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84. Mr. Justice A. K. M Rabiul Hassan

19 SCOB [2024]
Index of Cases
Appellate Division

19 SCOB [2024]
Index of Cases
High Court Division

Cases of the Appellate Division

Sl. No.	Name of the Parties, Citation and Key Words	Summary of the case	Key Ratio
1.	**Aziz Ara Rahman** **Vs.** **RAJUK and others** *(Obaidul Hassan, CJ)* 19 SCOB [2024] AD 1 **Key words**: Principle of *res judicata*; Article 111 of the Constitution; disputed question of fact; trespasser	In a previous Civil Petition for Leave to Appeal it was held that disputed plot was not situated in C.S. and S.A. Plot as claimed by the respondent No.5 and the said plot had not been released from acquisition made in L.A. Case No.10/63-64. Despite this fact, respondent No.5, filed a title suit for declaration of title of the disputed plot in his favor. On the other hand, the appellant as writ petitioner filed a Writ Petition before the High Court Division seeking direction upon the writ respondents to deliver physical possession of the disputed plot to her upon evicting illegal occupant therefrom and to execute and register the lease deed in respect of the said plot in her favor. However, the Writ Petition was discharged. The appellant then filed a CP against the decision of the High Court Division, which ultimately turned into this Civil Appeal. The Appellate Division taking into consideration the previous decision of it in the same matter held that the title suit filed by the respondent no. 5 is barred by the principle of res judicata and as such, the High Court Division on the face of the aforesaid decision of the Apex Court was in breach of Article 111 of the Constitution when it discharged the Writ Petition filed by the appellant.	It is our considered view that the High Court Division committed illegality in passing the impugned judgment without taking into consideration that earlier in Writ Petitions No.11099 of 2006 and 3030 of 2005 the High Court Division found that the respondent No.5 has no right and title over the disputed plot. But in the case in hand, the High Court Division while dealing with the Writ Petition filed by the appellant held relying on the claim of the respondent No.5 to the effect that since the case involves the disputed question of facts as to the title over the disputed plot the same should be settled in Title Suit No.373 of 2005 filed by the respondent No.5 and as such the Writ Petition is not maintainable. The above findings of the High Court Division is absolutely unwarranted inasmuch as the fresh consideration of title of the respondent No.5 in disputed plot which has already been decided earlier by the High Court Division in Writ Petitions No.11099 of 2006 and 3030 of 2005 is barred by the principle of *res judicata.* ...(Para 18)
2.	**Md. Taherul Islam** **Vs.** **The Speaker Bangladesh Jatiya Sangsad & ors** *(Obaidul Hassan, J)* 19 SCOB [2024] AD 10 **Key Words:** Article 123(3); Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh, Deeming Clause, Parliamentary Election, Member of Parliament, Legal Fiction	In this case petitioner challenged the holding of office by taking oath by the Members of Parliament who were elected for the 11th National Parliament before expiration of the term of the previous Parliament. The petitioner alleged that by taking oath before dissolution of the 10th National Parliament, the MPs had violated the Article 123(3) read with Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh. The High Court Division summarily rejected the writ petition on the ground that Article 148(3) of the Constitution had been incorporated to maintain continuity of running the	Article 56(3) and 148 (3) of the Constitution of the Peoples' Republic of Bangladesh: Once the names of elected members of Parliament returned by the Election Commission in the official gazette, it becomes necessary for them to take oath and this necessity arises because of the relevant provisions of the Constitution in order to form a new government. The intention of the legislature is transparent while going through Article 56(3) of the Constitution whereby the President is to have commanded majority support of the members of parliament, as Prime Minister of the country. Therefore, for such appointment of an MP as Prime Minister, the first sitting of the Parliament is not necessary to be held. Rather, it is the discretion of the Hon'ble President to appoint a member

Cases of the Appellate Division

Sl. No.	Name of the Parties, Citation and Key Words	Summary of the case	Key Ratio
		government for the best interest of democracy. A "deeming clause" exists under Article 148(3) is to facilitate the continuity of the government. It was also held that though, upon taking oath, the MPs in reality had not assumed office of members of parliament, yet they had assumed office by way of legal fiction created by the Constitution. Therefore, taking oath by the MPs before dissolution of previous parliament was not illegal. The Appellate Division, concurring with the finding reached at by the High Court Division (which has been reported in 19 SCOB [2024] HCD 66) dismissed the Civil Petition.	as Prime Minister from among the elected members of parliament commanding the support of the majority. In the given circumstances, it is clear that latent intent of the legislature for incorporating the deeming clause under Article 148(3) of the Constitution is to maintain the continuity of the government. ...(Para 39)
3.	**A.B.M. Altaf Hossain & ors** **Vs.** **Bangladesh & ors** *(Md. Nuruzzaman, J; Obaidul Hassan, J; Borhanuddin, J; M. Enayetur Rahim, J; Md. Ashfaqul Islam, J; Md. Abu Zafor Siddique, J; Jahangir Hossain, J)* 19 SCOB [2024] AD 21 **Key Words:** Article 48(3), 52, 55, 95 and 98 of the Constitution of Bangladesh; Interpretation of the Constitution; Consultation; Appointment of the Judges of the High Court Division; Antecedents; Judicial Independence; Basic Structure; 10 Judges Case	In these cases, non-appointment of two Additional Judges of the High Court Division as Judge of the High Court Division under article 95 of the Constitution despite positive recommendation from the Chief Justice of Bangladesh was challenged. After hearing, Appellate Division gave split verdicts on various issues. Consequently, by majority decision, the Appellate Division held that the concerned authority may consider appointing Mr. A.B.M. Altaf Hossain as the permanent Judge of the High Court Division.	We, therefore, sum up as under: (a) The Chief Justice of Bangladesh in exercise of his functions as consultee shall take aid from the other senior Judges of the Supreme Court at least with two senior most Judges of the Supreme Court before giving his opinion or recommendation in the form of consultation to the President. (b) In the light of the observations made in S.P. Gupta, Ten Judges' cases, and the article mentioned in paragraph-17, it is evident that in case of appointment of a Judge of the Supreme Court under Articles 95 and 98 of the Constitution the opinion of the Chief Justice regarding legal acumen and professional suitability of a person is to be considered while the opinion of the Prime Minister regarding the antecedents of a person is also to be considered. If divergent opinions from either side of the two functionaries of the state occur the President is not empowered to appoint that person as Judge. The opinion of any functionary will not get primacy over the others. (c) If any bad antecedent or disqualification is found against any Additional Judge, who is under consideration of the Chief Justice to be recommended for appointment under the provision of Article 95 of the Constitution, it is obligatory for the executive to bring the matter to the notice of the Chief Justice prior to the consultation process starts. (d) After recommendation is made by the Chief Justice to the President, even if, at that stage it is revealed that

