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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF MAY, 2020

BEFORE

THE HON'BLE MR.JUSTICE K. N. PHANEENDRA

CRL.P. NO.6578/2019

BETWEEN

1. BABUL KHAN
S/O ARJUTH ALI KHAN
AGED ABOUT 46 YEARS

PRESENTLY R/AT SHED IN NAGESH LAND
KOMMASANDRA, SARJAPURA HOBLI
ANEKAL TALUK
BENGALURU RURAL DISTRICT.

PERMANENT R/OF
KANBARI VILLAGE
PERISBUR DISTRICT
BANGLADESH

C/O MR. SHAHEEN
R/AT IMMADHUL
HOSUR ROAD, BASAPURA
ELECTRONIC CITY
BENGALURU – 560 100

2. TANIYA
W/O MOHAMMED RAJU @ JUHAIL
D/O BABUL KHAN
AGED ABOUT 20 YEARS

PRESENTLY R/AT SHED IN NAGESH LAND
KOMMASANDRA, SARJAPURA HOBLI

ANEKAL TALUK
BENGALURU RURAL DISTRICT.

PERMANENT R/OF
RAINDA VILLAGE
BAGARHUT DISTRICT
BANGLADESH

C/O MR. SHAHEEN
R/AT IMMADHUL
HOSUR ROAD, BASAPURA
ELECTRONIC CITY
BENGALURU – 560 100. ... PETITIONERS

(BY SRI. C. MOHAMMED PASHA, ADVOCATE)

AND

1. STATE OF KARNATAKA
BY SARJAPURA POLICE STATION
BENGALURU RURAL DISTRICT
REP BY SPP, HIGH COURT CAMPUS,
BENGALURU – 560 001

2. UNION OF INDIA
MINISTRY OF HOME AFFAIRS
REPRESENTED BY SECRETARY
BENGALURU. ... RESPONDENTS

(BY SRI. PRASANNA DESHPANDE, AAG A/W
SRI. ROHITH B.J, HCGP FOR R1,
SRI. C. SHASHIKANTH ASG FOR R2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION
439 CR.P.C PRAYING TO ENLARGE THE PETITIONERS ON
BAIL IN CR.NO.213/2018 OF SARJAPURA POLICE
STATION, BENGALURU CITY FOR THE OFFENCE P/U/S.14A

AND 14B OF THE FOREIGNERS ACT, 1946; SECTION 25 OF THE INDIAN ARMS ACT, 1959 AND SECTION 34 OF AADHAAR ACT, 2016.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 20.02.2020, COMING ON FOR '**PRONOUNCEMENT OF ORDER**' THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

This petition is filed seeking grant of bail under Section 439 of Code of Criminal Procedure, pertaining to Crime No.213/2018 of Sarjapur Police Station. The said case after charge sheet culminated into CC No. 1734/18. Finally after committal proceedings, it came to be registered as SC No.5014/2019, pending on the file of III Additional District and Sessions Judge, Bangalore Rural District, sitting at Anekal. The said case was registered for the offence punishable under sections 14A and 14B of the Foreigners Act, 1946; under Section 25 of the Indian Arms Act, 1959; and Section 34 of the Aadhaar Act, 2016.

2. The petitioners are arraigned as Accused Nos.7 and 10 respectively in the said Case.

3. The brief facts of the case divulged from the Charge sheet papers are that:

Accused Nos.1 to 15 named in the Charge sheet belonged to Bangladesh, illegally migrated to Indian Territory, without Passport and Visa and they have been staying in Indian Territory without any legal documents or any license or permission from the competent authorities.

It is also alleged that Accused Nos.1, 3, 14 and 15 have illegally obtained Aadhaar Cards by fraud and misrepresenting themselves as Indian Citizens. It is further alleged that Accused No.2 was possessing bullets and thereby the Accused persons have committed an offence under the Arms Act.

4. On plain reading of the Charge Sheet papers, it is seen that specific allegations have been made against the petitioners that, they are Bangladesh citizens, and they have been illegally migrated to Indian Territory and residing in India without any authority of law. Hence, they

have committed the offence under Sections 14A and 14B of the Foreigners Act. So far as other offences are concerned, no such allegations are made against the petitioners.

5. At the time of submitting arguments, the petitioners' counsels Sri C. Mohammad Pasha, Sri Sirajuddin Ahmed and as well the learned High Court Government Pleader Sri Rohith B.J., have submitted that, there is no decision as to when and on what grounds the bail can be granted to such persons. No specific guidelines have been made to regulate the stay of such persons who have come to India without any Passport or Visa. There are no specific guidelines in this context as to how those persons should be treated during the course of investigation, inquiry, trial, and after acquittal or conviction by the Courts. Therefore, both of them have submitted that this court has to hear the matter in detail so as to set some guidelines to the Police, Judicial officers, and to all the Government Officers concerned, who are in

the helm of affairs while dealing with deportation of such persons.

6. In the above said background, this Court has felt that the Central Government is also a necessary party, as such, the Counsel for the petitioners was directed to make the Central Government as a party to the proceedings. Accordingly, as per the Court's order dated 16.10.2019, the Union of India, Ministry of Home Affairs is also made as Respondent No.2.

7. I have heard the Learned Counsels for the Petitioners Shri C.Mohammad Pasha and Sri Sirajuddin Ahmed who enlightened the Court on various aspects. The learned Additional Solicitor General Sri C. Shashikantha, who has taken notice of the petition on behalf of the Union of India, has also very effectively assisted the Court in disposing of this petition. Sri Prasanna Deshpande, Additional Advocate General, along with Sri B.J. Rohith, learned High Court Government Pleader, have also given

their valuable inputs to this Court as and when required with necessary particulars.

8. In view of the extensive submissions made by the learned Counsels as noted supra, and various legal and factual points which have been raised, though it appears to be simple bail matter, but the Court has taken up the matter in detail to discuss about various facets of the case so as to find out some solutions to the gray areas in law, so as to lay down certain guidelines if possible. Though, it is a very difficult task to lay down guidelines exhaustively but an effort, and endeavor is always expected from the court, in that context an attempt is made by this Court.

9. The Learned Counsels for the Petitioners Sri Mohammad Pasha and Sri Sirajuddin Ahmad in detail submitted that, petitioners though migrated themselves without any Passport or Visa, but they can still be considered as Indian citizens since they are living in India for a long period and a child is also born to second

petitioner, and presently the child though not committed any offence is with the mother in the jail. The foreigners have to be treated with all dignity and respect till they are deported to their country if they are found to be illegally residing in Indian Territory. Women and Children have to be given with special facilities during their detention or stay in India. Therefore, they submitted that proper directions may be issued to the concerned authorities in this regard.

10. The learned Additional Solicitor General Sri C. Shashikantha submitted that, the Central Government in this Context has made certain guidelines and also taken care of the foreign nationals who have violated the laws of Indian territory by way of issuing directions to the concerned authorities under various provisions of law in the name and Style of "MODEL DETENTION CENTRE/HOLDING CENTRE/CAMP MANUAL 2019", which exhaustively covers all the queries raised by the learned counsel for the petitioners. Therefore, he has submitted

that, the same may be taken into consideration. He has also submitted so far as women and children are concerned, the other prevailing laws like Juvenile Justice Act, and Prisons Act and Rules and Jail Manuals would take care of the same.

11. The Learned Additional Advocate General Shri Prasanna Deshpande and Learned High Court Government Pleader Sri Rohith B.J., have submitted that various directions have been issued by this Court, regarding adaptation of the directions issued by the Central Government to the State Government. The State Government has in-turn furnished sufficient information to the Court in this regard, and they requested the Court to peruse the same.

12. The Learned Additional Solicitor General and as well, the learned Additional Advocate General are of the opinion that even if bail is granted to the petitioners, they should not be allowed to go anywhere and their

movements have to be restricted, till they are deported to their country, they shall have to be kept in the Detention Centers though not in regular jails unless the court concerned feels it just and necessary under the facts and circumstances of each case. It is also submitted that, the State Government has already established Detention Centers in this regard.

13. In the wake of the above said submissions, the Court has to examine this Case with regard to the following important points:

(1) What are the procedures to be followed by the concerned authorities and Courts, when an offence said to have been committed by illegal immigrants, under the Foreigners Act, 1946 and offences under any other law of the land for the time being in force is detected?

(2) How a foreign National who is considered to be an illegal immigrant shall be treated till they are deported to their country, or appropriate government taking any

decision about their citizenship in general and with reference to women and children in particular?

14. Before answering the above points it is just and necessary to bear in mind that, once the appropriate Governments or Union Territories or any other authority is entrusted with the task of identifying, detecting and deporting the illegal migrants, it is their duty to deport them to their respective nation as expeditiously as possible. The Courts should also bear in mind that, India is a large country having its border with many countries. People in the sub-continent have a common history and share many similarities in physical looks. Due to various reasons including political or economical, inimical reasons, some people from neighboring countries may enter India. May be due to some cultural and ethnic similarities, on many occasions such migrants go unnoticed and they almost willing and try to settle in our country. These illegal migrants sometimes pose threat to the national

security, and infringe the rights of Indian Citizens. It should also be borne in mind that now-a-days terrorism has become serious concern for most of the nations. Illegal migrants who enter Indian Territory with obvious motives to cause damage to the national security are more vulnerable. It is also evident from various instances which happened in India, that some miscreants have recruited Indian citizens to their organizations for their wrongful gain, in turn to cause wrongful loss to Indian territory. We have very bitter examples of infiltrators inhuman acts at Jammu and Kashmir, Rohingyas in State of Myanmar. The retaining of the illegal migrants may be some times helpful to the country if they came to our country eking their lively hood and they are all from hard working community. But, that does not mean to say that for that reason, they can be retained in India in violation of the various Acts and Rules of the Country.

15. Therefore, preventing the entry of illegal migrants to India and deporting them to their country, if

they are found to be illegal migrants or without or invalid Passport and Visa, continued to reside in India without any authority of law, is an important task as they also sometime impose pressure on citizens and pose a security threat, especially in sensitive areas. In this background, we have to understand how those persons should be dealt with and what are the responsibilities of the authorities, who are in the helm of affairs.

16. **FIRST POINT:** In order to answer this point, various facets of laws of the land with reference to the facts, needs to be discussed in detail. The following are the important aspects:

- (a) Who is a foreign national called an illegal migrant?
- (b) Detection, identification and determination of foreign nationals and offences under various laws.
- (c) Procedure during investigation, inquiry and trial.

(d) Procedure after the trial. (Acquittal or conviction) till deportation of such foreign national.

17. **Illegal migrants**: Section 2(1) (b) of Indian Citizenship Act, 1955, explains who is an illegal migrant, and how citizenship can be acquired. The provision reads as follows.

"Section 2. 1(b) ***"illegal migrant"***
means a foreigner who has entered into India -

- (i) without a valid Passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or
- (ii) with a valid Passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time;

Section 3 ***'Citizenship by birth'***
means -

(i) Except as provided in sub-section (2), every person born in India,

- (a) On or after the 26th day of January, 1950, but before the 1st day of July, 1987;
- (b) On or after the 1st day of July, 1987, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth;
- (c) On or after the commencement of the Citizenship (Amendment) Act, 2003, where
 - (i) both of his parents are citizens of India; or
 - (ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth,

shall be a citizen of India by birth.

18. Therefore, according to Indian law, illegal migrants are not actually refugees. Since India is not a signatory to the 1951 Refugee Convention, the United Nations principle of non-refoulement and impediment to expulsion does not apply in India. Illegal migrants are

denied impediment to expulsion if they do not fall within the host country's legal definition of a lawful refugee.

