

(2009) 07 DEL CK 0035
In the Delhi High Court
Case No : WP (Criminal) 758 of 2008

Tasleema

APPELLANT

Vs

State (Nct of Delhi) and Others

RESPONDENT

Date of Decision : 03-07-2009

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 22(2), 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 160, 160(1), 164, 195(1), 340
Foreigners Order, 1948 — Section 12
Penal Code, 1860 (IPC) — Section 114, 193, 194, 195, 196

Citation : (2009) 6 ILR Delhi 486 : (2010) 6 RCR(Criminal) 1309

Hon'ble Judges : Badar Durrez Ahmed, J;Ajit Bharihoke, J

Bench : Division Bench

Advocate : Nitya Ramakarishnan and Trideep Pais, for the Appellant; Rajat Katyal, for Respondent Nos. 1-3 and Sidharth Luthra Hemantika Wahi and Enmatoli Sema, for the Respondent

Judgement

Badar Durrez Ahmed, J.

Preface:

This is a case where we are called upon to decide whether a mother (the petitioner) should be compensated by the State of Gujarat, as a public law remedy, by way of strict liability, for the adventure undertaken by its police officials in taking away her minor son, without reason and without the authority of law, from Delhi to a lock-up in Ahmedabad? And, if so, how do we determine the amount? We are to decide these questions in the backdrop of the allegation that the petitioner as also her husband and children are not citizens of India but, are Bangladeshis. An ancillary issue is also being vigorously pursued by the State of Gujarat which wants us to make a complaint u/s 340 of the Code of Criminal Procedure, 1973 against the petitioner for having filed a false birth certificate of her son along with an amendment application in respect of the present writ petition. To unravel these knotty questions, it would be necessary to examine the

underlying circumstances in some detail. We shall do so presently.

1. Initially, this Writ Petition was filed by the petitioner seeking the issuance of a writ, order or direction in the nature of habeas corpus directing the respondents to produce her minor 13 year old son, Shamim, before this Court. It was also prayed that a direction be issued to respondents 1 to 4, through telegraphic/ telephonic communication to ensure the physical safety and return of Shamim to New Delhi immediately. The third prayer sought the award of exemplary damages to the petitioner. Since the boy was produced before court pursuant to orders passed herein, as we shall see, it is only the third prayer which survives.

The petitioner's son is =taken away":

2. The petitioner's case is that on 25.5.2008 between 9 a.m. and 10 a.m. some men in a white Tavera vehicle which had tinted glasses and a Gujarat registration number GJ 2G 4522 came to her husband's kabari (Scrap) shop at Seelampur. Her minor son Shamim was present at the shop as his father was away to Gurgaon, Haryana, to collect scrap. Near the said shop, there were others, such as, Salim, Shaidul and Rubel, who either owned or worked in the neighbouring shops. The men in the said white Tavera asked the names of the persons present and as soon as Shamim told them that his father's name was Mohd Azad, he was picked into the Tavera and taken away. It is further alleged in the writ petition that when asked, the said men in the said white Tavera said that they had come from Gujarat to arrest Shamim's father.

3. The other persons, who had watched this incident, narrated the same to the petitioner when she arrived at the shop shortly thereafter. Salim, who was one of the persons who watched the said incident, called the police control room after dialing the number 100. The local police arrived at the scene and was apprised of the fact that Shamim had been taken away by men who appeared to be from Gujarat. The police personnel from police station Seelampur thereupon informed the petitioner that it was the Gujarat police who had taken away the boy. D.D. Entry No 27A dated 25.5.2008 was made at police station Seelampur indicating that the Gujarat police had taken away a boy aged 13 years. On 26.5.2008, the police officers of police station Seelampur told the petitioner that her son was in the custody of the Gujarat police in Ahmedabad, Gujarat and the mobile phone number of the officer who took Shamim into custody was 09825163594. It is alleged that the petitioner was able to get through to the said phone number only on 27.5.2008. The person at the other end did not reveal his name but admitted to the fact that he had Shamim in his custody. It is further alleged that the said person was very rude and accused the petitioner of being a bangladeshi and threatened to deport the child. The petitioner lodged a complaint with the Commissioner of Police, Delhi and also sent a letter by courier to the Commissioner of Police, Ahmedabad. The petitioner stated that she is poor and illiterate and that she finally contacted social service organizations - Aman Biradari and The Commonwealth Human Right Initiative - and it is through their assistance that the present writ petition could be filed before this Court.

The Writ Petition is filed and orders passed:

4. On the first day, i.e. on 29.05.2008, when this writ petition came up for hearing before this Court, a predecessor Bench directed issuance of notice. Notice had been accepted by Ms Mukta Gupta, Standing Counsel for the Government of NCT of Delhi on behalf of respondents 1, 2 and 3. The order dated 29.5.2008 records that the counsel for the petitioner had served an advance copy of the petition on the respondent No. 4 (State of Gujarat) through its Standing Counsel, Ms Hemantika Wahi. But, as she was not present, the Court expressed its displeasure by recording .we cannot appreciate her absence in this hearing.. Nevertheless, the Bench issued notice to the respondent No. 4, returnable on 30.5.2008.

5. The order of 30.05.2008 reads as under:-

It is not the disputed fact that the child in question, 13 years old Shamim was .arrested. in Seelam Pur, Delhi. The response of Respondent No. 1, 2 & 3 is that their permission or cooperation was not sought and they were given intimation only after the child had been taken into custody and that too Respondent No. 1, 2 & 3 were not informed that the child has been taken into custody.

Respondent No. 2 to produce the child Shamim s/o Tasleema, the Petitioner herein, on 2nd June, 2008 before vacation Bench..

Status Report of the Delhi Police:

6. It is significant to note that prior to the passing of the said order dated 30.5.2008, a Status Report of the same date signed by the Station House Officer of Police Station Seelampur had been filed in Court by Ms Mukta Gupta, the Standing Counsel (Criminal) Government of NCT of Delhi. The Status Report reads as under:

STATUS REPOT

Hon"ble Sir,

Brief facts of the case are that on 25.5.2008 at 1.10 p.m., S.I. J.M. Bharwad, Police Sub. Insp. SOG, Crime Branch Ahmedabad City, Gujarat alongwith three constables came at P.S. Seelampur and informed that he had come for the investigation of case FIR No. 840/06, u/s 457/380/114 IPC of P.S. Alis Bridge, Ahmedabad City, Gujarat for search of Mohd. Azad and after searching they lodged the information which was recorded vide D.D. No. 22B, dated 25.5.2008, P.S. Seelampur, Delhi. However, they did not seek any help from Delhi Police nor informed that they were taking anyone alongwith them. S.I. J.M. Bharvad also gave a written statement simultaneously that they had come for search of accused Azad S/o Shamsu Ali R/o C- 98, Shastri Park, D.D.A. Flat, Delhi but Azad could not be traced as his house was found locked from outside. S.I. J.M. Bharvad further stated that Azad above is a Bangladeshi National and he was

deported to Bangladesh from Delhi but at present he is residing illegally in Delhi. S.I. J.M. Bharwad requested to make search of Azad above and if any clue is found, information be given to Ahmedabad city Police on the Ph. No. 07925630600, Mobile No. 09825163594. Copy of the said written statement is enclosed herewith for the kind perusal of Hon"ble Court.

It is further submitted that on 25.5.2008 at 4.20 p.m. a PCR call vide DD No. 15A was received at P.S. Seelampur, Delhi that a boy aged 13-14 years has been abducted and taken up in vehicle No. GJ-1G 4522 by 5-6 Police Officials in civil dress from Kabari Shop, near Nala, red light Dharampura. The said call was entrusted to ASI. Iftikhar Ahmed for enquiry on which ASI Iftkhar Ahmed made enquiry and it was revealed that a boy has been taken away by Gujarat Police officials, on 26.5.2008 again a PCR Call vide DD No 7A was received at P.S. Seelampur that Shamim S/O Md. Azad who works in a Godown of Kabari at Dharampur has not been returned at his home from 25.05.08 at 10.00 o" clock. The said PCR call was entrusted to ASI Gaje Singh and the said DD entry was kept pending and on 29.05.08 she alongwith her son Shamim @ Milan aged 13 years was present at her shop. At about 4.15 PM 5/6 policemen in plain clothes came to her shop and asked about her husband. They stated that Azad had gone to somewhere in Gurgaon. On this they took her son in vehicle NO GJ 1G-4522 at some unknown place. On the basis of the statement of the complainant a case vide FIR No. 212/08 dated 29/05/08 u/s 363/34 IPC was registered at P.S. Seelampur and taken up for investigation. A team has been sent to Gujarat for the investigation of the case.

Submitted please

Sd/

SHO/Seelampur

Dated - 30/05/08.

7. The above status report has revealed the following facts:-

1) On 25.5.2008 at about 1.10 p.m., Sub Inspector J.M. Bharwad, Special Operation Group (SOG) Crime Branch, Ahmedabad City, Gujarat along with three constables came to Police Station Seelampur and informed that he had come for the investigation of FIR No. 840/06, u/s 457/380/114 IPC of Police Station Elis Bridge, Ahmedabad City, Gujarat in search of Mohd. Azad.

2) This information was recorded on 25.5.2008 at P.S. Seelampur, vide D.D. Entry No. 22B.

3) The said S.I. J.M. Bharwad and the other three constables from Gujarat did not seek any help from Delhi Police nor did they inform Delhi Police that they were taking any person along with them.

4) Sub Inspector J.M. Bharwad also gave a written statement at the Police Station Seelampur.

5) On 25.5.2008 itself a PCR call vide DD No. 15A was received at Police Station Seelampur indicating that the boy Shamim, aged 13-14 years had been abducted and taken in a vehicle No GJ IG-4522 by 5- 6 police officials in civil dress from a Kabari shop near Nala, red light Dharampura.