Cases of the Appellate Division

Sl. No.	Name of the Parties, Citation and Key Words	Summary of the case	Key Ratio
			antecedent of any recommended candidate is not conducive to appoint him as a Judge under Article 95 of the Constitution, it shall be obligatory for the executive to send the file of that Additional Judge or the person, back to the Chief Justice for his knowledge, so that the Chief Justice can review his earlier recommendation regarding the such candidate. (e) If the Chief Justice again (2nd time) recommends the same Judge/person for appointment under Article 95, whose antecedent has been placed before him for reconsideration, this Court expects that, the President of the Republic would show due respect to the latest opinion of the Chief Justice. ... (Para 311)
4.	**Grameenphone Ltd & ors Vs.** **BTRC & Ors** *(Borhanuddin, J)* 19 SCOB [2024] AD 96 **Key Words:** Sub-Section 3(Ga) of Section 3, 5(4), Sub-Section 4 of Section 6, Section 6 (4KaKa), Section 9(Uma), 15 (4) of the VAT Act, 1991; Rule 18(Ka) and 18(Uma) of the VAT Rules, 1991; Cellular Mobile Phone Operator Regulatory and Licensing Guidelines, 2011; Market Competition Factor (MCF);	In these appeals and civil petitions the issues involved for determination, among others, were whether the claim of the BTRC for additional spectrum fee based on Market Competition Factor (MCF) is lawful; whether the Cellular Mobile Phone Operator can withhold the VAT collected at source and then pay the same directly to Government exchequer and VAT paid by the Cellular Mobile Phone Operator is rebatable or not; and whether BTRC requires a compulsory registration under the VAT Act. Contrary to some findings of the High Court Division, the Appellate Division analyzing relevant laws, rules and guidelines held that (1) in accordance with clause-12(viii) of the Cellular Mobile Phone Operator Regulatory and Licensing Guidelines, 2011 BTRC reserves the right to make any change in the charges or levies from time to time and the mobile phone operators are bound to abide by such decision and as such, additional spectrum fee based on Market Competition Factor (MCF) is lawful; (2) the Cellular Mobile Phone Operator cannot withhold the VAT collected at source, the BTRC is to collect VAT from the Cellular Mobile Phone	**Section 9(1)(Uma) of the VAT Act, 1991:** VAT paid by the cellular mobile companies on the spectrum fees and the license fees are not rebatable: It is clear from Section 9(1)(Uma) of the VAT Act, 1991 that 'spectrum' comes within the definition of infrastructure (অবকাঠামো) and thus VAT paid by the cellular mobile companies on the spectrum fees and the license fees are not rebatable. Said provisions of Section 9 does not require the infrastructure to be tangible as such the argument placed by the learned Advocate for the cellular phone companies that infrastructure cannot intangible is not correct inasmuch as spectrum provided to the cellular mobile phone companies are a range of wave of radio frequencies which is uniquely distinguishable by intangible boundaries that is why spectrum allotted to one cellular phone company cannot be used by others. The cellular phone companies cannot provide service without allocation of spectrum. ...(Para 53) **Clause-7 (অন্যান্য সেবা)(ঘ) of the second schedule of the VAT Act, 1991:** Compulsory VAT registration is not necessary for BTRC: Government, local authorities, the organization of local authority or organization those who are working for the Government are exempted from payment of VAT. The NBR, postal department, Bangladesh Bank, City Corporation and land revenue authority although

Cases of the Appellate Division

Sl. No.	Name of the Parties, Citation and Key Words	Summary of the case	Key Ratio
		Operators and then deposit it to the Government exchequer and VAT paid by the cellular mobile companies on the spectrum fees and the license fees are not rebatable; and (3) under clause-7 (অন্যান্য সেবা)(ঘ) of the second schedule of the VAT Act, 1991 compulsory VAT registration is not necessary for BTRC.	engaged in realization of VAT through deduction at source bearing no registration under VAT Act, 1991 and thus the BTRC being Government organization is also exempted from payment of VAT under Clause-7 (অন্যান্য সেবা)(ঘ) of the second schedule of the VAT Act, 1991 and compulsory VAT registration is not necessary for BTRC. ...(Para 56)
5.	**Bangladesh & anr Vs. Nazrul Islam Biswas** *(M. Enayetur Rahim, J)* 19 SCOB [2024] AD 119 **Key Words:** Administrative Tribunal; Administrative Appellate Tribunal; Current Charge; Section 4 (3) (b) of the Government Servants (Discipline and Appeal) Rules, 1985	In this case the finding of the Administrative Appellate Tribunal that the impugned penalty imposed on the respondent was illegal as because that was imposed by the Director General who was, admittedly, holding current charge and was not the appointing authority, was challenged. Appellate Division analyzing the relevant provisions of law came to the conclusion that when current charge was given for unlimited period it was to be presumed that he had been given all the administrative and financial power of the institution. Consequently, Appellate Division set aside the judgment and order of the Administrative Appellate Tribunal.	When current charge is given for unlimited period it is to be presumed that he has given all the administrative and financial power of the institution: The current charge given to a particular officer by an official notification has got some force of law, and when it is given for unlimited period it is to be presumed that he has given all the administrative and financial power of the institution. The current charge given by a gazette notification cannot be termed or treated that the concerned officer will perform only day to day routine work, rather on the strength of such notification he has been vested all the administrative and financial power to be done in accordance with rules of business. Said current charge cannot be equated as a stop gap arrangement. ...(Para 19)
6.	**Niko Resources (Bd) Ltd Vs. Professor M. Shamsul Alam & ors** *(Md. Ashfaqul Islam, J)* 19 SCOB [2024] AD 125 **Key Words:** Section 161, 162 and 163 of the Penal Code; statutory public authority; Article 152 of the Constitution; Res judicata; Section 23 of the Contract Act; No one can benefit from one's own wrong; Corruption; proceeds of crime; public policy;	In this case the Appellate Division found that the writ respondents No.4 Niko Resources (Bangladesh) Limited and No.5 Niko Resources Limited of Canada had set up a corrupt scheme to illegally obtain gas exploration rights in Bangladesh. Contracts were procured by corruption and therefore those were void ab initio. The Court also found that the rights and assets of the writ respondent No.5 in Block 9 PSC, had also been obtained through corrupt scheme. Consequently, dismissing the petition the Appellate Division held that the High Court Division had rightly declared the Joint Venture Agreement and the Gas Purchase	**Section 162 and 163 of the Penal Code:** We note that section 162 of the Penal Code deals with "Taking gratification, in order, by corrupt or illegal means, to influence public servant". Under section 162 of the Penal Code private individuals, such as Mr. Salim Bhuiyan or Mr. Giasuddin Al Mamoon, taking bribes to influence a public servant by corruption or illegal means is a crime. Similarly, section 163 of the Penal Code deals with "Taking gratification, for exercise of personal influence with public servant". Taking or giving gratification to private individuals for their personal influence with public servants is also a crime. Thus, under the laws of Bangladesh there is no requirement that only direct payments to a Government official can constitute

