IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 7297 OF 2019

In the matter of:
An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

And

In the matter of:

Banu, wife of late Md. Yasin, 13 Huts, Tejgaon Non-Local Relief Camp, 10/A, Post Office Mirpur-1216, Pallabi, Dhaka

...Petitioner

-Versus-

Bangladesh represented by the Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Secretariat Building, Ramna, Dhaka and others.

...Respondents

Mr. Mohammad Humaun Kabir, Advocate
...For the petitioner

Mr. Nawroz Md. Rasel Chowdhury, D.A.G with
Mr. MMG Sarwar, A.A.G,
Mr. Ashique Rubaiat, A.A.G and
Ms. Yeshita Parvin, A.A.G

…For the respondent no. 5

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Heard on 03.12.2020 and 09.12.2020

Judgment on 31.12.2020.

Present:
Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Mohi Uddin Shamim

Md. Mozibur Rahman Miah, J:

On an application under article 102 of the Constitution of the People's Republic of Bangladesh, this Rule Nisi was issued calling upon the respondents to show cause as to why the detenue, namely, Md. Arman, now being detained in Kashimpur Jail-2 should not be brought before this court so as to it may satisfy itself that, he is not being held in custody/jail without lawful authority or in an unlawful manner and to set him at liberty and to declare the detention/ confinement of the detenue to be without lawful authority and is of no legal effect and why the respondents should not be directed or award appropriate compensation to the detenue for wrongful confinement and/or pass such other or further order or orders as to this court may seem fit and proper.

Background

The salient facts leading to filing of the instant writ petition are as under:

One Monir Sk, an FIR named accused, in Mohammadpur Police Station Case No. 83(8) 05 that initiated under section 4 of Explosive Substances Act and that of Police Station Case No. 84(8) 05 under sections 399/402 of the Penal Code, on 30.08.2005 while was under the police custody of Detective Branch of Police (shortly, DB), informed

them that, other accused were staying in a house under Pallabi Police Station. Being informed, Police Inspector, Abdul Awal accompanied by other police forces of the DB by lodging a general diary (shortly, G.D.) bearing no. 1684 on 30.08.2005 at 01.20 a.m. made a raid in the house and caught one, Shahabuddin Behari, Sohel and Shagor red-handed with 40 bottles of phensidyl wrapped in two plastic bags, that is, 20 bottles each weighing 4 liters. They then brought the accused to the Pallabi Police Station and one, Nure Alam Siddique, Sub-Inspector, DB lodged an FIR under table 3(ka) of section 19(1) of the Narcotics Control Act, 1990 which then gave rise to Pallabi Police Station Case No. 61 dated 30.08.2005 corresponding to G. R. Case No. 434 of 2005.

Then one Sub-Inspector (shortly, SI), Abdur Rouf who was also posted at DB, (7th team) Dhaka Metropolitan Police (shortly, DMP) Dhaka was then assigned to investigate the case. During investigation, as he was transferred, then another Sub-Inspector, Md. Serajul Islam Khan, DB, DMP took over the charge to proceed and complete the investigation.

During investigation, he (the second investigation officer) visited the place of occurrence, recorded statement of the witnesses under section 161 of the Code of Criminal Procedure, verified the identity and addresses of the accused and finally submitted police report (charge-sheet, shortly C.S) on 18.09.2005 before the Chief Metropolitan Magistrate (precisely, CMM), Dhaka implicating all the three FIR named accused with the commission of offence under table 3(ka) of

section 19(1) of the Narcotics Control Act, 1990 where word 'Arman' was added after the name of one of the accused, Shahabuddin Behari.

As the case is triable by a Sessions Judge, the CMM then forwarded the case record to the court of Metropolitan Sessions Judge, Dhaka where it was registered as Sessions Case No. 2521 of 2005. The Sessions Judge then took cognizance of the offence and transferred the case to the court of learned Judge, Jananirapatta Bighnakari Oporadh Daman Tribunal, Dhaka (জননিরাপত্তা বিঘ্নকারী অপরাধ দমন ট্রাইব্যুনাল, ঢাকা) for holding trial.

During trial accused, Shahabuddin was enlarged bail on 05.03.2007 when the testimony of as many as five prosecution witnesses (shortly, PWs) were completed. However, soon after getting bail, accused Shahabuddin and other two accused went absconding and ultimately, the Tribunal by its judgment and order dated 01.10.2012 convicted all the three accused in absentia under table 3(ka) of section 19(1) of the Narcotics Control Act, 1990 and sentenced all of them to suffer rigorous imprisonment for 10(ten) years with a fine of taka 5,000/- each.

By filing supplementary-affidavit dated 11.11.2020 annexing different sort of documents as of Annexure- 'D' to 'E' thereof, it has further been stated by the petitioner that, just one day before the above FIR was lodged (that culminated in conviction and sentence to the accused) an FIR had also been lodged implicating as many as five accused in Mohammadpur Police Station on 29.08.2005 under sections 399/402 of the Penal Code where that convict, Shahabudin Behari had

been implicated as accused no. 5 where his name has been mentioned as "Shahab". He was then produced before the court of CMM, Dhaka on 30.08.2005 in connection with the said case with a prayer for 5 days' remand. In that case, after completion of investigation, police report was also submitted by the DB, DMP on 23.10.2005 against as many as 7 accused including Shahabuddin Behari under sections 399/402 of the Penal Code. That case was then transferred by the CMM to its Additional Chief Judicial Magistrate, 3rd Court, Dhaka for trial where it was registered as G.R. Case No. 736 of 2005. However, during trial, all the accused including Shahab alias Shahabuddin Behari alias Arman (included in the C.S) was granted bail but as they misused the privilege of bail, the trial court then cancelled the bail and declared them fugitive by its order dated 17.06.2012. Subsequently, Pallabi Police arrested Shahabuddin and produced before the court long after eight years on 05.03.2020 and the learned Magistrate on that very date, granted him bail (Annexure-'D-4' to the supplementary-affidavit). Annexure- 'E-5' to the supplementary-affidavit further reveals that, till 12.08.2020, the said case was set for producing prosecution witness and next date has been fixed on 03.01.2021 for the same. By Annexure- 'E' to said supplementary-affidavit, the petitioner has also annexed a news item run by "The Daily Amader Shomoy" ("দৈনিক আমাদের সময়") dated 04.03.2020 under the caption "পল্লবী থানায় এসব কি হচ্ছে" where it has been described how the Pallabi Police Station became the hub of harbouring the criminals and den of thug police officials where rampant violation of law

and corrupt practice is being done unabated setting free branded criminals in exchange for money.