Illegal migrants are those people who migrate to a country in violation of the immigration laws, and who have not acquired the citizenship of India, or continued their residence without any sort of legal right to live in our country. That means to say the persons who have not acquired any citizenship as per the Indian Citizenship Act, but who resides in India fall under the category of illegal migrants. Even the children born to parents who are illegal migrants, or any one of them is illegal migrant is also not a citizen of India automatically by birth. Therefore, it clearly goes to show that taking birth in India is not a criterion, but they should fall under the definition as defined under the Citizenship Act.

19. In this background it is appropriate to note that, in a case reported in **(2005) 5 SCC 174** between ***Sarbananda Sonowal and Union of India***, wherein the Hon'ble Apex court in clear terms after detail thorough

discussion rejected the bringing of an act called '**Illegal Migrants (Determination by Tribunal) Act, 1983**,

holding that, the Act "*has created the biggest hurdle and that is an impediment or barrier in the identification and deportation of illegal migrants.*" On 9th August 2012, the Hon'ble Supreme Court while hearing a Public Interest Litigation petition for deportation of illegal migrants, it was observed that, the policy of the Government of India does not support any kind of illegal migration either into its territory or illegal immigration and the Government is committed to deport illegal migrants, but only lawfully.

20. The Citizenship Amendment Act, amended in the year 2019, which gave some relief to some persons, which reads as follows.

"Under the Indian Citizenship Act, 1955 (hereinafter referred to as the Principal Act), clause (b) of sub-section (1) of Section 2, the following proviso shall be inserted, namely:—

*Provided that any person belonging to **Hindu, Sikh, Buddhist, Jain, Parsi or***

Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made there under, shall not be treated as illegal migrant for the purposes of this Act;

21. Therefore, it is clear that the persons who are not given with any neutralization certificate or who does not fall within the category of amended provisions of Citizenship Act and who are defined as illegal migrants are to be treated as illegal migrants to Indian Territory.

22. **(b) Detection, identification and determination of foreign nationals who are accused of committing offences in India:**

The power to identify or detect and deport the foreign nationals staying illegally in the country is the

primary duty of the Central Government. In fact, such powers are also delegated to State Governments and Union Territories by various provisions under various notifications.

23. Let me have some provisions under important laws in this regard.

(1) Under '***the Passport (Entry into India) Act 1920***',

Section 2 defines the word 'entry' means entry by water, land or air;

Section 3 of the Act '***Power to make Rules***' says that the Central Government may make Acts and Rules to prohibit the entry into India or any part thereof any person who has not in his possession a Passport issued to him;

Section 4 of the Act '***Power of arrest***' also provides that - (1) any officer of police, not below the rank of a sub-Inspector, and any officer of the Customs Department empowered by a general or special order of the (Central Government) in this behalf may arrest without a warrant any person who has contravened or against whom a reasonable suspicion exists

that, he has contravened any rule or order made under section 3 of the Act.

Section 5 '**Power of removal**' also provides the Central Government may by general or special order, direct the removal of any person from India who, in contravention of any Rule made under Section 3 of the Act, prohibiting entry into India without Passport and thereupon any officer of the Government shall have all reasonable powers necessary to enforce such direction.

(2) The Passports Act, 1967 and the Passport Rules, 1980, are enacted to regulate the purpose of issue of Passports and travel documents, to regulate the departure from India, the Citizens of India and for other persons and for matters incidental or ancillary thereto. Under this Act particularly Sections 2 and 3, defines what is meant by 'departure', 'Passport', 'Passport Authority', 'Prescribed' and 'travel documents'.

Section 3, explains the '**Passport or travel document for departure from India**'.

Section 12 of the Act deals with the offences and penalties prescribed.

Section 13 of the Act deals with the **power to arrest** such persons who have committed any offence under section 12 of the Act.

Section 13(1) prescribes the Officers who are empowered to make arrest by a general or special order of the Central Government (like officer of police not below the rank of Sub-Inspector or Immigration Officer Etc.,)

(3) Under Section 14, 14A and 14B of the Foreigners Act, 1946, the offences are defined as to who can be treated as not a citizen of India. It can be safely said that, under Section 14, whoever (a) remains in India exceeding the period mentioned in Visa, (b) does any act in violation of the conditions of the valid Visa regarding his entry and stay in India (c) contravenes the provisions of this Act or any order made or any direction given in pursuance of this Act or such order. The said acts shall be punished with imprisonment for 5 years and with fine etc.,

(4) Section 14 (A) deals with '**penalty for entry of a person in a restricted areas**' etc., whoever -

(a) enters into any area in India, which is restricted for his entry under any order made under this Act, or any direction given, remains in such area without any authority of law beyond the period specified in any permit for his stay; or

(b) Any person enters into or stays in India in any area without valid documents required for such entry or stay;

shall be punished with imprisonment for two years and may extend to eight years with fine.

(5) Section 14(B) deals with '**Penalty for using forged Passport**', whoever uses a forged Passport he shall be punishable with imprisonment which shall not be less than 2 years may also be extended to 8 years with fine.

(6) Section 14 (C) deals with '**Penalty for abatement**'. It means whoever abets any offence under the Act also be made punishable with the same punishment provided for the offence abated.

(7) Apart from the above, the Central Government has also framed The Foreigners Order, 1948, is a subordinate legislation, framed exercising powers under section 3 of the Foreigners Act, 1946. Section 7 of the said Foreigners (Tribunals) Order, 1948 deals with **Restrictions of Sojourn in India**, which specifically mandates that;

(i) Every foreigner who enters India on any authority or Visa and Passport, he shall also obtain from the Registration Officer in accordance with Rule 6 of the Registration of Foreigners Rules, 1939 a permit indicating the period for which he would remain in India. In such an eventuality registering authority can restrict the stay at any place specified in the Visa.

(ii) If he has no Passport or Visa, he has to obtain a permit indicating the period during

which he is authorized to remain in India from the Registration Officer.

(iii) He shall not visit any other place or places unless such Visa or permit prescribes and further that before the expiry of the period, he shall leave India.

Under Rule 6 of the said Rules, it is also clear that every foreigner entering India shall submit a report submitting his address in India and other particulars in a specified Form A. Rule 9 also speaks about proof of identity and Rule 8 speaks about the validity of the Certificate of registration.

24. The Competent Authorities under various enactments, Rules and Orders (like Police, Customs Officers, Immigration Officer, FRRO, FRO and other are entrusted with the responsibility of identifying the persons who are not citizens of India, who have entered into India without any Passport or Visa, or even if they have entered into Indian Territory with valid Visa and Passport or stayed in the country with any license or permission from the

competent authority and the same has been expired and in spite of that they are staying in India.

25. Apart from the above, the Competent Authorities under Order 2 of the Foreigners (Report to Police) Order 2001, mandates that - "Where any person who has reason to believe that a foreigner has entered India without any valid documents or is staying in the country beyond the authorized period of his stay, accommodates such foreigner in a premises, occupied owned or controlled by him, for whatever purpose, it shall be the duty of such person to inform the same to the nearest police station within 24 hours about the presence of such foreigner. Therefore, various Acts and the Rules as noticed supra, empowers any person who is having responsibility as a citizen of this country can bring it to the notice of the competent authority about such illegal migrants, or any foreigner who is staying in India beyond the period of license or permit so as to take appropriate

action in this regard, and to deport such persons to their respective countries.

26. In the above said context it is worth to mention here that, Sri C. Shashikantha, learned Addl. Solicitor General of India has furnished a letter addressed by the Joint Secretary to Government of India to all the Principal Secretaries of Home Departments of the States, in No 24013/29/Mis./2017-CSR.III(i) Dated 8th August 2017, in which strict directions have been issued to the concerned authorities Stating that –

"It is essential to identify illegal migrants/person and also keep watch on their activities for preventing any untoward incident that can take place, All States/Union Territories, Administrations are advised to sensitize all the law enforcement and intelligence agencies for taking prompt steps in identifying the illegal migrants and initiate the deportation process expeditiously and without delay".

27. In another letter issued by the Central Government to the State Governments through Chief Secretaries issued in No 25022/63/2017-F.IV dated 28th February 2018, requesting to take appropriate prompt expeditious steps for identification of illegal migrants, regarding their restriction to specified locations as per the provisions of law, capturing their biographic and biometric particulars, cancellation of fake Indian Documents, and for legal proceedings including initiation of deportation proceedings as per provisions of law. Particulars of those illegal migrants who have wrongfully obtained Aadhaar Cards are directed to be shared with UIDAI for appropriate legal action.

28. In the above context it is also worth to mention here a decision of this Court reported in **ILR 2004 KAR 4603** between ***El Mustafa El Fathi*** and ***State Of Karnataka***, wherein this court has observed on facts and law that - " The judges who deal with the offences under the Foreigners Act are justified in giving direction to the

State and concerned authorities to take appropriate steps to deport the accused (foreigner) after serving sentence."

The relevant Para is extracted hereunder:

"7. Every country, in its laws provides for restrictions on entry of foreigners into such country and rules regulating their stay in the country for the period permitted. Measures governing the foreigners are found in the Foreigners Act, 1946 and the Foreigners Order, 1948. Among other things, they provide for expulsion of foreigners, whose entry into India is unauthorized or whose permit for stay in India has expired. They also provide for the detention of such persons pending removal and ban on their re-entry after removal. A court convicting a foreigner for his illegal entry or his over stay in India has a duty to direct for requisite steps for deportation of such foreigner, unless requisite permit to stay in India is granted by the competent Authority. It cannot therefore be said that the Court convicting a foreigner for an offence under Section 14(C) of the Foreigners Act

committed an illegality in directing for requisite steps for deportation of such person from India.'

29. Therefore, in case of a Foreign National (not a citizen of India) entering into the Indian Territory without any Passport or Visa or any permit under the prevalent Indian laws or if he continues in the country even after the lapse of the period prescribed in such Visa or permit has to be considered an illegal migrant and he has to be deported to his country as expeditiously as possible, i.e., immediately after detection and identification of such Foreign Nationals, but strictly in accordance with the laws of India.

30. At the time of detection and identification as noted in the first point, the competent authorities and officers under various enactments and rules as noted above, like police or Vigilance departments, they may also find that apart from committing the offences under the Passport Act or under the Foreigners Act, such illegal

migrants also committed various other offences under various provisions of Indian Penal laws. In such an eventuality, what has to be done by the authorities, also requires to be taken note of.

31. It Goes without saying that an Accused, who has violated any of the penal laws of the country shall be treated on par with the other accused who have violated the same laws and stand on the similar footing. The same procedure has to be adopted by the authorities, with reference to Registration, investigation and report to the Courts, and also inquiry and trial before the competent court of law. Before advertiring to this aspect further, it is just and necessary to bear in mind, as to how determination of nationality of a person can be done before he being deported to his country.

32. The Foreigners Act, 1946 is the present parent enactment which also says that how the determination of

nationality has to be done. Section 8 of the said enactment is the relevant provision which reads as follows:

"8. *Determination of nationality* – (1)

When a Foreigner is recognized as a national by the law of more than one foreign country or where for any reason it is uncertain what nationality if any is to be ascribed to a foreigner, that foreigner may be treated as the national of the country with which he appears to be prescribed authority to be most closely connected for the time being in interest or sympathy or if he is of uncertain nationality, of the country with which he was last so connected:

Provided that where a foreigner acquired a nationality by birth, he shall, except where the Central Government so directs either generally or in a particular case, be deemed to retain that nationality unless he proves to the satisfaction of the said authority that he has subsequently acquired by naturalization or otherwise some other nationality and still recognized as entitled to protection by the

Government of the country whose nationality he has so acquired.

(2) A decision as to nationality given under sub-section (1) shall be final and shall not be called in question in any Court:

Provided that the Central Government, either of its own motion or on an application by the foreigner concerned, may revise any such decision."