Cases of the Appellate Division

Sl. No.	Name of the Parties, Citation and Key Words	Summary of the case	Key Ratio
	Article 31, 51, 53 and 54 of the UNCAC;	and Sale Agreement to be without lawful authority and of no legal effect and had rightly attached the assets of writ respondent Nos.4 and 5.	corruption. It would be sufficient if the gratification is extracted on a promise of exercise of personal influence with an official, to bring the offence within the mischief of this section 163 of the Penal Code. Proof of actual exercise of personal influence with an official is not necessary. ...(Para 49)
7.	**Shahin** **Vs.** **The State** *(Md. Abu Zafor Siddique, J)* 19 SCOB [2024] AD 148 **Key Words:** Section 302/34 of the Penal Code; dying declaration; motive; physical and mental capacity to make dying declaration;	In this case the trial Court found all the accused including the appellant guilty of the offence charged under sections 302/34 of the Penal Code and sentenced each of them including the appellant to death. The High Court Division, however, modified the sentence of the convict-appellant Shahin altering the death sentence to imprisonment for life. On the other hand, analyzing the evidence on record the Appellate Division found that the prosecution had failed to prove the allegations against the appellant beyond reasonable doubt and as such, allowing the appeal acquitted him.	Only to prove the motive is not sufficient where the subsequent act relating to murder is doubtful relying on which the High Court Division has given the benefit of doubt to the other accused except the present appellant. The only reason that he took the money from the deceased cannot be the sole basis for his conviction in a murder case. According to the prosecution all the F.I.R. named accused had actively participated in the murder of the deceased Biplob and as many as eleven severe bleeding injuries were found on his body. So, only the appellant can't be held liable for committing the murder when the High Court Division has ignored the dying declaration taking into consideration the incapacity of the deceased at that moment and the contradictory statement of the vital PWs as well on the basis of which the trial Court had convicted and awarded death sentence to all of them. ...(Para 21)
8.	**Bangladesh & ors** **Vs.** **Golam Mustafa** *(Jahangir Hossain, J)* 19 SCOB [2024] AD 155 **Key Words:** Legitimate expectation; work order; Article 102 of the Constitution; Dalilpatra	In this case Hakkani Publishers moved the High Court Division claiming that the Ministry of Information issued work order to supply 2317 sets of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] but later did not pay the bill. However, it transpires that no work order was given to the publisher. The Appellate Division found that different correspondences took place between and among different ministries about the purchase of 2317 sets of the Dalilpatra without due process of tender. It then held that inter-ministry correspondences regarding buying of additional sets of Dalilpatra without tender do not tantamount to any binding agreement between the instant appellants and the respondent and as such, the appellants are	**<u>Article 102 of the Constitution:</u>** Mere correspondence in the office of ministries concerned, does not fulfil any requirement to make a statutory contract or contract entered into by the Government in the capacity as sovereign, the relief sought by way of writ jurisdiction in the present case is not sustainable. The High Court Division cannot exercise its power conferred under Article 102 of the Constitution where the desire of buying and selling books without tender between the appellants and the present respondent is of inter-ministerial correspondences in nature. Apart from this, without tender and legal approval from the concerned authority, the proposal for buying additional 2317 sets of Dalilpatra would be an act of criminal offence that was realized later by the offices of ministries concerned and subsequently, it had to cancel for avoiding illegality in purchasing

Cases of the Appellate Division

Sl. No.	Name of the Parties, Citation and Key Words	Summary of the case	Key Ratio
		under no obligation to buy any book from the respondent. The Court also held that legitimate expectation cannot be based on departmental note as it was seen that the letters communicated among the ministries, were internal correspondences.	additional books in question. Such act of illegal attempt cannot be justified invoking Article 102 of the Constitution in the form of judicial review. ... (Para 21)

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
1.	**Md. Zoni** **Vs.** **The State** *(Md. Shahinur Islam, J)* 19 SCOB [2024] HCD 1 **Key Words**: Murder; Culpable homicide; Confessional statement; Section 302 and section 304 Part II of the Penal Code; premeditation	In this case the convict-appellant was sentenced to suffer imprisonment for life by the trial court under section 302 of the Penal Code. High Court Division, however, finding that the victim sustained single injury and died 18 days later, the weapon (Batal) was not carried by the appellant in advance, there was no premeditation and the convict lost self-control being emotional before committing the crime held that the convict-appellant had no intention to commit the murder. His act falls under the offence of 'culpable homicide not amounting to murder'. Consequently, appellant's sentence was altered by the High Court Division from life imprisonment to rigorous imprisonment for 10 (ten) years.	**In the absence of any motive, conspiracy, pre-plan or pre-meditation on part of accused it can be deduced that the appellant had no 'intention to commit murder':** It is to be noted that to find an accused guilty of offence of murder punishable under section 302 Penal Code it must be proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death. But in the case in hand, we do not find the injury sustained by the victim was sufficient to cause his death. Injured victim however died in hospital 18 days after he sustained injury. The post Mortem doctor admits in cross-examination that no appropriate treatment was provided to injured victim when he had been in hospital. It appears from the evidence on record that prosecution failed to prove any motive, pre-meditation, pre-plan or any conspiracy on the part of accused appellant to kill victim Alimullah. In the absence of any motive, conspiracy, pre-plan or pre-meditation on part of accused-appellant Joni while inflicting injury resulting the death of the victim 18 days after the occurrence, we find that the accused-appellant Joni had no 'intention to commit murder' but he committed the offence of 'culpable homicide not amounting to murder'. ...(Para 65 &66)
2.	**Mesbaul Alam & ors** **Vs.** **Bangladesh & ors** *(Kashefa Hussain, J)* 19 SCOB [2024] HCD 14 **Key Words:** Sections 2(65), 4Ka of Bangladesh Labour Law, 2006; section 2(c) of Services (Reorganisation & Conditions) Act-1975; dismissal; termination; termination simpliciter; Section 14, 16 of the সমবায় সমিতি আইন ও সমবায় সমিতি বিধিমালা; Sections 14 and 21 of the Co-	Question arose in this petition whether writ is maintainable against Milk Vita. The High Court Division found that Milk Vita is a public body and not a private entity and as such Writ is maintainable. The court also found that the petitioners are not "worker" so their case does not lie before the Labor Court. Finally, Court found that impugned memos were not issued lawfully so it declared them issued without lawful authority and directed the concerned authority to proceed against the petitioners under clause 8.06 of the চাকুরী বিধি ও নিয়োগ নীতিমালা ২০০৮ (সংশোধিত-২০০৯) and dispose of the matter in	**Section 1(4)(ka) of the বাংলাদেশ শ্রম আইন-২০০৬:** We have next drawn our attention to Section 1(4)(ka) of the বাংলাদেশ শ্রম আইন-২০০৬. Section 1(4)(L) contemplates organizations which shall fall within the exception of Section 1(4)(L) and shall not fall within the meaning of বাংলাদেশ শ্রম আইন-২০০৬. We have particularly drawn attention to Section 1(4)(L) and which is reproduced hereunder: "সরকার বা সরকারের অধীনস্থ কোন অফিস" which means Government office or institutions owned by the government. Since we are of the considered finding and opinion that the বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড is a public body and is owned by the government therefore it is needless to state that the organizations owned by the government falls within the exception of Section 1(4)(L). Consequently the provisions of বাংলাদেশ শ্রম আইন-২০০৬ shall not be applicable in the

