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

WRIT PETITION No. 12388 OF 2014.

Farah Mahbub, J Kazi Md. Ejarul Haque Akondo, J **Judgment on: 18.02.2016[1].**	Children's Charity Bangladesh Foundation (CCB Foundation) …Petitioner. Vs. Bangladesh and others. …. Respondents.

For the Petitioner.	*Mr. Md. Abdul Halim, Advocate with Ms. Sadia Arman, Advocate.*
For the Respondent Nos. 3 and 5.	*Mr. Amit Talukder, D.A.G with* *Ms. Nusrat Jahan, A.A.G. with* *Ms. Bilkis Fatema, A.A.G.*
For the respondent No.4	*Mr. Shaheed Alam, Advocate*
For the respondent No.6	*Ms. Quamrun Nessa, Advocate*
For the Intervenor.	*Ms. Sara Hossain, Advocate with* *Ms. Sharmin Akter, Advocate.*

Terms, Issues and Phrases:

Public law compensation, Constitutional tort, Compensation for gross violation of human rights, Res Ipsa Loquitor, CCB Foundation, PIL, Vicarious liability, Death due to negligence of public authority, Breach of public duty, Principle of strict liability, Sovereign immunity not available in case of breach of public duty.

Main Decision:

In the result, the Rule is made absolute…….(Para 106).

The inaction and/or negligence, and/or failure on the part of the respondent Nos. 3, 5 and 4 respectively in respect of rescuing a minor boy of 4(four) years named Jihad which resulted in his tragic and shocking death, is hereby declared to be illegal, without lawful authority and hence, of no legal effect being violative of the law of the country, as well as his fundamental rights as guaranteed under Article 32 of the Constitution of the People's Republic of Bangladesh……(Para 107).

We direct the respondent No.4, Bangladesh Railway to pay the sum of Tk.10,00,000/=(Taka ten lac) and Tk.10,00,000/- (Taka ten lac) by the Fire Service and Civil Defense, the respondent Nos. 3 and 5 to the respective parents of the victim named Jihad as monetary compensation within 90(ninety) days from the date of receipt of the copy of this judgment and order…….(Para 108)

This order of awarding compensation will not impede/affect other liabilities, if there be any, of the respondents concern or its officials resulting from the death of the said victim……..(Para…..109).

Main Legal Issues and Findings:

Issue-1:

Whether the petitioner, CCB Foundation, has locus standi to file the instant writ petition in the form of public interest

[1] Judgment published on 07.10.2017

litigation agitating the cause of death of a 4 years old boy named Jihad due to the alleged negligence of the respondents concern.

Finding-1:

The issues being raised in the instant writ petition by the petitioner involves grave public injury as well as invasion on the fundamental right to life of the victim guaranteed under the Constitution. As such, it cannot be said that the petitioner has no locus standi on the issue in question. In other words, this Rule is maintainable so far the locus standi of the petitioner Foundation is concerned……..(Paras 46 and 98).

Issue-2:

Whether the death of Jihad was due to the alleged negligence of the respondents concern.

Finding-2:

It is sufficient for the aggrieved person to prove the accident and nothing more, for, there is a presumption of negligence according to the maxim "res ipsa loquitur" (the thing speaks for itself). Such presumption arises when the cause of the mischief was apparently under the control of the other person or his servants. The accident itself constitutes reasonable evidence of negligence in the particular circumstances……(Para 54).

However, falling in pipes, wells, holes and entrapping into fences of human body are not rare in the country. Rather, in their own volition they admitted that they did not have any expertise in the incident in question. In the said state of position, when the said respondents had abandoned the rescue operation upon declaring that "there was no trace of human body inside the pipe", the dead body of Jihad was found and uplifted by a group of five young people within a short time of such declaration. The said simple and ordinary device was not known to the respondent Nos. 3 and 5. By making a mere statement that they did not have proper expertise in the matter in question, cannot go to absolve them from their public duties as well as liabilities, which have been casted upon them by the statute……..(Para 58).

Therefore, it is apparent that rescuing the dead body of the victim Jihad by 5(five) young people is not the result of integrated efforts but an unfortunate reflection of negligence on the part of the respondents concern demonstrating their ineligibility to handle rescue operation in any deep pipe/shaft……..(Para 64).

We have no manner of doubt to find that the respondent No.4 cannot avoid it's liability when the negligence of it's contractor is admitted by the said respondent in it's affidavit in compliance…….(Para 67).

Thus, it appears that the said respondent No. 4 is shifting their liability on each other for the failure to take proper maintenance of the said shaft. They, however, do not dispute that one or the other is indeed responsible for the negligent act…….(Para 68).

There can be no dispute that the shaft in question should have remained covered, there should have been sufficient precautionary measures on the part of the respondent No.4 so that no one can

fall down. Falling of Jihad inside the said uncovered shaft is itself a prima facie evidence of negligence. Moreso, nothing otherwise has been posed by the respondents to suggest that Jihad fell down despite the respondents taking proper care of the same, or for any other cogent/plausible reason whatsoever……(Para 69).

Issue-3:

Whether a claim for compensation be made against public authority regarding an action/inaction which resulted in a death of the 4 years old boy Jihad, for breach of statutory/constitutional duty.

Issue-4:

Whether claim for compensation can be made directly under the writ jurisdiction against the public authority in question.

Findings-3 and 4:

It is pertinent to observe that Article 146 of our Constitution, however, does not make any distinction between the sovereign and non-sovereign acts nor makes any reference to the extent of liability of the government. Thus, the power to grant compensation against public authority regarding an action/inaction which resulted in a death, for breach of statutory/constitutional duty is not barred by our Constitution……(Para 80).

Issue-5:

How to quantify such a claim for compensation.

Finding-5:

The court while exercising jurisdiction under Article 102 of the Constitution can award monetary compensation against the State and its officials for its failure to safeguard the fundamental rights of the citizens of the country, but there is no set method to measure the damages caused in such situations. Quite often the courts have a difficult task in determining damages in various fact-situations. The yardstick generally adopted for determining the compensation payable in a suit for damage are not applicable when a constitutional court determines the compensation for violation of the fundamental rights guaranteed to its citizens under Part III of the Constitution……..(Para 99).

Constitution of Bangladesh: Article 102: Public Law compensation: High Court Division has discretion to fashion the compensation:

The Constitution, however, does not stipulate the nature of relief which may be granted. It has been left to the High Court Division to fashion the relief according to the circumstances of the particular case: Bangladesh V. Ahmed Nazir(1975) 27 DLR(AD)41. It need not be confined to the injunctive relief of preventing the infringement of a fundamental right and in an appropriate case it may be a remedial one providing relief against a breach already committed: Mehta V. ***India, AIR 1987 SC 1086, 1091…….*****(Para 77).**

Constitution of Bangladesh: Article 146: Constitution does not make any distinction between the sovereign and non-sovereign acts:

In this regard, it is pertinent to observe that Article 146 of our Constitution, however, does not make any distinction between the sovereign and non-sovereign

acts nor makes any reference to the extent of liability of the government. Thus, the power to grant compensation against public authority regarding an action/inaction which resulted in a death, for breach of statutory/constitutional duty is not barred by our Constitution……(Para 80).

Constitution of Bangladesh: Article 32 and 102:

Compensation can be awarded for breach of public duty and gross violation of right to life under judicial review power under Article 102:

In view of the above observations of the Appellate Division, it can unequivocally be discerned that the High Court Division is competent to award compensation in the cases of established unconstitutional deprivation of the fundamental right to personal life or liberty of the person concern, while exercising its jurisdiction under Article 102 of the Constitution provided said violation is gross and patent i.e., incontrovertible and ex-facie glaring…….(Para 95).

The present case is a case of evident negligence on the part of the respondent Nos.3, 5 and 4 (Fire Service and Civil Defense and Bangladesh Railway), which led to violation of the fundamental right to life of the deceased Jihad. Consequently, the maxim res ipsa loquitor as well as strict liability principles applies. As such, the petitioner is entitled to take resort to a constitutional remedy for award of compensation in favour of the bereaved family members of the said boy. In this regard, it is pertinent to observe that in the Constitution of India the State has the defence of sovereign immunity as provided under Article 300 of the Indian Constitution. Despite the same the Supreme Court of India awarded compensation to the aggrieved person for infraction of fundamental right to life or liberty. In our Constitution there is no such provision like Article 300 of the Indian Constitution; as such, there can be no bar to award compensation to the bereaved family members of Jihad for the injustice being caused to them due to the sheer negligence of the respondents concern leading to violation of his fundamental right to life, guaranteed under Article 32 of the Constitution……(Para 96).

Constitution of Bangladesh: Article 102: Assessment and Measurement of Public law compensation: No yardstick:

The court while exercising jurisdiction under Article 102 of the Constitution can award monetary compensation against the State and its officials for its failure to safeguard the fundamental rights of the citizens of the country, but there is no set method to measure the damages caused in such situations. Quite often the courts have a difficult task in determining damages in various fact-situations. The yardstick generally adopted for determining the compensation payable in a suit for damage are not applicable when a constitutional court determines the compensation for violation of the fundamental rights guaranteed to its citizens under Part III of the Constitution……..(Para 99).