33. From reading of the above said provision, it is clear that if a question arises for consideration in respect of a particular person as to which nation he belongs to or whether a citizen of India, the same has to be determined as a condition precedent before his deportation from India. The proviso also clearly discloses that where the foreigner has acquired the nationality of Indian country by birth, he shall, except where the Central Government so directs either generally or in a particular case, he is deemed to retain that nationality unless he proves to the satisfaction of the said authority that he has subsequently acquired by

naturalization or otherwise some other nationality and still recognized as entitled to protection by the Government of the country, whose nationality he has so acquired. Sub clause (2) also makes it abundantly clear that a decision as to nationality given under sub-section (1) shall be final and shall not be called in question in any court. However, the Central Government has the powers to revise any such decision.

34. Section 9 of the said Act deals with '**Burden of proof**' on whom to prove that aspect is also predominantly explained. This provision meticulously casts the burden on the persons who claim that they are Indian citizen and is not a foreign national or an illegal migrant. Section 9 reads as follows:

*"9. **Burden of proof** – If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description the*

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

35. From reading the above said provisions, it is clear that if a question arises with reference to the Act, whether any person is or is not a foreigner of a particular class or description, the onus of proving such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be shall not notwithstanding anything contained in the Indian Evidence Act, 1872 lie upon such person. Therefore, it is the reverse burden cast upon the person who claims that he is not a foreigner or he is not a foreigner of a particular class or description particularly when he claims that he is the citizen of the country of India. That presumption will always be continued till he rebuts the presumption in accordance with the recognized principles of criminal jurisprudence of our

Country. This presumption runs virtually Contrary to the general principles that the proof to be given by the prosecution.

36. In this context, it is also worth to refer the Foreigners (Tribunals) Order, 1964. In pursuance of the powers of the Central Government, on the basis of the parent Act, i.e., Foreigners Act, 1964, the Tribunals have to be constituted by the Central Government for determination of the nationality of any person whose nationality is in dispute or questioned. It is to be taken note of that, the Competent Authority referred to in sub clause (2) of schedule to the Citizenship (Registration of Citizens and Issue of National Identity Cards), Rules 2003, makes it abundantly clear that the Tribunals constituted under the Foreigners (Tribunals) Order, 1964, the Tribunal has got absolute power for the purpose of deciding the nationality of a person which calls for consideration before such Tribunal. As per Order 2(a) of the said Foreigners (Tribunals) Order, 1964, "the Central Government or the

State Government or the Union Territory Administration or the District Collector or the District Magistrate may" by order refer a question as to whether a person is not a foreigner within the meaning of Foreigners Act, 1946, to the Tribunal constituted for the said purpose. After following the procedure as contemplated under Rule 3 of the said order, the Tribunal has to decide the nationality of the said person. Rule 4, the power of the Tribunals is also explained stating that the Tribunal shall have the powers of the Civil Court while trying the suit under the Code of Civil Procedure for the purpose of determining the nationality of a particular person. Constitution of the Tribunal is also explained in Rule 2 itself.

37. Therefore, it is clear that the Tribunals are the competent authority in order to determine the nationality of a person. In this context, it is worth to refer a decision of the Hon'ble Apex Court reported in **(2019) 6 SCC 604** between ***Abdul Kuddus and Union of India and Others***,

wherein the Hon'ble Apex Court has made an observation that –

"The Competent Authority referred to in Para 3(2) of the schedule to Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003, can be without a doubt, the Tribunal constituted under the Foreigners Act i.e., the 1964 Order." Apart from stating the procedure to be followed by the Tribunal and how the proceedings have to be conducted etc., the Hon'ble Apex Court has observed at paragraphs 21 and 22 in the following manner:

21. *Referring to the above amended provisions, it is urged on behalf of the appellants that an order of the Foreigners Tribunal is an executive order which renders an opinion and therefore, it cannot be equated with a Judgment, Summary opinion of the Foreigners Tribunal. It is submitted, is not a detailed order and hence, is not a decision or Judgment. Based on the said submission, it is argued that the opinion formed by the Foreigners Tribunal is not an order of the*

Competent Authority for the purposes of sub-para (2) to Para 3 of the Schedule to the 2003 Rules. Further, the opinion formed by the Foreigners Tribunal being an executive order would not operate as res-judicata. It is highlighted that in some cases, persons who have been declared to be a Foreigner under the Foreigners Act have been included in the draft National Register of Citizens for the State of Assam, while in others siblings and close blood relations of such persons have been named in the draft National Register of Citizens. It is averred that in these cases of contradictions, an aggrieved person should be entitled to take recourse to Para 8 of the schedule to the 2003 Rules.

22. We have examined the contentions and have no hesitation in holding that they have no force. The Foreigners Act and the Citizenship Act including the Rules framed under the two Acts have to be read harmoniously as both the Acts are inter-related and sister enactments. Pertinently, the Rules framed under the Citizenship Act are subordinate legislation. The expression

Competent Authority used in sub-para (2) to Para 3 of the Schedule to the 2003 Rules would obviously and without a doubt has reference to the duly constituted authority under the Foreigners Act. Indeed, the learned counsel for the appellants did not make any attempt to point out and highlight that there could be any other authority covered by the expression "Competent Authority" or which would qualify and can be treated as a Competent Authority referred to in sub-para (2) to Para 3 of the Schedule, albeit in a different context as a Competent Authority that makes reference to the Tribunal in terms of Para 3. On receipt of such reference, the Tribunal has to submit its opinion/decision, which opinion/decision in terms of the Explanation to Section 6-A of the Citizenship Act is final and binding. Decisions of the Tribunal have been given primacy. Thus, the Competent Authority referred to in sub-para (2) to Para 3 of the schedule would be, without a doubt, the Tribunal constituted under the Foreigners Act i.e., the 1964 Order."

38. If the above said two paragraphs are understood meaningfully in consonance with the Citizenship Act and the Foreigners Act, 1946, it is clear that the decisions of the Tribunal have to be given primacy. The expression Competent Authority used in sub para (2) to Para (3) of the Schedule to the 2003 Rules noted above would obviously and without a doubt has reference to the duly constituted authority (Tribunal) under the Foreigners Act and there is no other authority competent to decide this particular issue of determining the nationality of a person. Therefore, it is clear that the Competent Authority has got absolute power to determine the nationality of a person. The expression Competent Authority as is used in the enactments noted above, that makes only reference to the tribunal in terms of para 3 and also the only authority which has empowered to determine the nationality of a person. Therefore, the Hon'ble Apex Court has with all clarity and certainty said that the opinion of the Tribunal is final and binding and the decision of the

Tribunal has to be given the primacy over all other proceedings if any. The Tribunal constituted under the Foreigners Act i.e., 1964 order is the ultimate authority to determine the nationality of a person.

39. In the above said background, it is made clear that even before the Tribunal and also before any court of law, if any question arises with regard to the nationality of a person particularly when the violation of section 14, 14A, 14B offences under the Foreigners Act, are alleged, it is the burden on the person who claims that he is not a foreign national and he has to prove the same before the court of law. But, ultimately even for any reason, when courts may tentatively come to the conclusion that he rebutted the presumption, but still the other authorities as noted in the Foreigners (Tribunals) Order, 1964 u/s.2, can refer the question as to whether a person is not a foreigner within the meaning of Foreigners Act, 1946 to the Tribunal constituted for the purpose of the same.

40. The Foreigners (Tribunals) Order has been subjected to amendment in the year 2019. By way of an amendment the State Government or the Union Territory or the District Collector or the District Magistrate can refer the matter to the Tribunal for determination with reference to the nationality of any person. Therefore, from reading the above said provision, it is abundantly clear that if any doubt arises with regard to the nationality of a person, irrespective of any opinion expressed by any of the authorities or courts, still the authorities mentioned in Rule 2 of the Foreigners (Tribunals) Order, 1964, can make a reference to the Tribunal, and the decision of the Tribunal is final and binding on the parties unless the said Order is set aside in any appeal or re-considered by the Central Government.

41. In the above said backdrop, as I have already referred to in the decision of the Hon'ble Apex Court reported in **(2007) 1 SCC 174** between ***Sarbananda***

Sonowal and Union of India, on this point, it is just and necessary to re-look into the observations that -

"Whenever a judicial or quasi judicial tribunal gives a finding on law or fact, its findings cannot be impeached collaterally or in a second round and are binding until reversed in appeal or by way of writ proceedings. The characteristic attribute of a judicial act or decision is that it binds, whether right or wrong. Thus, any error either on fact or law, committed by such bodies cannot be controverted otherwise by way of an appeal or a writ unless the erroneous determination relates to the jurisdictional matter of that body. The Act and power of judicial review vested with the constitutional courts provide sufficient safeguards, in the present context."

42. Under the above said provisions of law, the determination of the nationality of a person has to be decided by the Competent Authority i.e., the duly Constituted Tribunals only, and the same is binding on the

parties unless the same is set aside or reviewed by competent constitutional court or Central Government.

43. PROCEDURE DURING INVESTIGATION, INQUIRY AND TRIAL:

At the time of detection and identification of a foreign national and offence committed by him and also determination of his nationality, how it should be made has been discussed above in the first point. The Competent Authority under various enactments as noted above and the Police/Vigilance department who are empowered may also find that apart from committing the offences under the Passports Act or under the Foreigners Act by such illegal migrants, they might have also committed various offences under the various provisions of Indian penal laws, in such an eventuality, how they have to be treated and what has to be done by the concerned authorities is the moot question to be resolved?

44. It goes without saying that if an accused, a foreign national who is not a citizen of India, violated not only the provisions under Foreigners Act, but also any of the penal laws of the country, shall be treated on par with other accused. So far as the procedural aspects are concerned, the same procedure requires to be adopted by the authorities with reference to Registration, investigation, inquiry and trial before the competent courts of law.

45. It is worth to refer here, the Foreigners Act, which is enacted in the year 1946 and the same is enacted in addition to Registration of Foreigners Act, 1939, the Indian Passports Act, 1920 and other enactments for the time being in force govern the foreign nationals. Therefore, all the other enactments are also applicable particularly, Passports Act and other enactments which are referable to the Foreigners in order to detect the offence committed by them, apart from the offences committed under the Foreigners Act.

46. In fact, I have carefully examined the Foreigners Act, 1946 and other enactments as noted above, wherein, there is no provision provided for application of a separate procedure by the courts while dealing with such offenders who have committed the offences under the Foreigners Act and other penal laws of the country. Therefore, unless a separate procedure is contemplated or the application of general law like, Code of Criminal Procedure is barred, the common Code of Criminal Procedure, 1973, is with equal force applicable for the purpose of dealing with such offenders particularly by the Investigating agencies and the criminal courts. Section 5 of Cr.PC. also says that –

“Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

47. Therefore, it goes without saying that if there is any special law like Foreigners Act, if it does not provide

any special procedure for the purpose of conducting investigation, inquiry and trial. In such an eventuality, the Code of Criminal Procedure is applicable.

48. In this background, the court has to examine the above said aspects with reference to Registration, investigation, inquiry and trial by the courts.

49. As narrated in the earlier part of this Judgment, the Central Government vide its letters dated 8.8.2017 and 28.2.2018 addressed to the Chief Secretaries to all the State Governments/Union Territory Administrations, have brought it to the notice that the authorities should detect and identify the foreign nationals in the country who have violated the Passport Act or Foreigners Act and to deal with them as expeditiously as possible to bring them to the jurisdiction of the courts and also to take appropriate steps for their deportation expeditiously without any delay. Therefore, it is clear that the police and other Competent Authorities can register a criminal case against such

foreign nationals for the offences alleged to have been committed by them and register case and investigate and file appropriate report to the competent Court. All the provisions of Cr.P.C are ipso facto applicable to those foreign nationals also.

50. So far as this particular case is concerned, without over burdening this judgment, I am mainly concerned with the provisions of bail as to whether the foreign nationals are also entitled for the remedies as contemplated under the provisions of Cr.P.C.