6) On 26.5.2008 another PCR call vide DD No. 7A was received at P.S. Seelampur that Shamim s/o Mohd. Azad had not returned home from 25.5.2008 at about 10.00 O" Clock.

7) On the basis of the statement of Shamim's mother (Taslina), the petitioner herein, FIR No. 212/2008 dated 29.5.2008 u/s 363/34 IPC was registered at police station Seelampur and taken up for investigation.

8) A team had been sent to Gujarat for the investigation of case.

8. From the above facts, it became absolutely clear that the petitioner's minor son Shamim had been picked up by the Gujarat police. In fact, it became clear that it was Sub Inspector J.M. Bharwad along with other constables who had come from Ahmedabad, Gujarat in search of Mohd. Azad and, not finding Mohd. Azad in Delhi, they, instead, picked up his minor son Shamim and took him into their "custody". They not only removed him from his place of residence/work but also took him out of Delhi to Gujarat.

Sub-Inspector J. M. Bharwad's written note submitted at PS Seelampur:

9. It is important to note the contents of the written statement/note given by S.I. J.M. Bharwad, SOG Crime Branch, Ahmedabad City, Gujarat at the police station Seelampur. A copy of the said document has been placed on record. It is in Hindi. The English translation of the said document reads as under:-

To

SHO,

Police Station Seelampur,

Delhi - 53.

Subject: Information regarding search of the accused and for necessary action.

Sir,

The report/request of S.I. J.M. Bharwad, SOG Crime Branch, Ahmedabad City is as under:-

Following is the request on above subject by SI. J.M. Bharwad SOG Crime Branch Ahmedabad City.

Accused Sujit Dass @ Alam s/o Tarni Das (+2 =3) persons have been arrested on 16/5/08 at 22.30 PM. Vide CR no 840/06 u/s 457/380/114 IPC PS. Elisbridge Ahmedabad City. On interrogation he disclosed that Azad s/o Samsul Ali Sheikh R/O C-98 Shastri Park DDA Flat had been involved in the above case.

As per the disclosure statement of accused arrested search was made at C-98 Shastri Park Delhi but it was learnt that he had left the rented house and shifted to some unknown place. Search was made at the kabari shop of accused at Dharampura red light where one Mohd. Salim s/o Ali Mohd. Sheikh aged 28 years r/o A-469 JJ colony Bawana, Delhi was found present. On enquiry he stated that Mohd Azad s/o Samsu Alam Sheikh is a permanent resident of Gobar Chakar, Khulna, Bangladesh and is presently residing at Sudama Park, gali No. 10 West Babarpur, Delhi and C-58 DDA Flats Shastri Park, Delhi. On search he could not be found and the houses were locked. Mohd. Azad had previously been arrested in a case of house breaking by the Ahmedabad City police. On interrogation he disclosed that he was a Bangladeshi citizen and was deported to Bangladesh as he was found staying in Delhi without a Passport and Visa. He returned back from Bangladesh. Accused if traced, be arrested in above said offence, and information may be given to Ahmedabad city control room on 079 -256-30600.

Mobile No. 9825163594 Dt 25/5/08 Sd/- J.M. Bharvad,

Police Sub Inspector,

SOS Crime Branch,

Ahmedabad City

Gujarat (State).

Production of the boy before this Court:

10. On 2.6.2008, when the matter appeared before the Vacation Bench, Ms Wahi, appearing on behalf of the State of Gujarat (respondent No. 4), produced the child Shamim s/o Tasleema, the petitioner herein. She made a curious submission that "the minor boy Shamim accompanied the Gujarat Police willingly of his own accord and that he is not in police custody, since there is no proceeding or FIR registered against him." Ms Wahi also submitted that they were handing over the minor boy to the Delhi Police. The order dated 02/06/08 indicates that Ms Mukta Gupta, appearing on behalf of the Respondent Nos 1 to 3 had no objection to the custody of the child being handed over to his mother, the petitioner herein. She also sought further time to file a status report with regard to the investigation carried out pursuant to FIR No. 212/2008 dated 29.5.2008 registered in connection with the alleged abduction of the minor child. The Vacation Bench also directed the police officer who arrested the boy to file an affidavit explaining the circumstances under which they took the boy from Delhi to Ahmedabad. Four weeks' time was granted for filing the said affidavit and two weeks' time was granted to the petitioner to file the rejoinder. The Bench also directed, in view of the submission made by Ms Mukta Gupta, counsel for the State, that the minor boy be released into the protective custody of his mother, the petitioner herein.

Shamim's statement u/s 164 Cr. P.C:

11. On the same day, the minor boy Shamim was produced before the learned Metropolitan Magistrate, Karkardooma, Delhi where his statement u/s 164 CrPC was recorded. As per the said statement, Shamim has clearly stated that he had been forcibly taken away to Gujarat by the officials of Gujarat Police and he had been confined in a lock-up in Ahmedabad, Gujarat. His statement u/s 164 CrPC dated 2.6.2008 is in Hindi. An English translation of the said statement is as under:-

Q. What is your name?

A. Shamim.

Q. Where do you live?

A. Kasim Vihar.

Q. What do you do?

A. I am doing the work of Kabari.

Q. Do you know, where are you sitting?

A. In the Court.

Q. Are you studying?

A. No.

Q. How many members are there in your family?

A. Mother, Father and three sisters.

Q. Do you want to depose?

A. Yes.

Q. Are you deposing of your own free will?

A. Yes.

Q. How old are you?

A. Thirteen years.

Master Shameem @ Milan s/o Mohd. Azad, age about 13 years r/o 32A Kasim Vihar, Loni, Gaziabad, U.P.

On 25/04/2008, Gujarat Police came to Dharampura Red Light where I have a Kabari business. Two police men approached me and asked my name. Then they asked my father's name which I told them. Then they asked me to take them to my father. Then they put me in a vehicle and left. Apart from me one driver and four police men were sitting in the vehicle.

Then I took them to my house to meet my father. My father was not present in the house, so they again took me to my kabari shop. Then they slapped me two

three times, and scolded me saying .you are lying, why did you not take us to your father.. Then they said that if I did not tell the truth about my father, they would kill me with the gun. Then by instilling fear in me they forced me to sit in the same vehicle and took me to Seelampur. They stopped the vehicle in front of police station Seelampur and one police man went inside the police station. Then after five minutes, he returned with a red paper in his hand and sat in the vehicle. In the same vehicle they took me to Gujarat. We left in the day and 2-3 times we halted at dhabas to take meals. They also gave me dal roti once. Then after reaching Gujarat they put me in a lock-up. Many other police men were also present there.

Then after four days, I was taken out from that lock-up. Along with me, one woman and four other men were also taken out. After removing me from there, they took me into a chamber situated above. There, they slapped me 2- 3 times, abused me and told me that .you are a Bangladeshi.. Then, in one file, after substituting someone's Bangladeshi address as my address, told me that now they would definitely send me to Bangladesh. After further questioning, they put me in the same lock- up. Then on the next day, I was taken out from the lock- up and taken into a cabin where one officer told me .if I loose my job due to you, then I will shoot you and your family.. Then they told me that if I went to Delhi then I should say that I returned to Delhi of my own free will to save my father and nobody pressurized me nor did anybody take me anywhere and nobody beat me. I was told to tell this to everybody, whether it was my mother, or advocate or anybody else. Again I was put into the same lock-up. The next day they took me out and took me to a cabin and again told me to say the same thing after reaching there (Delhi), what had been told to me by them. They again put me in the same lock-up. There, they also did not give any proper food to eat. They again told me that when they take me to Court then I should repeat what has been told by them. Yesterday, 01.06.08, we left at 1.00 p.m. We stopped at 2-3 places for tea and twice at dhabas for taking meals and some rest. This morning at 6.30 a.m. we reached Gujarat Bhawan in Delhi. Some police men, driver and one writer (scribe) went upstairs for washing up and bathing etc.

There, two senior officers had also come from Gujarat. After freshening up, all left for Court. I was brought to Court in the same vehicle on which I had been taken to Gujarat. We left at about 8 a.m. and reached Court at 10 a.m.

Sd/- Shamim Sd/- English (in English) MM

RO&AC

As the witness is not educated so his thumb impression of left thumb has also been taken which is as under:-

LTI.

Thumb impression of Shamim..

12. The above statement of the minor boy Shamim, recorded on 2.6.2008

immediately after he had been produced before this Court, clearly indicates that:-

- 1) he was taken by the Gujarat Police on 25.5.2008 from Delhi and placed in a lock-up in Ahmedabad, Gujarat till 1.6.2008 on which date, he was taken out from the lock-up for the purposes of returning to Delhi.
- 2) Shamim was produced before this Court on 2.6.2008 by the respondent No. 4.
- 3) Shamim was forceably taken from Delhi on being given repeated life threats both to him and other family members by the Gujarat Police.
- 4) Shamim had also been slapped on two occasions.
- 5) Shamim had been instructed by the Gujarat police to narrate a story which had been cooked up by them to the effect that he had voluntarily gone with them.
- 6) After four days in the lock-up, Shamim was taken to some chamber where he was accused of being a Bangladeshi and threatened that he would be sent to Bangladesh.

Sub-Inspector J. M. Bharwad's affidavit dated 09.07.2008:

13. In sharp contrast to this horrific tale, the affidavit of J.M. Bharwad, Sub-Inspector of Police, Crime Branch, Ahmedabad, Gujarat dated 9.7.2008 reiterates the submissions made earlier by the counsel for respondent No. 4 that Shamim had voluntarily gone with him and other members of the Gujarat Police to Ahmedabad. In the said affidavit, the said Sub Inspector J.M. Bharwad, inter alia, stated that on 25.5.2008, he along with three constables and the arrested accused, Sujitdas who was in police remand for the purpose of investigation came to Delhi with the intention of arresting Mohd. Azad. He stated that they went to Seelampur Police Station to inform that they were searching for an absconding accused named Mohd. Azad and he asked them to inform him if they had any clue as to his whereabouts. The said affidavit then narrates the factum of Shamim being taken to Gujarat. It would be best to set out the exact words used in the said affidavit:-

6. That on the same day, we enquired about the whereabouts of Mohammad Azad and went upto his house. However we found the house locked. Thereafter we found a teenage boy named Shamim who was recognized by the arrested accused Sujitdas to be the son of the absconding accused. We enquired from him the whereabouts of his father.