Public law compensation: Remedies in public law compensation is separate and in addition to any other remedies available in other forums:

This order of awarding compensation will not impede/affect other liabilities, if there be any, of the respondents concern or its officials resulting from the death of the said victim……(Para 109).

Cases cited and/or relied on:

National Board of Revenue Vs. ***Abu Sayeed Khan*** **18 BLC (AD) (2013) 116**

Rudul Shah v. State of Bihar **(1983) 3 SCR 508*; 1983(4) SCC 141; AIR 1983 SC 1086***

Smt. Nilabati Behera v. State of Orissa **1993 2 SCC 746**

DK Basu v. Union of India (1997) **1 SCC 416**

Kartic Das Gupta Vs. ***Election Commission of Bangladesh and others*** **8 ADC 578**

Kazi Mukhlesur Rahman Vs. ***Bangladesh and another*** **26 DLR (SC) 44**

Bangladesh Sangbadpatra Parishad (BSP) represented by its Secretary General Anwarul Islam Vs. The Government of the People's Republic of Bangladesh represented by its Secretary, Ministry of Information and 4 others **43 DLR (AD) 126.**

Dr. Mohiuddin Farooque Vs. ***Bangladesh*** **49 DLR(AD)1**

Bangladesh Beverage Industries Ltd. Vs. ***Rowshan Akter and others*** **62 DLR 483**

Bangladesh Beverage Industries Ltd. Vs. ***Rowshan Akter and others*** **[2016] 4 CLR(AD) 411**

Scott v. ***London & St. Katherine Docks Co. (1865 3 H & C 596)***,
Kochuni V. ***Madras,*** **AIR 1959 SC 725**.

Bangladesh V. ***Ahmed Nazir*** **(1975) 27 DLR(AD)41**.

Mehta V. ***India,*** **AIR 1987 SC 1086, 1091**.

Khatri V. ***Bihar,*** **AIR 1981 SC 928**

Nilabati Bahera V. Orissa, **AIR 1993 SC 1960**

Privy Council in ***Maharaj*** V. ***A.G. of Trinidad and Tobago 1978(2) all E.R. 670***

Railway Board V ***Chandrima Das*** **(2000) 2 SCC 465**

U.P. State Co-operative Land Development Bank Ltd. Vs. ***Chandra Bhyan Dubey and others*** **[1999(1) SCC 741**

D.K. Basu Vs. ***State*** **(1997)1 SCC 416**.

BLAST v. Bangladesh **(2003) 55 DLR(HCD) 363.**

AK Fazlul Hoque v. Bangladesh **57 DLR (HCD) 725**

Md. Shahnewas v. Government of Bangladesh **18 BLD(HCD) 337.**

Bilkis Akhter Hossain v. Bangladesh and others **17 BLD (HCD) (1997) 395**

Habibullah Khan v. Azaharuddin **35 DLR (AD) 72**

Bangladesh v. Nurul Amin **67 DLR(AD) 352; [2015] 3 CLR (AD) 352**

Sri Manmath Nath Kuri Vs. ***Mvi. Md. Mokhlesur Rahman*** **22 DLR(SC)51**

JUDGMENT

FARAH MAHBUB: J

1. In this Rule, issued under Article 102 of the Constitution of the People's Republic of Bangladesh, the respondents have been called upon to show cause as to why the inaction and/or negligence, and/or failure on the part of the respondent Nos. 2, 4, 6 and 7 and the respondent Nos. 3, 4 and 5 respectively in respect of rescuing a minor boy of 4(four) years named Jihad which resulted in his tragic and shocking death, as reported in all the national dailies and medias particularly in the "Daily Prothom Alo" and the "Daily Star" dated 27.12.2014 and 28.12.2014 (Annexure-A,A-1,A-2 and A-3 respectively) should not be declared to be illegal, without lawful authority and hence, of no legal effect being violative of the law of the country, as well as his fundamental rights as guaranteed under Articles 31, 32 and 36 of the Constitution of the People's Republic of Bangladesh; and accordingly, why the respondent Government /Ministry concern should not be directed to take appropriate steps against the concerned officials /respondents for failing to discharge their respective duties in accordance with law; also as to why the respondents concern should not be directed to give compensation of Tk. 30,00,000/- (Taka thirty lac) only to the respective family members of the said deceased for gross negligence and violation of his fundamental rights as guaranteed under Articles 31 and 32 of the Constitution of the People's Republic of Bangladesh; also as to why the respondent Nos. 2, 4, 6 and 7 should not be directed to make a list of pipes, wells, tube wells, sewerage pipes, holes and water tanks left uncared for or uncovered or unsafe throughout the country under their jurisdiction and submit a list to that effect before this Court within a prescribed period; further, as to why the respondent Nos. 3 and 5 should not be directed to produce before this Court all information, data on purchase of expenditure on modern technologies and expertise so far they had with regard to rescuing people in life threatening accidents, particularly in the cases of falling in uncared pipes, holes, water-tanks, water-bodies, sewerage pipes, drowning, entrapping in fences etc. causing death-traps and or such other or further order or orders passed as to this court may seem fit and proper.

2. Facts, in brief, are that the petitioner, being a conscious and a respectable law abiding citizen, who is also a practicing lawyer of the Supreme Court of Bangladesh filed this writ petition in the form public interest litigation on behalf of Children's Charity Bangladesh Foundation (CCB Foundation), a non-profit and charitable society, registered under the Societies Registration Act, 1860, which works for the promotion and protection of rights and interests of the children and young persons and to protect their welfare, education, safety, security, acts against gender-discrimination and also to protect the life, liberty and freedom of expression, conscience, movement etc. of students, children, young girls and women, respectively.

3. Zihad, a 4 years old boy while playing in the Shahjahanpur Railway Colony playground fell inside the 16 inches uncovered shaft which was left abandoned by Bangladesh Railway and WASA authorities, i.e., the respondents Nos.3, 5 and 6. The said tragic incident took place at 3.30 p.m. on 26.12.2014 which was broadcasted throughout all electronic and print media of the country. As a part of the rescue operation the respondent Nos. 3, 5 and 6 sent down cameras through the said shaft to see the condition of the boy. However, the said camera being unworkable, they brought about another camera in order to see his condition without taking fruitful step to rescue him immediately. The said camera show down went on for about 10-12 hours, but without any result.

4. Following the said camera show down for long 10-12 hours the respondent Nos. 3 and 5 ultimately abandoned the rescue operation of the said child in public and left the place of occurrence. Immediate thereafter a group of five young volunteers by using their hand-made device pulled up the dead body of the said child from the said pipe within a short time after it was declared by the respondents concern that there was nothing in the pipe, leaving the whole nation frustrated, mum and shocked.

5. Being aggrieved by and dissatisfied with the petitioner filed the instant writ petition and obtained the present Rule Nisi.

6. During the pendency of the instant Rule Bangladesh Legal Aid and Services Trust(in short, BLAST), a national legal services organization with a long track record in providing legal aid to individuals as well as undertaking public interest litigation(PIL) and has in particular undertaken many cases on child rights and child issues and has considerable experience and expertise in implementing human rights and fundamental rights under the laws applicable within the country, had been added as Intervenor vide order dated 24.04.2015 passed by this Court in order to assist on the issues of accountability of these public authorities to be brought under judicial scrutiny for better human rights protection, fundamental rights protection and human rights justice in the country and at the same time safety and security of the children in the country.

7. However, at the time of issuance of the Rule the respondent Nos. 4 and 5 were directed to produce before this Court all information, data on training, expenditure on purchase of modern technologies, equipments of the last 2(two) years and expertise so far they had gathered with regard to rescuing people in life threatening accidents, particularly in the cases of falling in uncared pipes, holes, wells, tube wells, water-tanks, water-bodies, sewerage pipes, drowning, entrapping in fences etc. causing death-traps, by filing an affidavit.

8. In compliance thereof the respondent No.5 filed an affidavit in compliance stating, *inter alia*, that the Directorate of Fire Service and Civil Defense (in short, the Fire Service) is a Directorate under the Ministry of Home Affairs and that the officers and employees of the said Directorate work under the provision of "অগ্নি প্রতিরোধ ও নির্বাপন আইন, ২০০৩" and the Civil Defense Act, 1952. During any rescue operation the employees of the said Directorate give their best effort to discharge their professional duties and due to their service they have earned a good reputation in the country.

9. In this regard it has also been contended that on receiving any information

of any accident such as, fire accident, building collapse, accident in garments factory or other commercial places the members/employees of the Directorate rush to the place of occurrence immediately and try to rescue the victims with the help of their equipments and experiences. The members of the Directorate never show any negligence whatsoever to serve the nation.

10. On receiving the message about the tragic accident held at Shahjajanpur Railway Colony on 26.12.014 the members of the rescue team of the Fire Service immediately rushed to the place of occurrence in order to rescue the boy named Jihad and took active part in the rescue operation.