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
	operative Society Act-2001; Section 1(4)(ka) of the বাংলাদেশ শ্রম আইন-২০০৬	accordance with law.	petitioners case. Such being the position, we are also of the considered view that the petitioners' are not workers rather they are permanent employees under a particular selection grade. ...(Para 35) The employees must be afforded due process before seizing him of his employment. In not affording due process is a direct infringement into the employee's fundamental rights guaranteed under the constitution. ...(Para 42)
3.	**Tanvir Quader & anr** **Vs.** **Bangladesh & ors** (*Farah Mahbub, J*) 19 SCOB [2024] HCD 27 **Key Words:** Article 102(5) read with Article 152 of the Constitution; Sections 3(39) and 3(28) of the General Clauses Act, 1847; Registration of Private Schools Ordinance, 1962;	The petitioners as being the parents of the students who were studying at the respective private schools filed this writ petition challenging the charging of unreasonable high tuition fees on the students who were attending on-line classes of the respective private schools during Covid-19 pandemic. The High Court Division, however, found that writ petition was not maintainable against the private schools who are neither "statutory body" nor "local authority". Consequently, it discharged the 1st part of Rule. But it directed the respective registering authorities to take immediate steps under the provisions of বিদেশি কারিকুলাম এ পরিচালিত বেসরকারি বিদ্যালয় নিবন্ধন বিতিমালা, ২০১৭ and বেসরকারি প্রাথমিক (বাংলা ও ইংরেজী মাধ্যম) বিদ্যালয় নিবন্ধন বিতিমালা, ২০১১ to constitute respective Managing Committees who can look into the issue of the quantum and collection of tuition fees from students.	**<u>Registration of Private Schools Ordinance, 1962:</u>** In the instant case, the petitioners have miserably failed to show that charging same tuition fees as charged in pre Covid-19 period from the students of private schools including respondent Nos. 5 and 6 for the on line classes during Covid-19 pandemic is violative of the provisions of the Ordinance No. XX of 1962 and the Rules so have been framed thereunder. Consequently, the line of argument which has been resorted to by the petitioners for maintainability of the 1st part of the Rule, falls through. ...(Para 57)
4.	**Swairachar O Sampradaiyikata Protirodh Committee & ors** **Vs.** **Bangladesh & ors** (*Naima Haider, J & বিচারপতি মোঃ আশরাফুল কামাল)* 19 SCOB [2024] HCD 41 **Key Words:** State Religion; Articles 2A, 12, 41 and 100 of the Constitution; Section 2 of the Constitution (Eight Amendment)	In this writ petition the constitutional amendments by which the creation of permanent Benches of the High Court Division and insertion of article 2A in the constitution, declaring Islam as the state religion, was challenged. The High Court Division mainly discussed the issue of state religion as the legality of creation of permanent Benches has already been decided by the Appellate Division in the case of Anwar Hossain Chowdhury and others Vs. Bangladesh [41 DLR (AD) 165]. The Court, by majority, held that though Islam had been declared as the state religion, the amendment, by creating positive obligation upon the state, had also ensured that	Article 2A of the Constitution: Article 2A of the Constitution, impugned herein, in our view, neither offends the basic principles of the Constitution, as contained in the preamble nor offends any other provision of the Constitution. The conferment of status of "State Religion" on its own does not tantamount to an action on the part of State to grant political status in favour of Islam. Article 2A must be read as a whole and once read, it becomes obvious that the insertion of the concept of Islam being the state religion does not, on its own, affect the constitutional rights of others having different religious beliefs. It does not affect the basic structure of the Constitution and also does not

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
	Act 1988; religious establishment; political questions; secularism;	other religion would not be discriminated. However, Mr. Justice Md. Ashraful Kamal indicated that no hearing on merit of the Rule took place and the Rule was discharged only on the point of locus standi of the petitioner organization and others. In the result, the larger Bench discharged the rule.	render the Constitution redundant. The impugned amendment also does not offend the concept of secularism, as provided for in the Constitution. ...(Para 39, Per Naima Haider, J) দরখাস্তকারী সংগঠনের অত্র মোকদ্দমা অত্র আদালতের সামনে উপস্থাপনের নিমিত্তে প্রয়োজনীয় আইনগত যোগ্যতা না থাকা হেতু অত্র রুলটি খারিজ যোগ্য। অতএব, আদেশ হয় যে, অত্র রুলটি বিনা খরচায় খারিজ করা হলো। ...(Para 70 & 71, বিচারপতি মোঃ আশরাফুল কামাল)
5.	**Taherul Islam** **Vs.** **Speaker, Bangladesh Jatiya Sangsad & ors** (*Sheikh Hassan Arif, J*) 19 SCOB [2024] HCD 66 **Key Words:** Article 123(3), Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh; Deeming Clause; Parliamentary Election; Member of Parliament; Legal Fiction	In this case petitioner challenged the holding of office by taking oath by the Members of Parliament who were elected for the 11th National Parliament before expiration of the term of the previous Parliament. The petitioner alleged that by taking oath before dissolution of the 10th National Parliament the MPs had violated the Article 123(3) read with Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh and there existed 600 MPs at that time. The High Court Division analyzing different provisions of the Constitution, summarily rejected the writ petition on the ground that Article 148(3) of the Constitution was incorporated to maintain continuity of running the government for the best interest of democracy. The "deeming clause" that exists under Article 148(3) is to facilitate the continuity of the government. The Court also held that though, upon taking oath, the MPs in reality had not assumed office of Members of Parliament, yet they had assumed office by way of legal fiction created by the Constitution. Therefore, taking oath by the MPs before dissolution of previous parliament was not illegal. This view of the High Court Division was affirmed by the Appellate Division (see 19 SCOB [2024] AD 10).	**Article 123 (3) and 148(3) of the Constitution of the Peoples' Republic of Bangladesh:** MPs who took oath even before the first meeting of the parliament shall not in fact or in reality assume such office of members of parliament before expiration of the tenure of the last parliament: This 'deeming clause' has been incorporated in sub article (3) of Article 148 just to facilitate such working and continuity of the government. Though, upon taking oath, the MPs in reality have not assumed office of members of parliament, yet they have assumed office by way of legal fiction created by the Constitution and that legal fiction must be interpreted by this Court limiting the same to be used for the said purpose only. It is apparent from the examination of the relevant provisions of the Constitution as mentioned above that our legislature has deliberately created this legal fiction so that the next executive government can be formed and appointed by the President. This intention of the legislature has been made clear by proviso to sub article (3) of Article 123 wherein it has been provided that such MPs shall not assume office as members of parliament except after the expiration of the term of the previous parliament. This means that, the MPs who took oath even before the first meeting of the parliament shall not in fact or in reality assume such office of members of parliament before expiration of the tenure of the last parliament. ...(Para 22)