51. It is also worth to note here that in none of the above said special enactments including the Foreigners Act, 1945, there is no bar for the courts exercising the powers under Chapter 33 of Cr.P.C particularly with reference to the provisions of Sections 436 to 439 of Cr.P.C. In the absence of any bar in the special enactment, the said provisions are equally applicable to

the foreign nationals so far as the bail provisions are concerned.

52. Once a case is registered when it is said that the provisions of bail is also applicable, but the question arises as to what is the procedure that should be followed at the time of granting or refusing bail to such persons under the provisions of Sections 436 to 439 of Cr.P.C. It is quiet natural that under the Foreigners Act, 1946, the foreigners who have violated the provisions of the said Act, they are not supposed to wonder around the country freely as if they are the citizens of the country, even if bail is granted to such persons. The bail cannot be treated as an authority or license to move around the country as if a legal document by the competent authorities. Therefore, the courts, without hearing the Competent Authorities, and the State, and without imposing necessary conditions, no such bails can be granted to such person to move freely anywhere in India even for a day without Passport or Visa, as he is presumed to be an illegal migrant. Therefore, it

goes without saying that, an under-trial prisoner even during the investigation, inquiry and trial, whether he should be given a free hand to move anywhere as he likes, or his movements have to be restricted, or he has to be detained anywhere else is the question i.e., to be considered by the Courts.

53. Of course, in the above said context, as noted above, Section 9 of the Foreigners Act '**Burden of Proof**' will come into play, which raises a presumption that if in any case not falling u/s.8, any question arises with reference to this Act or any Order made or direction given thereunder whether any person is or is not a foreigner of a particular class or description as the case may be, shall notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person to show to the authorities or Court, that he is not a foreign national i.e., he was authorized to remain in Indian territory.

54. In this Context section 3 of the Foreigners Act 1946 also play a dominant role, which entrusted certain powers to the competent authorities. The said provision reads as follows.

"3. Power to make orders.—

(1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into [India] or their departure there from or their presence or continued presence therein.

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner—

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

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

(c) shall not remain in [India] or in any prescribed area as therein;

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

(d) shall remove himself to, and remain in, such area in [India] as may be prescribed;

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

- (i) requiring him to reside in a particular place;
- (ii) imposing any restrictions on his movements;
- (iii) requiring him to furnish such proof of his identity and to report such particulars to

such authority in such manner and at such time and place as may be prescribed or specified;

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

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

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

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

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

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

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

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

(3) Any authority prescribed in this behalf may with respect to any particular foreigner make orders under clause (e) or clause (f) of sub-section (2).

3A. Power to exempt citizens of Commonwealth Countries and other persons from application of Act in certain cases.—

(1) *The Central Government may, by order, declare that all or any of the provisions of this Act or of any order made there under shall not apply, or shall apply only in such circumstances or with such exceptions or modifications or subject to such conditions as may be specified in the order, to or in relation to—*

(a) *the citizens of any such Commonwealth Country as may be so specified; or*

(b) *any other individual foreigner or class or description of foreigner.*

(2) *A copy of every order made under this section shall be placed on the table of both Houses of Parliament as soon as may be after it is made. "*

55. On meticulous reading and meaningful understanding of the above said provisions, it clears out the doubt that, a foreigner who is presumed to be an illegal migrant cannot remain in India or wonder or move around freely, unless and until he is authorized or

permitted by the Competent Authorities to remain in India with certain conditions regulating his conduct with specifications as provided u/s.3 (2) (a) to (g) of the Foreigners Act. This provision empowers the competent authorities for any valid reasons to exercise their powers under section 3(2) (a) to (e), restricting the movements of a foreigner, with specifications. In that eventuality Particularly under Section 3(2)(f) such person shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions; noted at sub clause 3(2)(a) to (e). In fact section 3(2) (g) empowers the competent authority that, they can arrest and detain or confine such persons, if no license or permission granted under section 3(a) to (e) and also make a provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters as may be, in the opinion of the Central

Government, be expedient or necessary for giving effect to this Act.

56. Therefore, subject to the above said conditions, the court has to examine while granting or refusing bail as to whether the said person has to be detained anywhere else other than regular jails. It goes without saying that, after registration of a criminal case, during investigation, inquiry and trial, the accused persons are entitled to make application for grant of bail as a matter of right. The court has to examine depending upon the facts and circumstances of the case applying the general guidelines for grant of bail and if for any reason, the court comes to the conclusion that the accused is entitled to be released on bail, the court has to examine whether the said person has to be kept in any detention centers during the pendency of investigation, inquiry or trial, even after acquittal or conviction of the said person.

57. As noted above, granting bail, should not be understood that it amounts ratifying or legalizing their illegal stay in the country. Therefore, the courts have to pass an order only after hearing the Competent Authorities (State) who are empowered to pass appropriate orders u/s.3 (2) of the Foreigners Act to ascertain whether the competent authority has got any grievance to keep the accused persons anywhere else other than the jails till the investigation, inquiry or trial is concluded. Further, the Competent Authorities can put any conditions, to them and on taking bond with or without surety for the due observance of conditions, they can be released on bail. Otherwise, if the accused persons have to be released on bail, the Central Government or the State Government as the case may be, have to make necessary arrangements to detain them in separate detention centers, till they are deported to their countries. This does not mean to say that the courts have no power to keep those persons in jail

itself. It all depends upon the facts and circumstances of each case.

58. If the offences are committed apart from the Foreigners Act and Passports Act, and under any other penal laws, for the time being in force, where serious allegations are made, having committed serious heinous offences and if the court on considering the gravity of the offence, nature of allegations made against them and in respect of that if it comes to the conclusion that even for such serious offence, apart from the Foreigners Act and Passports Act, if the court inclines to grant bail, then the court can definitely order to keep them in the jail itself because they should also be treated on par with the other accused persons who have committed similar offences under various other penal laws of the country. If the offence committed either under the Passports Act or the Foreigners Act, and *prima facie* found that they are the foreign nationals and no other offences under any other penal laws of the country has been committed, in such an

eventuality, they should be treated as foreign nationals and till they are deported, normally, they should not be detained in the prison if bail is granted, the court has to direct them to be detained in the separate Detention Centre established by the Central Government or the State Government as the case may be. If for any reason they are not entitle for bail they can be ordered to be kept in regular jails.

59. During the course of inquiry and trial, if the court finds that the Competent Authorities while filing the charge sheet have not complied with the legal requirements, if for any reason, the court cannot take cognizance of any offence alleged by the competent authorities under the various enactments, in such an eventuality, the Competent Authorities still have got power to refer the question of nationality of such person for determination as per the procedure noted above, while dealing with the determination of the question of nationality of alleged foreign national and to take

appropriate orders from the Tribunal constituted under the Foreigners (Tribunals) Order, 1964. The appropriate Governments shall also take steps to deport if they are determined as foreign nationals.

60. For any reason, the proceedings before the criminal court or before any court, where the proceedings are initiated against a foreign national under the Foreigners Act or under any other penal laws, which raises the question of nationality, is quashed by the competent court like High Court or Supreme Court u/s.482 of Cr.P.C. even in such an eventuality also, as noted above, the Competent Authorities as per the Foreigners (Tribunals) Order, 1964, can still refer the question as to whether a person is not a foreigner within the meaning of the Foreigners Act, 1946, to a Tribunal constituted for the purpose of the same. If the courts are reluctant to grant bail for any reason, though the offences alleged only falls under the Foreigners Act, or under the Passports Act, only and the determination of his nationality is pending or it is

to be considered by such court, in such an eventuality also, the court can order to keep them in regular jails.

61. It is obvious that whether the accused is enlarged on bail or kept in jail or in the Detention Center is entitled to be tried before the court in accordance with law for the alleged offences committed by him.

62. Further, the court at the time of framing of charges, discharges or releases the accused and close or drop the proceedings for any technical reasons and if the Competent Authorities who have filed the charge sheet to the concerned court, if they are of the opinion that the accused person is still a foreign national and he is not an Indian citizen, then also they can invoke the provision of section 3 of the Foreigners (Tribunals) Order, 1964 for referring the said question as to whether such person is not a foreigner for the purpose of taking appropriate steps to deport such person. Such remedy is not barred to the competent authorities.

63. Section 3A of the Foreigners Act, 1946, also empowers the Central Government to exempt any person from the purview of the Act and declare such persons legality in staying in the country. Therefore, the authorities taking action against such person under the Foreigners Act shall also bear in mind the above provisions, and ascertain whether such person fall within the category as per Section 3A of the Foreigners (Tribunals) Order, 1964.

64. (D) **PROCEDURE AFTER TRIAL [ACQUITTAL OR CONVICTION TILL DEPORTATION OF SUCH FOREIGN NATIONAL TO HIS COUNTRY:**

After the trial, if the accused is acquitted or convicted, what is the procedure that should be followed till his nationality is decided, if it is pending or if he was convicted for the offence punishable under Section 14, 14A and 14B of the Foreigners Act for having found that he is an illegal migrant, it goes without saying that if the court

convicts an accused holding that he is a foreign national and not entitled to be continued in India, the deportation process should be adhered to in order to send back the said foreign national to his country. But for serving the sentence imposed upon him he shall be kept in detention centers and not in regular jails till he is deported, after serving the sentence or ordered to be released from jail for any other reasons.

65. The learned Addl. Solicitor General of India Sri Shashikantha has produced document No.3 before the court in No.25022/19/2014.F1, dated 29.04.2014 of Government of India, Ministry of Home Affairs (Foreigners Division) addressed to the Principal Secretary (Home) of all State Governments/Union Territory/ Administrations with regard to Consolidated instructions regarding procedure to be followed for deportation/repatriation of a foreign national.

66. On careful perusal of the same, it is observed that the Central Government has delegated its power to State Governments and other competent authorities u/s.3(2)(c) and 3(2)(e) of the Foreigners Act, 1946 for the purpose of taking appropriate action whenever a case has been registered against a foreign national vide its Notification, New Delhi-2 dated 19th April, 1958 in S.O.Nos.590 and 591 (F.No.4/3/56-(I)F.I.) and (F.No.4/3/56-(II)F.I.) respectively. By virtue of the said powers there is a direction issued to the Competent Authorities like Police, Foreigner Regional Registration Officer (FRRO)/FRO to examine the valid travel document of a foreigner to ascertain whether he is an illegal migrant and to take appropriate action to prosecute him and to take appropriate action to deport him from the country as early as possible. In the said letter, it is directed that all the State Governments and the Competent Authorities were requested to ensure that such process has to be initiated from the date of registration of a case itself and if

the trial of the accused is on and if the accused is convicted, action should be taken much before the actual date of completion of the sentence so that the travel document of the foreigner is made available by the Embassy/High Commission concerned well before he/she completes the sentence. The said letter also directs that, the concerned authorities may also impose restriction on the foreigner on the completion of their jail terms, restricting the movements of those persons or they should be kept in Detention Centre/Holding Centre/Camp to ensure their availability for expeditious deportation or repatriation to their country. There is also a direction in the said letter that the respective Governments were also advised to ensure all foreign nationals who have completed their sentence but whose deportation or repatriation is awaited due to non-confirmation of nationality, non-issue of travel documents and/or delay in arranging air tickets by the foreigner concerned or by the Mission of the country concerned for deportation, they may be released from jail

but they shall be kept at appropriate places or in detention centers. Such Detention Centers as many required have to be established which are having basic facilities of Water, Electricity with hygiene location and appropriate security.