It has also been stated that, when the said case (G.R Case No. 736 of 2005) was in progress, all of a sudden, the detenue, Md. Arman on 27.01.2016 was picked-up from the vicinity of his house (though in Annexure- '6' and '6-1' to the affidavit-in-opposition filed by respondent no. 5, it mentioned the date of alleged arrest as 30.01.2016) by one S.I, Hazrat Ali and another ASI, Khan Emdadul Huq of Pallabi Police Station finding him as Shahabuddin Behari alias Arman convicted in G. R. Case No. 434 of 2005 corresponding to Sessions Case No. 2521 of 2005 (that stemmed from Narcotics Control Act, 1990) and produced him before the Jananirapatta Bighnokari Aparad Daman Tribunal who then sent him to jail and since then detenue Md. Arman has been languishing therein.

Having noticed of such harrowing incident, the national bengali daily namely, "The Amader Shomoy" ran a news item on 18.04.2019 under the caption "কারাগারে আরেক জাহালাম" and then on 23.04.2019, it ran another report titled "আমার ছোকরাটা মুক্তি পাবে তো" quoting the lamentation of the mother of the detenue (herein the petitioner) making a detailed account of ordeal went through by the detenue and his hard-up family for the brazen, obstinate and willful negligence of some corrupt police officials posted at Pallabi Police Station.

It has been further been stated that, aside from the print media some electronic media such as "Channel News24" also telecast the said incident giving reference to the assertion of convict, Shahabuddin Behari

going fugitive claimed that, he is the actual convict and soon he would surrender before the court (Paragraph No. 6 to the writ petition).

At that, it made a headway to the police administration and then formed a three-member enquiry committee who ultimately found two of its officials posted at Pallabi Police Station negligent in performing their respective duties in arresting the detenue mistakenly for having similarity of the name of the father of original convict, Shahabuddin Behari with that of the detenue, Md. Arman yet the enquiry committee came to a decision that the detenue is totally innocent and has wrongly been serving the sentence.

After the above enquiry was done, the said bengali daily "the Amadar Shomoy" in its online edition dated 30th June, 2019 published another report titled "পুলিশের তদন্তে আরমান নির্দোষ" (Annexure- 'C' to the writ petition).

It is only at that stage, the mother of the detenue who was an elderly widow of 61-year-old came before this court and filed this writ petition only to get his hapless son released and obtained the instant rule.

Mr. Mohammad Humayun Kabir, the learned counsel appearing for the petitioner upon taking us to the writ petition, supplementary-affidavit and that of the documents so appended therewith at the very outset submits that, actually the detenue has not been the real convict and no conviction or sentence was awarded against him and therefore, keeping him in jail is clear violation of his fundamental rights guaranteed under Articles 27, 31, 32, 33 and 36 of the Constitution and

as such, the respondents should be directed to release him from jail immediately.

The learned counsel further contends that, the detenue is an innocent person and has not committed any prejudicial act against the state and as such his confinement in jail custody is totally arbitrary, unlawful, reckless act on the part of the respondents and violative to the fundamental rights guaranteed to the citizen of this country by our Constitution.

The learned counsel goes on to contend that, after long span of time of passing the judgment on 01.10.2012 in Sessions Case No. 2521 of 2005 the detenue Arman, was picked-up by the Pallabi Police showing him arrested in Pallabi Police Station Case being No. 61(8)05 corresponding to Special Case No. 2521 of 2005 and the learned Judge of Jananirapatta Bighnokari Aparadh Daman Tribunal, Dhaka without checking his identity sent him jail resulting in, the detenue has been in prison since 30.01.2016 and therefore his such illegal incarceration is liable to be declared without lawful authority and is of no legal effect.

The learned counsel further contends that, various efforts have been taken by the widow mother and pregnant wife of the detenue including his near and dear ones to get him (the detenue) released running from pillar to post imploring to the police officials that, he is not any convict but the respondents did not pay any heed to such earnest request and therefore, the detention of the detenue is done on reckless use of power by the respondents and thereby he should be released immediately by awarding adequate compensation.

To buttress the above assertion, the learned counsel has relied upon a plethora of decisions in the case of Rudul Sah-Vs-State of Bihar and another reported in 1983 SCR (3) 508; Smt. Nilabati Behera alias Lalit-Vs-State of Orissa and others reported in 1993 SCR(2) 581; Chairman, Railway Board and others-Vs- Mrs. Chandrima Das and others reported in AIR 2000(SC) 988; Government of Bangladesh and others-Vs-Nurul Amin and others reported in 3 CLR (AD) 410; Z. I. Khan Panna-Vs-Bangladesh represented by the Secretary, Ministry of Home Affairs and others, 4 CLR (HCD) 265; Children's Charity Bangladesh Foundation (CCB Foundation)-Vs-Bangladesh and others reported in 5 CLR (HCD) 278 and Government of Bangladesh represented by its Secretary Ministry of Home Affairs, Dhaka and others-Vs-Children's Charity Bangladesh Foundation (CCB Foundation) represented by its Chairman Mr. Md. Abdul Halim, Dhaka and others reported in 6 CLR (AD) 282 and finally Md. Rustom Ali and others-Vs-The State reported in 5 CLR (AD) 154.

With the submission and relying on those decisions, the learned counsel finally prays for make the rule absolute giving adequate compensation for the prolong wrongful confinement of the detenue in the jail endured for the unlawful action of the respondents.

Per contra, Mr. Nawroz Md. Rasel Chowdhury, the learned Deputy Attorney-General (hereinafter referred to as the "DAG") appearing for the respondent no. 5 that is, Officer-in-Charge of Pallabi Police Station, Kazi Wazid Ali filed an affidavit-in-opposition denying the material statements made in the writ petition contending *inter alia*

that, vide office order dated 18.04.2019, a three-member enquiry committee was formed at the order of Deputy Police Commissioner (Mirpur Division), DMP to determine the responsibility of the concerned police officers over the incident after it came across a news report dated 18.04.2019 published in a Bengali daily named "The Amader Shomoy" concerning the wrongful arrest and detention of one, Md. Arman asking it to submit report by three working days.