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
6.	**Ali Imam** **Vs.** **The Judge, Artha Rin Adalat & ors** (*J.B.M. Hassan, J*) 19 SCOB [2024] HCD 76 **Key Words:** Section 7(c) of the Bangladesh Passport Order; Sections 6(5), 34(1) and 57 of the Artha Rin Adalat Ain, 2003; Article 36 of the Constitution; Seizure of the passports, Freedom of movement	In the instant writ petition, the petitioner came before the Court when on the application under section 7(c) of the Bangladesh Passport Order, 1973 read with section 57 of the Artha Rin Adalat Ain, 2003 of the respondent no. 2, the Artha Rin Adalat passed an order against the plaintiff directing him to submit the passport and restraining him from going out of the country. The petitioner claimed that as a mere mortgagor he cannot be held liable and there is no provision relating to deposit of passport, curtailing freedom of movement in the Artha Rin Adalat Ain 2003. The High Court Division mentioning the case reported in 22 BLC (AD) 53 held that under section 6 (5) of the Act 2003, the plaintiff would also be liable with the same responsibilities as principle borrower. Moreover, the Court held that under article 36 of the Constitution freedom of movement is subject to the supervision by the court. The Court also held that under section 57 of the Act of 2003, the Adalat can pass any supplementary order to ensure justice.	**<u>57 of the Artha Rin Adalat Ain, 2003:</u>** Section 57 of the Act, 2003, in addition, authorizes the Adalat to pass any supplementary order to secure ends of justice, on consideration of the facts and circumstances under the proceedings. Therefore, we are of the view that section 57 is the appropriate provision incorporated in the statute (Act, 2003) authorizing the Adalat to pass the necessary order in order to ensure realization of the decretal dues. As such, in the public interest to ensure realization of public money, the Artha Rin Adalat exercised the statutory authority under section 57 of the Act, 2003 and by the impugned order directed the petitioner to deposit his passport. Hence, Article 36 of the Constitution has not been violated in passing the impugned order by the Adalat. ...(Para-25)
7.	**Sufia Bewa and ors** **Vs.** **Md. Aminul Islam and ors** (*Md. Ruhul Quddus, J*) 19 SCOB [2024] HCD 85 **Key Words:** Subsection (3) of Section 92 of the State Acquisition and Tenancy Act, 1950; Rule 6, Subrules (2) and (3) of the Tenancy Rules, 1954; Article 143 (1) (c) of the Constitution; Hindu law of inheritance; exchange deed; paper transaction; chance litigants;	In this suit the High Court Division analyzing the evidence on record, not only disbelieved the plaintiffs' claim but also found that the defendants, except defendant number 6 Haripada Mahato, had no lawful title over the suit land. Court then came to the conclusion that the rightful owner of the suit property was unavailable for a long period. It then directed to the Deputy Commissioner of Rajshahi to commence an inquiry into whether any rightful owner of the suit property is available or not. If no rightful owner is available, the Court ordered, the suit land except the share of defendant number 6 (Haripada Mahato) would vest in the Government.	**<u>A plaintiff's failure never means that the defendant is the lawful owner of the subject matter:</u>** On a contradictory claim of title on land between the plaintiff and defendant, if the plaintiff fails, everyone thinks that the claimant-defendant is the owner of the suit land. It is absolutely a wrong notion and misconceived social psychology. A plaintiff's failure never means that the defendant is the lawful owner of the subject matter. In a case like the present one where the defendants, besides resisting the plaintiffs' claim, fail to establish their lawful title over the suit land, they should not be allowed to continue with the possession, if any, over the same. ...(Para 39)

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
8.	**Justice Md. Joynul Abedin (Rtd.)** **Vs.** **State & anr** (*Md. Nazrul Islam Talukder, J*) 19 SCOB [2024] HCD 94 **Key Words:** Anticipatory Bail; Section 498 of the Code of Criminal Procedure; Section 21, 26, 27 of the Anti-Corruption Commission Act, 2004;	In this case the petitioner prayed for anticipatory bail under section 498 of the Code of Criminal Procedure being aggrieved by a news report published in the Daily Janakantha. Thus, with the anticipation of arrest and harassment, he came to this Court. The Court held that mere fear cannot be the reason for granting anticipatory bail and there must be reasonable belief for malicious intention. Moreover, the court found that the bench had no jurisdiction to dispose of the matter and thus discharged the rule.	The anticipatory bail is neither a passport to the commission of crimes nor shield against any and all kinds of accusations, likely or unlikely. The anticipatory bail cannot be granted to a person/accused for the reason that he or she is in mere fear that he or she may be arrested and the same cannot be granted on vague apprehension of arrest. Mere fear is not a belief for which reason the accused/person may be granted anticipatory bail. ...(Para-42)
9.	**Danish Foods Ltd** **Vs.** **Rani Food Industries Ltd & anr** (*Md. Ashraful Kamal, J*) 19 SCOB [2024] HCD 104 **Key Words:** Sections 41 and 42 of the Trade Marks Act, 2009; honest intention; honest purpose;	In this case the petitioner Danish Food Limited filed an application under Section 42 and 51 of the Trade Marks Act, 2009 for removal of trade mark consisting of the word 'RANI' granted by the respondent No.2 in favour of the respondent No.1 from the register. High Court Division, however, hearing both sides, found that section 51 has no manner of application in this case and stipulations provided in section 42 of the Act, have not been fulfilled so as to order the removal. Therefore, it rejected the application.	**Sections 41 and 42 of the Trade Marks Act, 2009:** Section 42 of the Trade Marks Act, 2009 deals with the removal and impose limitation of the mark from the registrar book for non use of the trade mark. According to sub section (1) of section 42 of the Trade Mark Act, 2009, on the basis of any application by any aggrieved person, High Court Division or Registrar of Trade Mark can remove any mark from the register book, if the applicant of the trade mark registration of the goods or service or constituting company under section 41 of the Trade Marks Act, 2009 has no honest intention or 1(one) month prior registration of the mark had not use the mark for honest purpose or has no use the mark for honest purpose after 5(five) years and above from the date of registration. ...(Para 26)
10.	**Reliance Insurance Ltd.** **Vs.** **Phoneix Fin. & Invest. Ltd & ors** (*Md. Mozibur Rahman Miah, J*) 19 SCOB [2024] HCD 112 **Key Words:** Admissibility of evidence; Cross-	The question arose in this case was regarding the admissibility of evidence. Phoneix Finance and Investments Ltd. sued Reliance Insurance Ltd. and presented a witness (P.W-1) who provided testimony during examination-in-chief. However, due to the plaintiffs' repeated failure to produce P.W-1 for cross-examination by the defendant, the trial court closed the cross-examination. The defendant submitted an application to hold the evidences provided by P.W-1	In absence of cross-examination, mere examination-in-chief cannot be admitted as evidence when the defendants cannot get any opportunity to test the veracity of such testimony as well as the documents so have been produced and exhibited by the plaintiff-witness. In essence, the evidence ended in chief has got no evidentiary value at all. ...(Para 13)

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
	examination; Money Suit;	to be inadmissible and argued that without cross-examination, they were unable to test the veracity of P.W-1's statements and exhibited documents, which hinders their ability to present a proper defense. The trial court rejected the application and the defendants instituted the instant Civil Revision. The High Court Division allowed the revision, emphasizing the importance of cross-examination as a fundamental right and a crucial element in ensuring a fair trial. However, the plaintiffs retain the option to present new witnesses, or the case can proceed with the defendant presenting their own witnesses.	
11.	**Shaikh Ali Iman** **Vs.** **Subodh Kumar Mondol & ors** (*Muhammad Khurshid Alam Sarkar, J*) 19 SCOB [2024] HCD 116 **Key Words:** Section 89 and 96 of the State Acquisition and Tenancy Act; preemption cases; preemptor; preemptee; notice of transfer; dispatch book/register;	In this case while adjudicating the issue as to whether the pre-emptor had knowledge about the transfer of property within the statutory limitation, the High Court Division held that it is the legal presumption that the transfer notice was duly served to the pre-emptor. If in fact, it was not, then it has to be proved in the trial court producing the dispatch book/register of the Registering or other concerned Officer or by examining the process server. The High Court Division also held that the trial Court must frame issue relating to service of notice while adjudicating preemption cases. Finally, the High Court Division issued some guidelines for the subordinate Courts to be followed while dealing with pre-emption cases.	**Section 89 of the SAT:** No sale of a property, in which existence of co-sharers would be apparent from the records, can be completed without serving notice upon the co-sharers inasmuch as the law forbids the Registering Officer to register a sale-deed without obtaining the notice together with the process-fees from the seller and, thereafter, the Registering Officer is duty bound to transmit the notice to the Revenue Officer who shall, then, serve the said notice by registered post. And, in the light of use of the word 'shall' by the Legislature in each of the steps mentioned in Section 89 of the SAT Act, the legal presumption is that all the State/Government functionaries have performed their duties assigned under Section 89 of the SAT Act. If any preemptor claims that s/he was never served with the notice under Section 89 of the SAT Act, then, in turn, the preemptee shall have to prove its service. However, for an effective adjudication of a preemption case, the preemptor may either apply to the trial Court for production of the 'dispatch book/register' of the Registering Office and that of the Revenue Office of the relevant dates or may apply to the Court for examining the process-server of the Revenue Office to prove contrary to the legal presumption. If the office/person responsible for serving notice under Section 89 of the SAT Act proves before the Court the fact of serving the said notice upon the preemptor, then, it would be for the notice receiver, being a preemptor in a preemption case, to rebut before the trial Court by any other ocular

