause notices were served at Bombay as claimed by the respondents or subsequently in West Bengal as alleged by some of the petitioners.

112. Be that as it may, as pointed out hereinbefore, such question being disputed questions of fact, I have proceeded on the footing that such show cause order of deportation were actually served upon the writ petitioners at Mumbai while they are in custody of the Mumbai Police, but since the allegation of the respondents were disputed by the writ petitioners, it cannot be said that there has been any suppression of facts unless it is decided first of all where such service was effected. As to the other contention of Mr. Gavilkar relating to incorrect statements made by the petitioner about production of materials before the appropriate authority, it appears from the date of certain documents specially some certificates which have been annexed to the writ petition by way of proof of their Indian citizenship, that the same could not have been produced before the appropriate authority in Mumbai as admittedly the same bear dates subsequent to the passing of order of deportation. But I am not inclined to dismiss the writ petition on that ground alone as prayed for by Mr. Gavilkar.

113. When the questions before the court is whether there has been violation of the rights of the petitioners to livelihood and liberty as guaranteed under Article 21 of the Constitution and procedures followed by the respondents for taking away such right is fair and reasonable and whether reasonable opportunity was given to the writ petitioners to prove that they are Indian citizens and not foreigners and when the court is not deciding the question whether the writ petitioners are citizens of India, the court is not placing any reliance on such documents produced by the petitioners in proof of their citizenship. That apart, the court cannot also overlook certain conduct of the respondent Nos. 5 and 6. an impression was sought to be created that the petitioners never claimed that they are permanent residents of West Bengal and Bihar and Indian citizens. In the remand application made before the learned Metropolitan Magistrate, Mumbai, it was claimed that the petitioners at the time of arrest admitted that

they are Bangladeshis. Yet the Deputy Commissioner of Police, Mumbai in the affidavit before this court has stated that the petitioners were asked by the show-cause notice to produce documents to prove their claim of Indian citizenship, which clearly indicates that the petitioners did claim before the respondents that they are Indian citizens.

114. Mr. Gavilkar has submitted referring to records that in case of a person who disclosed his address in West Bengal, he was released after verification. But there are also instances when from the records it is apparent that the permanent address of a deportee in West Bengal and Bihar was known to the respondents and yet he was sought to be deported as Bangladeshi. It will appear from the list of deportees handed over by Maharashtra Police to the West Bengal Police along with the deportees that at least in two cases it will appear from the address recorded that the same is in India and yet it has been written that the same is in Bangladesh. Two of such lists are annexed to, the writ petition of Tojibut Rahaman being W. P. No. 22905(W) of 1998 as annexure ?D?. It will appear from serial No. 18 of such first list at page 39 of the writ petition that the address of deportee is recorded as Rajmahal, Shaibganj, it is at Bangladesh although Rajmahal- Sahibjang in at Bihar in India. In Serial No. . 13.. of the second: list at page 41 of the writ petition the address is recorded) as Rampurhat, Birbhum, Bangladesh, although Rampurhat is in: the District of Birbhum in. West Bengal.

115. The learned Amicus Curiae also brought to the notice of this court, the decision of the Supreme Court in the case of Hens Midler vs. Superintendent of Presidency Jail, Calcutta, reported: in AIR 1951 SC 367.

116. In the said decision, the Supreme Court although held inter alia that the protection of Articles 21 and 22 of the Constitution of India is also applicable to foreigners, in paragraph 36 of the said judgment it has been held that the Foreigners Act vests the Central Government with absolute and unfettered discretion and; there is no provision in- the Constitution fettering such discretion and unrestricted rights to expel remains. It has been submitted by Mr. Paul, learned Amicus Curiae that as an Amucus Curiae it is his duty to bring to the notice of the Court, the aforesaid decision of the Supreme Court to enable the Court to come to a proper decision.

117. The aforesaid decision of the Supreme Court does not, however, hold that the appropriate authority u/s 3 of the Foreigners Act can arbitrarily deport any person who is not an admitted foreigner but a suspected one without holding any enquiry and without giving opportunity to such a person to prove that he is not a foreigner. The aforesaid observation of the Supreme Court has to be read in the context of the said case where the Supreme Court was faced with the situation where admittedly a foreigner, namely a German national was detained under the Preventive Detention Act and was sought to be expelled. The aforesaid observation of the Supreme Court that the Foreigners Act vests the Central Government with absolute and unfettered discretion to expel a foreigner will obviously be confined to cases to an admitted foreigner. That apart, as in the self-

same decision, it was also held that the protection of Articles 21 and 22 of the Constitution will be applicable to foreigners, such discretion shall also be subject to Articles 21 and 22 of the Constitution and therefore the procedure to be followed for taking away the right to life and liberty even of a foreigner has to be fair and proper.