7. That Shamim told us that at present his father is in Ahmedabad but he does not know exactly where his father is staying. However, he informed us that if we take him to Ahmedabad he will take us to the place where his father is staying. He voluntarily agreed to come with us to Ahmedabad and show us the hiding place of his father.

8. That the action of Shamim coming with us to Ahmedabad was absolutely voluntary and at no point forced or coerced him to come with us. We even

informed at the Police Station that Shamim has volunteered to come with us.

9. That on reaching Ahmedabad, Shamim could not recall the hideout of his father. However he did reveal that in 2006, his father, mother and siblings were deported to Bangladesh from Delhi as they were illegally residing in Delhi. After a few months of being deported his father and mother came back to Delhi with a passport but he does not have a valid passport and had crossed the Indo-Bangladesh border illegally to come to Delhi. He stated that he is staying in India without any official documents. The order of deportation issued against Md. Azad, his wife & children by Delhi FRRO annexed hereto and marked as ANNEXURE-A.

10. That it was only when Shamim revealed that he is an illegal immigrant, he was detained on 27.5.2008 for the purpose of deportation process and informed the Competent Authority, i.e Joint Commissioner, Special Branch, Ahmedabad city for the same.

11. That thereafter the necessary report was sent to the Joint Commissioner, Special Branch, Ahmedabad and the necessary procedure of his deportation was undertaken by the Joint Commissioner, Special Branch, Ahmedabad City who issued the order of detention of Shamim along with five other Bangladeshi Nationals. Copy of the detention order dated 29.5.2008 issued by the Joint Commissioner, Special Branch, Ahmedabad city is annexed hereto and marked as ANNEXURE-B.

12. That Shamim had accompanied us voluntarily to show the place where his father was staying. Our intention was to find the absconding accused to achieve the ends of justice and at no point did we intend to harm the boy..

The above narration given in the said affidavit makes one thing absolutely clear which is that the said S.I. J.M. Bharwad along with three constables had come to Delhi purportedly to arrest Mohd. Azad. According to them, they did not find Mohd. Azad. They, however, found his son Shamim. The said Shamim was taken by them to Ahmedabad, Gujarat and was detained there. It is also revealed that Shamim was detained on 27.5.2008 for the purposes of deportation to Bangladesh.

14. A fantastic and unbelievable story has been made up by the deponent by stating that Shamim voluntarily agreed to go with him and the other constables of Gujarat Police to Ahmedabad to show the purported hiding place of his father and that the action of Shamim going with them to Ahmedabad was absolutely voluntarily and at no point was he forced or coerced to go with them. Could it ever be believed that a minor child of 13 years of age on being told by the police from another state that they are searching for his father who is to be arrested by them, would "volunteer" to accompany them to another city in a far-off State to point out the place where his father is allegedly hiding?

15. In the said affidavit S.I. J.M. Bharwad also stated that he had given information at the Police Station at Seelampur that Shamim had volunteered to

go with them. This is an absolute falsehood. This is apparent from the fact that the written statement/note of 25.5.2008 handed over by him to the Station House Officer of Police Station Seelampur does not mentioned this fact anywhere. It is also further established by the fact that the status report submitted on behalf of the Police Station Seelampur categorically stated that the Gujarat police did not seek any help from Delhi Police nor did they inform them that they were taking anyone with them.

16. The Affidavit of J.M. Bharwad also indicates that Shamim revealed that he is an illegal migrant and that his father, mother and the siblings were Bangladeshis and they had been deported to Bangladesh from Delhi in 2006 as they were illegally residing in Delhi. According to the said affidavit, SI J.M. Bharwad apparently came to know of this only on reaching Ahmedabad and, consequently, Shamim was detained on 27.5.2008 for the purpose of deportation and that the competent authority, i.e., the Joint Commissioner, Special Branch, Ahmedabad City was accordingly informed. It is consequent thereupon that the order of deportation in respect of Shamim and five other alleged Bangladeshi nationals was passed on 29.5.2008. This story also cannot be believed. This is so because in the written statement/note of 25.5.2008 itself, SI J.M. Bharwad had alleged that Mohd Azad was a Bangladeshi and that he had been deported to Bangladesh as he had been found to be staying in Delhi without any passport or visa and that he had returned from Bangladesh and was now residing in India. Thus, the story that it was only on reaching Ahmedabad that Shamim allegedly revealed that he was an illegal migrant and that his father, mother and siblings had been deported to Bangladesh in 2006 is belied by the said deponent's written statement of 25.5.2008 which he had submitted to the Station House Officer of Police Station Seelampur.

17. Alongwith the said Affidavit of J.M. Bharwad, a copy of an order dated 19.11.2007 purportedly passed by the Foreigners Regional Registration Officer/Civil Authority, Delhi had been annexed as Annexure- =A". As per the said order, 16 illegal migrants of Bangladesh nationality detected by S.T.F. staff of North-East District were directed not to move out of Sewa Sadan, Shahzada Bagh, Delhi till the travel arrangements were made. The list of sixteen persons included six members of Shamim's family - his parents, himself and his three sisters. Interestingly, at Sr No. 8 of the said list Shamim's name has been shown and his age has been given as 13 years. This is a significant fact and would be of material relevance as would be clear from the circumstances to be indicated hereinbelow. Annexed as =Annexure B" to the said affidavit of SI J.M. Bharwad is a copy of an order dated 29.5.2008 passed by the Joint Commissioner of Police, Special Branch, Ahmedabad Police whereby Shamim along with five other alleged Bangladeshis were ordered to be detained in Crime Branch, Ahmedabad city u/s 12 of the Foreigners Order, 1948 and Notification No. RCF/1960 (11) dated -02/12/1960 of the Government of Gujarat. Interestingly, either by design or inadvertently, Shamim's age was indicated as sixteen years. How could his age be recorded as sixteen years? Shamim, himself, in his statement u/s 164

CrPC which was recorded before the learned Metropolitan Magistrate in Delhi on 2.6.2008 has given his age as 13 years. The order dated 19.11.2007 referred to above passed by the FRRO, Delhi also, as noted above, indicates the age of Shamim to be 13 years. How could Shamim, who was 13 years old on 19.11.2007, become 16 years of age on 29.5.2008. It is obvious that Shamim did not give his age as 16 before the said Joint Commissioner of Police at Ahmedabad but that the age of 16 years was either put by the Joint Commissioner of Police himself or at the instance of somebody else, perhaps with the object of somehow showing that Shamim was more than 15 years of age in order to avoid legal complications under the Indian Penal Code.

18. It is also interesting to note the allegation that has been leveled upon Shamim by virtue of the said order dated 29.5.2008. This is apparent from the order itself which, inter alia, reads as under:-

The above mentioned Bangladeshi Nationals who have illegally crossed over in India without having passport or legal documents were staying and working as labours (sic) at various locations at Ahmedabad. All these Bangladeshi National were detained by Police official of Crime Branch, Ahmedabad City vide D.C.B. Police Station, Station Diary Entry No. 15/2008 dated - 25/05/2008 at 2100 hrs as they were staying illegally in Ahmedabad. Their stay in India is suspicious and their relatives are in Bangladesh. Until Government of India deports them to Bangladesh, I, the under signed restrict their detention in Crime Branch, Ahmedabad City, u/s 12 of the Foreigners Order, 1948 and Notification No. RCF/1960(11) dated - 02/12/1960 of Government of Gujarat.

Sd/-

(Pravin B. Gondia)

Joint Commissioner of Police,

Special Branch, Ahmedabad City.

So, as per the said order, Shamim was a Bangladeshi national having illegally crossed over into India without a passport or legal documents and was "staying and working as labours (sic) at various locations at Ahmedabad." This is an ex facie false statement. Shamim was residing in Delhi, he had been picked up by SI J.M. Bharwad and his team of police officials from Ahmedabad and taken to Ahmedabad against his will. How could it, even in the wildest of imaginations, be contemplated that Shamim was working as a labourer in Ahmedabad? This is not all. The order further goes on to say that these Bangladeshi nationals mentioned by the said order were detained by the police officers of Crime Branch at Ahmedabad City on 27.5.2008 at 2100 hrs as they were staying illegally in Ahmedabad. This is a complete travesty of truth insofar Shamim is concerned. He had been taken into "custody" against his will from Delhi and put in a lock-up in Ahmedabad, Gujarat on 25.5.2008. What was the occasion of detaining him as someone staying illegally in Ahmedabad and that, too, at 11 o'clock at night on

27.5.2008? The falsity of the statements contained in the order are further indicated. In the said order, it was stated that the stay in India of all the persons mentioned in the said order, which includes Shamim, was suspicious and that their .relatives are in Bangladesh.. This is a further falsehood. It is the case of J.M. Bharwad himself that Shamim's father, mother and three sisters are all residing in Delhi.

19. Continuing the sequences of events, we note from the said affidavit of SI J.M. Bharwad that a warrant of arrest u/s 70 CrPC had been issued against Shamim's father Mohd Azad on 26.6.2008. But this does not help the respondents inasmuch as the warrant of arrest was issued subsequent to the incident of 25.5.2008 leading to the detention of Shamim by the Gujarat Police and his ultimate release on 2.6.2008 consequent upon the directions of this Court.