67. The learned ASGI also produced another letter No.25022/45/2019-F.1 dated 1.7.2019 from Government of India, Ministry of Home Affairs, addressed to the Principal Secretary (Home) of all the State Governments/ Union Territory Administrations, and DGP. of all the States and to the FRROs. Requesting them to ensure that this process is initiated immediately on arrest of the foreigner or on filing of FIR, so that the process of nationality verification is completed by that time, the travel document of the foreigner is made available by the Embassy/High Commission concerned, so that the said person can be deported immediately after the completion of the trial and serving sentence if any.

68. Therefore, it goes without saying that immediately after the registration of the case, the Competent Authorities having found or suspected that the person involved in the said case is a foreign national, who has according to them has no right to be in India or continued to be in India, but for the proceedings against him, before the court of law or Tribunal, in such an eventuality, all necessary steps to be taken subject to the orders of the competent court to detain them in a Detention Center till they are deported to their country.

69. The learned Additional Advocate General has produced a letter dated 09.01.2019 in No.25022/32/2014-F.I. (VOL.II) of Government of India, Ministry of Home Affairs addressed to the Additional Chief Secretary (Home) and Principal Secretary (Home) of all the State Governments/Union Territory Administrations, with reference to establishment of Model Detention Center/Holding Centre/Camp Manual. The document reveal that, the Central Government, has drafted detention

centers manual, as directed by the Hon'ble Apex Court in their orders dated 12.9.2018 and 20.9.2018 in IA No.105821/2018 in WP (Civil) No.406/2013 filed by Collaborative Network for Research and Capacity Building, Guwahati, for the purpose of setting up of a Detention Center/Holding Centre/Camps in various States and Union Territories and to prepare a manual for Detention Centers.

70. It is also stated in the said letter that the Central Government has prepared a draft of Model Detention Centre for the purpose of keeping such illegal migrants or the accused persons in connection with the above said enactments. Therefore, from the above said directions, the Detention Centers have to be established for the purpose of keeping the accused persons in such Detention Centers till their deportation takes place from the Indian country.

71. In addition to the above, the learned Addl. Solicitor General of India has also produced the approved,

Model Detention Centre/Holing Centre/Manual, 2019. The said document reveals that, it contained all the details in four chapters:

Chapter 1 contained – Legal provisions with regard to deportation and detention of a foreign national;

Chapter 2 contained – Instructions issued by the Ministry of Home Affairs with regard to Detention Centers;

Chapter 3 contained – Categories of persons who may be detained in a Detention Centre/Holding Centre/Camp is explained; and

Chapter 4 contained – Amenities to be provided in the Detention Centers/Holding Centers/Camps.

72. According to the said manual, the powers of the Central Government, u/s.3(2)(c) and 3(2)(e) of the Foreigners Act, 1946, have been delegated to the State Government and Union Territory Administrations for establishment of Detention Centers and how the Detention

Center should be and what are the facilities that should be provided in the Detention Centers.

73. On careful perusal of this manual, the Central Government has directed the State Governments and Union Territories to provide all necessary facilities for the inmates to maintain standards of living in consonance with human dignity and all basic amenities like electricity, drinking water (including water coolers), hygiene, accommodation with beds, sufficient toilets/baths with provision of running water, communication facilities, provision for kitchen etc., shall be provided. There should be proper drainage and sewage facilities. All the accommodations should provide basic requirements of healthy living. It is also directed that CC TV cameras shall be installed at various centers for monitoring movements of detainees, apart from providing all other basic necessities.

74. Therefore, it is clear from the above aspects that, the Central Government on the directions of the Hon'ble Apex Court has taken steps and directed the State Governments to establish the Detention Centers as and when necessary and at the places where it is necessary for the purpose of detaining the foreign nationals till their case is decided by the court or if they are convicted till they serve the sentence and deported to their country.

75. This court in order to ascertain the steps taken by the State Government in pursuance of the said directions issued by the Central Government on various occasions called for information from the Competent Authorities to file their necessary affidavits regarding steps taken by them to establish the Detention Centers in Bengaluru and other various places in the State.

76. In pursuance of the directions issued by this Court, a memo was filed by the Additional Advocate General(AAG) with a document dated 31.10.2019 stating

that, the Chief Secretary, Government of Karnataka in a meeting with Principal Secretary, Social Welfare Department and Additional Commissioner of Police, Intelligence and others taken a decision with regard to establishment of foreigners Detention Center at Bengaluru and also other places in the State. They have filed the resolution dated 21.10.2019 wherein the Competent Authorities have taken a decision to establish Detention Centers with standard operating procedure.

77. On 18.11.2019, an affidavit was filed by one Mr. K. Nanjundegowda, Police Officer on the query raised by this court stating that, the Government has established a temporary Detention Centre, presently for the purpose of keeping the foreign nationals convicted and again whose cases are pending, providing all facilities, situated near Sarjapur Police Station within the jurisdiction of Sarjapur Police Station which is having twelve two bed room houses, fitted with CCTVs, and it is ready for occupation of the inmates.

78. Dr.Rajanish Goel, Additional Chief Secretary to Government of Karnataka has also filed a detail affidavit dated 8.11.2019, wherein he has categorically stated that in pursuance of the directions issued by this court vide order dated 5.11.2019 to furnish the information about the establishment of Foreigners Detention Centre within the state of Karnataka as per the empowerment given to the State by the Central Government. It is submitted that the Central Government has circulated the model Detention Centre/Holding Centre/Camp manual prepared in pursuance of the directions of the Hon'ble Apex Court order dated 12.9.2018 and 20.09.2019 on IA No.105821/2018 in Writ Petition (Civil) No.406/2013. According to those directions, the State Government has also prepared Standard Operating Procedure ('**SOP**' for short) and Detention Centers will be established and maintained as per the guidelines contained in the SOP. It is also stated that the State Government has identified a place and building, called Government Pre-Metric Boys

Hostel, Bengaluru, which is situated at Sondekoppa Village, near Tavarekere, Bangalore North, which cater the needs of all the foreign nationals to be detected and detained till their deportation. He has also produced the SOP and also the photographs of the Detention Center and it appears the same is ready for its inauguration.

79. Mr. Goel has also filed another affidavit on 26.11.2019 stating that the State Government has taken steps to establish 35 temporary Detention Centers in almost all the districts temporarily including Bengaluru City and they are all equipped with basic facilities such as Bed rooms, Bath rooms, water and electricity, drinking water facility, medical facility, food and sufficient police protection as per the requirement and directions of the Central Government and the Hon'ble Apex court. The said affidavit is also annexed with a document which shows that in all the District Headquarters the Detention Centers are identified and they are established.

80. On 11.12.2019, the Additional Advocate General has also filed a memo along with certain documents, wherein it is specifically stated that the Department of 'Women and Child Development' have also stated that they have taken special care and protection to the children and women who are or who may be kept in Detention Centers and they have established Child Welfare Committees throughout the State and the Committees are taking all the responsibilities of food, clothing, shelter, education, Vocational training, Recreation facilities etc., as per the Juvenile Justice (Care and Protection of Children) Model Rules, 2016. Further, the committee will also take appropriate action to repatriate the children belonging to other Districts, States or country by following all necessary procedure. It is clarified that the committee only can take appropriate steps so far as the juveniles and minors who are not implicated in any crime born to foreigners.

81. Therefore, from the above said submissions and the affidavits filed before the court, it is clear that the

State Government has also taken appropriate steps for the purpose of establishing as many Detention Centers and Holding Centre/Camps as per the model manual issued by the Central Government.

82. Under the above said facts and circumstances of the case, it is clear that as per the directions issued by the courts on various dates for establishment of Detention Centers in almost all the districts including Bengaluru City said to have been accomplished on the basis of the affidavits filed before the court by the responsible officers of the State. However, it is made clear that it is an endless process, the government has to take necessary steps as and when need arises to establish detention centers to cater the needs, with all basic necessities.

83. In view of the above, it can be said that whether the accused is released on bail or acquitted, or his nationality is questioned and not yet determined, it is the Competent Authorities who have to take a decision to keep

him in the Detention Centre or he should be released by taking bond with or without sureties specifying the conditions for his stay in any particular place as per Section 3(2)(a) to (f) of the Foreigners Act. If the accused person is detained in the jail by the court, in such an eventuality, the court has to examine the situation whether he should be kept in jail or in the Detention Centre depending upon the facts and circumstances of each case and the heinous nature of offence committed by him other than the offences under the Foreigners Act and Passports Act etc., and further if the persons are acquitted even then the Competent Authorities have got any doubt with regard to the nationality of such person, can file appropriate application before the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 and also keep such person in the Detention Centre till the deportation takes place by the Competent Authority. Further, if the accused is ordered to kept in regular jail either rejecting the bail or is convicted and is sentenced to

undergo imprisonment, appropriate Government have to take or initiate action from the date of registration of the FIR and keep the deportation papers ready to deport the said person immediately after the sentence is completely undergone by such person and thereafter, immediately, deport such person to their mother country.

84. In this context, it is also just and necessary for this court to guide the concerned as to how the courts have to deal with the foreigners if the offence is committed and they are before the court.

85. Of course, this court in a decision reported in **ILR 2016 KAR 1232** between ***Christian Chidieere Chukwu and The State of Karnataka by K.R. Puram Police Station, Bengaluru and another*** wherein this court has held that –

"Normally, while considering a bail application, Criminal Courts will see forum of trial and whether they are punishable with death or imprisonment for life. But in cases of over

stay of a foreign national in India, it amounts to illegal stay till he/she is deported and if he/she is released and trial takes a lot of time, on the basis of the order of bail, he/she will be allowed to stay in India till the conclusion of the trial and this would be contrary to the provisions of Section 14 of the Foreigners Act, 1946”

Though such observation was made, but there is no mention as to how they should be kept in prison. In view of the same, as I have noted that, depending upon the facts and circumstances of each case, they should be kept in Detention Centre or in regular Jails by following certain procedure as noted above.

86. In the above cited case, the court has also directed that if a foreign national is involved in any offence including the Foreigners Act, the concerned police department and other Foreign Regional Registration Officer have to share their respective data; there should be periodical meeting to share the opinion in order to monitor such persons.

87. The court also observed that in the event of filing charge sheet for the offence under the Foreigners Act or any other Act or penal provision or local laws, the court has to take up such accused on trial on top priority and dispose of the said case as expeditiously as possible. The Public Prosecutors should also bring it to the notice of the court and request the court to take up the case on priority and examine all relevant witnesses without undue delay and steps to be taken to deport the said person after the sentence being undergone.

88. The court also observed that while convicting the accused persons in such cases and while imposing sentence, a positive attempt must be made by the judges of the criminal court by writing judgments preferably in English and also recording evidence in English in order to make them to understand the judgment.

89. Apart from the above, this court also feels it just and necessary to direct the trial Courts to deal with the

matters where a foreign national is involved and alleged to have committed the offence under the Foreigners Act and other offences:

(1) The court has to at the initial stages itself provide opportunity to the State/competent authorities to file their objections if any for the purpose of disposing of the bail petition filed by the accused persons and also to take care whether those persons have to be kept in jail or to be kept in Detention Centers even though the court inclined to grant bail to them and pass appropriate order in this regard in consultation in view of the powers of the Competent Authorities u/s.3(2)(a) to (f) of the Foreigners Act.

(2) If the court allows the bail petition, the court, as required with reference to the restrictions to be put to the foreign nationals and bond to be taken from them and whether they have to be detained in the Detention Centre or to be kept in a particular specified places if the

Competent Authority under takes to monitor their movements.

(3) The court has to take into consideration the nature of allegations and the facts of the case at the time of taking cognizance or framing of charges and if for any reason the court, decline to take cognizance or releases or discharges the accused, then also it should be brought to the notice of the Competent Authority so as to enable them to take appropriate steps for determination of nationality of such person by approaching the tribunal and till then, if necessary, the competent authorities may detain such persons in the Detention Centers. The same principle is also applicable whenever the accused is acquitted.