11. So far the list of equipments and the programmes undertaken by the officers and employees concern for handling emergency situation and any kind of rescue operation it has been stated, *inter alia*, that in the year 2013 and 2014, the officers and employees of the Directorate participated in a good number of training programmes organized by Bangladesh Army, BRTA, BPATC, RPATC, NAPD, BRAC and by the Directorate itself. They participated in various other training programmes outside the country and had completed the same successfully (Annexure-2 and 2(A) respectively). Moreover, pursuant to the policy decision of the respondent-government to establish fire station in every upazilla of the country necessary work has already been started. More so, the Directorate for its smooth functioning had purchased required number of vehicles and other equipments.

12. It has been stated that since there was no high tech powerful camera/equipment in Fire Service and Civil Defense which could be used to locate any victim in such a deep and narrow pipe it sought support and co-operation from the other government and non-government machineries, volunteers and common people to take part in the rescue operation.

13. In this regard, it has been stated that the incident, which took place at Shahjahanpur Railway Colony on 26.12.2014, is unique and rare in Bangladesh. The personnel concern of Fire Service and Civil Defense were not quite familiar with such kind of incident. But they tried their best to rescue the victim with utmost sincerity but could not succeed; that does not go to construe negligence on the part of this respondent in discharging their public duties. Ultimately, the victim was rescued by the integrated efforts of all the stakeholders (Annexure-3).

14. Respondent Nos. 3 and 5 entered appearance by filing affidavit in opposition taking more or less similar stand as they have taken in the affidavit in compliance stating, *inter alia*, that these respondents are the authorities of the Directorate of Fire Service and Civil Defense, which is under the respondent No.1. However, the officers and employees of the Directorate work under the provision of "অগ্নি প্রতিরোধ ও নির্বাপন আইন, ২০০৩" and Civil Defense Act, 1952. The Fire Service is serving the nation with sincerity and diligently with its limited manpower of only about 8,000 employees in Dhaka City and that it has only 13 Fire Stations.

15. In this connection, it has also been stated that earlier Fire Service had actively and successfully took part in rescue operation at Rana Plaza collapse, Tajrin Fashion Fire accident at Savar and Neemtali Chemical Storage fire accident in Dhaka which earned good reputation at home and abroad.

16. In the instant case, the members of the rescue team of the Fire Service rushed to the place of accident at Shahjahanpur Railway Colony immediately after they received the information in order to rescue the boy named Jihad and had actively took part in the rescue operation. However, despite the fact that this type of incident was an exceptional and rare incident in Bangladesh and that the personnel of Fire Service were not quite familiar with such type of accident nevertheless, they tried their heart and soul to rescue the victim sincerely. The Fire Service, however, had thermal imaging camera and with its support persons and objects in fire could be detected and with search vision camera location of a victim in a collapsed building could be detected, but there was no high-tech powerful camera or equipment in Fire Service which could be used to locate the victim in such a deep and narrow pipe. Consequently, at Shahjanpur Railway Colony, the respondent Nos. 3 and 5 did not use any camera since the cameras of Fire Service could not locate the child in the narrow pipe. In the given context, they sought support and co-operation from the other government and non-government organizations, volunteers and common people to take part in the rescue operation.

17. It has also been stated that the nature of the said accident at Shahjahanpur Railway Colony was a rare of the rarest one. The rescue team of Fire Service tried their best to rescue the boy, but unfortunately they did not succeed. Later on, with the support of the local volunteers the victim was rescued following an indigenous method. The respondent Nos. 3 and 5, however, had no negligence in discharging its professional duties to rescue the boy, named Jihad (Annexure-X, X-(1)-X(3) respectively).

18. In compliance of the direction so given by this Court at the time of issuance of the Rule respondent No.4, Bangladesh Railway also filed affidavit of facts stating, *inter alia*, that the authority concern of Bangladesh Railway through its officers immediately went to the place of accident after receiving the information in order to rescue the boy and they took part in the rescue operation accordingly.

19. However, following the incident on 26.12.2014 the Ministry of Railway vide Memo dated 28.12.2014 constituted a 2(two) members enquiry committee to enquire into the matter. Said committe after due enquiry submitted report on 06.01.2015 for consideration by the authority concern.

20. Pursuant thereto process was duly initiated with service of notice upon all the persons concern. Ultimately, vide order dated 25.12.2014 its enlisted contractor, M/S. S.R. House had been relieved from doing the work of deep tubewell excavation and installation "খনন ও স্থাপন" and was blacklisted (Annexure-A to the affidavit in opposition filed by respondent No.4).

21. Mr. Md. Abdul Halim, the learned Advocate appearing in person on behalf of the petitioner submits that the respondent No.5 in its affidavit in compliance by identifying the incident as a unique and rare incident in Bangladesh has categorically admitted that the personnel of Fire Service and Civil Defense are not quite familiar with such kind of incident. To that effect he goes to submit that falling in pipes, wells, holes and entrapping into fences of human body are not rare, rather they often occur but unfortunately, the respondent Nos.3 and 5 have not gained any expertise to handle such kind of situation for reasons best known to them. As such, he

submits that by making an assertion that they are not familiar with such an incident cannot absolve them from their liability of not being able to rescue the boy named Jihad in time, which resulted in his tragic death due to their sheer negligence, which is further fortified from the fact that when they had abandoned the rescue operation declaring that there was no trace of human body inside the pipe, the dead body of the child was found and uplifted by a group of five young people within a short time. In the given context, he submits that if this simple and ordinary device is not known to the respondent Nos. 3, 4 and 5 what special training and expertise do they have with regard to rescuing people in danger? What expertise do they have gained during the last 44 years for public benefit?

22. He further goes to contend that as per direction of this Hon'ble Court the respondent No.5 did not submit required information in their affidavit in compliance regarding expertise, expenditure or training with regard to rescuing people in life threatening accidents, particularly in the cases of falling in uncared pipes, holes, wells, tube wells, water-tanks, water-bodies, sewerage-pipes. Thus, goes to prove that the said respondents had negligence on rescuing the ill-fated child Jihad. He further submits that no clear averments have been made in the said affidavit that there was any person from the Fire Service at the site of the accident who was expert in rescuing a human being trapped in any hole or deep pipe. Rather, the respondent Nos.3, 5 and 6 had sent down cameras to see the condition of the baby and the camera being unworkable, they brought about another camera just to see his condition without taking fruitful step to rescue him immediately. Said camera show down went on for about 10-12 hours. This untrained show down substantiates how careless those respondents were in dealing with emergency and tragic accidents on human life.

23. In this connection he goes to argue that in today's modern days the rescue technology has been so developed that anything being underneath the sea can be seen and observed within 5 minutes whereas the respondent Nos.3, 5 and 6 posing to be legally trained and specialized in rescuing people were not at all equipped to handle the rescue operation and due to their sheer negligence resulted the death of Jihad in an uncovered deep tube well pipe.

24. He also submits that it was reported and also telecasted live through all electronic and print medias that both the Ministry of Homes and Fire Service declared the rescue operation abandoned by giving declaration in public that there was no trace of human body inside the pipe. However, after such abandonment a group of five young people rescued the dead body of Jihad within a short period of such declaration; as such, it cannot be said that the victim was rescued by the integrated efforts of all the stakeholders, as claimed by the respondent No.5.

25. Respondent No.4, i.e., Bangladesh Railway in its affidavit of facts stated that following the tragic incident of Jihad's death an inquiry committee was formed. In this regard, Mr. Halim submits that while making recommendation the Inquiry Committee had by-passed the liability and negligence of the respondent No.4 by shifting the same on its contractor. Accordingly, he submits that the respondent No.4 is vicariously liable for the negligence of its contractor and also for gross violation of the human as well as fundamental rights of the said victim.

26. The respondent No.5 in its affidavit in compliance categorically stated that "*there is no high tech powerful camera/equipment in Fire Service and Civil Defence that can be used to locate victim in such a deep and narrow pipe*." Referring to the said averments of the respondents concern he goes to submit that it is not only surprising but also astonishing that the Civil Defense authority has not purchased any powerful camera in its 44 years of tenure to see if there is any human being who has fallen in a pipe or deep hole. Having and possessing a high powered camera should have been a usual purchase item by this respondent, for, a high powered camera is very much necessary for search in rescuing incidents like drowning in a ship, boat, deep sewerage pipe or deep wells. He also submits that the respondent No.5 has annexed the list of instruments purchased in the last two years. From a plain reading of this Annexure it appears that in 2012-2013 they purchased instrument worth Tk.29,03,58,486/= and in 2013-2014 they purchased instruments worth Tk.67,81,14,708/=, but surprisingly they did not buy a modern camera to rescue people in danger in any pipe or holes or wells, which goes to substantiate their negligence in their rescue operation.

27. So far the maintenance system is concerned, he submits that the respondent No.4 owed a public duty to maintain the deep tube well, so as to keep the same from harming those who would rightly assume that they would not fall down, but in the instant case they miserably failed to discharge their said duty.

28. Accordingly, he goes to submit that the maxim r*es ipsa loquitor* as well as strict liability principles are squarely applicable and attracted in the instant case and as such, the family members of the victim are entitled to compensation due to the irretrievable loss suffered by them on account of the negligence of the said respondents.