Accordingly, vide letter dated 05.05.2019 containing Memo No. V/1673 DC/ (Mirpur Division), a detailed report was submitted by the Inquiry Committee headed by one Additional Deputy Police Commissioner (Mirpur Division), DMP, Dhaka to the Deputy Police Commissioner (Mirpur Division), DMP, Dhaka. The Deputy Police Commissioner then forwarded the said report to the Police Commissioner, DMP on 12.05.2019. Thereafter, on 12.09.2019 containing Memo No. V/ 3238/ DC/ (Mirpur Division), the Deputy Police Commissioner (Mirpur Division) wrote a letter to the Officer-in-Charge, Pallabi Police Station asking him to let him (Deputy Police Commissioner) know what legal step was taken about the detenue. On 04.11.2020 containing Memo No. V/4073/ DC (Mirpur Division), the Deputy Police Commissioner (Mirpur Division) further wrote a letter to the Officer-in-Charge of the Pallabi Police Station asserting that, the detenue, Md. Arman had been serving jail without committing any offence (**এতে প্রমানিত হয় যে মোঃ আরমান বিনা দোষে জেল খাটছে**) and asked the said Officer-in-Charge of the Pallabi Police Station to make contact with

Deputy Police Commissioner (Prosecution) and the Public Prosecutor (PP) and that of law section of DMP to take legal step to that effect.

It has further been asserted in the affidavit-in-opposition that, eventually by a provisional order (সাময়িক আদেশ) dated 20.10.2019, the Deputy Police Commissioner, Professional Standard and Internal Investigation, DMP, Dhaka found one, Sub-Inspector Hazrat Ali, Pallabi Police Station, Mirpur Division, DMP, Dhaka (afterwards he transferred to PBI, Munshiganj) and one, Assistant Sub-Inspector, Khan Emdadul Huq, Pallabi Police Station (afterwards he transferred to Shah Ali Police Station, Mirpur, Dhaka) negligent and incompetent to perform their duties and slapped major punishment upon them demoting to their immediate lower rank for five years made in pursuance of the departmental proceeding bearing nos. 199 of 2019 and 200 of 2019 both dated 15.07.2019

Substantiating the action taken against the 2(two) delinquent police officials, the learned DAG contends that, in accordance with the departmental proceedings provisional order has already been passed followed by final order from the concerned authority and it has already been executed and now necessary legal steps are being taken to release the detenue, Md. Arman from jail and as such, the instant rule is liable to be discharged.

It has further been contended by the learned DAG that, the matter in determining the quantum of compensation depends on taking evidence from the persons in question who is found to have detained and as such it may not be practically possible by this Hon’ble Court to fix the

quantum of compensation and as such the instant rule is liable to be discharged insofar as regards to awarding compensation.

It has also been averred by the learned DAG that, steps taken by the respondent no. 4 is visible and appropriate and the respondent no. 4 is taking prompt steps in releasing the detenue Md. Arman and as such the rule is liable to be discharged for end of justice.

The learned DAG goes on to submit that, nowhere in the instant writ petition any statement or any explanation has been given by the petitioner as regards to delay in seeking compensation before this Hon'ble Court and even the petitioner did not take any initiative before the court below to prove the identity of Md. Arman in order to exonerate him from confinement and therefore, it can be said that the petitioner has not come before this Hon'ble Court with clean hand to seek compensation from the respondents and as such, the second part of the rule-issuing order relating to compensation is liable to be discharged.

The learned DAG next contends that, the determination of the compensation does not lie under the writ jurisdiction as there is no such provision under Article 102 of the Constitution to pass any order in relation to award compensation by the Hon'ble Court and as such, the rule is liable to be discharged for ends of justice.

The learned DAG wrapped-up his submission contending that, the authority concerned had initiated necessary action against the delinquent police officials even prior to issuance of the instant rule on 09.07.2019 as an inquiry committee was formed by high ranking police officers whereupon inquiry was held and report was submitted recommending

punitive action to be taken against the police personnel who failed to discharge their respective duties with due diligence and the said officers have ultimately been punished and as such, the instant rule is liable to be discharged.

Discussion and observations

Anyway, we have considered the submissions advanced by the learned counsel for the petitioner and that of the learned DAG for the respondent no. 5. We have also gone through the writ petition, the supplementary-affidavit and all its annexure and that of the affidavit-in-opposition filed by the respondent no. 5 and the documents annexed, with utmost importance.

Before dive in the legal aspect in adjudicating the rule, we feel it appropriate to discuss the factual aspect first that gave rise to arrest and incarceration of the detenue. It is the assertion of the petitioner who is the mother of the detenue that, the detenue was picked-up by the police officials on 27.01.2016 within the vicinity of her house when he was having tea at a road side tea stall. On the other hand, it is the version of respondent no. 5 that, he was arrested on 30.01.2016 and on the same date, he was produced before the court from where he was sent to the jail.

There has been no disagreement to the fact that, it was only on 18.04.2019 that is, after more than three years of his incarceration, a news report was published by one Bengali daily “The Amader Shomoy” where it was exposed that, the detenue had wrongly been serving 10(ten) years in jail in place of the original convict, named, Shahabuddin Behari

and only then the higher police administration could sense their apparent fault over the issue and on the very date of publishing the news item they formed 3-member enquiry committee to unearth the truth over the said news report and eventually found two of its officials guilty for dereliction of duty, incompetent and then demoted them to their immediate lower rank for five years vide provisional order dated 20.11.2019 (Annexure- '6' and '6-1' to the affidavit-in-opposition filed by the respondent no. 5) when the instant rule was pending.