20. In response to the affidavit filed by SI J.M. Bharwad, a reply was filed by the petitioner supported by an affidavit dated 13.8.2008. As per the said reply, it was, inter alia, indicated that upon inspection of the records in Gujarat, it was revealed that the case described as FIR No. 840/06 was in fact closed by PS Ellisbridge by filing a summary in February, 2007. Consequently, there was no occasion for the petitioner's husband to present himself before any authority in Gujarat in that connection. Apparently in May, 2008, the Crime Branch decided to require him for questioning after re-opening the case as CR No. 9/2008. No notice was served on him in this regard. The warrant issued by the Magistrate is dated 26.6.2008, more than a month after Shamim's alleged abduction and nearly a month after this Court directed SI J.M. Bharwad to file his affidavit.

The amendment application and the fake birth certificate:

21. In the meanwhile, the petitioner had filed an application seeking to amend the writ petition. Along with the said application, the proposed amended writ petition was also filed. In the proposed amended writ petition, the petitioner made the following prayers:-

(a) Issue a writ, order or direction in the nature of mandamus or other appropriate writ directing the Delhi police to arrest the officer and proceed against him in accordance with the law.

(b) Direct the State of Gujarat to institute administrative action against the Shri Bharwad and others who were with him;

(c) Direct the state of Gujarat to institute a comprehensive enquiry into the roles of all the senior officers who would necessarily have been complicit in sustaining the illegal act of taking and keeping the child Shamim in custody.

(d) Direct payment of exemplary damages to Shamim for the trauma inflicted on him as held payable for violation of fundamental rights in D.K. Basu and Nilabati Behra.

(e) Pass such other order as thought fit.

22. In paragraph 4 of the proposed amended petition, it was stated that Shamim is, in fact, only 13 years old; a birth certificate of Shamim was annexed therewith as "Annexure P-1". This birth certificate, ultimately, turned out to be a fake/false certificate and from this issue arises the connected question of proceedings u/s 340 of the Code of Criminal Procedure, 1973. In this connection, the learned Counsel for the petitioner drew our attention to paragraph 10 of the proposed amended writ petition wherein it has been stated that the nationality of Shamim or his parents is completely irrelevant insofar as judging the action of the Gujarat police is concerned. The actions of the Gujarat police call for the strictest penal and administrative action. However, certain documents were annexed with the application which also made out a case for Shamim's Indian citizenship. They include the said birth certificate. Apart from the said birth certificate which ultimately turned out to be a fake certificate, other documents had also been filed, such as Shamim's father's residence/school certificate of the State of West Bengal. Consequently, it was submitted that Shamim having been born after 1987 but before 2003, with one of his parents being an Indian citizen, would be entitled to be called an Indian citizen. In the said paragraph 10 of the proposed amended writ petition, it was reiterated that it is open to the State to verify the said documents. The subject matter of the instant writ petition is not the nationality or status or whether Shamim or his parents were Indians but whether the Gujarat Police followed the law and lawful procedure while removing Shamim from the custody of his parents, and in then attempting to deport him to Bangladesh.

23. One of the documents annexed as "Annexure P-2" was a photo copy of the Ration Card and Voter I.D. Card issued by the Election Commission of India in respect of Mohd Azad's father Samsel Haque, which showed him to be a voter in Part No. 124, Nurnagar, North 24 Parganas, West Bengal falling in 82 Deganga Assembly Constituency.

24. It is pertinent to note that in the reply of the respondent No. 4 to the application for amendment of the writ petition, one of the grounds taken was that the amendment was not necessary as it would only complicate the issues. It is, however, in the affidavit dated 11.9.2008 titled as "Sur- Rejoinder to the reply on behalf of the petitioner to the affidavit filed by Sub-Inspector Shri Bharwad. that objection as to the genuineness of the birth certificate of Shamim had been taken.

25. On 23.9.2008 when the matter came up before another Division Bench of this Court, it was observed that since the child has been recovered and is no longer with the Gujarat police, prayers (i) and (ii) made by the petitioner in the writ petition stood granted and, therefore, the petition stood disposed of to the extent of those prayers. The writ petition, therefore, survived in respect of prayer (iii) which related to compensation. With regard to the application for amending the writ petition (Crl. M.A. 6979/2008), the Bench observed that instead of

seeking an amendment, the relief for alleged human rights violations may be agitated by way of an independent petition as the same did not appear to be relatable to prayer (iii) of the present petition but rather seeks to lay foundation for grant of some additional reliefs. The Bench also observed that the birth certificate dated 30.7.2008 relating to Shamim was found to be a forged one and it was urged on behalf of the respondent No. 4 (State of Gujarat) that the petitioner had committed the offence of perjury for which she must be proceeded with in accordance with the law. Being prima facie satisfied that the offence of perjury was made out against the petitioner and that she needed to be proceeded against, a show cause notice was, therefore, issued to her asking her to indicate as to why she should not be proceeded against for perjury. It may be noted that prior to the order dated 23.09.08, an affidavit had been filed by one Pushkar Raj who was said to be working as a Program Officer with Commonwealth Human Rights Initiative, New Delhi. As per the said affidavit, the birth certificate of Shamim was filed under the belief that the said birth certificate was genuine. The said document had been provided by the petitioner's husband who claimed that he had obtained the same from the office of the Municipal Corporation of Delhi and, therefore, there was no reason for the said NGO (Commonwealth Human Rights Initiative, New Delhi), which was assisting the petitioner, in suspecting the genuineness of the said document. The affidavit further reveals that upon verification, it was found that the said birth certificate was, indeed, false. However, it was also stated that Mohd Azad, the petitioner's husband, who had made the birth certificate available for the purposes of filing in Court, claimed that the certificate was genuine and stated that the MCD Office at Daryaganj issued the birth certificate as also the birth certificate of his younger daughter (Zyasha). The birth certificate in respect of his daughter Zyasha had been found to be valid and genuine. It is further narrated that when Mohd Azad asked for a birth certificate for his son Shamim, he was referred by the MCD office at Daryaganj to the office at Irwin Road, where he says an official of the MCD, named Pradeep, provided him with the said birth certificate on payment of Rs 140/-. The deponent of the said affidavit namely, Pushkar Raj, was again deputed to visit the office of the MCD at Irwin Road where he met Mr Pradeep and he assured him that the certificate issued by him was genuine. He, however, submitted that the birth certificate of Shamim attached along with the proposed amended writ petition was a false certificate and that this fact is uncontested. The deponent also expressed deep regret that a wrong document was filed before this Court. The two issues:

26. From the aforesaid facts and circumstances, it is apparent that two issues arise for the consideration of this Court. They are:

1. The question of compensation under prayer (iii) of the writ petition; and
2. The question of making a complaint u/s 340 CrPC in respect of the fake birth certificate of Shamim.

27. We shall take up consideration of the second issue, i.e., the issue of inquiry u/

s 340 CrPC, first.

The issue of initiation of inquiry u/s 340 CrPC:

28. Ms Nitya Ramakrishnan straightway drew our attention to Section 340 CrPC which reads as under:-

340. Procedure in cases mentioned in Section 195. - (1) When upon an application made to it in this behalf or otherwise any Court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in Clause (b) of Sub-section 195 , which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, -

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance for the accused before such Magistrate, or if the alleged offence is non- bailable and the Court thinks it necessary so to do send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by Sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under Sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of Sub-section (4) of Section 195.

(3) A complaint made under this section shall be signed, -

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorize in writing in this behalf.

(4) In this section, .Court. has the same meaning as in Section 195.

She submitted that presently we are at the stage of preliminary inquiry and it is only if the Court is of the opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in Section 195(1)(b) CrPC that the Court would record a finding and make a complaint in writing and sent it to the Magistrate having jurisdiction. The said Section 195(1)(b) reads as under:-

195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.-

(1) No Court shall take cognizance -

(a) xxx xxx xxx

(b) (i) of any offence punishable under any of the following section of the Indian Penal Code (45 of 1860), namely, Sections 193 - 196 (both inclusive), 199 , 200 , 205 - 211 (both inclusive) and 228 , when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in Section 463, or punishable u/s 471, Section 475 or Section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in Sub-clause (i) or Sub-clause (ii).

except on the complaint in writing of that Court by such officer of the Court as that Court may authorize in writing in this behalf, or of some other Court to which that Court is subordinate.

xxx xxx xxx.

29. The learned Counsel for the petitioner submitted that in this case the allegation is that the petitioner used the birth certificate of Shamim which was a forged document and, therefore, the provisions of Section 471 read with Section 463 are sought to be pressed into service on behalf of the respondent No. 4 against the petitioner. In this connection, the learned Counsel for the petitioner referred to the affidavit of the petitioner dated 19.11.2008 in response to the show cause notice issued by this Court on 23.9.2008. In Paragraph 2 of the said affidavit the petitioner apologized unconditionally regarding the filing of the said birth certificate of Shamim which has turned out to be a fake certificate. The petitioner stated that the certificate was filed under the belief that it was a genuine certificate issued by the Municipal Corporation of Delhi. The circumstances under which the said certificate was obtained and came to be filed are set out in paragraphs 3 to 7 of the said affidavit which are as under:-

3. That I have not attempted to mislead this Hon''ble Court by filing a false certificate. As this Hon''ble Court will, appreciate, the sought for relief had been granted by this Hon''ble Court, and there was no reason for me to file a false birth certificate for my son.

4. The certificate had been provided by my husband who had obtained the birth certificate of my son Meelam Shamim from an office of the Municipal Corporation of Delhi.

5. That my husband had obtained the certificate from the Irwin road office of the MCD. He had gone to the MCD office on 05.05.2008 to try and obtain a copy of the birth certificate for his son, Shameem. At that time, he obtained a copy of the birth certificate of our younger daughter, Zayasha, as well. This certificate

has been found to be genuine. However, my husband informed me that my son's birth certificate, that is, the certificate which has been found to be false was issued from the Irwin Road office of the MCD. That was all I knew about the issuance of the certificate, at the time of filing the certificate before this Hon'ble Court, and I did so under the belief that the certificate was genuine.