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
			evidence with corroboration that he has never received the notice under Section 89 of the SAT Act. ...(Para 12)
12.	**Mosarrof Hosen and anr** **Vs.** **Artha Rin Adalat-1, Dhaka & ors** (*A. T. M. Saifur Rahman, J*) 19 SCOB [2024] HCD 126 **Key Words:** Section 10, 19, 41 of the Artha Rin Adalat Ain, 2003; Ex-parte Decree; Article 102 of the Constitution; Alternative remedy	This writ petition was filed challenging the ex-parte judgment and decree passed by the Artha Rin Adalat on the ground that the trial court has violated the provision of section 10 of the Artha Rin Adalat Ain, 2003 by not giving opportunity to the petitioner to submit written statement. Another question was raised by the opposite party as to the maintainability of the writ petition. The Court found that as the petitioner appeared before the trial court to submit the written statement, he should have been given the opportunity as per the law. Moreover, the Court also held that alternative remedy would not be a bar in case of exercise of the jurisdiction under article 102 of the constitution by the High Court Division.	In the instant case, we have noticed that the trial Court below for the first time fixed the date for an ex-parte hearing on 28.02.2022, and on that day the petitioner appeared before the trial Court along with an application prayed for time to submit the written statement, which was rejected and thereby passed the ex-parte judgment and decree on the same day in presence of the petitioner as evident from Annexure – B to the writ petition. So it is crystal clear that in violation of the mandatory provision of section 19(1) of the Ain 2003, the ex-parte judgment and decree has been passed and, as such, it is a nullity in the eye of the law. ...(Para-13)
13.	**Md. Julhas Uddin Jibon** **Vs.** **Md. Ayub Khan & ors** (*Md. Badruzzaman, J*) 19 SCOB [2024] HCD 130 **Key Words:** Sections 14, 15, 16, 17 and 21 A(b) of the Specific Relief Act; Section 115(1) of the Code of Civil Procedure; specific performance of contract; Order VII Rule 11 of the Code of Civil Procedure; rejection of plaint; return of plaint;	In this case, the plaintiff filed the suit for specific performance of part of the contract where part unperformed was large. At the time of filing the suit he did not deposit the balance consideration money at the court. He deposited consideration money after few days of filing the suit and that too was less than the agreed amount. The defendant prayed for rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 but the trial Court rejected the application for rejection of plaint. The defendant then filed this revisional application. The High Court Division, upon hearing and analyzing section 15 and 21A of the Specific Relief Act came to the conclusion that the plaint should have been rejected for not depositing the balance consideration money at the time of filing the suit in full. It also directed the Sub-ordinate Courts to strictly follow the expressed provisions of the statute as well as the law settled and declared by our Apex Court.	**<u>Section 15 of the Specific Relief Act:</u>** In this case, the plaintiff filed the suit for specific performance of part of the contract where part unperformed is large. As per claim of the plaintiff the defendant is unable to perform the whole of his part because the quantum of land, after measurement, was found less and that substantial part of the contract can be performed and the part unperformed is a considerable portion of the whole. Accordingly, this suit obviously comes under the second exception provided in section 15 of the Specific relief Act. As such, to get a decree of specific performance of the part of the contract (i.e for .2123 acre land), the plaintiff must be willing to pay total consideration of Tk. 12.75 crore for said .2123 acre land though as per contract said amount was fixed as the value of entire .2825 acre land. But the plaintiff unilaterally measured the suit land as .2123 acre instead of .2825 acre as was agreed to purchase by him and he is willing to pay part consideration of Tk. 9,58,16,814.16 as value of .2123 acre land instead of entire consideration of Tk. 12.75 crore and with such calculation the plaintiff

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
			deposited balance consideration of Tk. 6,08,16,814.23 instead of agreed balance of Tk. 9.25 crore. As per section 15 of the Specific Relief Act the plaintiff was required to file the suit for specific performance of the part of the contract for .2123 acre land by depositing Taka 9.25 crore out of total consideration of Tk. 12.75 crore and being failed to do so, the suit is barred under section 15 of the Specific Relief Act. ...(Para 25)
14.	**Prof. Dr. Md. Rahmat Ullah Vs. Bangladesh & ors** (*Zafar Ahmed, J*) 19 SCOB [2024] HCD 140 **Key Words:** Article 52 and 56 (3) of the Dhaka University Order, 1973; clause 45(3) of the First Statutes; temporary release; suspension	In the instant case, the High Court Division examined whether the Syndicate of the University of Dhaka has the power to release a Professor of Law temporarily (সাময়িক অব্যাহতি) from all academic and administrative duties of the University and in view of the stand taken by the University whether formal departmental proceedings have been initiated against the petitioner Professor. The Court found that the term 'সাময়িক অব্যাহতি' (temporary release) used against the petitioner is not synonymous to 'suspension' because the committee formed by the Syndicate, being not formed in accordance with law, cannot be termed as a statutory Enquiry Committee. The Court also found that the Syndicate did not take any decision to initiate any formal departmental proceedings against the petitioner by framing formal charge. Based on these grounds, the Court held that the Syndicate's decision to release the petitioner temporarily from his duties is beyond the purview of law and the said decision was taken without lawful authority and without jurisdiction.	**<u>The Syndicate's decision to release the petitioner temporarily from his duties is beyond the purview of law:</u>** In the instant case, the Syndicate did not deliberately use the term 'suspension' (সাময়িক বরখাস্ত), rather it used the term 'সাময়িক অব্যাহতি' (temporary release) which is not synonymous to 'suspension' for the reason that the syndicate did not take any decision to initiate any formal departmental proceedings against the petitioner by framing formal charge. The Syndicate formed a committee which seems to be merely a fact-finding committee. In our view, there was no exigency or circumstances envisaged by law to release the petitioner temporarily from his duties. Moreover, the term 'temporary release from duties' is uncommon in service jurisprudence. The University Order, Statutes and Service Regulations do not recognise such action. Therefore, we have no hesitation to hold that the Syndicate's decision to release the petitioner temporarily from his duties is beyond the purview of law and the said decision was taken without lawful authority and without jurisdiction. ...(Para 16)
15.	**Md. Nurul Islam Vs. The State & anr** (*Md. Shohrowardi, J*) 19 SCOB [2024] HCD 146 **Key Words:** Misappropriation of property; Evidence	The appellant came to this court when in a case of misappropriation of property he was convicted under section 409 of the Penal Code and under Section 5(2) of the Prevention of Corruption Act, 1947. The Court found that to prove the case the prosecution had submitted photocopy of all the exhibited documents. The Court	**<u>Section 66 of the Evidence Act, 1872:</u>** The prosecution proved the photocopy of alleged letter of admission of guilt of the accused Md. Nurul Islam as exhibit-1 and the photocopy of the deposit slips as exhibit-II. No original letter of admission of guilt and deposit slip was proved by the prosecution. Admittedly all the documents lie with the Sonali Bank Ltd. Neither the