(4) If the accused is convicted by the court, the court has to direct the Competent Authorities to take appropriate steps for deportation of such foreign national immediately after serving the sentence by them. If the

accused is sentenced, in such an eventuality, they should be kept in regular prison and not in the Detention Centre as they are considered to be the convicts and they are to be treated on par with the other convicts of our country.

90. **REGARDING DETENTION OF WOMEN AND CHILDREN:**

It is quite understandable that the inmates of prisons who are foreign nationals are inherently were at a more vulnerable position. They face so many issues such as specific needs but also because of language, lack of ties in the country and difficulty in adjusting to the culture and society of a foreign land. Therefore, more care requires to be taken in respect of such women in the jail particularly who are having children. The children are also vulnerable. It should be borne in mind that the children are the citizens of future era whether they belongs to India or any country. Therefore, proper bringing up of the children nourishing and nurturing them with good environment and atmosphere and giving them proper education and training

if necessary to make them the good citizens of the country. Therefore, the development of the children is a paramount consideration whether the said child is an orphan or it is neglected by the parents or even the said child belonged to any foreign country.

91. In this context, it is worth to be noted that in 1959, the United Nations declaration with reference to the rights of the child was adopted by the General Assembly of the United Nations and in Article 24 of the International Covenant on Civil and Political Rights, 1966. In the said declaration, the importance of the child has been fairly recognized and accepted by India as a party to the said declaration the said international charters have been ratified by the Government of India. Therefore, India has to identify and respect and implement the rights of the children whether they belonged to Indian country or any country who are residing in India.

92. The women prisoners who are also to be taken care of considering their rights and as well as vulnerability of them and susceptible for exploitation and easily become prey's under various unavoidable and precarious, and peculiar circumstances in the jails or while in detention centers. In this regard, there are various Rules under the Prisoners Act and also as well as the Prison Rules. Presently, I am not concerned with those Prisoners Act or Rules, which has already taken care of as to how the women have to be treated in the jails.

93. What I would like to impress upon the Governments is that whatever the facilities given and care they take with reference to Women and children in the jails on the basis of the Prisons Act and Prisons Rules and Manuals, at least same facilities or even more facilities to be provided depending upon the circumstances of the situation and the nature of the persons particularly women and children though they are kept in jails or Detention Centers. It is just and necessary to say that in the present

day situation, considering the great traditions of our country as to how we are treating, respecting and taking care of women and children, particularly so far as the prisoners are concerned much care has to be taken if possible to avoid any social stigma that may be attached to women living in prison or Detention Center, as the same often severely affect and attach stigma upon them even after they are released. It is also to be taken note of by the concerned Governments that particularly when a foreign national women is kept in Detention Center or in jail, apart from providing basic necessities to them they must also be provided with opportunities to have contact with their respective counsels, embassies, through Competent Authorities. In fact, the jail authorities who are entrusted with the task of maintaining Detention Centers must inform the respective consulates about the details of their incarceration and the contact must be established with the inmates appropriately. If necessary, the foreign inmates must be provided with translators to help them to

communicate with the prison officials and other inmates for easy understanding of the Rules and procedure and to communicate their grievance to the Competent Authorities.

For the purpose of effective post release of the accused and their psychological well being, it is essential for the said persons to communicate with their family, friends regularly by allowing the friends and family persons to the jails and to the Detention Centers or by means of using new technological deals by way of video conferencing for proper communication.

94. Especially female prisoners living with their children need more care and nourishment. The Detention Center authorities and the jail authorities are also provide if possible with added food provisions and medical facilities to meet their dietary requirements. So far as the women are concerned, as there is no necessity for this court to go in detail because prison manual and Prisoners Act itself takes care and to keep the women prisoners separately not to allow them to mingle with the male prisoners and

various provisions have been made under several enactments and Rules to take care of the women in the jail. I can only remind the authorities to follow them very meticulously.

95. If the child belonged to a foreign national and where both the parents or one of the parent particularly mother is in jail, then necessary steps should be taken in lieu of the law that, the child must always enjoy all the rights as set forth in the United Nations declaration of the rights of the Child whether it is outside or inside the jail without distinction or discrimination on account of race, colour, language, origin of political or other national or social by birth or other status. Further, the child shall enjoy the special protection and shall be given opportunities and facilities by law and other means to enable it to develop physically, mentally and socially in a healthy and normal manner with dignity. The child is also entitled to receive education which shall be free and compulsory at least in the elementary stages even if the

child happens to be in the jail or detention center along with its mother. The concerned states while framing the laws particularly in Detention Centers, shall respect the right of the child, who is actually separated from one or both the parents and the State should make arrangement to safeguard the interest of such child.

96. In fact, there is no necessity for this court to give a detailed separate guidelines as the subject matter involved in this particular case, has already been dealt with by the Hon'ble Apex Court in a decision reported in **(2007) 15 SCC 337** between ***R.D.Upadhyay and State of AP and others***, wherein the Hon'ble Apex Court while dealing with the matter with reference to the plight of the under trial prisoners languishing in various jails in the country with regard to the children in jail with their mothers who are in jails either as under trial prisoners or convicts. Sometimes the children, for no fault, but by force or under such circumstances have to stay in jail with their mother in some cases because of the tender age of

the child. While in other cases, it may be because there was no one to take care of the child when the mother has been in jail. In such circumstances, the environment is certainly not congenial for the development of the children.

97. Taking into consideration the various enactments particularly the Juvenile Justice Act, the Hon'ble Apex Court has called for the opinion from all the states and also collected research study of children, women prisoners in jails conducted by the National Institute of Criminology and Forensic Sciences. In the above said judgment at paragraph 14, the Hon'ble Apex Court has in detail extracted the salient features of the study and brought to the notice of all the Governments in February, 2002. After the said report being communicated to the States, the Hon'ble Apex Court has also called for the opinion of the various states in order to safeguard the interest of the women and children languishing in jail. It was suggested by the Hon'ble Apex Court that the arrest of women suspects be made only by lady police, as such suspicion

itself affects the innocent children who are taken into custody with their mother to avoid arrest of innocent. It is also suggested, Periodic meetings should be available to the women with the child for up-keeping of the rights of the children.

98. The Karnataka State has also put forward its opinion by stating that the children are allowed to live with their mother up to the age of six years and education is also looked after by the various NGOs, when the children are left to be in jail. After considering the reports and as well as the representation of the various states, the Hon'ble Apex Court has formulated various guidelines which in my opinion require to be extracted in this judgment:

"26. In light of various reports referred to above, affidavits of various State Governments, Union Territories, Union of India and submissions made, we issue the following guidelines :

1. A child shall not be treated as an under trial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right.

2. Pregnancy:

a. Before sending a woman who is pregnant to a jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as for providing pre- natal and post-natal care for both, the mother and the child.

b. When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall report the fact to the superintendent. As soon as possible, arrangement shall be made to get such prisoner medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery

and so on. After ascertaining the necessary particulars, a report shall be sent to the Inspector General of Prisons, stating the date of admission, term of sentence, date of release, duration of pregnancy, possible date of delivery and so on.

c. *Gynecological examination of female prisoners shall be performed in the District Government Hospital. Proper pre-natal and post-natal care shall be provided to the prisoner as per medical advice.*

3. Child birth in prison:

a. *As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility.*

- b. Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.*
- c. As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.*

4. Female prisoners and their children:

- a. Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.*
- b. No female prisoner shall be allowed to keep a child who has completed the age of six years. Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department. As far as possible, the child shall not be transferred to an institution outside the town or city where*

the prison is located in order to minimize undue hardships on both mother and child due to physical distance.

- c. *Such children shall be kept in protective custody until their mother is released or the child attains such age as to earn his/her own livelihood.*
- d. *Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet the mother at least once a week. The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons.*
- e. *When a female prisoner dies and leaves behind a child, the Superintendent shall inform the District Magistrate concerned and he shall arrange for the proper care of the child. Should the concerned relative(s) be unwilling to support the child, the District Magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or*

hand the child over to a responsible person for care and maintenance.

5. Food, clothing, medical care and shelter:

- a. Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/U.T. Government shall lay down the scales.*
- b. State/U.T. Governments shall lay down dietary scales for children keeping in view the calorific requirements of growing children as per medical norms.*
- c. A permanent arrangement needs to be evolved in all jails, to provide separate food with ingredients to take care of the nutritional needs of children who reside in them on a regular basis.*
- d. Separate utensils of suitable size and material should also be provided to each mother prisoner for using to feed her child.*
- e. Clean drinking water must be provided to the children. This water must be periodically checked.*

- f. Children shall be regularly examined by the Lady Medical Officer to monitor their physical growth and shall also receive timely vaccination. Vaccination charts regarding each child shall be kept in the records. Extra clothing, diet and so on may also be provided on the recommendation of the Medical Officer.*
- g. In the event of a woman prisoner falling ill, alternative arrangements for looking after any children falling under her care must be made by the jail staff.*
- h. Sleeping facilities that are provided to the mother and the child should be adequate, clean and hygienic.*
- i. Children of prisoners shall have the right of visitation.*
- j. The Prison Superintendent shall be empowered in special cases and where circumstances warrant admitting children of women prisoners to prison without court orders provided such children are below 6 years of age.*

6. *Education and recreation for children of female prisoners:*

- a. *The child of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crèches under the charge of a matron/female warder. This facility will also be extended to children of warders and other female prison staff.*
- b. *There shall be a crèche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below three years of age shall be allowed in the crèche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said creche and nursery outside the prison premises.*

7. *in many states, small children are living in sub-jails that are not at all equipped to keep small children. Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a*

conducive environment there, for proper biological, psychological and social growth.

8. the stay of children in crowded barracks amidst women convicts, under trials, offenders relating to all types of crimes including violent crimes is certainly harmful for the development of their personality. Therefore, children deserve to be separated from such environments on a priority basis.

9. Diet:

Dietary scale for institutionalized infants/children prepared by Dr. A.M. Dwarkadas Motiwala, MD (Paediatrics) and Fellowship in Neonatology (USA) has been submitted by Mr. Sanjay Parikh. The document submitted recommends exclusive breastfeeding on the demand of the baby day and night. If for some reason, the mother cannot feed the baby, undiluted fresh milk can be given to the baby. It is emphasized that "dilution is not recommended; especially for low socio-economic groups who are also illiterate, ignorant, their children are already malnourished and are prone to gastroenteritis and other infections due to poor living conditions and

unhygienic food habits. Also, where the drinking water is not safe/reliable since source of drinking water is a question mark. Over-dilution will provide more water than milk to the child and hence will lead to malnutrition and infections. This in turn will lead to growth retardation and developmental delay both physically and mentally." It is noted that since an average Indian mother produces approximately 600 - 800 ml. milk per day (depending on her own nutritional state), the child should be provided at least 600 ml. of undiluted fresh milk over 24 hours if the breast milk is not available. The report also refers to the "Dietary Guidelines for Indians - A Manual," published in 1998 by the National Institute of Nutrition, Council of Medical Research, Hyderabad, for a balanced diet for infants and children ranging from 6 months to 6 years of age. It recommends the following portions for children from the ages of 6-12 months, 1-3 years and 4-6 years, respectively: Cereals and Millets - 45, 60-120 and 150-210 grams respectively; Pulses - 15, 30 and 45 grams respectively; Milk - 500 ml (unless breast fed, in which case 200 ml); Roots and Tubers - 50, 50 and 100 grams respectively;

Green Leafy Vegetables - 25, 50 and 50 grams respectively; Other Vegetables - 25, 50 and 50 grams respectively; Fruits - 100 grams; Sugar - 25, 25 and 30 grams respectively; and Fats/Oils (Visible) - 10, 20 and 25 grams respectively. One portion of pulse may be exchanged with one portion (50 grams) of egg/meat/ chicken/fish. It is essential that the above food groups to be provided in the portions mentioned in order to ensure that both macronutrients and micronutrients are available to the child in adequate quantities.