29. He lastly submits that this is not a case of violation of ordinary right under any ordinary law; rather this is a case of violation of the fundamental right to life, which is guaranteed under Article 32 of the Constitution of the People's Republic of Bangladesh. Since the State has failed to protect the fundamental rights of the victim Jihad accordingly, this public law remedy is available to his bereaved family members to claim compensation. In support, the learned counsel for the petitioner has relied upon the decisions of the Supreme Court of India in ***Rudul Shah*** Vs. ***State of Bihar (1983) 3 SCR 508***, ***Smt. Nilabati Behera*** v. ***State of Orissa 1993 2 SCC 746*** as well as the case of ***DK Basu*** Vs. ***Union of India(1997) 1 SCC 416*** to contend that a writ petition to claim compensation is maintainable where it involves infraction of the fundamental rights of the citizens.

30. He also relied upon various other judgments in support of his contention that the principles of strict liability including the maxim r*es ipsa loquiter* will apply, for, the negligence of the respondents is writ large in the face of keeping the deep tube well uncovered situated in a densely populated area i.e., Shahjahanpur Railway Colony.

31. Per contra, Mr. Amit Talukder, the learned Deputy Attorney General appearing on behalf of the respondent Nos. 3 and 5 submits that this writ petition as public interest litigation is not maintainable in view of the decision and parameters set by the Hon'ble Appellate Division in ***National Board of Revenue*** Vs. ***Abu Sayeed Khan*** reported in ***18 BLC (AD)(2013)116*** since it is in the nature

of *certiorari* and *mandamus* and that the petitioner is not a person aggrieved. Moreover, he submits that in the writ petition there is no explanation as to why the affected party has not come before this Hon'ble Court. As such, in the absence of satisfactory reason for non appearance of such affected party this Rule is liable to be discharged.

32. He further submits that the respondent Nos.3 and 5 are under the authority of Fire Service and Civil Defense Directorate which is regulated by the "অগ্নি প্রতিরোধ ও নির্বাপন আইন, ২০০৩"(in short, the Ain). Section 25 of the said Ain provides that if any harm or damage is caused due to any act done in good faith by any officer or any employee of the Fire Service, he will not be liable to any civil suit or criminal case or any other legal proceeding. In this regard, he submits that the unfortunate accident did not take place due to any negligence of the respondent Nos.3 and 5. Moreover, said respondents did actively participate in the rescue operation with utmost sincerity and diligently with the equipment and manpower they have. Moreover, the rescue team of Fire Service did not show any negligence in the said rescue operation with their limited equipments and trainings to rescue the victim in this type of rare accident. In the given context, he submits that for not having modern technological device and lack of expertise in handling this type of rare accident cannot go to render the said respondents liable for negligence.

33. He also submits that following the said incident Bangladesh Railway had black listed its contractor namely M/S S.R. House including one Senior Assistant Engineer named Jahangir Alam who had been suspended soon after the accident on the ground that said Engineer was responsible for supervising the work of the firm but he did not look into the situation that the said contractor had kept the pipe open. In that view of the matter, he submits that if anybody is responsible for the accident it is the contractor and the concerned Engineer. Consequently, they are liable to give compensation to the respective family members of the deceased for their negligence. The respondent Nos. 3 and 5 are not in any way liable to give compensation.

34. In this connection, he also submits that claim of compensation of the petitioner should not be considered under Article 102 of the Constitution, for, disputed question of facts are involved for determination of the negligence of the authorities concern. As such, he submits that this Rule should be discharged.

35. Ms. Quamrun Nessa, the learned Advocate appearing on behalf of the respondent No.6 by filing affidavit in opposition submits that the deep tube-well at Shahjahanpur Railway Colony in which the ill fated boy named Jihad had fallen belonged to Railway authority which was installed, operated and maintained by the concerned department of Bangladesh Railway. Dhaka WASA, however, had no manner of involvement with the installation, operation or maintenance of the said deep tube well. As such, she submits that Dhaka WASA is not responsible for the tragic death of the innocent boy named Jihad.

36. She also submits that hearing the news of the accident, the Managing Director of Dhaka WASA rushed to the place of occurrence taking a powerful camera of Dhaka WASA in order to co-operate the rescue operation conducted by Fire Service. As such, the allegation of negligence against WASA authority is without any substance.

37. Mr. Shaheed Alam, the learned Advocate appearing on behalf of the respondent No.4, Bangladesh Railway submits by filing an affidavit in opposition that the respondent No.3 undertakes rescue operation with the aid of all its equipments to rescue the victims of such accident. However, he does not deny the occurrence of the aforesaid incident.

38. The cardinal issues requiring determination in the present Rule Nisi are: whether the petitioner, CCB Foundation, has *locus standi* to file the instant writ petition in the form of public interest litigation agitating the cause of death of a 4 years old boy named Jihad due to the alleged negligence of the respondents concern; whether the death of Jihad was due to the alleged negligence of the respondents concern; whether a claim for compensation be made against public authority regarding an action/inaction which resulted in a death of the 4 years old boy Jihad, for breach of statutory/constitutional duty; whether claim for compensation be made directly under the writ jurisdiction against the public authority in question; and how to quantify such a claim for compensation.

39. At the very outset, the categorical assertion of the respondents concern is that the instant writ petition is not maintainable in the form of public interest litigation in view of the ratio as decided by the Appellate Division in ***National Board of Revenue*** Vs. ***Abu Sayeed Khan*** reported in **18 BLC(AD)(2013)116.**

40. In ***National Board of Revenue*** Vs. ***Abu Sayeed Khan (supra)*** the Appellate Division has set 14 criterions for entertainment of public interest litigation. Of those 14 conditions Nos. 4, 7, 9 and 13 are relevant for disposal of the said issue and thus, are quoted as under-

> "*(4) The expression "person aggrieved" used in Article 102(1) means not any person who is personally aggrieved but one, whose heart bleeds for the less fortunate fellow beings for a wrong done by any person or authority in connection with the affairs of the Republic or a Statutory Public Authority.*
>
> *(7) Only a public spirited person or organisation can invoke the discretionary jurisdiction of the court on behalf of such disadvantaged and helpless persons.*
>
> *(9) The court should also guard that the petition is instituted for the benefit of the poor or for any number of people who have been suffering from common injury but their grievances cannot be redressed as they are not able to reach the court.*
>
> *(13) A petition will be entertained if it is moved to protect basic human rights of the disadvantaged citizens who are unable to reach the Court due to illiteracy or monetary helplessness.*"

41. On the duty of the writ bench to see whether the writ petition itself is maintainable in law the Appellate Division in the case of ***Kartic Das Gupta*** Vs. ***Election Commission of Bangladesh and others*** reported in ***8 ADC 578*** observed, *inter alia*,-

> *" ..... before going into the merit of a writ petition the first and primary duty of the writ Bench is to see whether writ petition itself is maintainable in law or whether the writ petitioner has got any*

interest in the matter which if not protected he shall suffer injury. "

42. In the case of ***Kazi Mukhlesur Rahman*** Vs. ***Bangladesh and another*** reported in ***26 DLR(SC)44***, the Appellate Division also observed, *inter alia*,-

" It appears to us that the question of locus standi does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the Court exercises upon due consideration of the facts and circumstance of each case."

43. In ***Bangladesh Sangbadpatra Parishad(BSP) represented by its Secretary General Anwarul Islam*** Vs. ***The Government of the People's Republic of Bangladesh represented by its Secretary, Ministry of Information and 4 others*** reported in ***43 DLR(AD)126***, the Appellate Division further goes to observe, *inter alia*,-

"The Parishad was not espousing the cause of a downtrodden and deprived section of the community unable to spend money to establish its fundamental right and enforce its constitutional remedy. The indication was thus broadly given that in case of a violation of any fundamental right of the citizens affecting particularly the weak, downtrodden or deprived section of the community or that if there is a public cause involving public wrong or public injury, any member of the public or an organisation, whether being a sufferer himself/itself or not may become a person aggrieved if it is for the realisation of any of the objectives and purposes of the Constitution."

44. While giving interpretation to the words "*sufficient interest*" with the words "*any person aggrieved*" the Appellate Division in the case of ***Dr. Mohiuddin Farooque*** Vs. ***Bangladesh*** reported in ***49 DLR(AD)1*** observed, *inter alia*,-

"Any person other than an officious intervenor or a wayfarer without any interest or concern beyond what belongs to any of the 120 million people of the country or a person with an oblique motive, having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of public duty or for violation of some provision of the Constitution or the law and seek enforcement of such constitutional or legal provision. Now what is 'sufficient interest' will essentially depend on the co-relation between the matter brought before the Court and the person who is bringing it. .....

The High Court Division will exercise some rules of caution in each case. It will see that the applicant is, in fact, espousing a public cause, that his interest in the subject matter is real and not in the interest of generating some publicity for himself or to create mere public sensation, that he is acting bona fide, that he is not a busybody or an interloper, that it is in the public interest to grant him standing and that he is not acting for a collateral purpose to achieve a dubious goal, including serving a foreign interest."