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
	Act, 1872; Section 409 of the Penal Code, 1860; Section 5(2) of the Prevention of Corruption Act, 1947; Section 10 of the Criminal Law Amendment Act, 1958; Section 66 of the Evidence Act 1872	also found that there was no proof of distribution of the misappropriated allowances by the appellant and that the prosecution failed to provide the explanation under section 66 of the Evidence Act 1872 regarding the non production of the original document. Thus, finding merit, the High Court Division allowed the appeal.	investigating officer seized those documents nor any original document was proved by the prosecution. Furthermore, the investigation officer PW. 9 Rabindranath Chaki stated that seized documents were not attested by any officer of the bank. The prosecution failed to give any explanation under section 66 of the Evidence Act, 1872 for not producing original documents. No evidence was adduced by the prosecution to show that the original document was lying with the accused Md. Nurul Islam. Therefore, exhibits- 1, 2, 4, 5, 6 and 7 in Special Case No. 8 of 2012, exhibits- 2 to 7 in Special Case No. 9 of 2012, and exhibits 1 to 5 in Special Case No. 10 of 2012 are not admissible in evidence. ...(Para-49)
16.	**Adv. Abu Saleh Ahmadul Hasan** **Vs.** **The State** (*S M Kuddus Zaman, J*) 19 SCOB [2024] HCD 161 **Key Words:** Section 561A of the Code of Criminal Procedure, 1898; Section 27 of the Real Estate Unnayan and Bobosthapana Ain, 2010; Arbitration Act, 2000	Rule was issued in the instant case calling upon the opposite parties to show cause as to why the proceedings of a C. R. Case filed under section 27 of the Real Estate Unnayan and Bobosthapana Ain, 2010 should not be quashed under section 561A of the Code of Criminal Procedure. The High Court Division found that the complainant without making full payment of the price of the apartment filed the CR case against the developer for not completing the construction work, for which there remains no element of initial cheating by the developer in this case. Moreover, article 24 of the deed of contract between the petitioner and opposite party No.2 for purchase of apartment provides for provision of arbitration for settlement of any dispute arising out between the parties while the construction work is in progress. The dispute as stated in the petition of complaint falls within the purview of article 24 of the deed of contract. So, the complainant should have approached the learned District Judge for appointment of Arbitrators under the Arbitration Act, 2000. Finally, the High Court Division refusing to accept the argument of the learned Advocate for the opposite party No.2 that a legal notice served upon the concerned Advocate for the petitioner for	**Section 27 of the Real Estate Development and Management Act, 2010:** There is no allegation in the petition of complaint that there is no progress of construction of the second apartment or the petitioner has sold out the same to any other person. It has merely been stated that the petitioner did not complete the construction work of the second apartment. But since the complainant did not make full payment for above apartment he cannot expect the completion of the construction worker or transfer of ownership of the above apartment. In view of above materials on record we are unable to find any element of initial cheating in this case. As such section 27 of the Real Estate Development and Management Act, 2010 does not have any application in the facts and circumstances of this case. (Paras 12 &13)

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
		completion of construction work could be treated as a notice for Arbitration, observed that a legal notice cannot be construed as a notice for arbitration and a notice for arbitration cannot be addressed to the Advocate of the concerned party.	
17.	**Mahmud N. A. Khan & ors** **Vs.** **Md. Kamrul Islam Khan & ors** (*Md. Zakir Hossain, J*) 19 SCOB [2024] HCD 165 **Key Words:** Section 81 and 82 of the Trusts Act, 1882; Land Reforms Ordinance, 1984; benami transaction; Rules of preponderance of evidence	In this case question arose as to whether the plaintiff was a benamder of his father as the respondents claimed. The trial court found that the plaintiff was not a benamder but the Appellate Court reversed the decision. High Court Division, however, discussed the laws relating to benami transaction and then assessing the evidence on record, came to the conclusion that as per the rules of preponderance of evidence it has been proved that plaintiff was not benamder of his father and consequently, set aside the judgment of the Appellate Court.	On perusal of the oral and documentary evidences, it appears that as per the Rules of preponderance of evidence, the contention of the plaintiff's possession is heavy in weight but the learned District Judge on slipshod statement held that the joint possession of the plaintiff and the defendants without sifting the documents in entirety. The original documents are lying with the plaintiff and produced from the custody of the plaintiff and those were admitted as evidence without any objection from the defendants' side. The burden of showing that the alleged transfer is banami transaction has not been discharged by the defendants' side. Undisputedly, the father of the defendants in his lifetime did not take any legal action against the transaction nor he filed any suit for declaration that the plaintiff was his benamder. Considering the surrounding circumstances, the relationship between the parties and intention and subsequent conduct of Naybullah Khan, it is as clear as daylight that 94 years ago, Naybyllah Khan took settlement of the suit land for the benefit of his eldest son i.e the plaintiff for the purpose of the welfare of his son. ...(Para 25)
18.	**Sannyashi Mondal** **Vs.** **Nirmol Chandra Mondol & ors** (*Md. Akhtaruzzaman, J*) 19 SCOB [2024] HCD 172 **Key Words:** Solenama; Compromise Decree; Order 3 Rule 1, 4 of the Code of Civil Procedure; Order 23 Rule 3; In writing; Signed by the parties	The petitioner came to the High Court Division for setting aside the compromise judgment and decree on the ground that the decree was fraudulent and illegal as the parties had not signed the compromise decree and were not aware of it. Moreover, they claimed that the engaged lawyers had not also deposed before the court regarding the terms and conditions and consent of the parties of the solenama. They had also questioned about the title of the opposite parties. The Court analyzing the evidence found that the defendant had no title or	The Court must satisfy itself by taking evidence or on affidavits or otherwise that the agreement is lawful: The Court must satisfy itself about the terms of the agreement. The Court must be satisfied that the agreement is lawful and it can pass a decree by it. The Court should also consider whether such a decree can be enforced against all the parties to the compromise. A Court passing a compromise decree performs a judicial act and not a ministerial work. Therefore, the Court must satisfy itself by taking evidence or on affidavits or otherwise that the agreement is lawful. If the compromise is not lawful, an order recording the compromise can

Cases of the High Court Division

Sl. No.	Name of the Parties and Citation	Summary of the case	Key Ratio
		ownership over the suit land and held that though an advocate has the authority to act on behave of his clients but he should not act on implied authority except for emergency situations. The court also held that the court must inquire into and decide whether there has been a lawful compromise in terms of which the decree should be passed. Moreover, the court held that the compromise should be in writing and signed by the parties and written authority should be given to the appointed lawyers. Thus, for not following the conditions of order 23 rule 3 of Code of Civil Procedure and for not following proper procedure of law, the court made the rule absolute.	be recalled by the Court. In case of any dispute between the parties to the compromise, the Court must inquire into and decide whether there has been a lawful compromise in terms of which the decree should be passed. The Court in recording compromise should not act casually. Where it is alleged by one party that a compromise has not been entered into or is not lawful, the Court must decide that question. ...(Para 67 & 68)