10. Jail Manual and/or other relevant Rules, Regulations, instructions etc. shall be suitably amended within three months so as to comply with the above directions. If in some jails, better facilities are being provided, same shall continue.

11. Schemes and laws relating to welfare and development of such children shall be implemented in letter and spirit. State Legislatures may consider passing of necessary legislations, wherever necessary, having regard to what is noticed in this judgment.

12. The State Legal Services Authorities shall take necessary measures to periodically inspect jails to

monitor that the directions regarding children and mother are complied with in letter and spirit.

13. The Courts dealing with cases of women prisoners whose children are in prison with their mothers are directed to give priority to such cases and decide their cases expeditiously."

99. In view of the above said guidelines, it appears, the Karnataka State Government has also taken various steps in this regard. The Detention Center manual which I have already referred to, submitted by the learned Addl. Solicitor General of India, **in Chapter 4, item No.4.30**, says that - "Adequate provision should be made for medical attendance for the detainees. A mobile medical dispensary may also be provided for attending to the medical emergency 24 x 7. Posting/detailing of a staff nurse/training of some staff for giving first aid may also be considered. Any additional medical facilities to be provided may be considered by the State Governments/Union Territory Administrations concerned. **Item No.4.31** says that - Special attention may be given to the

women/nursing mother, transgender detainees, children etc., **Item No.4.32** says that - Crèche facilities for children may be provided. **Item No.4.33** says that - Children lodged in the Detention Center may be provided educational facilities by admitting them in local schools nearby. **Item No.4.34** says that - A skill centre may also be provided within the detention centre.

100. The learned Addl. Solicitor General of India also produced a communication letter in No.23/IMM-1/2019(1)-III 1552 dated 9.12.2019 which is styled as Memorandum has stated that though there is no specific legal norms could be find in respect of looking after children of illegally staying foreigners (in custody or in bail). However, the court has to take into consideration the circumstances has to pass appropriate orders. In this background, it is just and necessary to direct the concerned authorities that:

(i) If the mother who is in custody and having infant below the age of Six years ,up to six years, the court may order the child to accompany the mother during her custody.

(ii) If, either of parents got arrested, then the custody of the child may be given to the other parent who is not arrested.

(iii) If, both the parents are arrested and in custody in same or other case, court may order custody of children to their close relative or to Government shelter home, or to any other organization recognized or undertaking of the government where government or concerned authorities can monitor the well being of the child, as per Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, 'JJ Act and Rules).

101. He has also produced another document No.2 about the care taken by the Central Government under the JJ Act, wherein Section 3(v) of the said Act empowers the

Government to take appropriate measures to take care of the children and protection of the children by catering to their development needs and by adopting a child friendly approach in dealing with the matters in the best interest of the children.

102. The rehabilitation, transfer, repatriation and restoration of children rights have also been enumerated under the JJ Act, u/s. 3(v) & (x) of the Act. Section 3(v) of the Act says, - *The primary responsibility of care, nature and protection of the child shall be biological family or adoptive or foster parents, as the case may be*". Section 3(x) of the Act says; *there shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child*".

103. The Juvenile Justice (Care and Protection of Children) Model Rules, 2016 has also been framed under

the said Act, which provide detail procedures for transfer of child, when the child is a national of another country or the subject is raised before any Competent Authority or court. Rule 81(1) says that - *During the inquiry if it is found that the child hails from a place outside the jurisdiction of the JJ Board or the Child Welfare committee, the Board or the committee shall order for transfer of the child and send a copy of the order stating the reasons for and circumstances of such transfer to the State Government and District Child Protection Unit.* Sub-clause (5) of Rule 81 of the said Rules says that - *Where a child is a national of another country, the Board or the committee shall inform the State Government immediately on the production of the child before the Board or the Committee which may initiate the process for repatriation of the child immediately in consultation with the Ministry of Home Affairs and Ministry of External affairs as the case may be.* Sub Clause (6) of Rule 81 of the said Rules says that - *During the period pending finalization of the repatriation;*

the child shall be kept in a Child Care Institution. Sub-clause (7) of Rule 91 of the Rules says that - *The expenses for the repatriation of the child to another country shall be borne by the State Government concerned.*

104. In the light of the above said provisions under the JJ Act, it is worth to note here a letter in F.NO.14051/169/2019-F-VI dated 6.12.2019 produced by Sri. Shashikantha, the Addl. Solicitor General of India, which indicates that, the Ministry of Home affairs also filed an affidavit before the Hon'ble Supreme Court of India in Writ Petition (Civil) No.1045/2018 between **Hash Mander** and **Union of India and another**, which later converted into Supreme Court Legal Services Committee Vs. Union of India and another, by way of an affidavit dated 29.10.2019, that the provisions under JJ Act and Rules are equally applicable to all the children, who deemed to be foreigners, including inter-alia the children who are detained and also those children from outside, who have no other person to take care of them.

105. From the above said aspect, it is clear that, by establishing the Detention Centers or in the event of the mother or father of the child who belonged to foreign nationals or one of them belonged to foreign national and is suspected to be an illegal migrant to India, in such an eventuality, the procedure contemplated under the detention manual which is in fact adopted by the Karnataka State also as per the affidavit filed by the Additional Secretary to the Government has to be very strictly and meticulously followed. It is to be noted that if the children is given to the mother who is in jail, the Government shall make all necessary arrangements for the said child development as per the guidelines of the Supreme Court in **Upadhyaya's** case noted supra, and also as per the provisions under the JJ Act and Rules.

106. At the cost of repetition, I may say that, a memo filed by the Additional Advocate General for the State of Karnataka dated 11.12.2019 before this court clearly discloses that, the Women and Child Development

Department has already undertaken to provide protection to the children as per the JJ Act and Rules. In this regard, the department has already established Child Welfare Committees throughout the State of Karnataka and as on date, more than 33 Child Welfare Committees are functioning within the State. The Committee will take all the responsibilities of providing food, shelter, clothing, education, vocational training, recreation facilities etc., as per the Juvenile Justice (Care and Protection of Children) Model Rules, 2016. It is also stated, under Rules 32 and 38, the Committees will take appropriate action to repatriate the children who belonged to other Districts, States or Country by following necessary procedures and will oversee the transfer or deportation of such children to their motherland. Though it is stated in the said memo that, there is no special protection centers established by the State Government exclusively for juveniles or minors who are not implicated in any crime born to foreigners, but, it is clear from the affidavit filed before the Hon'ble

Apex Court as noted above, in Writ Petition (Civil) No.1045/2018, the Central Government has accepted that the Juvenile Justice Laws which are applied to all children of those deemed to be foreigner including the children who are detained and those who are free while their parents are detained. Therefore, it goes without saying that all the facilities which are available to the children of our country also shall be extended to the children who are found to be the children of the illegal migrants who are in jail or in detention centers during the course of investigation, inquiry or trial or undergoing punishment after the sentence being passed against them, till they are deported to their country.

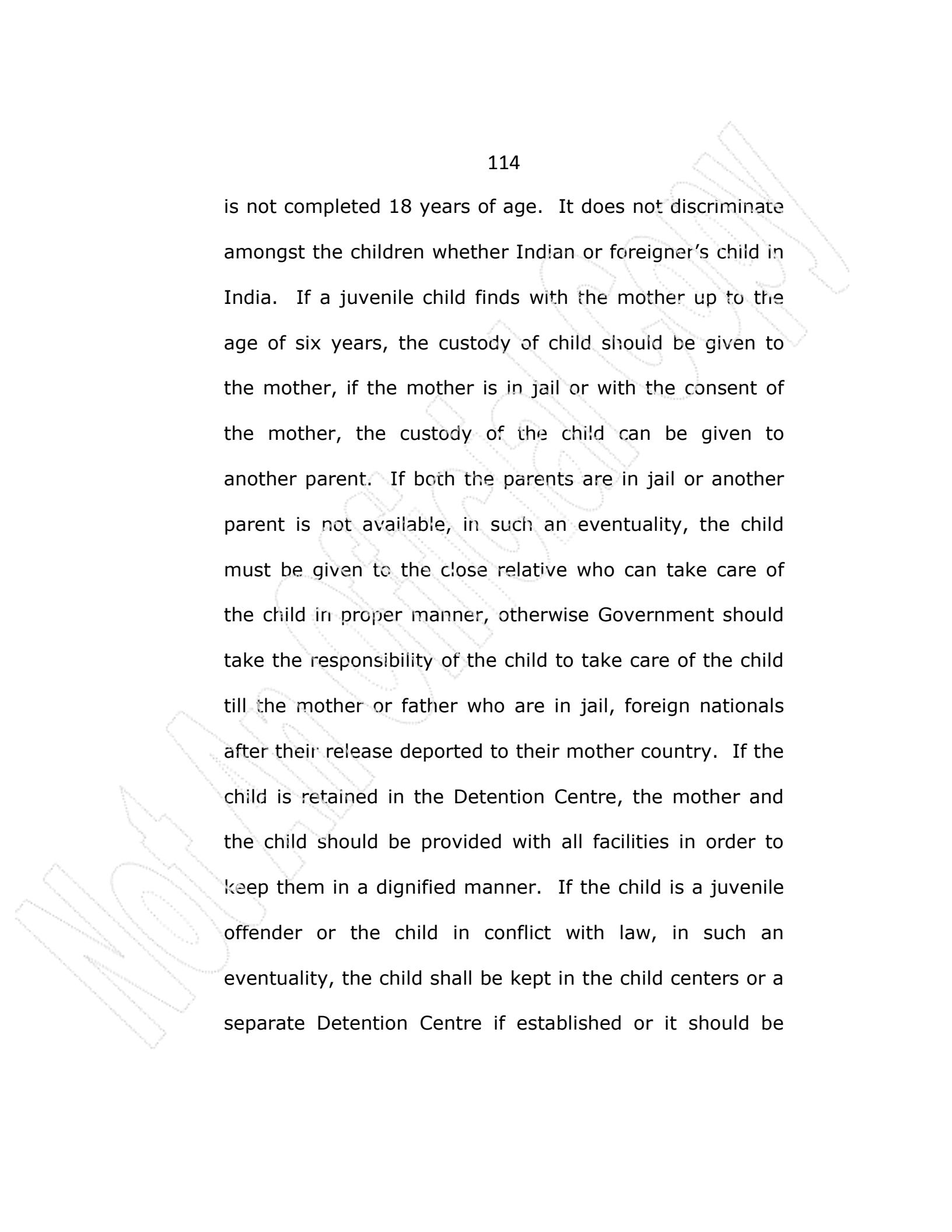
107. Therefore, what are all the facilities and the guidelines issued by the Hon'ble Apex court in **Upadhyay's** case is strictly applicable to the women and children who are in jail irrespective of whether they are Indian citizens or foreign nationals.

108. While adopting the model Detention Centre/Holding Centre/Camp Manual, 2019, the State Government also should take care of the directions issued by the Hon'ble Apex Court in **Upadhyay's** case with respect to women and children who are said to be vulnerable, they have to take proper care in this regard particularly with reference to the health condition of the women and their education and their dignity during their stay in Detention Centers or in the jail. Further, added to that, the children born to them who are also considered to be not the Indian Nationals but the foreign nationals, the children are also entitled to all facilities and rights that may be available to the Indian children, in view of the above said discussion and also in view of the protection under Juvenile Justice Act.