Now very naturally question may crop up, since it has been proved by the departmental proceeding that, it was not that Shahabuddin Behari who was supposed to serve jail rather one innocent named, Md. Arman has been serving jail in his place for the alleged negligence of two police officials then on that simple count, the rule can be made absolute by setting the detenue free. But the matter cannot be taken so leniently and end in such a simple way when an innocent person has been in prison for nearly 5 years and his widow mother had to remain silent for most of the period taking no legal recourse for releasing her innocent son. It thus surely smacks of high-handedness of a powerful quarter who made him languishing in jail on purpose. And obviously, Article 102 of the Constitution has mandated this court to direct the concerned authority to dig-out the truth basing on the materials on record, so that none howsoever he/she mighty be cannot play ducks and drakes with the life and liberty of any citizen of this country to serve their petty interest. Our Constitution guarantees enjoying the fundamental right to every citizen of this country and this court as a

guardian of the Constitution is oath bound to protect that inalienable right.

It is true, the documents annexed with the affidavit-in-opposition are good enough and complete testament of innocence of the detenue and it has repeatedly been found from those documents that, incarceration of Md. Arman is not mere an accident (একটি নিছক দুর্ঘটনা নয়) then what does it indicate? From the alleged inquiry report submitted by the inquiry committee, it appear to us they have tried to establish two things, **one,** mistaken indentity that is to say, Yasin, father of Md. Arman is the namesake of the convict, Shahabuddin and for that, Md. Arman was arrested and **secondly**, since ASI Khan Emdadu Huq in response to an enquiry slip (ES, that covered rule 389 of Police Regulations Bengal, 1943, volume-1) issued by first investigation officer had not provided actual identity of the convict, Shahabuddin for that the detenue, Arman was arrested and has been serving the sentence. And providing the above explanation, both the investigation officers of the case were relieved from the charge of wrong incarceration of the detenue by the inquiry committee.

Now let us examine how far such explanation can be sustained on the face of the materials on record placed before us. It is true, the real culprit, Shahabuddin Behari since his arrest dated 30.08.2005 had been in jail custody till 05.03.2007 when evidence of as many as 5(five) prosecution witnesses were completed though police report was submitted far back on 18.09.2005 by the Second Investigation Officer,

Sub-Inspector Md. Serajul Islam when he was serving at DB, DMP (7th team).

But the above explanation appears us to be totally vexatious, frivolous and is devoid of any material basis given the facts laid out in the FIR and police report under which Shahabuddin Behari was convicted and sentenced. **In the first place**, on examining the FIR and that of police report (Annexure- 'B' and 'B-'1 to the writ petition), we find, the address of Shahabuddin Behari in both those documents are same. So, the alleged assertion that, for providing wrong address and particulars of the convict by ASI Khan Emdadul Huq does not stand at all. **Secondly**, the very arrest and detention of the detenue, Md. Arman has not been occurred neither during the trial of the case nor soon after submitting the police report rather long after 4(four) years of passing the judgment in that case on 27.01.2016 (judgment passed on 01.10.2012).

Further, in the operative portion of the judgment dated 01.10.2012 address of the convict, Shahabuddin Behari has been given which clearly commensurates with the address/particular appeared both in the FIR and the police report. So under no circumstances, can it be believed that, due to supplying wrong particular of the convict, by ASI Khan Emdadul Huq, the detenue was arrested and has been serving the sentence.

Also, in the police report dated 18.09.2005, it has clearly been asserted by the Investigation Officer, ASI Md. Serajul Islam that, he has collected and checked the identity (নাম ও ঠিকানা) of the accused and recorded statement of the witnesses. So this very admission alternatively proves, the implication of ASI of Khan Emdadul Huq in the arrest and

wrong incarceration of the detenue totally untrue and he has simply become a scapegoat just for paving an escape route to both the investigating officers from being charged in the departmental proceeding.

Furthermore, in this case, most striking part is the insertion of additional name of the convict, Shahabuddin and that of his father in the charge-sheet which was not there in the FIR and the inquiry committee has very conspicuously avoided it. If we look at the FIR, we find that, in the respective column of the FIR, the name of the convict (as accused there) has been mentioned simply as "Shahabuddin" (though word "Behari" has been hand written having no initial thereon) and that of the name of his father as "late Yeasin". But when the Investigation Officer submitted police report in that case on 18.09.2006 he inserted **"alias Arman"** after the name Shahabuddin Behari and that of **alias Mohiuddin** after his father's name. But why the Investigating Officer did so, there has been no explanation to that effect in the entire police report as to how Shahabuddin Behari became **"Arman"**. Moreover, at the fag-end of that report, the Investigating Officer gave an affirmation that, all those accused had been living in the address given in the police report for nearly 10 (ten) years. So there is hardly any scope for the investigation officer to escape the liability of inserting the name of "Arman" after the name "Shahabuddin". Such maneuvour clearly manifests arresting and detaining the detenue, Md. Arman is premeditated one not merely because of having nexus of the name of the father of both the detenue and convict, Shahabuddin Behari.

Now, let us take a glance to the inquiry report submitted by a three-member Enquiry Committee (Annexure-'2' to the affidavit-in-opposition filed by the respondent no. 5). In furnishing opinion (মতামত), that committee framed as many as 8(eight) different issues as of "ka to ja" (ক-জ) and took statement of as many as 10(ten) police officials including two delinquents and discussed the documents available before them. But curiously enough, without discussing all those eight issues independently, the committee out of the blue found issue nos. "ka" and 'kha' proved in the affirmative and those of other issues unproved. Most surprisingly, issue no. (ছ) which framed as "পল্লবী থানায় মামলা নং ৬১(৮)০৫ মাদক মামলার প্রকৃত আসামী শাহাবুদ্দিন বিহারীর পরিবর্তে ভূল ক্রমে নিরাপরাধ মোঃ আরমানকে গ্রেফতার করা হয়েছিল কি না?" has also been found unproved. It is totally incomprehensible to us how the said issue has not been proved when issue nos. 'ক' and 'খ' became proved. Then again, it too sounds ridiculous after the arrest of the detenue, his widow mother and pregnant wife did not bother to go to the police station or knocked any authority for the last four years requesting them to get the detenue free providing evidence of his innocence and the police officials posted at Pallabi Police Station had/has no hand in keeping the main convict, Shahabuddin scot-free. Rather, record (Annexure-'E' to the supplementary-affidavit filed by the petitioner) shows, the Officers-in-Charge and other police officials out there at Pallabi Police Station did the total opposite ensuring detenue, Arman to serve total period of sentence in place of convict, Shahabuddin. So, it very reasonably

appears to us, both the Investigation Officers who had investigated the case through which Shahabuddin was sentenced and those of the Officers-in-Charge posted at Pallabi Police Station who took over the charge at that police station soon after the arrest of the detenue, Arman had hand to made Shahabuddin to remain out of jail and thus cannot evade the responsibility of long detention of the detenue. Because, it depicts from Annexure-'E' to the supplementary-affidavit which is another news report carried by the same Bengali daily filed by the petitioner dated 11.11.2020 as how the said Officers-in-Charge kept on hush-up the matter and how the convict was set free from the said police station in February, 2020 in exchange for bribery. But even then no protest has been registered or any rejoinder has ever been published against that very reports let alone higher police authority bothered to take cognizance of the same like that of the report published earlier on 18.04.2019.