6. That it was only after the certificate was found to be false as per the report presented by the Gujarat Police, that I came to know the sequence of facts as to how the said certificate had been obtained by my husband, which sequence of facts has been narrated in the affidavit filed by Shri Pushkar Raj of the Commonwealth Human Rights Initiative, who was kind enough to check the validity of the certificates on our behalf. My husband was referred by the MCD office at Dariyaganj to the office at Irwin Road, where he says an official of the MCD named Ashok, provided him with the said birth certificate on the payment of Rs 140/- (Rupees One Hundred and Forty Only), for which amount no receipt was issued to him. The birth certificate obtained by my husband Mohd. Azad, for my daughter has been found to be genuine, while the birth certificate of my son has been found to be false.

7. That my husband and I are illiterate people. Whenever we interact with government offices, we depend on government officials telling us about rules and procedures, and we follow their instructions unquestioningly. My husband and I have been victims of corrupt government officials. Both the certificates obtained by my husband, one for my daughter and the other for my son, look the same to my eyes, but I am told that although the birth certificate for my daughter is genuine, the certificate for my son is false. I had no way of knowing that the certificate was a fake one.

In paragraph 8 of the said affidavit, the petitioner has once again apologized and expressed deep regret for unsuspectingly filing a false certificate. She stated that she had no reason to file a false certificate in view of the nature of the relief sought in the present petition as also in the proposed amended writ petition. She submitted that she was deeply indebted to this Court for restoring her son to her and that she would never participate in any activity that seeks to subvert the process of law.

30. The petitioner's husband Mohd Azad also filed an affidavit on 12.1.2009 where, again, an unconditional apology has been tendered. It is also stated that there was no reason for filing a false certificate as the main relief prayed for had already been granted for which he was deeply indebted to this Court for restoring his son to him.

31. The learned Counsel for the petitioner submitted that Section 471 read with Section 463 could not be pressed into service for the simple reason that the petitioner did not know that the certificate was not a genuine one or was forged. She submitted that even Section 193 which is perhaps, the only other provision under which the present case could be attempted to be brought under, is not

applicable. It was never the intention on the part of the petitioner to give fabricated or false evidence for the purpose of it being used in any case or judicial proceedings.

32. She submitted that in any event, it would also have to be considered whether it is at all expedient in the interest of justice for this Court to make a complaint u/s 340 CrPC. It was submitted that the Court will not make a complaint unless it has a direct bearing on the administration of justice. She placed reliance on a decision of the Supreme Court in the case of Iqbal Singh Marwah and Another Vs. Meenakshi Marwah and Another, wherein the expression. Court is of the opinion that it is expedient in the interest of justice. appearing in Section 340 CrPC was considered and the Supreme Court took the view that this expression indicated that the Court is not bound to make a complaint regarding commission of an offence referred to Section 195(1)(b) CrPC but that such a course is to be adopted only if it is required in the interest of justice. The expediency is to be judged by the Court not by considering the magnitude of injury suffered by a person affected by perjury or a forged document but by having regard to the effect such commission of offence has on the administration of justice. The Supreme Court observed that it was quite possible that a forged document may cause a very serious and substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. The Supreme Court, therefore, observed that in such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint.

33. The next decision relied upon by the learned Counsel for the petitioner was that of the Supreme Court in Dr. S.P. Kohli, Civil Surgeon, Ferozepur Vs. High Court of Punjab and Haryana, . In that decision, the Supreme Court observed:-

It is now well settled that prosecution for perjury should be sanctioned by courts only in those cases where it appears to be deliberate and conscious and the conviction is reasonably probable or likely. It is also well recognized that there must be a prima facie case of deliberate falsehood on a matter of substance and the Court should be satisfied that there is reasonable foundation to the charge. (see Chajoo Ram Vs. Radhey Shyam and Another,

34. The last and final decision referred to by the learned Counsel for the petitioner was that of a learned single Judge of the Patna High Court in the case of Mangal Singh Vs. The State, The learned Counsel for the petitioner stated that this decision is certainly not binding on this Court but it has persuasive value. She, in particular, referred to page 158 of the said judgment and submitted that the document must be fraudulent in the sense that it has a direct tendency to injure the interest of a third person. In this background, she submitted that the birth certificate was only for the purpose of showing that Shamim was an Indian and that he was a juvenile. She submitted that the issue of juvenility already

stands admitted, and, insofar as the present petition is concerned as also the proposed amended writ petition, the question as to whether Shamim was an Indian or a Bangladeshi is irrelevant and, therefore, the petitioner did not have any object or motive for forging/fabricating the birth certificate. Consequently, she submitted that neither a case of perjury has been made out nor is it expedient in the interest of justice that a complaint should be made u/s 340 Cr P C.

35. Mr Sidharth Luthra, the learned Senior counsel appearing on behalf of the respondent No. 4 (State of Gujarat), submitted that in the proposed amended writ petition in paragraph 4 thereof, the age of Shamim has been indicated as 13 years and the same is sought to be substantiated by the said fake birth certificate. He submitted that the age of 13 years is a material circumstance inasmuch as the validity of the action of the respondent No. 4 would have to be judged from the standpoint of what is the age of Shamim - whether he is 13 years of age as stated by the petitioner or 16 years old as indicated by the respondent No. 4? In case Shamim was under 15 years of age on 25.5.2008, then the action on the part of the Gujarat Police would be ex-facie illegal in view of the provisions of Section 160 CrPC. The proviso to Section 160(1) CrPC reads as under:-

Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides.

It is obvious that if Shamim was below the age of 15 years, then the action on the part of the respondent No. 4 would be ex-facie illegal in view of the clear provisions of Section 160 CrPC.

36. Secondly, Mr Luthra submitted that the question of age would also be material from the standpoint of Section 361 IPC which describes the offence of kidnapping from lawful guardianship. He submitted that u/s 361 IPC the taking away of a minor, under the age of 16 years in case the minor is a male or under the age of 18 years in the case of a female, out of the keeping of the lawful guardian of such minor without the consent of such guardian would amount to the offence of kidnapping of such minor from lawful guardianship. Thus, according to Mr Luthra, it was also material as to whether Shamim was under 16 years of age or not. Because, if he was under the 16 years of age and he was taken away from the lawful guardianship of parents without their consent, then an offence u/s 361 IPC could be made out. He submitted that it is for the purpose of establishing the illegality of the action u/s 160 CrPC and Section 361 IPC that the false birth certificate, indicating the age of 13 years, was submitted before this Court.

37. The learned Counsel placed reliance on the case of *Prithvi Vs. State of Maharashtra and Others*, and *Goswami Brij Kumar Jee v. UOI W.P. (C) 3042/2000* and *CM 15976/2005* decided on 3.7.2007. He also submitted that by virtue of

the order dated 23.9.2008, this Court had already taken a prima facie view and based upon that view directed the issuance of show cause notice to the petitioner. He submitted that the petitioner has admitted that the birth certificate was fake. According to him, there is nothing further which remains to be done but to give a direction to file the complaint before the Magistrate in terms of Section 340 Cr. P.C.

38. With regard to petitioner's reliance on the Supreme Court decision in Iqbal Singh Marwah's case (supra), Mr Luthra submitted that the said decision was distinguishable on facts as, in this case, not only the document but also the affidavits indicate that an attempt to introduce false evidence had been made. According to him, this was a clear case attracting the provisions of Section 340 CrPC and, therefore, this Court, after recording a finding to this effect, ought to make a complaint and send it to a Magistrate for further proceedings.

38. Section 340 CrPC has reference to the offences mentioned in Section 195(1) (b) CrPC. The said provisions, to the extent relevant for this case, have already been extracted earlier in the judgment. Section 195(1)(b)(i) has reference to offences punishable under Sections 193 - 196 , 199 , 200 , 205 - 212 and 228 of the Indian Penal Code. It is an admitted position that the offences punishable under Sections 199, 200 , 205 - 211 and 228 are not attracted at all in the present case. Insofar as Section 193 - 196 IPC are concerned, it is apparent that Sections 194 , 195 and 195A IPC cannot be invoked in the present case inasmuch as they relate to giving or fabricating false evidence with intent to procure a conviction for (a) a capital offence or (b) an offence punishable with imprisonment for life or imprisonment for a term of seven years or more and threatening any person to give false evidence. We are, therefore, left to consider the provisions of Section 193 and 196 IPC. Section 193, inter alia, prescribes the punishment for false evidence and stipulates that whoever intentionally gives false evidence at any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used at any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. The expressions giving false evidence and fabricating false evidence. have been explained in Section 191 and 192 IPC. Section 191 stipulates that whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence. Explanation 1 to the said Section makes it clear that a statement is within the meaning of this section, whether it is made verbally or otherwise. The allegation against the petitioner, in this case, is that she not only forged the birth certificate of Shamim but also stated that it was a genuine certificate. The reply to the show cause notice submitted by the petitioner outlines the circumstances under which the said birth certificate was filed in Court. Apart from the unconditional apology tendered by the petitioner, she has also stated that she believed that the said birth certificate was a genuine one. It

is not as if she knew and believed the same to be false and yet submitted the same before the Court. If this explanation is to be accepted, then obviously Section 191 IPC would not be made out.