109. It goes without saying that, if the child has committed any offence under the Foreigners Act, 1946 or under other Penal Laws of the land, who is a foreign national, the child has to be tried by the Juvenile Justice

Board and for those persons Juvenile Justice Act and Rules are applicable with reference to the Registration, investigation, inquiry or trial as contemplated under the Juvenile Justice (Care and Protection of children) Act, 2015. The Act was amended twice in 2006 and 2011, though the enactment was introduced in the year 2000. Mainly the Act was amended to provide amenities for the children and for its implementation to make the law more child friendly during the course of implementation of the Act in order to take care of several issues such as increasing incidents of abuse of children in various institutions, inadequate facilities, care, quality and rehabilitation measures in homes, high pendency of cases, responsibility and accountability of institutions and also inadequate provisions to counter offences against children like sale of children for adoption purpose etc.

110. The new enactment has addressed all these issues. In fact, said enactment explains the definition of child which simply says that the child means a person who



is not completed 18 years of age. It does not discriminate amongst the children whether Indian or foreigner's child in India. If a juvenile child finds with the mother up to the age of six years, the custody of child should be given to the mother, if the mother is in jail or with the consent of the mother, the custody of the child can be given to another parent. If both the parents are in jail or another parent is not available, in such an eventuality, the child must be given to the close relative who can take care of the child in proper manner, otherwise Government should take the responsibility of the child to take care of the child till the mother or father who are in jail, foreign nationals after their release deported to their mother country. If the child is retained in the Detention Centre, the mother and the child should be provided with all facilities in order to keep them in a dignified manner. If the child is a juvenile offender or the child in conflict with law, in such an eventuality, the child shall be kept in the child centers or a separate Detention Centre if established or it should be

kept under the institution recognized under the JJ Act and Rules with all facilities, till the child is deported to its mother country. All the bail provisions are equally applicable to such children.

111. Therefore, looking from the above said facts and circumstances of the case, it goes without saying that there shall not be any discrimination so far as the foreign child is concerned if it happens to be a child, whose father and mother are illegal migrants or one of the parent is illegal migrant, all facilities and care to be taken and given as if the said child has the nationality of Indian country till deportation takes place.

112. Before parting with this Judgment I feel it just and necessary to issue the following guidelines to the Courts and the concerned authorities on the basis of the above said discussion, though it may not be exhaustive but it may have some help to the authorities in the helm of affairs.

GUIDELINES.

- (1) As soon as the offence under Foreigners Act and other Laws is detected and there is a strong *prima facie* material to show that the detected person is a foreign national, and if he has no Passport or Visa, or if the Visa is expired, and he has no right to stay in Indian Territory, proceedings shall be immediately started to deport him to his nation, without un-necessary delay, from the date of registration of FIR against such person.
- (2) The jurisdictional police have to immediately take steps to inform the concerned competent authorities to initiate proceedings to deport such foreign national to his mother country *visa-a-vis* other competent authorities also share the details of such person amongst themselves and concerned jurisdictional Court.
- (3) If the Court refuses to grant bail to those persons (foreign nationals) in any criminal case, the Court shall keep such person in regular jail, till the disposal of the case.

(4) If for any reason the Court grants bail including anticipatory bail, in any criminal case where the offender is a foreign national, and the offences are under the Foreigners Act and/or also under any other Laws for the time being in force, and their Visa is cancelled or lapsed, or they have no Passport, or they are illegal migrants, then the Courts shall specifically order to keep them in detention centers, unless the competent authority has passed any order under section 3(2)(a) to (f) of Foreigners Act, 1946, or till further orders of the court or till they are deported to their mother country.

(5) If the case registered against the foreign nationals, ended in conviction, they shall be ordered to be kept in regular prison of the State till they serve their sentence, and after serving the sentence, they shall be kept in detention centers till, they are deported to their country.

(6) If the case ends up in discharge, release of the accused or acquittal, and their nationality is in dispute before the competent Tribunal, they shall be ordered to be kept in detention centers till they are deported to their country unless they have any right or otherwise entitled to remain in India, or the

competent authority has passed any orders under section 3(2)(a) to (e) of Foreigners Act 1946, the acquittal, discharge or release of the accused is no bar for the concerned competent authorities to question the nationality of that person before the competent Tribunal.

(7) The Public Prosecutors, the defence Counsel and the Courts shall make all their efforts to expeditiously deal with such cases by giving priority, for its early disposal, so as to enable other competent authorities to take appropriate steps under the facts and circumstances of each case for deportation of such foreign national (accused) as early as possible. The Court may also if permissible under law, and applicable to the facts and circumstances of a case may invoke sections 265A to 265L under chapter XXI (A) of Code of Criminal procedure, after following due procedure.

(8) As far as possible where a foreign national is involved in a case, the courts shall make their endeavor to record evidence and write the judgment in English Language, if the accused in such case is not conversant with the local language.

(9) The Central Government and the State Governments shall take all necessary steps to establish as many as necessary Detention Centers, at Cities, Districts and Taluka places as per the detention Center Manual referred to in this judgment, with all necessary basic facilities, as per the detention centre manual, as per the directions and guidelines of the Hon'ble Apex **Court in the case of Upadhyaya Vs State of A.P. and others** reported in **(2017)15 SCC 337**, so as to keep the foreign nationals, till their deportation whenever they are ordered to be kept in detention centers by competent authorities or by the Courts.

(10) In case, the accused/foreign national is a woman or a woman having a child or the child itself, the competent authorities, including jail authorities, detention centers, and the Courts and Juvenile Justice Boards have to follow the Guidelines of the Hon'ble Apex Court laid down in *Upadhyaya's case noted supra*; in addition to the provisions under the Prisons Act as well as Prisons Rules, and Juvenile Justice Act and Rules strictly and meticulously in their letter and spirit.

(11) If a mother who is a foreign national, is in custody and having infant below the age of six years or up to six years, the court may order the child to accompany the mother during her custody. If, either of parents got arrested, then the custody of the child may be given to the other parent who is not arrested. If both the parents are arrested and they are in custody in same or in some other case, court may order custody of children to their close relative or to Government shelter home, or to any other organization recognized or undertaking of the government where government or concerned authorities can monitor the well being of the child, as per Juvenile Justice (Care and Protection of Children) Act, 2015 and Rules.

(12) If a foreign national is convicted by the Court, and any application for parole is made, the jail authorities have to take in to consideration the conditions enumerated under Section 4 of the Foreigners Act, 1946, in addition to the Prisons Act and Rules.

(13) If a Foreign National is found to be an illegal migrant and not a citizen of India, and has been

involved in criminal offences under other law of the land for the time being in force, apart from Foreigners Act, the State Government or the Central Government as the case may be, take immediate necessary steps by exercising their discretion after applying their mind to the facts and circumstances of the case, if necessary and if the circumstances warrants, if the said offences are not heinous or anti-social, or not punishable with imprisonment for more than three years, or with fine only to withdraw those cases under Section 321 of Cr.PC., so as to enable the concerned authorities to take necessary steps to deport such persons to their mother country, as expeditiously as possible.

(14) The State Legal Services Authority, District Legal services Authorities, and Taluka Legal Services Committees, shall make a periodical visit to the jails and Detention centers to ensure and satisfy itself that the concerned authorities have taken necessary steps to implement the directions issued by the Hon'ble Apex Court in ***Upadhyay's*** case and also the Detention Center Manual, so as to take appropriate action to inform the concerned authorities to rectify their mistakes and also the

Legal Services Authorities suo-motu can take steps in accordance with law to get the mistakes or errors rectified on the legal side.

(15) The Central Government and the respective State Governments shall often revise the Detention Center Manual and also the Prisons Act and Rules based on the need of the hour to bring necessary changes, so as to effectively and efficiently implement the very object of such Manual and laws.

(16) The Central Government, the State Government, the Karnataka State Legal Services Authority, Karnataka Judicial Academy and Police Academy in the State shall take appropriate necessary swift action to sensitize all the stakeholders, Judges, Prosecutors, Police Officers, Custom and Immigration Officers (FRRO-FRO), Jail Authorities and Officers delegated in Detention Centers, in this regard.

(17) ***Registry is directed to send a copy of this Order to the Chief Secretary, Principal Secretary to Home Department, Director General and Inspector General of Police,***

***Karnataka State Legal Services Authority and
Karnataka Judicial Academy, for appropriate
necessary steps.***

113. With the above said observations, now I would like to recollect the facts of this case to consider the merits of this case to find out whether the petitioners are entitled to be enlarged on bail or not.

114. In the bail petition, it is categorically stated that there is no *prima facie* case made out against the petitioners, but unfortunate is that they have become the scapegoats in the hands of the complainant police and they should not be detained in judicial custody merely on suspicion or doubt. The petitioners have already undergone imprisonment for more than one year and long incarceration may not be necessary as the offences are not punishable either with death or imprisonment for life and the offence u/s.14, 14A and 14B of Foreigners Act, is only punishable with maximum punishment of 7 years imprisonment. It is also submitted that, the petitioners are

father and daughter and they were residents of West Bengal and are rag pickers. It is also submitted at paragraph 12 that the petitioners did not have any intention to stay in India and they are about to leave after the treatment of the child but to their misfortune they were arrested and implicated in this case. They claim that they have become the citizens of India and there are no documents to show that they belong to Bangladesh and there is no report or authentic document to show, in order to attract Section 14 of the Act.

115. However, when the police have invoked Section 14 of the Foreigners Act, the presumption u/s.9 of the Foreigners Act, will come into play, unless it is shown to the court during the course of trial, that the petitioners are not foreign nationals, they should be presumed as foreign nationals. Apart from invoking Section 14A of the Foreigners Act, it is alleged that they were holding the empty cartridges with them and therefore, the police have invoked Section 25 of the Indian Arms Act. However, the

major offences are u/s.14A and 14B of the Foreigners Act.

The offence u/s.25 of the Arms Act is not punishable either with death or life imprisonment. Therefore, in my opinion, by means of imposing stringent conditions, the petitioners are entitled to be enlarged on bail. However, it is made clear that though the court is enlarging them on bail, they cannot be given free movements to wonder across India as per their whims and fancies, till the case is decided or till the Government decides whether they have to be deported to their mother country or not. Till that point of time, in my opinion, they shall be kept in Detention Centre with all facilities as noted above and if they are acquitted in the case registered against them, the Government has to take appropriate steps whether the determination of their nationality has to be done by the Competent Authority and whether they are still to be deported to their mother country and thereafter only appropriate decision has to be taken by the Government. Further, if they are convicted for any reason, the Competent Authorities have to take

appropriate steps to deport them to their country immediately.

116. With the aforesaid observations, I pass the following:

ORDER

The Petition is allowed. Consequently, the petitioners shall be released on bail in connection with SC No.5014/2019 on the file of the III Addl. District and Sessions Judge, Anekal, Bangalore Rural District, for the offences punishable under Sections 14A and 14B of the Foreigners Act, 1946; Section 25 of the Indian Arms Act; and Section 34 of the Aadhaar Act, subject to the following conditions:

- (1) The petitioners shall be released on bail on executing their personal bond for a sum of Rs.50,000/- each with one surety for the like sum to the satisfaction of the trial court.
- (2) The trial court is hereby directed that, at the time of releasing of the petitioners on bail, the Competent

Authorities shall be informed to detain them in any of the Detention Centers in Bangalore or at any place nearby Bengaluru City, till the trial is concluded.

(3) It is also made clear that, under Section 3(2) of the Foreigners Act, if the Competent Authority feels that, by means of imposing restrictions on the movements of the petitioners by taking bond with or without surety for the observance or as an alternative to the enforcement of any of the prescribed or specific restrictions or conditions can control their movements, such orders may be passed by the Competent Authority with intimation to the Court.

(4) The petitioners shall not indulge in hampering or tampering the prosecution witnesses and they shall be made available to the court on all the future hearing dates unless they are exempted by the court for any genuine reasons or cause.

(5) The petitioners however, shall not leave the jurisdiction of the trial court without prior permission till the case registered against them is disposed of.

Sd/-
JUDGE

PL*