Another aspect of the said enquiry report is, one Sub-Inspector, Md. Rasel has not been found involved in arresting and handing over the detenue in the said police station explaining that, since the conviction warrant (CW) was endorsed upon one, Sub-Inspector, Hazrat Ali so he had no responsibility. But from the testimony given by one Sub-Inspector, Moniara (witness no.7 in the enquiry report), it is found that, it is the S.I Rasel who after arresting the detenue handed over to the police station on 30.01.2016 who in her entire testimony has not mentioned the name of Hazrat Ali even though it is alleged that, the custody warrant was endorsed upon Hazrat Ali for execution. Since

without verifying the identity, S. I. Rasel arrested an innocent person, so he cannot evade the responsibility as of Hazrat Ali. In view of the above, we *prima facie* find the inquiry report followed by provisional order (সাময়িক আদেশ) dated 20.10.2019 mared by controversy, not based on evidence and materials on record and is thus invalidated.

Further, from annexure-'4' and '5' to the affidavit-in-opposition, we find that, the Deputy Police Commissioner, Mirpur wrote two letters to the then Officer-in-Charge (shortly, "OC") of Pallabi Police Station expressing concern over the wrong detention of Md. Arman and asked the OC to let him inform about the step taken in releasing Arman but we don't find that, the said OC of that police station ever bothered to reply that letter to his higher authority that is, Deputy Police Commissioner of Mirpur Zone compelling the said Deputy Police Commissioner to issue another letter on 04.11.2019 (Annexure'-5' to the affidavit-in-opposition) giving reminder of his earlier letter dated 12.09.2019 (Annexure- '4' to the affidavit-in-opposition) saying that "ইতোপূর্বে অত্রাফিস স্মারক নং ভি-৩২৩৮, তারিখ- ১২/১৯/২০১৯ খ্রিঃ মূলে প্রেরণ করা হয়েছিল। কিন্তু অদ্যাবধি কোন জবাব পাওয়া যায় নাই ". By that very conduct of the Officer-in-Charge of Pallabi Police Station towards his higher authority it *prima facie* proves two things **first,** he has obviously disowned the instruction of his higher authority which amounts to dereliction of duty and acted going beyond the discipline of the force (কর্তব্যে অবহেলা ও শৃংখলা পরিপন্থি কাজ করা) which is also a classic example of insubordination and **second,** he might have been harbouring the convict, Shahabuddin that actually deterred him to

respond to his superior authority and came out from the vicious circle which deserves thorough investigation in the light of the news report published and upon examining the victim, petitioner, their near relatives, police officials posted at that period, Officers-in-Charge of that Police Station and that of the convict, Shahabuddin.

Now let us examine what the respondent no. 5, Mr. Kazi Wazed Ali, current Officer-in-Charge (OC) of Pallabi Police Station has asserted in his affidavit-in-opposition before this court. It is worth mentioning that, none of the five respondents except for the said Officer-in-Charge has been contesting the rule by filing affidavit-in-opposition. This respondent though in his affidavit-in-opposition has not opposed releasing the detenue from jail rather opposing the prayer for payment of compensation— which he can do for the sake of argument. But he out of the blue in paragraph no. 15 of the affidavit-in-opposition, tried to assert that, since the petitioner has not proved the identity of the detenue, so he cannot get released and not entitled to have any compensation as she (petitioner) has not come with clean hand. That sounds ridiculous given the overall scenario of the matter so far as regards to the identity of the detenue when the petitioner annexed the National Identity Card (NID) of the detenue with the writ petition which remained unchallenged and more so, in the inquiry report two vital issues to that effect, have been proved in the affirmative. Even, all the documents followed by the enquiry report including in the provisional order (Annexure- ‘6’ to ‘6-1’ to the affidavit-in-opposition) it has been found that, the detenue has wrongly been incarcerated, so such kind of reckless statement clearly

runs counter to the stand taken by his higher authority who deliberately asserted that the detenue has wrongly been serving jail in place of real convict, Shahabuddin Behari and obviously it sounds an ill-motive of the respondent no. 5 to deflect the guilt.

Fixing the liability, deliberation and decision in awarding compensation in favour of the detenue for his <u>illegal incarceration:</u>

Those points are inextricably intertwined with one another. From the enquiry report, testimony of witnesses in particular, the statement of witness no. 7 S.I. Moniara and finally that of the provisional order, it has overwhelmingly found that, the detenue has been detained in the jail custody unjustly by purposely showing him convict in a narcotic case in which one, Shahabuddin Behari and two other accused were convicted and sentenced. And from the documents annexed by the respondent no. 5 it unequivocally proves that, detenue Md. Arman has been subjected to victim of a long-running conspiracy of some greedy and corrupt police officials that led him to serve such a long confinement. So it needs no further discussion on such distinct fact that, the detention of the detenue is totally without lawful authority who is being held in the custody in an unlawful manner and his arrest that leading to incarceration can never be an mistaken identity as alleged by the respondent no. 5 and the very report by the enquiry committee in light of such wrong direction that culminated alleged departmental punishment all appears to us nothing but to shield the actual actors.

Now question may arise, is that enough for this court to declare the confinement of the detenue illegal and set him free by this court and the wrongdoers who took away nearly 5(five) years from the life of the detenue for no fault of him will go unpunished? Certainly not. From the foregoing discussion, this court has tried to fix the liability for Arman's painful ordeal caused purely at the willful negligence and defiant device hatched by some handful corrupt and cruel police officials.