45. The petitioner, CCB Foundation, is a non-profit and charitable registered society under Societies Registration Act, 1860 (bearing registration No. S-4000(102)/2004 dated 04th August, 2004). The said organisation works for the promotion of child rights and child education in the country. It has outlined its objectives in paragraph 3 of the writ petition and also by supplementary affidavit. However, clause 13 of the object clause of the Memorandum of Association of the petitioner-organisation is "to organise legal assistance, support groups for victims of social, political and human rights crimes". Further, Annexure-C series to the supplementary affidavit substantiate that the petitioner organisation has undertaken different projects as well as conduct programmes for child education and promotion of child rights.

46. The issues being raised in the instant writ petition by the petitioner involves grave public injury as well as invasion on the fundamental right to life of the victim guaranteed under the Constitution. Accordingly, it has sought protection of this Court, the guardian and custodian of the Constitution of the People's Republic of Bangladesh, for violation of the said right by filing application under Article 102 of the Constitution for the bereaved poor family members of the 4 years old boy named Jihad who died by falling into an uncovered deep tube well pipe of Bangladesh Railway situated at Shahjahanpur Railway Colony. As such, it cannot be said that the petitioner has no *locus standi* on the issue in question. In other words, this Rule is maintainable so far the *locus standi* of the petitioner Foundation is concerned.

47. The categorical assertion of the petitioner is that it is a clear case of negligence on the part of the respondent No.4, Bangladesh Railway, as they owed a public duty to keep the uncovered tube well pipe surrounded with a fence or something with clear sign of caution to the inhabitants of the area concern of the risk it entails with and also to cover it so that no one could fall down having not known that it was uncovered, which they did not. The further contention of the petitioner is that Fire Service, respondent Nos.3 and 5 also have miserably failed to discharge their public duty, for, admittedly they did not even have a camera to locate the position of the boy named Jihad whereas they posed a show-down for long 10-12 hours by sending down a camera which was unworkable and ultimately, they declared the rescue operation abandoned making statements in public that there was nothing or no body inside the pipe, which is a glaring instance of negligence on the part of the said respondents. Thus, the maxim *res ipsa loquitor* as well as strict liability principles are squarely attracted in the present case and as such, the bereaved family members of the victim are entitled to compensation due to the irredeemable loss suffered by them on account of the said negligence of the respondents.

48. Conversely, the contention of the respondents are that they are not responsible for the occurrence, rather it was the duty of the contractor M/S S.R. House and the Engineer concern to look after and maintain the said tube well.

49. The word "negligence" is defined as the breach of a duty caused by the omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do. In other words,

negligence may arise from non-feasance or from misfeasance.

50. An action for negligence proceeds upon the idea of an obligation or duty on the part of the person concern to use care, a breach whereof results in the injury of the aggrieved person.

51. However, the standard or degree of care which a man is required to use in a particular situation varies with the obviousness of the risk. If the danger of doing injury to the person or property of another in pursuance of a certain line of conduct is great, great care is necessary. If the danger is slight, only a slight amount of care is required. The care that will be required of them will be the care that an ordinary prudent man is bound to exercise. But, persons who profess to have special skill, or who have voluntarily undertaken a higher degree of duty, are bound to exercise more care than an ordinary prudent man.

52. In order to succeed in an action for negligence, the aggrieved person must prove the followings -1. that the other party was under a legal duty to exercise due care and skill; 2. that the duty was towards aggrieved person; 3. that in the circumstances of the case, the other party failed to perform that duty; 4. that the breach of such duty was the *causa causans* i.e., the direct and proximate cause, of the damage complained of; and 5. that the injury is caused on account of this breach of duty.

53. As a general rule, the onus of proving negligence is on the aggrieved person. He must not merely establish the facts of the other parties' negligence and of his own injury, but must show that the one was the effect of the other.

54. However, in an action of negligence the affected person must affirmatively prove negligence but may find hardship in cases where the aggrieved person can prove the accident, but cannot show how it happened, the fact being solely outside his knowledge and within the knowledge of the other party who causes it. In such cases, it is sufficient for the aggrieved person to prove the accident and nothing more, for, there is a presumption of negligence according to the maxim "*res ipsa loquitur*" (the thing speaks for itself). Such presumption arises when the cause of the mischief was apparently under the control of the other person or his servants. The accident itself constitutes reasonable evidence of negligence in the particular circumstances.

55. Thus, the following are the essential requirements for application of the said maxim: (i) The thing causing the damage must be under the control of the other party or his servants; (ii) the accident must be such as would not, in the ordinary course of things, have happened without negligence and (iii) there must be no evidence of the actual cause of the accident.

56. A classic exposition of the said maxim is found in the judgment of Sir William Erle C.J. in the leading English case, ***Scott*** v. ***London & St. Katherine Docks Co.(1865 3 H & C 596)***, where it was observed as follows:

> *"There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servant, the accident is such as in the ordinary course of things does not happen if those who have the management used proper care, it affords reasonable evidence, in the absence of any*

explanation by the defendant, that the accident arose from want of care. "

57. The incident in question has not been disputed by the respondents concern, nor is it disputed that the cause of death of the 4 years old boy named Jihad was due to falling in the uncovered deep tube well pipe maintained by the respondent No.4.

58. The respondent Nos. 3 and 5, Fire Service and Civil Defense in their affidavit in compliance categorically contends that "*this type of incident is an unique and rare incident in Bangladesh. The personnel of Fire Service and Civil defence are not quite familiar with such an incident."* However, falling in pipes, wells, holes and entrapping into fences of human body are not rare in the country. Rather, in their own volition they admitted that they did not have any expertise in the incident in question. In the said state of position, when the said respondents had abandoned the rescue operation upon declaring that "*there was no trace of human body inside the pipe*", the dead body of Jihad was found and uplifted by a group of five young people within a short time of such declaration. The said simple and ordinary device was not known to the respondent Nos. 3 and 5. By making a mere statement that they did not have proper expertise in the matter in question, cannot go to absolve them from their public duties as well as liabilities, which have been casted upon them by the statute.

59. Moreover, the respondent No. 5 did not submit any information, by filing affidavit in compliance, as to their *expertise, expenditure or training with regard to rescuing people in life threatening accidents, particularly in the cases of falling in uncared pipes, holes, wells, tube wells, water-tanks, water-bodies, sewerage-pipes,* as was directed by this Court. Even, there was no statement in the said affidavit that there was any person from the Fire Service Department at the site of the incident who was expert in rescuing a human being trapped in any hole or deep pipe.

60. In this regard, it is also pertinent to observe that in paragraph 11 of the affidavit in compliance said respondents have categorically stated that *"there is no high tech powerful camera/equipment in Fire Service and Civil Defence that can be used to locate victim in such a deep and narrow pipe."* It is astonishing that Civil Defense Authority has not purchased any powerful camera to see if there is any human body in danger in the pipe or deep hole, for, having and possessing a high powered camera is an important item for any rescue operation to be conducted by the said respondents. Even in ordinary rescuing incidents like drowning in a ship, boat, deep sewerage pipe or deep wells searching by high powered camera is a common method to be applied in any rescue operation.

61. Even, in 2012-2013 they claimed to have purchased instruments worth Tk. 29,03,58,486/= and in 2013-2014 they had purchased instruments worth Tk. 67,81,14,708/=. It is surprising to observe that although more than 60 crores of taka the authority had expended to purchase life saving instruments in a year, but they did not buy a modern camera to rescue people in danger in any pipe or holes or wells.

62. The respondent Nos. 3, 5 and 6 though had sent down cameras to see the condition of the child but the same being unworkable, they brought about another camera just to see the condition of the boy without taking fruitful step to rescue him immediately. This camera show down went on for about 10-12 hours resulted in tragic death of Jihad.

63. Furthermore, in the said affidavit the respondent No. 5 also stated that "*Fire Service and Civil Defence had sought support and co-operation from other government and non-government orgnaisations, volunteers and common people to take part in the rescue operation. The victim was rescued finally by the integrated efforts of all stakeholders*."

64. From record it appears that the Ministry of Homes and Fire Service declared the rescue operation abandoned by making statement in public that there was no trace of human body inside the pipe, which was reported and also telecasted live through all the electronic and print medias. However, within a short time of declaration a group of 5(five) young people rescued the dead body of Jihad. Therefore, it is apparent that rescuing the dead body of the victim Jihad by 5(five) young people is not the result of integrated efforts but an unfortunate reflection of negligence on the part of the respondents concern demonstrating their ineligibility to handle rescue operation in any deep pipe/shaft.