118. The fact that such absolute discretion of the Central Government to expel a foreigner under the Foreigners Act as held in the aforesaid case of Hans Moller vs. Superintendent, Presidency Jail Calcutta, reported in AIR 1951 SC 367 will not empower the Central Government to arbitrarily expel a person who is not an admitted foreigner but may be a suspected foreigner without holding any enquiry and without giving opportunity to such a person to prove that he is not a foreigner, will be evident from the subsequent decision of the Supreme Court in the case of Louis De Raedt vs. Union of India & Ors. reported in 1991(3) SCC 554. In the aforesaid case the petitioners who were admitted foreign nationals were staying in India since pre-independence period on the basis of foreign passport and residential permits issued by the Government of India and renewed from time to time. They were Christian Missionaries. They challenged an order issued u/s 3(2) (d) of the Foreigners Act whereby their prayer for further extension of their period of stay in India was rejected and they were asked to leave the country. They contended that they became citizens of India by virtue of Article 5(c) of the Constitution. Such contention was rejected by the Supreme Court. In the said case also the Supreme Court held that the fundamental right of a foreigner is confined only to Article 21 for life and liberty. Following the decision of the Supreme Court in the case of Hans Moller vs. Superintendent, Presidency Jail Calcutta, reported in AIR 1951 SC 367. It was further held that the power of the Government of India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering such discretion. It was, however, not held in the said case that such foreigners have no right to be heard. But it was held that so far as right to be heard is concerned, there cannot be any hard and fast rule about the manner in which a person concerned had to be given an opportunity to place his case. It was further held that it was not claimed in the said case that had the authority concerned served a notice before passing the impugned order, the petitioners could have produced same relevant materials in support of their claim of acquisition of citizenship which they failed to do in the absence of a notice.

119. The aforesaid decision of the Supreme Court therefore in the said case of Louis De Raedt vs. Union of India, reported in 1991(3) SCC 554. clearly indicates that the observation of the Supreme Court that it is the absolute discretion of the Central Government to expel a foreigner will be confined only to a case of admitted foreigner and a suspected foreigner cannot be expelled without holding enquiry and without giving an opportunity to him to prove that he is not a foreigner.

120. Even in the case of a foreigner since the rights guaranteed under Article 21

of the Constitution is very much available to him, he cannot be whimsically and arbitrarily be expelled from India without holding enquiry and without giving any opportunity to him to establish that he is not a foreigner but Indian. His right to life and liberty being guaranteed under Article 21 of the Constitution the same can only be taken away by a procedure established by law which again has to be fair and proper and no such procedure can be fair and proper unless such a person gets an opportunity to establish that he is not a foreigner but he is an Indian citizen.

121. In the case of *S. G. Jaisinghani vs. Union of India*, reported in AIR 1967 SC 1427, the Constitutional Bench of the Supreme Court held inter alia that the absence of arbitrary power is the first essential of the rule of law upon which our constitutional system is based. In a system governed by a rule of law discretion when conferred upon executive authority must be confined within clearly defined limit. A rule of law from this point of view means that decision should be made by the application of known principles and rules and in general such decision should be predictable and the citizen should know where he is. If the decision is taken without any principle or without any rule it is unpredictable and such decision is anti-thesis of a decision taken in accordance with rule of law.

122. Since the power of the Central Government u/s 3(1)(c) of the Foreigners Act to expel a foreigner from India is an administrative, power, the discretion to be exercised in respect thereof cannot be arbitrary, but has to be exercised reasonably following a fair and proper procedure, in consonance to the rule of law. The aforesaid decision of the Supreme Court, therefore, in the case of *Hans Moller vs. Superintendent Presidency Jail Calcutta*, reported in AIR 1951 SC 367 and in the case *Louis De Raedt vs. Union of India*, reported in 1991(3) SCC 554 have also to be understood in the context of the aforesaid Constitutional Bench decision of the Supreme Court reported in AIR 1967 SC 1427. In the case of *Maneka Gandhi vs. Union of India*, reported in AIR 1978 SC 597, it was held that the procedure contemplated under Article 21 must answer the test of reasonableness in order to be in conformity with Article 14, the same must be right and just and fair and not arbitrary, fanciful or oppressive. It was further held that the rule of law permeates the entire fabric of the Constitution and wherever there is arbitrariness or unreasonableness, the same will be denial of the rule of law.