In essence, basing on materials on record plus with the above discussion, we *prima facie* hold that it is the failure of the highest police administration to rein in its subordinate officials in particular, the Officers-in-Charge and other police officials posted therein at pallabi police station including two investigation officers. In the said Police Station, police officials have utterly failed to show accountability in their respective duty and obeyed instruction of its controlling authority and that burden must be shouldered by its highest controlling authority including the Police Commissioner, DMP, Dhaka. It is worth mentioning here that, after handing down alleged punishment to two petty police officers on 20.10.2019 basing on the alleged inquiry report, the same daily "The Amader Shomoy" on 04.03.2020 ran another striking report titled "পল্লবী থানায় এসব কি হচ্ছে" where amongst others, described how convict-Shahabuddin had managed the Officer-in-Charge of Pallabi Police Station evading arrest. So the allegations on their part that, they could not trace out the convict, Shahabuddin appears to be a blatant lie. In the said news report, some terrifying facts of various criminal acts have been surfaced. Obviously, it cannot be said those very incidents

went on in that particular police station lost sight of higher authority or they were not privy to the said facts. Then why the higher authority of police did not take cognizance of that news report, they took earlier when the report on the wrongful confinement of Arman was published in the same daily on 18.04.2019. Rather, from Annexure- '4' and '5' to the affidavit-in-opposition, it implies that, there has been hardly any control by the higher police authority upon its subordinate that is to say, the police officials of the said police station else, minimum protest against that very news report dated 04.03.2020 could have been registered or action be taken against the delinquent police officials in the report. Even nothing has been controverted by respondent no. 5 by filing any affidavit-in-reply against the supplementary-affidavit filed by the petitioner let alone against Annexure- 'E' thereof which alternatively proves, the news report so have been published in "The Daily Amader Shomoy" dated 04.03.2020 to be authentic.

It's our common knowledge just few months back three police officials of that particular police station were convicted and sentenced for the first time after the "Torture and Custodial Death (Prevention) Act, 2013" came into effect. And it has been found from the police report pressed in a much hyped Major (Retd.) Sinha murder case held in Cox's Bazar that, his murder has been orchestrated at the Teknaf Police Station. So how the general people will repose faith on the police force and find the police station as their safe place to register their grievance?

With the cumulative discussion and observation made above, we very consciously hold that, a handful corrupt police officials who have

been tasked with the duty to protect and preserve the life of innocent people of this country became errant and its higher authority has miserably failed to hold accountable to these corrupt, defiant police officials for which they (higher police authority) cannot absolve its responsibility as Annexure-‘3’ to the affidavit-in-opposition proves Police Commissioner was abreast with the unfortunate incident. And for that obvious reason, the respondent no. 4 who is the highest controlling authority of the police cannot skirt around his responsibility on such planned, deliberate and wrong committed to a hapless innocent Md. Arman.

It is thus high time to filter out those unscrupulous police officials from the disciplined force to renew confidence in the mind of general populace on the police force trusting them as their protector nor assailant. What happened to the fate of Md. Arman just bears the testimony of a naked highhandedness of some derailed police officials and certainly entire police force cannot take responsibility of that misdemeanor and blamed for such irresponsible, immoral act of some rogue police officials. So it is about time the police has to come out from such stigma and its higher authority to take some distinct and drastic action against the wrongdoers such that none can dare to infract discipline in the force and make any harm to the innocent general public.

Now, we would like to embark on the discussing over the very pivotal legal points whether in a writ of *habeas corpus* any monetary compensation can be awarded to the detenue fixing responsibility to any particular authority and any direction can be given in the form of

mandamus if this court finds from the materials on record that, another wrong is going to be committed in punishing officials who appear to have no part in the illegal confinement.

At the very outset, we thus feel it urge to take resort to Article 102 of our Constitution through which this court has been bestowed upon the authority to issue certain order in the form of writ of *certiorar*i, writ of prohibition, writ of *mandamus,* writ of *habeas corpus* and writ of *quo warranto*. Obviously, this court *prima facie* finding the confinement of the detenue illegal issued rule in the form of *habeas corpus* that contains in the substantive part of the rule-issuing order dated 09.07.2019 and in the second part of rule-issuing order, this court has also exerted its authority under writ of *mandamus* and issued rule in regard to awarding monetary compensation to the victim, detenue together with a prerogative order like, "*and/or pass such other or further order or orders as to this court may seem fit and proper*".

Article 102 of the Constitution mandates to this court to enforce fundamental rights that has conferred by Part III of our Constitution and if this court ever finds infringement any of such right by any action of any state machinery it will certainly enforce those rights as per Article 44 of the Constitution through 102 thereof. That very power cannot be confined within the "ambit of the term of the rule" issued rather this court can exercise any of those five forms of writ at the time of disposal of the rule if it ever finds at the hearing and that of from the materials on record that the party aggrieved deserves enforcement of other

fundamental rights that has been infringed other than what he sought initially.

In the same vein, if this court on the face of the materials on record and that of the grievance agitated during the course of hearing to any particular writ, finds injustice committed to any citizen of this country that directly infracts any of the fundamental rights which had not been brought initially to the notice of this court, can well be adjudicated, exercising power conferred upon this court under Article 102 of the Constitution.

We find our said view total conformity with what has been set out in Article 102(1) of the Constitution. We for obvious reason feel it expedient to quote the said relevant portion of the particular phrase enumerated in Article 102(1) of the Constitution which runs: *"as may be appropriate for the enforcement of <u>any of the fundamental rights</u> confined by Part III of this Constitution"*.

On top of that, from the foregoing discussion and observation, we very unambiguously find that, a formidable injustice has been perpetrated upon the hapless detenue by some immoral, corrupt, misguided and greedy police officials in a preplanned manner and in the name of holding the delinquents accountable a farce and unfounded disciplinary action had been initiated through which two petty police officials have also been subjected to injustice. By doing so, the kingpins who orchestrated the total wrongdoing and ultimately benefitted have been given protection. Such obvious unfairness has thus violated one's fundamental rights of protection of fair trial and punishment enshrined in

Article 35 of our Constitution and that can well be rectified manifestly in the exercise of writ jurisdiction invoking Article 102 of the Constitution by this court on its own.