65. The respondent No. 4 i.e., Bangladesh Railway in its affidavit-of- facts stated that following the tragic incident of Jihad's death an inquiry committee was formed, which gave the following opinion–

"**৬.০০ মতামতঃ**

৬.০১ শাহজাহানপুর রেলওয়ে কলোনীর জনবহুল এলাকায় পরিত্যক্ত নলকূপের চারপাশে নিরাপত্তামূলক বেষ্টনী না দিয়ে সম্পূর্ণভাবে অরক্ষিত রেখে এবং পরিত্যক্ত নলকূপের হাউজিং পাইপের মুখে ঢাকনা না লাগিয়ে যথাযথ কর্তৃপক্ষের অনুমোদন ব্যতিরেকে অবৈধভাবে পানি উত্তোলন করার জন্য সংশি- ষ্ট ঠিকাদারী প্রতিষ্ঠান দায়িত্ব ও কর্তব্য পালনে চরম অবহেলা করেছে। অধিকন্তু সাইটের safety & security নিশ্চিত করার জন্য সংশি- ষ্ট এসএসএই/সেত/নলকূপ ও পরিদর্শন, চট্টগ্রাম এবং এবিই/ফিল্ড/ঢাকা উভয় কর্মকর্তা কর্তৃক ঘটনার এক মাস পূর্বে সংশি- ষ্ট ঠিকাদারী প্রতিষ্ঠানকে অনুরোধপত্র দেয়া সত্বেও উক্ত প্রতিষ্ঠান তার প্রতি আদৌ কোন গুরুত্ব না দিয়ে উদাসীনতা, শৈথিল্য ও গাফিলাতি প্রদর্শন করেছে। ঠিকাদারী প্রতিষ্ঠানের এহেন অপরাধমূলক কর্মকান্ডের জন্য দুর্ঘটনাটি ঘটেছে বিধায় ঠিকাদারী প্রতিষ্ঠান এস, আর, হাউজ, ৩৮/৩ উত্তর মুগদাপাড়া, ঢাকা দায়ী।

৬.০২ প্রচলিত নিয়মানুযায়ী নলকূপ স্থাপনের সাইটের সার্বিক নিরাপত্তা নিশ্চিতকরণসহ কাজটি সুষ্ঠুভাবে সম্পন্নকরণের জন্য নিবিড় তদারকি (Close supervision) এর দায়িত্ব এসএসএই/সেতু/নলকূপ ও পরিদর্শন, চট্টগ্রাম জনাব মোঃ জাহাঙ্গীর আলম এর উপর ন্যস্ড় থাকলেও তিনি সংশ্লিষ্ট সাইটে Frequent Inspection করেননি। এমনকি নিয়োজিত ঠিকাদারী প্রতিষ্ঠান পার্শ্ববর্তী পরিত্যক্ত বোরিং হতে যথাযথ নিরাপত্তা অর্থাৎ হাউজিং পাইপের মুখ ঢাকনা দিয়ে বন্ধ না করে নির্মীয়মান নলকূপের বোরিংয়ের কাজের জন্য সাবমার্সিবল পাম্প স্থাপন করে পানি উত্তোলন করলেও তিনি তাতে বাধা প্রদানসহ হাউজিং পাইপের মুখে ঢাকনা লাগানোর কার্যকরী কোন পদক্ষেপ গ্রহণ করেননি। এতে তার সাইট পরিদর্শনে শৈথিল্য, অবহেলা, গাফিলতি ও উদাসীনতা এবং দায়িত্ব ও কর্তব্য পালনে ব্যর্থতা প্রমাণিত হওয়ায় এ দুর্ঘটনার জন্য তিনি দায়ী।

৭.০০ সুপারিশঃ

৭.০১ নবপদ সৃজনসহ প্রত্যেকটি রেলওয়ে ডিভিশনের জন্য (প্রতিটি জোনের পরিবর্তে) ন্যূনতম একজন এসএসএই/সেতু/নলকূপ ও পরিদর্শন পদায়নের ব্যবস্থাসহ তাদের কার্যপরিধি কমিয়ে আনা প্রয়োজন।

৭.০২ সকল Standard Tender Document (STD) এর General Conditions of Contract (GCC) তে "Safety, Security and Protection of Environment" clause অন্তর্ভুক্তির জন্য Central Procurement Technical Unit (CPTU) কে পত্র প্রেরণ করা যেতে পারে।

৭.০৩ সকল পূর্ত ও ভৌত অবকাঠামো কাজের ক্ষেত্রে জননিরাপত্তা (Public safety and security) নিশ্চিতকল্পে ঠিকাদারী প্রতিষ্ঠানসহ সংশ্লিষ্ট তদারকি-কর্মকর্তা/কর্মচারিদের নিবিড় তদারকি, পরিদর্শন এবং মনিটরিং আরো জোরদার করা প্রয়োজন।

৭.০৪ বাংলাদেশ রেলওয়ের প্রকৌশল বিভাগের Way and Works Manual এর Volume-1 Duties of Officials (Chapter I-VII) এর Section 2: Functions of Tube-well Branch under Bridge Engineer (অনুচ্ছেদ-৭১৪, ৭১৫ ও ৭১৬) তে নলকূপ স্থাপন, মেরামত ও রক্ষণাবেক্ষণ এবং পরিত্যক্ত নলকূপের রক্ষণাবেক্ষণ বিষয়ে সেতু বিভাগের বিই, এবিই/ফিল্ড ও এসএসএই/সেতু/নলকূপ ও পরিদর্শন, বৈদ্যুতিক বিভাগের ডিইই, এইই ও এসএসএই/ইলেক এবং ওপেন লাইনের ডিইএন, এইএন ও এসএসএই/ওয়ার্কস এর দায়িত্ব ও কর্তব্য সুনির্দিষ্ট না থাকায় এ বিষয়ে পরিপত্র/সার্কুলার জারিপূর্বক সংশি- ষ্টদের দায়িত্ব ও কর্তব্য সুনির্দিষ্ট করা প্রয়োজন।"

66. M/S S.R. House, an enlisted contractor of Bangladesh Railway was given work orders for excavation and installation of deep tube well in the area in question. It also appears from record that the said contractor without taking necessary precautionary measures around the said deep tube well, which was situated at a densely populated area within Shahjahanpur Railway Colony and without covering the same was extracting water therefrom without taking due approval of the authority concern.

67. Thus, it is apparent that the said enlisted contractor of the respondent No.4 had miserably failed to take due care while doing his work, as stated above. As such, we have no manner of doubt to find that the respondent No.4 cannot avoid it's liability when the negligence of it's contractor is admitted by the said respondent in it's affidavit in compliance.

68. From Annexure-A to the affidavit in opposition of the respondent No. 4 it appears that the enquiry committee while giving recommendation has by-passed the liability and negligence of the respondent No.4 by shifting the said liability on the contractor, as has been stated in paragraph 6 of the affidavit in opposition "*Bangladesh Railway was not negligent because it was the fault of the contractor who were carrying out the work* ". Thus, it appears that the said respondent No. 4 is shifting their liability on each other for the failure to take proper maintenance of the said shaft. They, however, do not dispute that one or the other is indeed responsible for the negligent act.

69. There can be no denying of the fact that said respondents owed a duty of care to the public in general so that no action or inaction on their part may cause any harm to the public at large. Also, there can be no dispute that the shaft in question should have remained covered, there should have been sufficient precautionary measures on the part of the respondent No.4 so that no one can fall down. Falling of Jihad inside the said uncovered shaft is itself a *prima facie* evidence of negligence. Moreso, nothing otherwise has been posed by the respondents to suggest that Jihad fell down despite the respondents taking proper care of the same, or for any other cogent/plausible reason whatsoever.

70. In view of the above, there is no doubt to find that the respondent No.4 through its contractor was negligent in the maintenance of the said shaft, due to which Jihad fell down and died.

71. Said negligent acts of the respondents concern are also a glaring instance of gross invasion of human and fundamental rights of

the 4 years old boy named Jihad as guaranteed under Article 32 of the Constitution of the People's Republic of Bangladesh.

72. Now, the next question is whether a claim of compensation be made against public authority regarding the action/inaction which resulted in a death of Jihad, for breach of their statutory/constitutional duty.

73. In respect of death or injuries occurring consequent to wrongful act the person aggrieved (the injured person) or in cases of death the members of the bereaved family may file case under section 1 of the Fatal Accidents Act,1855. While disposing of the said case the court has discretion to award such compensation as it deem commensurate to the loss resulting to the bereaved party from such death and if so doing the court may also award for any pecuniary loss that was caused to the family members of the diseased after his/her death. In this regard, the categorical assertion of the Intervenor is that the timeline for settlement of such cases is 10-20 years. Moreover, when a case is filed in civil court the pecuniary jurisdiction depends on the value of the suit, which also involves dilatory court's procedure and delay in trial. As a result, several cases were not even pursued to the end.

74. In this regard, it has also been contended that in the case of ***Bangladesh Beverage Industries Ltd.*** Vs. ***Rowshan Akter and others*** reported in ***62 DLR 483***[2] the only recorded instance of such a case where the High Court Division in an appeal in the year 2010 has awarded Tk. 02,00,00,000/= (Taka two crore) as compensation to the dependants of a journalist killed in a road accident in 1989 24 years after the case was originally filed and is still remain pending for hearing before the Appellate Division of the Supreme Court of Bangladesh and the payment of compensation is still unrealized.