123. In the case of *Advocates on Record of Supreme Court vs. Union of India*, reported in AIR 1994 SC 269, where the Supreme Court was considering the question of primacy in the matter of appointment of High Court and Supreme Court Judges, it was held inter alia that absolute power in one individual is not warranted under the Constitutional scheme, it was held that the rule of law to become realistic, although there is scope for discretion within the operation of the rule of law. it has to be reduced to the minimum extent necessary for proper governance and within the area of proper governance and within the area of discretion, the existence of prior guidelines of norms and general applications are

to be there to exclude in arbitrary exercise of discretionary authority. In the case of Union of India vs. Jesus Sales Corporation, reported in (1996)4 SCC 69. the court was considering the provision of predeposit under Imports and Exports (Control) Act, 1947, where it was held discretion under proviso of the Section cannot be exercised in an unfettered manner but has to be exercised objectively in a reasonable and rational manner taking into consideration, the relevant facts and circumstances.

124. It will thus appear from the above-mentioned decisions that arbitrary exercise of power without any guidelines and reasonable procedure have been regarded by the Supreme Court to be anti-thesis to rule of law and contrary to our Constitutional scheme.

125. In the case of Anwar vs. State of Jammu & Kashmir, reported in AIR 1971 SC 337, also it has been held by the Supreme Court that a non-citizen can also claim rights under Articles 20, 21 and 22 of the Constitution.

126. Many other decisions have been relied upon by Mr. Bhattacharyya and Mr. Gavilkar. Such, decisions are not really relevant for the purpose of the question in respect of which this court made an enquiry namely whether the order of deportation have been passed without holding any proper enquiry or giving a reasonable opportunity to the petitioners to prove that they were not foreigners and whether the right to life and liberty of the petitioners guaranteed under Article 21 of the Constitution can be taken away by a procedure established by law unless the same is fair and proper.

127. In the case of Izaz Ahmed Khan vs. Union of India, reported in AIR 1962 SC 1052, the Supreme Court was considering inter alia the question whether Section 9(2) of the Citizenship Act is constitutionally valid and whether rules prescribing irrebuttable presumption is a rule of evidence of substantive law.

128. In the case of Government of Andhra Pradesh vs. Syed Mohn. Khan. reported in AIR 1962 whether a person who has lost citizenship of India and has acquired the citizenship of a foreign country has to be tried by the Central Government and whether it is. only after the Central Government has decided the point, the State Government can deal with person as a foreigner.

129. In the case of Fateh Mohd. vs. The Delhi Administration, reported in AIR 1963 SC 1035. the Supreme Court was considering whether the appellant was guilty u/s 14 of the Foreigners Act. In such case admittedly the appellant entered India with a Pakistani passport in 1956 and the visa enabled him to stay in India till 8.8.1956 and the appellant claimed to be citizen of India under Article 5(a) of the Constitution by reason of Section 9 of the Foreigners Act. The Supreme Court also held the burden was upon him to establish that he was a citizen of India in the manner claimed by him.

130. In the case of Abdul Sattar Hazi Ibrahim Patel vs. State of Gujarat, reported in AIR 1965 SC 810, a Constitutional Bench of the Supreme Court was

considering the claim of an accused u/s 14 of the Foreigners Act that he was domicile in India and was residing in India when Constitution came into force. It was held that the burden was upon him to prove the same. In the said case, however, on facts the Supreme Court held that he was not given opportunity to prove the same and such opportunity should be given to him. This decision, therefore, really helps the petitioners."

131. In the case of Ibrahim vs. State of Rajasthan, reported in AIR 1965 SC 618. the Supreme Court was considering a question when the provisions of Section 9(2) of the Citizenship Act can be made applicable.

132. From the discussion made above referred to by the learned Amicus Curiae, it will appear that there cannot be any escape from the conclusion that the Central Government cannot pass an order of deportation in respect of a suspected foreigner without holding an enquiry and giving reasonable opportunity to the person concerned in such enquiry to prove that he is not a foreigner but an Indian.

133. For the reasons stated hereinbefore, this court has already held after considering all aspects of the matter that in the instant case such proper enquiry was not made and such reasonable opportunity of hearing was denied to the petitioners. The procedure followed by the Deputy Commissioner of Police for taking away the right to life which includes livelihood and liberty of the petitioners was not fair and proper.