All in all, we can come to the conclusion that, Article 102 of the Constitution confers power on us to make directions or orders or writes in any of the form of *habeas corpus*, *mandamus*, *prohibition*, *certiorari* and *quo warranto* whichever this court finds appropriate for the enforcement of fundamental right guaranteed by Part III of our Constitution at the time of disposal of the rule.

Now question may be ensued, if fundamental right of a citizen is found to have violated by any act of the state apparatus whether that can be remediated through monetary compensation. It is found from the record that, the detenue has still been languishing in the prison most illegally and certainly for such unlawful action his very fundamental right to life and personal liberty has grossly been curtailed when Article 32 of our Constitution guarantees protection of his such fundamental right. For the last 5(five) years the detenue indubitably went through untold physical, mental distress not to say his financial predicament. It has been found from the record that, when he had illegally been detained by the police he left behind his widow mother and pregnant wife and he himself is a patient of convulsion (মৃগী রোগী) and he had been earning his living as a banaroshi weaver (বেনারশী কারিগর) and with such meager income he would maintain his family. In such a compelling helpless situation of the detenue, giving direction upon the relevant organ of the state machinery to provide monetary compensation in the nature of writ

of *mandamus* cannot be said superfluous one rather considered to be perfect, lawful and justified remedy for his prolong and wrongful incarceration in the prison.

We perceive and deeply feel sorry that, the detenue will not get back his long five years he confined in the small cell in the prison nor we can return those golden time of his life he lost for none other than the madness of some immoral police officials nor the compensation we fix can recoup his travails and tribulation nor it can come any solace to the mental and physical agony he endured for the last five years' in a jail nor the same can be any means in exchange for his five years illegal incarceration. But it is just palliative for the unlawful act and that of the collective failure of certain authority to protect an innocent person which may act as a shield for the excesses wielded by a section of dishonest officials of the state machinery. So it is the respective organ of the state to be responsible for that misdeed and thus must provide reparation for the damage committed by its officers to the victim, detenue. And in this particular case, it is the highest authority of the police force who must pay compensation for the wrong committed by its substantiates not the state will take the responsibility let alone the respective ministry as they are not supposed to look into what conspiracy has been happening in a particular police station for doing harm on an innocent person.

Therefore, the respondent no. 4 is responsible for that. In this regard, the very term "vicarious liability" will come into play. From "Black's Law Dictionary", Eighth Edition we find its definition as under:

> *"**Vicarious liability:** Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties."*

From "Wharton's Law Lexicon (16th Edition)", we also find similar definition on that very term vicarious liability.

Having regard to the said definition, there is no shred of doubt that, the respondent no. 4 has to shoulder the liability of his subordinate and essentially pay the compensation.

It is right that, there has been no standard policy to measure the amount of compensation. In our jurisdiction and that of Indian jurisdiction in appropriate case, the amount has been fixed keeping in mind the surrounding circumstances and it has been left exclusively to the discretion and prorogation of the court to exercise such power. On the date of passing judgment, the learned counsel for the petitioner basing on our previous enquiry, apprised this court the detenue is a benaroshi weaver used to earn more than taka eight thousand per week. If we for arguments' sake take this earning for consideration it then comes nearly taka 20,80,000/- for the last 05(five) years that comes 260 weeks (52x5) he remained in jail. From the foregoing discussion where the determination of compensation has been left to the discretion of this court and from the above idea of his probable earning during his incarceration, we thus estimate the amount to be justified if it is at taka 20,00,000/- (twenty lakh) as compensation for the detenue to be borne

by the highest authority of police force that is, the respondent no. 4 because undoubtedly rather admittedly his subordinate police officials are found responsible for the wrong confinement of the detenue.

But it is worth noting that, this order of compensation will in no way preclude the detenue from bringing a further suit to recover appropriate damages from the respective organ of the state and its defiant officials nor bring any criminal case to any appropriate forum against the perpetrators who has caused physical harm and mental distress during his long unlawful custody. As it also came to our notice that, the detenue had been arrested on 27.01.2016 and upon torture he had to take admission to a hospital for nothing but to make him to admit that, he was Shahabuddin.

Be that as it may, we have very meticulously gone through the decisions so cited by the learned counsel for the petitioner as has been stated hereinabove. On going through the same, we find absolute nexus with the *ratio* so settled in the decision in the case of Rudul Sah-Vs-State of Bihar and another reported in 1983 SCR (3) 508 passed by the Indian Supreme Court where it has been settled of providing compensation in a writ of *habeas corpus*. We have very meticulously gone through thesaid decision and we must say, that very judgment is a seminal one specially in the field of providing compensation to a victim if any wrongful confinement is made by the state machinery. In that very decision, compensation was ordered to provide even for the second time by the state even after release of the detenue. Aside from that, our Appellate Division in the case of Government of Bangladesh-Vs.-Secretary,

Ministry of Railway and others reported in 6 CLR (AD) 282 headed by the current Honourable Chief Justice of Bangladesh upholding the decision in regard to compensation passed by this court in a case of Children's Charity Bangladesh Foundation (CCB Foundation)-Vs-Bangladesh and others reported in 5 CLR (HCD) 278. Apart from that in the judgment passed in the case of Md. Rostom Ali and others-Vs.- The state and others reported in 5 CLR (AD) 154, we find similar proposition on paying compensation by the respective state organ. So, all those decisions awarding compensation for the injury caused to any citizen of this country by the state organ has thus been set at rest once for all.

Before parting with the case, we with due respect appreciate the noble job rendered by "The Daily Amader Somoy" in particular, its respective reporter named, "Mr. Md. Yousuf Sohel" for whose ceaseless endeavour such harrowing incident committed to an innocent individual by a handful, greedy and corrupt police officials came into fore else, that very hapless mother of the detenue (petitioner here) would not have mustered the courage to take this legal recourse even though she had to wait for long three years to avail the same the reason one may undoubtedly conceive.