75. Accordingly, an argument has been advanced on behalf of the Intervenor that the High Court Division while exercising it's constitutional power under Articles 44 and 102(1) of the Constitution has ensured an effective response to the disaster by enabling remedial action to be taken for compensation to be paid to the victim and at same time penal action to be initiated against those who are responsible. In this regard, it has also been contended that such liability of the respondent has been recognized by the court on the basis of the principle of *res ipsa loquitor*, which was followed in ***Scott* V. *London and St Katherine Docks Co. (supra).***

76. In the book named ***"Constitutional Law of Bangladesh"*** authored by Late Mr. Mahmudul Islam his opinion was that under our Constitution, the High Court Division of the Supreme Court of Bangladesh has power under Article 102(1) to pass necessary orders to enforce fundamental rights. However, under Article 44(1) the right to move the High Court Division under Article 102(1) is itself a fundamental right. The position of the High Court Division in respect of enforcement of fundamental rights is the same as that of the Indian Supreme Court with the difference that its decision is not final and is subject to appeal under Article 103 of the Constitution. Thus, it is not discretionary with the High Court Division to grant relief under Article 102(1). Once it finds that a fundamental right has been violated, it is under constitutional obligation to grant necessary relief: ***Kochuni*** V. ***Madras, AIR 1959 SC 725***.

[2] In Appellate Division Judgment the reference is [2016] 4 CLR(AD) 411.

77. The Constitution, however, does not stipulate the nature of relief which may be granted. It has been left to the High Court Division to fashion the relief according to the circumstances of the particular case: ***Bangladesh*** V. ***Ahmed Nazir*** **(1975) 27 DLR (AD) 41**. It need not be confined to the injunctive relief of preventing the infringement of a fundamental right and in an appropriate case it may be a remedial one providing relief against a breach already committed: ***Mehta*** V. ***India, AIR 1987 SC 1086, 1091***.

78. As to the power of the Supreme Court of India under Article 32 of the Indian Constitution (which is identical to Article 44 of the Constitution of the People's Republic of Bangladesh) the Supreme Court of India observed, *inter-alia, in granting relief in case of a violation of fundamental rights the court is not helpless and it should be prepared to forge new tools and devise new remedies and, if necessary, to develop new principles of liability for the purpose of vindicating those precious fundamental rights"*: ***Khatri*** V. ***Bihar, AIR 1981 SC 928; Nilabati Bahera*** *V.* ***Orissa, AIR 1993 SC 1960***. In this regard, the decision of the ***Privy Council*** in ***Maharaj*** V. ***A.G. of Trinidad and Tobago*** reported in ***1978(2) all E.R. 670***. is apt to be quoted, which runs as under-

> *" ..... This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies where more appropriate. "*

79. In ***Rudul Shah*** v ***State of Bihar 1983 (4) SCC 141: AIR 1983 SC 1086,*** one of the earliest decisions where interim compensation was awarded by way of public law remedy in the case of an illegal detention, the Supreme Court observed as under:

> *"It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary process of courts, civil and criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. "*
>
> The Court further observed:
> *" In these circumstances of the case the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip service to his fundamental right to liberty which the State Government has so grossly violated. Article 21, which guarantees the right to life and liberty, will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation."*

80. In this regard, it is pertinent to observe that Article 146 of our Constitution, however, does not make any distinction between the sovereign and non-sovereign acts nor makes any reference to the extent of liability of the government. Thus, the power to grant compensation against public authority regarding an action/inaction which resulted in a death, for breach of statutory/constitutional duty is not barred by our Constitution.

81. However, in every case of violation of the fundamental rights, compensation may not be given by the High Court Division. But there is no reason why the relief should not be denied in a case of clear and blatant violation of fundamental rights involving life or liberty of the citizens caused by the State machineries.

82. In ***Railway Board*** V ***Chandrima Das (2000)2 SCC 465***, the Court considered the question whether the High Court could entertain the petition filed by the respondent by way of public interest litigation and award compensation of Rs. 10 lakhs to Hanuffa Khatoon, a national of Bangladesh, who was sexually assaulted by the employees of the Eastern Railway. While rejecting the argument of the appellant that the victim of rape could have availed remedy by filling suit in a civil court, the Supreme Court of India observed*:*

> *"Where public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law. It was more so when it was not a mere matter of violation of an ordinary right of a person but the violation of fundamental rights which was involved as petitioner was a victim of rape which is violative of the fundamental right of a person guaranteed under Article 21 of the Constitution."*

83. In ***M.C. Mehta*** V. ***Union of India [AIR 1987, SC 1086],*** while dealing with a writ petition, filed for closure of certain units, the Supreme Court observed as follows:

> "*..... The applications for compensation are for enforcement of the fundamental right to life enshrined in Art 21 of the Constitution and while dealing with such applications, a hyper-technical approach which would defeat the ends of justice could not be adopted. If the court is prepared to accept a letter complaining of violation of the fundamental right of an individual or a class of individuals who cannot approach the court for justice, there is no reason why the applications for compensation which have been made for enforcement of the fundamental right of the persons affected by the oleum gas leak under Article 21 should not be entertained. The Court while dealing with an application for enforcement of a fundamental right must look at the substance and not the forum".*

The Court further observed:

> " *..... We are also of the view that this Court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Article 32(2) has the implicit power to issue*

whatever direction, order or writ is necessary the Court in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The power of the Court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed vide Bandhua Mukti Morcha's case (supra). If the Court was powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the Court can injunct such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32. That would, to a large extent, emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile. We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases. .....The infringement of fundamental right must be gross and patent, that is, incontrovertible and exfacie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socially or economically disadvantaged position to require the person or persons affected by such infringement to initiate and pursue action in the civil courts. It is only in exceptional cases, compensation may be awarded in a petition under Article 32 of the Indian Constitution."

84. In ***Smt. Nilabati Behera*** v. ***State of Orissa 1993 (2) SCC 746*** the deceased was arrested by the police, handcuffed and kept in police custody. The next day, his dead-body was found on a railway track. The Court awarded compensation to the mother of the deceased on the following principles:-

" *.... Enforcement of the constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention. ..... A claim in public law for compensation" for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is "distinct from, and in additional to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the*

constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the state or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 31 and 226 of the Constitution."

The Court further goes to observe that-
"*Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability of the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law*."

85. In ***U.P. State Co-operative Land Development Bank Ltd***. Vs. ***Chandra Bhyan Dubey and others [1999(1)SCC 741*** it was observed that:

"the Constitution is not a statute. It is a fountainhead of all the statutes. ..... When any citizen or person is wronged the High Court will step in to protect him, be that wrong be done by the State, or an instrumentality of the State. ....."

86. In the case of ***D.K. Basu*** Vs. ***State (1997)1 SCC 416***, it has also been observed -

"*A court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim-civil action for damages is a long-drawn and a cumbersome judicial process. Monetary compensation for redressal by the court is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the breadwinner of the family.* "

87. In Bangladesh, awarding cost in judicial proceedings for being aggrieved is an established practice in the Supreme Court of Bangladesh. However, there is still vacancy on giving "*constitutional compensation*" in a petition for judicial review for violation of fundamental rights guaranteed under the Constitution.

88. In ***BLAST*** Vs. ***Bangladesh) (2003) 55 (DLR (HCD) 363***: a petition was filed with respect to the death of a student in police custody and also, for general direction regarding duty of the police under section 54 of the Code of Criminal Procedure. Although no compensation was awarded in this case, but the High Court Division made certain observations, which are apt to be quoted and runs as follows:

> " *If this Court, in exercise of its power of judicial review finds that fundamental rights of an individual have been infringed by colourable exercise of power by the police under section 54 of the Code or under section 167 of the Code, the Court is competent to award compensation for the wrong done to the person concerned. Indian Supreme Court held that compensatory relief under the public law jurisdiction may be given for breach of public duty by the state of not protecting the fundamental right to life of a citizen. We accept the argument that compensation may be given by this Court when it is found that confinement is not legal and the death resulted due to failure of the state to protect the life. ....."*

89. In ***A.K. Fazlul Hoque*** Vs. ***Bangladesh 57 DLR (HCD) 725***, a petition was filed and Rule was issued against high officials of the Housing and Settlement Directorate to show cause as to why they should not be held responsible for non-payment of the pension and gratuity to the petitioner in terms of his service conditions and why they should not be directed to pay compensation for such delay. After hearing and disposal the High Court Division awarded token compensation of Tk. 25,000/=.

90. Also, in ***Md. Shahanewas*** Vs. ***Government of Bangladesh 18 BLD (HCD) 337***: this Court awarded 'compensatory' costs of Tk. 20,000/=, against a delinquent police officer for negligently arresting a poor fisherman in place of a convicted criminal merely on the basis of their identical names by observing that the poor victim should be 'well compensated' for his 'immense sufferings' and loss of livelihood for six months due to a sheer negligence of the public servant in discharging his public duty.

91. In this connection the ratio of ***Habibullah Khan*** Vs. ***Azaharuddin, 35 DLR(AD)72*** may be referred to. In that case the High Court Division awarded compensatory cost against the then Minister-in charge of the Ministry of Information for exercising excessive power and for taking *malafide* action. But the Appellate Division knocked down the said judgment having offended the principles of natural justice on the ground that the High Court Division made several adverse findings against said Habibullah Khan in the judgment of the writ petition though he was not a party to the same. However, while disposing of the said matter the Appellate Division observed that "*awarding of compensatory costs is no doubt a matter of discretion of the Court, but it must be exercised judiciously*".