134. It is, however, also necessary to record in this connection that notwithstanding the allegation of some of the writ petitioners that the Maharashtra Government and the Police sought to deport them in the manner aforesaid as they belong to the minority community namely Muslim, I have not been unable to accept such contention of the petitioners in absence of sufficient material in respect thereof.

135. It may further be recorded although some of the writ petitioners have claimed damage and compensation for the harassment caused to them which has resulted in the loss of livelihood, I am not inclined to grant such relief in the present proceeding in absence of materials before the court that such loss of livelihood has resulted because the impugned action of the respondents lack bonafide.

136. The petitioners, however, will be at liberty to pray for such relief before the appropriate forum.

137. The question, therefore, which now comes up before this court is as to what relief the petitioners are entitled to.

138. The learned counsel appearing for the Union of India have contended inter alia that since no prayer for setting aside the order of deportation has been made in the writ petition, no such relief is available to the petitioners.

139. I am, however, unable to accept such submission.

140. If the court finds that the petitioners are entitled to such relief in a case where right under Article 21 of the Constitution have been violated the court should not be hypertechnical and refuse such relief simply because the same has not been prayed for in the writ petition. The court has ample power to mould the relief and grant a relief to a petitioner, if it is found, that he is entitled to the same, even if not prayed for, for ends of justice.

141. In the instant case, it has already been held by this court that the petitioners are sought to be deported by the respondents as foreigners without holding a proper enquiry and without giving a reasonable opportunity to the petitioners to prove that they are not foreigners but are not foreigners and are Indians. It has also been held by the court that the procedure followed by the respondents, for such deportation, by which the right to life and liberty of the petitioners as guaranteed under Article 21 of the Constitution is affected, is not fair and proper as the petitioners have been denied reasonable opportunity of hearing.

142. Under such circumstance, I am of the view, although it is not for this citizens, of India, the orders of deportation are liable to be quashed because of the reasons stated above.

143. It is also pertinent to record in this connection that after moving of the writ petitioner, either because of the order of this court or under the order of the Director General of Police himself, the Intelligence Branch of the district held enquiry as to the claim of the petitioners about their permanent residence in the places mentioned in the writ petition and their claim of citizenship by birth and in each case the claims have been found to be correct after such enquiry. Reports of such enquiry have been kept in the record. So far as the petitioner Nos. 13, 14, 15 in W. P. No. 15691(W) of 1998, Kalu Sheik alias Lilton Sheikh & Ors. vs. Union of India, who are residence of Bihar, such enquiry was held by the respective police authority in Bihar and in their case also it has been found that their claim as to permanent residence of Bihar and their claim of Indian citizenship by birth are correct.

144. For the reasons stated above, all the writ petitions succeed. The order of deportation issued in case of each of the writ petitioners are hereby quashed.

145. All the petitioners who are released from custody by the West Bengal Police on the undertaking that each of them will have to reside in his residence indicated in the writ petition and will not go out of the jurisdiction of the local police station and will appear before the local police station once in a week and the Officer-in-charge of the local police station shall ensure that he does not go out of the jurisdiction of the local police station are now released from such condition.

146. Let a writ in the nature of certiorari be issued accordingly.

147. There will be no order as to costs.

148. After delivery of the judgment, Mr. Govilkar, appearing for the State of Maharashtra prays for stay of operation of the direction passed by this Court to release the writ petitioner and/or deportees from such conditions upon which they have been released from the custody by the West Bengal Police, for a period four weeks.

149. It has been submitted by Mr. Govilkar that as a number of points have been decided in this matter, it will be necessary for his client to consider the appropriate steps to be taken after going through the judgment and therefore, for a period of four weeks the operation of the order may be stayed.

150. Such prayer has been opposed on behalf of the writ petitioners as it is submitted that because of such conditions the writ petitioners and/or the deportees could not move out of their villages to pursue their avocation.

151. As pointed out hereinabove the West Bengal Police after holding enquiry has submitted reports wherefrom it appears that the claim of the petitioners/deportees in different writ petitions as to their permanent residence in West Bengal as also their claim that they are Indians by birth have been found to be correct.

152. The writ petitioners/deportees almost for a year although have been free from custody but they have not been permitted to go out of the village and the jurisdiction of the local Police Station in view of the undertaking given by them and because of the order of this Court for which they were unable to pursue their normal avocation. In such view of the matter, I am not inclined to grant such stay as prayed for. I, however, direct that till 8th October, 1999, all the petitioners or the deportees as the case may be, will not go out of the respective jurisdiction of the local Police Station. Certified xerox copy of this order, if applied for, shall be given to all the parties within a week from the date of making application for the same.