Indisputably, that very journalist penned a very courageous and investigative report over the incident relentlessly most of which is proved to have material substance and in essence, through the report, it once again manifests that the media is truly the mirror of the society and sometimes it can play the role of saviour and for that, it is genuinely called the four pillar of democracy to make it functional in the sense to

establish rule of law and that very term has rightly coined by **Thomas Caryle**, a British historian, essayist and philosopher.

If the media continues its such praiseworthy role reporting objective news in that event, injustice, inequity, lawlessness, corruption and all sorts of crimes that cripples a society and the country at large will surely be diminished to a great extend and nation always deserves so from the media.

We also, express our sincere appreciation to Mr. Md. Abdul Halim, the learned counsel of this court who despite of not representing any parties to this writ spent a considerable time voluntarily making his invaluable submission against the injustice caused to the detenue. In course of his lengthy hearing it came to our notice that, he founded "Children Charity Bangladesh Foundation (CCB Foundation), a non-profit, charitable organization aimed at promoting and protecting the right and interest of the children and the cross section of distress populace in our society who deprived of having any legal protection of their rightful grievances. Mostly, for his unrelenting endeavour and quite resilient pursuit, the very concept of recovery of compensation from the State machinery through writ jurisdiction has greatly been evolved and expanded to its new heights which at the same time ushered the hope to the deprived section of litigants to get justice. We are indeed thankful to Mr. Md. Abdul Halim, the learned counsel for taking his time to fortify the proposition of realizing compensation through writ be it, *habeas corpus* and other nature of writ as enumerated in Article 102 of our Constitution.

ORDER

In the above panorama, we find considerable substance and merit in this rule.

Resultantly, the rule is made absolute.

The detention of the detenue namely, **Md. Arman**, son of late Yasin, 13 Huts, Block-A, Section 10, Tejgaon non-local relief camp Pallabi, Dhaka, now detained in Kashimpur Jail-2, Gazipur is declared to be held in custody without lawful authority and in an unlawful manner which is violative to his fundamental right as guaranteed by our Constitution and the same is thus declared without lawful authority and of no legal effect and the detenue is entitled to have compensation at taka 20,00,000/- (twenty lakh only) for his wrongful confinement and the respondent no. 4 is directed to pay the sum as directed below and hence, the respondents are thus directed to set the detenue Md. Arman at liberty forthwith.

In view of the foregoing observation, we also pass orders which are as under:

1) The Respondent no. 4, the Inspector General of Police, Police Headquarters 6, Phoenix Road, Dhaka-1000 is directed to award taka 20,00,000/- (taka twenty lakh) only to the detenue, **Md. Arman**, son of late Yasin, 13 Huts, Block-A, Section 10, Tejgaon non-local relief camp Pallabi, Dhaka as monetary compensation within 30(thirty) working days from the date of receipt of the copy of this judgment.

2) The Police Commissioner, Dhaka Metropolitan Police Headquarters, 36 Minto Road, Dhaka-1000 is directed to withdraw **(i)** Dadon Fakir who had been performing as Officer-in-Charge at Pallabi Police Station, Mirpur, Dhaka from 16.05.2015 to 19.07.2018, now serving as Inspector at DB, DMP from his current duty; **(ii)** withdraw Md. Nazrul Islam who had also been serving as Officer-in-Charge at Pallabi Police Station, Mirpur, Dhaka from 20.07.2018 to 09.08.2020, now serving as Inspector (Court), DMP from his current duty (information regarding such stint of duty has been supplied by the learned Deputy Attorney-General for Bangladesh); **(iii)** withdraw Md. Serajul Islam Khan who had been serving as Sub-Inspector, DB, acted as second investigation officer in Sessions Case No. 2521 of 2005 now been serving as Police Inspector, Sports and Culture Branch, Police Headquarters, Dhaka from his current duty; **(iv)** withdraw Sub-Inspector Rouf who had been serving at DB, DNP and investigated the case as first Investigation Officer in Sessions Case No. 2521 of 2005 from his current duty and **(v)** withdraw Md. Rasel who had been serving as Sub-Inspector at Pallabi Police Station now been serving in the same position at Mirpur Model Police Station, DMP, Dhaka from his current duty and **attach** all those police officers in the

respective police lines for holding an impartial and effective enquiry till the enquiry is completed and report submitted to the authority concerned specified below.

3) The Deputy Inspector General of Police, Police Bureau of Investigation (PBI), House# 12B, Rd# 4 Dhanmondi R/A, Dhaka is hereby directed to assign required number of officials at his disposal forming an "Inquiry Committee" for initiating departmental proceedings afresh against the officials mentioned in paragraph no. 2 above or against any other officials it seems fit fixing liability of illegal incarceration of the detenue, Md. Arman in the light of the observation made in the body of this judgment and the documents available in the writ petition.

The proposed enquiry committee is to interrogate the officials ordered to be withdrawn or any other officials or persons whoever it may deem fit including the detenue, the petitioner, their near relatives, other police officials privy to the incident, the convict by taking proper permission from the concerned authority or court and to submit report before this court within 3(three) months from the date of receipt of the copy of this judgment and other documents to be referred by this office.

4) The Respondent no. 4, Inspector General of Police and the Police Commissioner, DMP, Dhaka are directed to file affidavit-in-compliance before this court on 14.02.2021 annexing the proof of making payment of compensation to the detenue and that of withdrawing the police officials as directed above.

5) The Deputy Inspector General of Police, Police Bureau of Investigation is also directed to proceed with the departmental proceeding following the inquiry report against the delinquents to be found in the enquiry in accordance with law and to file affidavit-in-compliance accompanied by enquiry report and updates to this court on 11.04.2021.

6) The office is directed to serve a set of photocopy of all the documents related to this writ petition by annexing a copy of this judgment to **(i)** the Police Commissioner, Dhaka Metropolitan Police, Dhaka and **(ii)** the Deputy Inspector General of Police, Police Bureau of Investigation at the address given hereinabove through special messenger at the earliest and to apprise the learned Registrar of the High Court Division, Supreme Court of Bangladesh about service of the documents mentioned above providing service return to him by 17.01.2021.

Let a copy of this judgment be sent to all the respondents of this writ petition right away.

Let the matter appear in the list for order on 14.02.2021 and then on 11.04.2021 respectively.

Mohi Uddin Shamim, J:

I agree.

Abdul Kuddus/ B.O.