92. In the case of ***Bilkis Akhter Hossain*** Vs. ***Bangladesh and others 17 BLD HCD(1997)395,*** one of the Benches of this Division had directed the government to pay an exemplary compensation of Tk.1,00,000/- to each of the 4(four) political detenues who were held detain unlawfully, by observing, *inter alia*,-

"Under Article 102 of the Constitution Special Original Jurisdiction has been conferred to us. It is an original, but not appellate or revisional jurisdiction conferred under Article 102 of the Constitution conferring discretionary as well as extra-ordinary power to meet every situation where no other alternative, adequate and efficacious remedy is available. Though there is no specific provision for awarding cost and compensation under Article 102 of the Constitution. Yet it is a long drawn tradition., custom or discretion of the High Court Division that in every writ case this Court always passes judgment either with cost or without cost. Since this Court exercises its special jurisdiction and since this Court has got extraordinary and inherent jurisdiction to pass any order as it deems fit and proper. We are of the view that this Court has the power to award simple cost of the case as well as monetary compensation considering the facts and circumstances of each case.

In our opinion, the upshot of all the above judicial pronouncements is that the Constitutional Court, in exercise of its constitutional jurisdiction, can award monetary compensation in favour of the aggrieved detenu in case of violation of his fundamental rights guaranteed under the Constitution by the detaining authority in appropriate Habeas Corpus cases for illegal confinement in jail. "

93. Said observations of the High Court Division were subsequently set aside by the Appellate Division in ***Bangladesh*** Vs. ***Nurul Amin*** reported in ***67 DLR(AD)352*** on the ground that –

" ..... *There was no foundation in the writ petitions or prayer for exemplary, monetary compensation and compensatory costs was never made in the writ petitions and connected affidavits rather on the prayer of the learned Senior Advocate for the writ petitioners the learned Judges of the High Court Division on mere surmises and conjectures wrongly directed the respondent Nos.1 and 2 to pay monetary compensation to the respective detenues.* ..... "

94. However, while disposing of the said matter the Appellate Division by making the following observations has opened the forum to the aggrieved party to claim *constitutional compensation/monetary compensation* in appropriate cases for violation of fundamental rights, guaranteed under the Constitution of the People's Republic of Bangladesh. The relevant portion is quoted as under-

"*We have no hesitation in holding that the paramount object and purpose for which Article 102 has been enacted and the relevant factor and provision on which the interpretation of the Article 102 has been linked, the High Court Division in exercise of its jurisdiction under Article 102 of the Constitution, which is an instrumentality and a mechanism, containing both substantive and procedural provisions "to realise the objectives, purposes, policies, rights and duties which[the people] have set out for themselves and which they have strewn over the fabric of the Constitution," can award monetary*

compensation or compensatory cost mostly in appropriate cases for violation of fundamental rights which must be gross and patent i.e. incontrovertible and ex-facie glaring or that violation should appear unjust, unduly harsh or oppressive on account of the victim's disability or personal circumstance..... That is why the Court has to act firmly but with certain amount of circumspection and self-restraint, lest proceedings under Article 102 are misused as "appropriate cases" or "a disguised substitute for civil action in private law" It is only in the exceptional cases of the nature indicated above that compensation or compensatory cost may be awarded to a victim in a petition properly drawn under Article 102 of the Constitution. The violation must be gross and its magnitude must be such as "to shock the conscience of the Court" and it would be gravely unjust to the person whose fundamental right was violated to require him to go to the Civil Court for claiming compensation. "

95. In view of the above observations of the Appellate Division, it can unequivocally be discerned that the High Court Division is competent to award compensation in the cases of established unconstitutional deprivation of the fundamental right to personal life or liberty of the person concern, while exercising its jurisdiction under Article 102 of the Constitution provided said violation is gross and patent i.e., incontrovertible and *ex-facie* glaring.

96. The present case is a case of evident negligence on the part of the respondent Nos.3, 5 and 4 (Fire Service and Civil Defense and Bangladesh Railway), which led to violation of the fundamental right to life of the deceased Jihad. Consequently, the maxim *res ipsa loquitor* as well as strict liability principles applies. As such, the petitioner is entitled to take resort to a constitutional remedy for award of compensation in favour of the bereaved family members of the said boy. In this regard, it is pertinent to observe that in the Constitution of India the State has the defence of sovereign immunity as provided under Article 300 of the Indian Constitution. Despite the same the Supreme Court of India awarded compensation to the aggrieved person for infraction of fundamental right to life or liberty. In our Constitution there is no such provision like Article 300 of the Indian Constitution; as such, there can be no bar to award compensation to the bereaved family members of Jihad for the injustice being caused to them due to the sheer negligence of the respondents concern leading to violation of his fundamental right to life, guaranteed under Article 32 of the Constitution.

97. So far respondent No.6, Dhaka WASA, is concerned, we do not find any material whatsoever to suggest that they were responsible for the maintenance of the shaft in question nor they were under any statutory obligation to take part in the said rescue operation. The said respondent merely co-operated with the respondent No.5 by providing a camera in order to locate the position of the boy, who fell down in the uncovered deep tube well. Rather, it was, in fact, the duty and responsibility of the respondent Nos. 3 and 5 to participate in the rescue operation with sufficient required equipments and expertise in order to rescue Jihad, which they miserably failed.

98. Accordingly, this Court finds that the instant writ petition under Article 102 of the Constitution of the People's Republic of Bangladesh is maintainable, for, the said negligence of the respondent Nos.3,5 and 4 has culminated in infringement of the fundamental right to life of the deceased Jihad guaranteed under Article 32 of the Constitution.

99. As observed earlier, the court while exercising jurisdiction under Article 102 of the Constitution can award monetary compensation against the State and its officials for its failure to safeguard the fundamental rights of the citizens of the country, but there is no set method to measure the damages caused in such situations. Quite often the courts have a difficult task in determining damages in various fact-situations. The yardstick generally adopted for determining the compensation payable in a suit for damage are not applicable when a constitutional court determines the compensation for violation of the fundamental rights guaranteed to its citizens under Part III of the Constitution.

100. In ***D.K. Basu*** v ***Union of India (supra):*** a Constitution Bench held that there is no straight jacket formula for computation of damages and it is found that there is no uniformity or yardstick followed in awarding damages for violation of fundamental rights.

101. Fact remains, once a life is snatched away by a negligent act of the persons concern it cannot be equated or compensated with money. In view of the observations so made in ***Rudul Shah*** v ***State of Bihar (supra),*** " *the right to compensation is some palliative*" to the bereaved family members of the victim and is the only effective mode of redress available for the negligence of the State or its instrumentalities so caused while discharging their public duties.

102. In this regard, we feel the urge to quote the following observations so made in ***Smt. Nilabati Behera's case(supra)***:

> "*It is a sound policy to punish the wrongdoer and it is in that spirit the courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure the public bodies or officials do not act unlawfully and to perform their duties properly particularly where the fundamental right of a citizen under Article 21 is concerned.*
>
> *Law is in the process of development and the process necessitates developing separate proceedings and principles to apply and the courts have to act firmly but with certain amount of circumspection and self restraint, lest proceedings under Article 32 or 226 are misused as a disguised substitutes for civil action in private law."*

103. In the case of ***Sri Manmath Nath Kuri*** Vs. ***Mvi. Md. Mokhlesur Rahman*** reported in **22 DLR(SC)51** at page 58 it has been observed that –

> "A*ssessment of damages in such a case must, therefore, necessarily be to some extent of a rough and approximate nature based more or less on guess work, for, it may will be impossible to accurately determine the*

> *loss which has been sustained by the death of a husband, wife, parent or child.*"

104. In the case of ***Bangladesh Beverage Industries Ltd. Vs. Rowshan Akter*** **(supra)** the High Court Division goes to observe, inter alia,-

> " ..... *affection, pain, suffering, mental agony, physical incapability and emotion are not calculable and if the court is satisfied that plaintiff is entitled to any compensation that can be only in lump sum and not on calculation.*"

105. The instant case is one of such kind, which requires intervention by this Court with the award of compensation, not on calculation but in lump sum, while exercising jurisdiction under Article 102 of the Constitution. Accordingly, we are inclined to allow the prayer so made by the petitioner.

106. In the result, the Rule is made absolute.

107. The inaction and/or negligence, and/or failure on the part of the respondent Nos. 3, 5 and 4 respectively in respect of rescuing a minor boy of 4(four) years named Jihad which resulted in his tragic and shocking death, is hereby declared to be illegal, without lawful authority and hence, of no legal effect being violative of the law of the country, as well as his fundamental rights as guaranteed under Article 32 of the Constitution of the People's Republic of Bangladesh.

108. However, considering the socio-economic position of the country and also keeping in view of the applicable laws of the country with regard to award of compensation, instead of awarding Tk.30(Taka thirty lacs) as compensation, as claimed by the petitioner we direct the respondent No.4, Bangladesh Railway to pay the sum of Tk.10,00,000/=(Taka ten lac) and Tk.10,00,000/- (Taka ten lac) by the Fire Service and Civil Defense, the respondent Nos. 3 and 5 to the respective parents of the victim named Jihad as *monetary compensation* within 90(ninety) days from the date of receipt of the copy of this judgment and order.

109. This order of awarding compensation will not impede/affect other liabilities, if there be any, of the respondents concern or its officials resulting from the death of the said victim.

110. There will be no order as to costs.