39. Similarly, Section 192 deals with fabrication of false evidence and prescribes that whoever causes any circumstance to exist or makes any false entry in any book or record, or electronic record or makes any document or electronic record containing a false statement intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken in law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence to entertain an erroneous opinion touching any point material to the result of such proceeding, is said to fabricate false evidence.. It is obvious that in the present case the birth certificate of Shamim was a false certificate. The fabrication of the certificate was not done by the petitioner. Therefore, the provisions of Section 192 IPC can only be invoked with the help of Section 196 IPC which relates to using evidence known to be false. Section 196 provides that whoever corruptly uses or attempts to use, as true or genuine evidence, any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence. By virtue of Section 196 even a person who himself or herself was not involved in the fabrication of false evidence itself, but corruptly uses or attempts to use as true or genuine any evidence which he or she knows to be false or fabricated is to be punished under the law as if he/she gave or fabricated false evidence. The fact that Shamim's birth certificate was a fake certificate is now established beyond doubt. The only thing to be examined is whether the petitioner knew that the same was fabricated. From the material on record, it is apparent that the petitioner did not have the knowledge or belief that the birth certificate was not a genuine birth certificate. Therefore, it cannot be said that the petitioner corruptly used or attempted to use the fake certificate as a true or genuine certificate inasmuch as she did not know the same to be a false certificate. As a consequence, it does not appear that the petitioner committed any offence punishable u/s 193 read with Section 196 IPC, also.

40. This takes us to the consideration of the offences mentioned in Section 195(1)(b)(ii) CrPC. The offences mentioned therein are those described in Section 463 IPC and those punishable under Sections 471 , 475 or 476 IPC. Mr Sidharth Luthra, the learned senior counsel appearing on behalf of the respondent No. 4 had submitted that it was Section 471 IPC which would come into play in the present case. That Section relates to the punishment for using as genuine, a forged document or electronic record which a person knows or has reason to believe to be a forged document or electronic record. In such an eventuality, the offender is to be punished in the same manner as if he had forged such document or electronic record. Since there is no doubt that Shamim's birth certificate is not genuine, the only question is whether the petitioner fraudulently

or knowingly used the said document as a genuine document despite her knowing or having reason to believe that it was forged one. From the circumstances indicated above, it does not appear to us that the petitioner was aware that the birth certificate of Shamim was not genuine.

41. In any event, it does not appear to us that the birth certificate was introduced by the petitioner with a view to get any advantage. The learned Counsel for the petitioner is right when she says that in this case, the relief prayed for by her is not dependant on the factum as to whether Shamim was an Indian citizen or not. Therefore, production of a birth certificate showing the birth of a child in Delhi does not in any way affect the material outcome of the present case. It must also be noted that as per the birth certificate, Shamim's age would be about 13 years on the date on which he was taken away by the Gujarat police. The respondent No. 4, in any event, does not dispute that Shamim is a minor and as per their own case he was 16 years old when the incident occurred. In this connection, it would be relevant to recall that alongwith the affidavit dated 09.07.2008 of SI J.M Bharwad, an order dated 19.11.2007 purportedly passed by the FRRO, Delhi had also been annexed and along with the order a list of 16 alleged illegal migrants of Bangladeshi nationality had been enclosed. At Sr. No. 8 of that list the name of Shamim s/o Mohd Azad is mentioned and his age is shown as 13 years. Furthermore, the age of his elder sister Reshma is shown at Sr. No. 7 in the said list to be 14 years. It is obvious that when Shamim was 13 years old on 19.11.2007, he could not have been 16 years old on 25.5.2008. At the most he may have turned 14 in the meanwhile. Significantly, this document had been submitted by the respondent No. 4 along with the affidavit of the said SI J.M. Bharwad before this Court on 11.7.2008, meaning thereby that, the documents indicating the age of Shamim as 13 years were already on record when the petitioner filed the proposed amended writ petition in which there was a reference to Shamim's said birth certificate and a copy of the same was also annexed thereto. The proposed amended writ petition was filed before this Court on 11.8.2008.

42. Looked at from this stand point also, there was nothing to be gained by the petitioner by submitting the said birth certificate had she known or believed the same to be fake or forged. It is obvious that the present case is not one of deliberate falsehood on a matter of substance and consequently as indicated in S.P. Kohli (supra) the provisions of Section 340 CrPC are not attracted. We have already noticed the observations of the Supreme Court in the case of Iqbal Singh Marwah (supra), where the Supreme Court pointed out that Section 340 CrPC is conditioned by the words "court is of opinion that it is expedient in the interest of justice". Such expediency, as pointed out by the Supreme Court, is not to be judged by considering the magnitude of injury suffered by the person affected by the perjury or forged document but by having regard to the effect such commission of perjury has on the administration of justice. In the present case, first of all, no injury has been suffered by any person by the filing of the said birth certificate. This is so because, even de hors the said birth certificate,

Shamim's age as on 25.5.2008 would be 13-14 years, based on the records of the respondents themselves. Furthermore, the question as to whether Shamim is or is not an Indian national is irrelevant for the purposes of the present case. And, secondly, insofar as the administration of justice is concerned, the submission of the said certificate had a minimal impact thereon, if at all.

43. Lastly, we may recall that it was argued by Mr Luthra that, since this Court had already taken a prima facie view on 23.9.2008 and it issued a show cause notice, nothing remains for this Court to do but to give a direction to file a complaint. The order dated 23.9.2008 only indicates a prima facie view that an offence of perjury is made out against the petitioner and that she needs to be proceeded against. It was avowedly, as also otherwise, a mere prima facie view, because, at the same time, the Bench passing the said order required the issuance of a show cause notice to the petitioner asking her to show cause as to why she be not proceeded against for the offence of perjury. It is obvious that the view taken by the said Bench was only a prima facie view and in order to ascertain as to whether that view was well founded or not the issuance of show cause notice was deemed necessary. Therefore, it would not be correct to assume that the issue of whether a complaint ought to be made had been foreclosed by the said order dated 23.9.2008. The order dated 23.9.2008 merely initiated a preliminary inquiry.

Conclusions in respect of the issue of Section 340 CrPC:

44. Upon conclusion of the said preliminary inquiry we are now of the view that the petitioner does not appear to have committed any offence referred to u/s 195(1)(b) in relation to the present proceedings. We are also of the view that it is not expedient or in the interest of justice that a complaint be made or sent to the Magistrate for further proceedings in terms of Section 340 CrPC

The question of compensation:

45. We now come to the core issue of compensation. Ms Ramakrishnan submitted that this was a clear case where compensation ought to be awarded for violation of fundamental rights. She submitted that the petitioner's son Shamim had been taken from Delhi to Gujarat without the consent or even the knowledge of his parents who came to know of this .kidnapping. only because some of their neighbours had told them about it. The Gujarat police further tried to deport the child to Bangladesh in an attempt to provide some legitimacy to their illegal action. She submitted that the protection of Article 21 of the Constitution of India is available to all persons whether they are citizens of India or not. Since this valuable right guaranteed under Article 21 has been violated by the respondents and, particularly, the officers of respondent No. 4, State of Gujarat, the petitioner and her son are entitled to compensation for such violation of their fundamental rights and for the mental and physical harassment and anguish and for the purpose of sending a message that the police are supposed to enforce the law and not .kidnap.minor children. She placed reliance

on the following decisions:-

1. Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others,

2. The Chairman, Railway Board and Others Vs. Mrs. Chandrima Das and Others,

She also submitted that respondent No. 4 would, in all likelihood, place reliance on Sube Singh Vs. State of Haryana and Others, to contend that compensation is not payable in all cases. By way of a pre-emptive response, she submitted that the limitations prescribed in the said judgment do not cover the present case. She submitted that she relied upon the law laid down in Sube Singh (supra) but the case was distinguishable on facts.

46. In these circumstances, Ms Nitya Ramakrishnan submitted that this Court ought to award compensation to the petitioner and her minor son Shamim commensurate with the violation of fundamental rights and mental and physical harassment caused to them.

47. Mr Sidharth Luthra, appearing for the respondent No. 4, on instructions, submitted that the State of Gujarat is ready to pay a sum of Rs 50,000/- to the petitioner and her son Shamim but the same would be without prejudice to their rights and contentions. When this offer was made Ms Ramakrishnan submitted that such an offer cannot be accepted without prejudice. It must be with prejudice because there has been a grave violation of the fundamental right of liberty of a child. Mr Luthra however stated that their offer was a standing offer but it would have to be without prejudice to their rights and contentions. Since the offer made by Mr Luthra has not been accepted by the petitioner, this Court is left to determine the issue of compensation.

48. On merits, with regard to the question of compensation, Mr Luthra submitted that as stated in the affidavit of SI J.M. Bharwad, Shamim was not arrested or taken into custody but had voluntarily accompanied the said SI J.M. Bharwad and his associate police officers from Gujarat. He further submitted that the subsequent detention of Shamim at Ahmedabad, Gujarat was on the basis of the action taken under the Foreigners Order 1948 and, therefore, the same cannot be regarded to be an illegal detention.

49. Apart from this, Mr Luthra submitted that the decision of the Supreme Court in Sube Singh (supra) is an authority for the proposition that compensation is not to be awarded in all cases. Referring to paragraph 46 of the said decision, Mr Luthra submitted that before awarding compensation the Court will have to pose to itself the following questions:-

(a) Whether the violation of Article 21 is patent and incontrovertible?

(b) Whether the violation is gross and of a magnitude to shock the conscience of the Court?

(c) Whether the custodial torture alleged has resulted in death or whether the custodial torture is supported by medical report or visible marks or scars or

disability?

He submitted that, as indicated by the Supreme Court, where there is no evidence of custodial torture of a person except his own statement or where the allegation is not supported by any medical report or other corroborative evidence or where there are clear indications that the allegations are false or exaggerated, the Court may not award compensation as a public law remedy under Article 226, but relegate the aggrieved party to the traditional remedies of appropriate civil/criminal action. He submitted that in the present case there is no allegation of torture, no allegation of brutality and no physical injury has even been alleged. He also submitted that the alleged violation of the fundamental rights in this case is neither patent nor incontrovertible nor is it of such a magnitude as to shock the conscience of the Court. Consequently, placing full reliance on the Supreme Court decision in *Sube Singh (supra)*, the learned Counsel submitted that the present case is one where compensation should not be awarded as a public law remedy. If the petitioner and her son Shamim are aggrieved, they may invoke the traditional remedies by way of appropriate civil/criminal action.

50. Since we are on the decision of the Supreme Court in the case of *Sube Singh (supra)*, it would be appropriate to notice that the observations of the Supreme Court with regard to compensation were in the context of two sets of cases involving custodial death or torture. The first set being cases where the violation of Article 21 was established and incontrovertible. The second set was of those cases where such violation was doubtful or not established. This is apparent from paragraph 45 of the said decision which reads as under:-

45. Cases where violation of Article 21 involving custodial death or torture is established or is incontrovertible stand on a different footing when compared to cases where such violation is doubtful or not established. Where there is no independent evidence of custodial torture and where there is neither medical evidence about any injury or disability, resulting from custodial torture, nor any mark/scar, it may not be prudent to accept claims of human right violation, by persons having criminal records in a routine manner for awarding compensation. That may open the floodgates for false claims, either to mulct money from the State or as to prevent or thwart further investigation. Courts should, therefore, while jealously protecting the fundamental rights of those who are illegally detained or subjected to custodial violence, should also stand guard against false, motivated and frivolous claims in the interests of the society and to enable Police to discharge their duties fearlessly and effectively. While custodial torture is not infrequent, it should be borne in mind that every arrest and detention does not lead to custodial torture.

51. It is apparent that the Supreme Court distinguished between the cases where there was established and incontrovertible evidence of violation of Article 21 and cases where such violation was doubtful or not established. It is in this context that the Supreme Court, as noted above, observed that in the former type of cases compensation may be awarded under Article 32 and 226 but not in

the latter category of cases where the evidence is not incontrovertible and the violation of Article 21 is itself not established. In such cases, it was open to the aggrieved party to take recourse to the traditional remedies by way of appropriate civil/criminal actions.

52. It is, therefore, clear that in *Sube Singh* (supra), the Supreme Court highlighted this difference in the categories of cases where on the one hand, there was a patent and clear-cut violation of the fundamental rights guaranteed under Article 21, and on the other hand, cases where such violation was not patent or established. The present case falls in the former category. The violation of Article 21 is patent and incontrovertible. The explanation given by the respondent No. 4 that the child volunteered to accompany the police officers from Gujarat all away to Ahmedabad and also volunteered to be in a lock-up in Ahmedabad, is only to be stated to be rejected. The moment the police officials from Gujarat took the minor boy Shamim into their vehicle, it amounted to taking him into "custody". We have already seen the statement of Shamim made u/s 164 CrPC before the Metropolitan Magistrate in Delhi on 2.6.2008, immediately after his production before this Court. The said statement is categorical. He did not accompany the officials of the Gujarat police of his own volition. He was forced to go with them. He had been slapped on at least two occasions. He had been threatened that he would be killed by a rifle shot. In Ahmedabad, he had again been threatened with dire consequences including his death and the death of his other family members. By no stretch of imagination can it be said that the 13-year old boy Shamim had "volunteered" to go to Ahmedabad and to be placed in a lock-up there indefinitely by the Gujarat police. What is all the more shocking is the fact that, admittedly, there was no case whatsoever against Shamim. He was not wanted in any criminal case. Yet, the Gujarat police came all the way from Ahmedabad to Delhi, beyond their jurisdiction, did not seek any assistance from the local police, and set out in search of Shamim's father Mohd Azad, whom they apparently wanted to arrest in connection with some criminal case in Ahmedabad. They could not find Mohd Azad, but they found his 13 year old son Shamim at his kabari shop. So they did the next best thing. They took Shamim into "custody" and removed him from Delhi all the way to Ahmedabad and put him in a lock-up there. Before doing so, SI J.M. Bharwad did go to the police station at Seelampur and informed that Mohd Azad could not be found and that, if the local police came to know of the whereabouts of Mohd Azad, they should contact him at Ahmedabad on the given mobile number but, there was no mention of the fact that while they were returning to Ahmedabad they also had with them, in their "custody", Mohd Azad's minor son Shamim.

53. According to the respondent No. 4, Shamim was not "arrested" nor was he taken into "custody". Obviously, this is a very weak attempt on the part of the respondent No. 4 to wriggle out of the constitutional mandate of Article 22 which prescribes that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he

be denied the right to consult, and to be defended by, a legal practitioner of his choice. It is obvious that the Gujarat police felt that by simply making a 13 year old boy .volunteer. to accompany them under threat and coercion did not amount to arrest or detention in custody. Since there was no case, cognizable or non-cognizable, against Shamim, irrespective of the provisions of the Juvenile Justice Act, 2000, he could not have been arrested with or without warrant and kept in a police lock-up. The fact that Shamim was taken into custody against his will would have to be read as his arrest and detention in custody. Otherwise, any police officer can "pick up" anybody and detain him without having to fulfil the requirements of Article 22 of the Constitution because he can simply say that he did not "arrest" him in the technical sense or arrest in connection with some case. Since there were no grounds for the arrest of Shamim, it is obvious that he was not informed of any such ground. He, however, was not even made aware of his right to consult and to be defended by a legal practitioner of his choice.

54. Article 22(2) of the Constitution prescribes that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of the magistrate. Once, we have determined that the factum of picking up Shamim from Delhi amounted to his "arrest" and detention in custody, albeit illegal, it became incumbent upon the officials of the Gujarat police to produce him before the nearest Magistrate within a period of 24 hours. The nearest Magistrate was located in Delhi, but, obviously, he was not produced before any such Magistrate in Delhi. Even the farthest Magistrate located in Ahmedabad was not disturbed! But Shamim continued to be "arrested" and detained in custody. He was thrown into a lock-up in Ahmedabad for an indefinite period, not knowing for how long or what they would do to him. Article 22(2) specifically guarantees that no person shall be detained in custody beyond the period of 24 hours without the authority of the Magistrate yet, Shamim was detained not only beyond 24 hours but for several days thereafter till this Court intervened and directed his production on 2.6.2008. If this is not a violation of the provisions of Article 22, then what would be? Perhaps, the respondent No. 4 felt that Article 22(3)(a) could be pressed into service inasmuch as it stipulates that nothing in clauses (1) and (2) shall apply to any person who, for the time being, is an enemy alien. But Shamim cannot be regarded as an enemy alien. Even if it is assumed for the time being that he is a Bangladeshi and, therefore, an alien, he would not be an enemy alien because India is not at war with Bangladesh.

55. We now come to the violation of Article 21. The said article stipulates that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Fortunately, in this case nobody has been deprived of his life. But, unfortunately, Shamim was deprived of his personal liberty and that too without following any procedure established by law. There is a clear violation of this hallowed fundamental right which must be guarded at all times

and at all costs. Life and liberty are so fundamental to human society that the Constitution, in recognition of this fact, has made the right available to all humans - citizen or alien.

56. It is, therefore, apparent that the present case falls in the category of cases indicated in *Sube Singh* (supra) where the courts award compensation as a public law remedy as opposed to the traditional remedy and in spite of the availability of traditional remedies by way of appropriate civil/criminal action. The violation of Article 21 is patent and incontrovertible and it is of such a magnitude that it shocks the conscience of this Court. In this case, the torture meted out to the petitioner's son was more in the nature of mental torture which can be gauged from the fact that police officers from a different State came to Delhi, picked up the 13 year old boy Shamim and took him against his will and without any cause to Ahmedabad and threw him in a lock-up without telling him why they did so or what wrong had he committed. The boy had been snatched away from his parental home and his home environment, from his friends, and neighbours. At that point of time he had no hope for his future because he had nothing but fear in his mind. Fear of being deported to Bangladesh all alone. Fear of being killed and, what is worse, fear of his mother, father and three sisters being killed. These are all clear indicia of mental torture. This kind of torture will not show up as a physical mark or a disability upon any medical examination. It will not show up in any X-Ray or MRI Scan but, unlike a physical scar, it may never heal. It is, therefore, clear that this is a case where serious violations of fundamental rights enshrined under Articles 21 and 22 of the Constitution have taken place. It is a fit case for compensation under public law apart from whatever relief the petitioner and her son Shamim may be entitled to by way of appropriate civil/criminal action.

57. At this juncture, it would be pertinent to point out the observations of the Supreme Court in the case of *Bhim Singh* (supra) where the personal liberty of a member of a Legislative Assembly was violated by police officials. The Supreme Court observed as under:-

Police Officers who are the custodians of law and order should have the greatest respect for the personal liberty of citizens and should not flout the laws by stooping to such bizarre acts of lawlessness. Custodians of law and order should not become depredators of civil liberties. Their duty is to protect and not to abduct. However the two police officers, the one who arrested him and the one who obtained the orders of remand, are but minions, in the lower rungs of the ladder. We do not have the slightest doubt that the responsibility lies elsewhere and with the higher echelons of the Government of Jammu and Kashmir but it is not possible to say precisely where and with whom, on the material now before us. We have no doubt that the constitutional rights of Shri Bhim Singh were violated with impunity. Since he is now not in detention, there is no need to make any order to set him at liberty, but suitably and adequately compensated, he must be. That we have the right to award monetary compensation by way of

exemplary costs otherwise is now established by the decisions of this Court in Rudul Sah Vs. State of Bihar and Another, and Sebastian M. Hongray v. Union of India air 1984 SC 1026 . When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this an appropriate case. We direct the first respondent, the State of Jammu and Kashmir to pay to Shri Bhim Singh a sum of Rs. 50,000/- within two months from today. The amount will be deposited with the Registrar of this Court and paid to Shri Bhim Singh.

58. In Chandrima Das (supra), an issue had been raised that since the victim of a gang rape in that case was a foreign national, no relief under public law could be granted to her as there was no violation of fundamental rights available under the Constitution. The Supreme Court rejected such a submission. The Supreme Court observed as under:-

19. It was next contended by the learned Counsel appearing on behalf of the appellants, that Smt. Hanuffa Khatoon was a foreign national and, therefore, no relief under Public Law could be granted to her as there was no violation of the Fundamental Rights available under the Constitution. It was contended that the Fundamental Rights in Part III of the Constitution are available only to citizens of this country and since Smt. Hanuffa Khatoon was a Bangladeshi national, she cannot complain of the violation of Fundamental Rights and on that basis she cannot be granted any relief. This argument must also fail for two reasons; first, on the ground of Domestic Jurisprudence based on Constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948, which has the international recognition as the "Moral Code of Conduct" having been adopted by the General Assembly of the United Nations.

28. The Fundamental Rights are available to all the "Citizens" of the country but a few of them are also available to "persons". While Article 14, which guarantees equality before law or the equal protection of laws within the territory of India, is applicable to "person" which would also include the "citizen" of the country and "non-citizen" both, Article 15 speaks only of "citizen" and it is specifically provided therein that there shall be no discrimination against any "citizen" on the ground only of religion, race, caste, sex, place of birth or any of them nor shall any citizen be subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hostel and places of public entertainment, or the use of wells, tanks, bathing ghats, roads and place of public resort on the aforesaid grounds. Fundamental Rights guaranteed under Article 15 is, therefore, restricted to "citizen". So also, Article 16 which guarantees equality of opportunity in matters of public employment is applicable only to "citizens". The Fundamental Rights contained in Article 19, which contains

the right to "Basic Freedoms", namely, freedom of speech and expression; freedom to assemble peaceably and without arms; freedom to form associations or unions; freedom to move freely throughout the territory of India; freedom to reside and settle in any part of the territory of India and freedom to practice any profession, or to carry on any occupation, trade or business, are available only to "citizens" of the country,

29. The word "citizen" in Article 19 has not been used in a sense different from that in which it has been used in Part II of the Constitution dealing with "citizenship" [See *The State Trading Corporation of India Ltd. and Others Vs. The Commercial Tax Officer, Visakhapatnam and Others*, . It has also been held in this case that the words "all citizens" have been deliberately used to keep out all "non- citizens" which would include "aliens". It was laid down in *Hans Muller of Nuremburg Vs. Superintendent, Presidency Jail, Calcutta and Others*, , that this Article applies only to "citizens". In another decision in *Anwar Vs. The State of J. and K.*, , it was held that non-citizen could not claim Fundamental Rights under Article 19. In *Naziranbai v. State* AIR 1957 MB 1 and *Laxmi Prasad and Another Vs. Shiv Pal and Others*, , it was held that Article 19 does not apply to a "foreigner". The Calcutta High Court in *Sk. Md. Soleman Vs. State of West Bengal and Another*, , held that Article 19 does not apply to a Commonwealth citizen.

30. In *Anwar v. State of J. & K.* 1971 (3) SCC 367 (already referred to above), it was held that the rights under Articles 20, 21 and 22 are available not only to "citizens" but also to "persons" which would include "non-citizens".

31. Article 20 guarantees right to protection in respect of conviction for offences. Article 21 guarantees right to life and personal liberty while Article 22 guarantees right to protection against arbitrary arrest and detention. These are wholly in consonance with Article 3, Article 7 and Article 9 of the Universal Declaration of Human Rights, 1948.

37. Now, Smt. Hanuffa Khatoon , who was not the citizen of this country but came here as a citizen of Bangladesh was, nevertheless, entitled to all the constitutional rights available to a citizen so far as "Right to Life" was concerned. She was entitled to be treated with dignity and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution. As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be subjected to physical violence at the hands of Govt. employees who outraged her modesty. The right available to her under Article 21 was thus violated. Consequently, the State was under the Constitutional liability to pay compensation to her. The judgment passed by the Calcutta High Court, therefore, allowing compensation to her for having been gang raped, cannot be said to suffer from any infirmity.

It may also be pointed out that in *Chandrima Das* (supra) the Supreme Court upheld the award of compensation of Rs 10,00,000/- which had earlier been given by Calcutta High Court.

59. It would be appropriate to also note three other decisions of the Supreme Court which relate to the public law remedy of compensation for violation of the valuable rights guaranteed under Article 21 of the Constitution. They are:

- (1) D.K. Basu Vs. State of West Bengal,
- (2) Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, and
- (3) M.S. Grewal and Another Vs. Deep Chand Sood and Others,

60. In D.K. Basu (supra) the Supreme Court observed as under:-

44. The claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortious acts of the public servants. Public law proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 21 and 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the Courts under the public law jurisdiction for penalising the wrongdoer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen.

45. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much, as the protector and custodian of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim-civil action for damages is a long drawn and cumbersome judicial process. Monetary compensation for redressal by the Court finding the infringement of the indefeasible right to life of the citizen is, therefore, a useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the bread winner of the family.

54. Thus, to sum up, it is now a well accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence

of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.

61. In *Nilabati Behera* (supra) the Supreme Court held:-

35. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State, of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law - through appropriate proceedings. Of course, relief in exercise of the power under Article 32 or 226 would be granted only once it is established that there has been an infringement of the fundamental rights of the citizen and no other form of appropriate redressal by the court in the facts and circumstances of the case, is possible. The decisions of this Court in the line of cases starting with *Rudul Sah v. State of Bihar*¹ granted monetary relief to the victims for deprivation of their fundamental rights in proceedings through petitions filed under Article 32 or 226 of the Constitution of India, notwithstanding the rights available under the civil law to the aggrieved party where the courts found that grant of such relief was warranted. It's a sound policy to punish the wrongdoer and it is in that spirit that the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act

unlawfully and do perform their public duties properly particularly where the fundamental right of a citizen under Article 21 is concerned. Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles. It may be necessary to identify the situations to which separate proceedings and principles apply and the courts have to act firmly but with certain amount of circumspection and self-restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitute for civil action in private law. Some of those situations have been identified by this Court in the cases referred to by Brother Verma, J.

62. Finally in *M.S. Greval* (supra) the Supreme Court observed as under:-

28. Currently judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudential system - affectation of the people has been taken note of rather seriously and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of the civil court's obligation to award damages. As a matter of fact the decision in *D.K. Basu* has not only dealt with the issue in a manner apposite to the social need of the country but the learned Judge with his usual felicity of expression firmly established the current trend of ""justice-oriented approach"". Law courts will lose their efficacy if they cannot possibly respond to the need of the society - technicalities there might be many but the justice-oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice.

Computation of the compensation amount:

63. Now comes the question of how to calculate the amount of compensation that should be awarded to the petitioner and her son Shamim. In *Bhim Singh* (supra), a case decided in 1985, the Supreme Court had awarded a sum of Rs 50,000/- by way of compensation for the deprivation of personal liberty of Mr Bhim Singh by the police officials of the J & K Government. We see no reason to award anything less, particularly, as, in the present case we are concerned with the deprivation of the personal liberty of a minor. But, as explained by one of us (Badar Durrez Ahmed, J) in *Smt. Kamla Devi Vs. Government of NCT of Delhi and Another*, the amount of compensation has to be corrected for the erosion in its real value due to inflation. A sum of Rs 50,000/- may have been just and fair in 1985 but, a sum of Rs 50,000/- in the year 2008 would be worth much less because of inflation in the intervening years. As pointed out in *Kamla Devi* (supra), the figure of Rs 50,000/- as on 1985, as awarded in *Bhim Singh* (supra), has to be enhanced to correct for inflation and consequent decline of the real value of the rupee in the intervening years. A good index to work with is the consumer price index of industrial workers [CPI (IW)] (Source <http://labourbureau.nic.in/indtas.html>).

64. With the base year 1982 (= 100), the CPI (IW) for June, 1985 was 606 and

for June 1982 was 470. Hence, the inflation corrected value of Rs 50,000/- in 1985 would work out to approximately Rs 38,779/- in 1982. Taking 1982 as the base year (= 100), the said index for 2001 is 457. In other words, the value of Rs 38,779/- in 1982 which we derive from Rs 50,000/- in 1985, would be Rs 1,77,220/- in 2001 ($38,779 \times 457/100$). Now, taking the base year to be 2001 (= 100), the CPI (IW) for April, 2009 was 150. Consequently, the sum of Rs 1,77,220/- as of 2001 would translate, in real terms, to Rs 2,65,830/- in April, 2009. The sum and substance is that Rs 50,000/- in 1985 as awarded in Bhim Singh (supra) would, in real terms, be equivalent to Rs 2,65,830/- in April 2009. This figure can be rounded to Rs. 2,70,000/-.

Conclusions on the issue of compensation:

65. As a result of the aforesaid discussion, the prayer for compensation made in the writ petition is allowed. The State of Gujarat is directed to make the payment of the said sum of Rs 2,70,000/- to the petitioner by way of compensation to her and her son Shamim. The said payment shall be made within a period of two weeks from today and shall be paid to the petitioner for herself and her minor son (Shamim). It is made clear that the amount paid by the respondent No. 4 (State of Gujarat) as above would be liable to be adjusted against any amount which may be awarded to the petitioner and/or her son Shamim by way of damages in a civil suit or compensation under the Criminal Procedure Code, 1973, if any. We also make it clear that the State of Gujarat is required to pay the said compensation under public law and by way of strict liability. It is open to the State of Gujarat to fix the responsibilities for this infraction of constitutional rights and recover the same from those found delinquent. Subject to the adjustments mentioned above, this decision is independent of any other proceedings, civil or criminal, which arise out of or in connection with the said incident of 25.05.2008.

Finally:

66. The writ petition stands allowed to the aforesaid extent with costs which we quantify as Rs 25,000/-.