19 SCOB [2024] AD 1

APPELLATE DIVISION

Present:
Mr. Justice Obaidul Hassan, Chief Justice
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Md. Abu Zafor Siddique
Mr. Justice Jahangir Hossain

CIVIL APPEAL NO.128 OF 2016
(From the judgment and decree dated 15.02.2011 passed by the High Court Division in Writ petition No.7817 of 2009)

Mrs. Aziz Ara Rahman ….Appellant
Vs.
Rajdhani Unnayan Kartipakkha (RAJUK) and others ....Respondents

For the Appellant	:	Mr. Kamal-Ul-Alam, senior Advocate with Ms. Shahana Akther, Advocate, instructed by Mr. Syed Mahbubor Rahman, Advocate-on-Record
For respondents No.1-4	:	Mr. Md. Imam Hasan, Advocate, instructed by Mr. Mohammad Ali Azam, Advocate-on-Record
For the respondent No. 5	:	Not represented.
Date of hearing	:	The 5th day of December, 2023
Date of judgment	:	The 6th day of December, 2023

Editors' Note:
In a previous Civil Petition for Leave to Appeal this Division held that disputed plot was not situated in C.S. and S.A. Plot as claimed by the respondent No.5 and the said plot had not been released from acquisition made in L.A. Case No.10/63-64. Despite this fact respondent No.5, filed a title suit for declaration of title of the disputed plot in his favor. On the other hand, the appellant as writ petitioner filed a Writ Petition before the High Court Division seeking direction upon the writ respondents to deliver physical possession of the disputed plot to her upon evicting illegal occupant therefrom and to execute and register the lease deed in respect of the said plot in her favor. However, the Writ Petition was discharged. The appellant then filed a CP against the decision of the High Court Division, which ultimately turned into this Civil Appeal. The Appellate Division taking into consideration the previous decision of it in the same matter held that the title suit filed by the respondent no. 5 is barred by the principle of *res judicata* and as such, the High Court Division on the face of the aforesaid decision of the Apex Court was in breach of Article 111 of the Constitution when it discharged the Writ Petition filed by the appellant.

Key Words:
Principle of *res judicata*; Article 111 of the Constitution; disputed question of fact; tresspasser

It is by now finally settled that respondent No.5 cannot claim any valid right and claim over the land of disputed plot of the case in hand while the respondent No.1 became the owner of the land of disputed plot by way of acquisition. Although in the present case the respondent No.5 claims to be in possession of the disputed plot in view of the settled legal proposition the status of the respondent No.5 in the disputed plot is no better than a mere trespasser. ...(Para 16)

It is the case of the appellant that she took the allotment of the disputed plot from the respondent No.1, RAJUK vide memo dated 16.11.1995. Now the pertinent question is that whether the appellant has acquired a valid right and title of the disputed plot. Since it has already been settled by this Division that the land of disputed plot was acquired by RAJUK in accordance with law and the said land was not delisted from the acquisition, it is our considered view that the appellant having taken allotment of the same from RAJUK has acquired a legitimate right and title over it. ...(Para 17)

It is our considered view that the High Court Division committed illegality in passing the impugned judgment without taking into consideration that earlier in Writ Petitions No.11099 of 2006 and 3030 of 2005 the High Court Division found that the respondent No.5 has no right and title over the disputed plot. But in the case in hand, the High Court Division while dealing with the Writ Petition filed by the appellant held relying on the claim of the respondent No.5 to the effect that since the case involves the disputed question of facts as to the title over the disputed plot the same should be settled in Title Suit No.373 of 2005 filed by the respondent No.5 and as such the Writ Petition is not maintainable. The above findings of the High Court Division is absolutely unwarranted inasmuch as the fresh consideration of title of the respondent No.5 in disputed plot which has already been decided earlier by the High Court Division in Writ Petitions No.11099 of 2006 and 3030 of 2005 is barred by the principle of *res judicata.* ...(Para 18)

Any previous decision on a matter in controversy in a legal proceeding including writ petition decided after full contest by the parties or after affording fair opportunity to the parties to prove their case will operate as *res judicata* in a subsequent regular suit. Therefore, in view of the above decision of the Indian Supreme Court we hold that since the right and title of the respondent No.5 in the disputed land has not been found by the High Court Division in Writ Petitions No.11099 of 2006 and 3030 of 2005 filed at the instance of the respondent No.5, subsequent suit being No.373 of 2005 instituted by the respondent No.5 for declaration of title so far as it relates to the disputed plot claimed by the appellant in Writ Petition No.7817 of 2009 is barred by the principle of *res judicata*. ...(Para 21)

<u>Article 111 of the Constitution:</u>

The law declared by this Division regarding a subject matter is always binding on the High Court Division as well as other subordinate Courts. Since this Division in Civil Petition for Leave to Appeal No.1331 of 2008 has already categorically found that the respondent No.5 has no right and title in the disputed plot the impugned judgment

passed by the High Court Division violates the provisions of Article 111 of the Constitution. ...(Para 25)

JUDGMENT

Obaidul Hassan, C.J.

1. This Civil Appeal by leave granting order dated 24.01.2016 in Civil Petition for Leave to Appeal No.1354 of 2011 is directed against the judgment and order dated 15.02.2011 passed by the High Court Division in Writ Petition No.7817 of 2009 discharging the Rule.

2. The relevant facts necessary for disposal of this Civil Appeal are, in a nutshell, that the appellant as writ petitioner filed Writ Petition No.7817 of 2009 before the High Court Division seeking direction upon the writ respondents to deliver physical possession of Plot No.5, Road No.29, Gulshan Residential Area, Dhaka to the writ petitioner-appellant upon evicting illegal occupant therefrom and to execute and register the lease deed in respect of the said plot in favour of the writ petitioner-appellant.

3. The appellant filed the Writ Petition contending, *inter alia*, that she got allotment of the aforesaid plot by Rajdhani Unnayan Kartripakkha (RAJUK), which was communicated to her vide Memo dated 16.11.1995. Subsequently, on payment of the entire consideration money to the tune of Tk.36,87,428.00 (Taka Thirty Six Lac Eighty Seven Thousand Four Hundred Twenty Eight only) within the stipulated time the appellant applied for handing over physical possession of the said allotted plot in her favour on 27.09.2004, whereupon the concerned officer of RAJUK when went to the said plot for handing over physical possession of the same to the appellant it was found that a developer firm namely Mega Builders engaged by writ-respondent No.5 Shamsher Ali Miah had been illegally possessing the plot and making illegal construction without obtaining any approved plan from RAJUK. Thereafter, on 03.11.2004 an enquiry committee was constituted by RAJUK to enquire into the matter and that the said enquiry committee by a notice dated 29.11.2004 asked the writ-respondent No.5 to appear at a hearing before the enquiry committee on 03.01.2005 and to submit written statement with relevant papers. Although the writ respondent No.5 primarily appeared before the enquiry committee and submitted a written statement with some papers but without waiting for the result of the enquiry and decision of RAJUK thereon filed another Writ Petition being No.3030 of 2005 on 07.05.2005 in the High Court Division challenging the validity of the said notice dated 29.11.2004 and obtained a Rule Nisi and an interim order of injunction while the appellant got herself added as a respondent in Writ Petition No.3030 of 2005 and subsequently on 04.07.2005 the said order of injunction was stayed by this Division in Civil Petition for Leave to Appeal No.704 of 2009. Later on, the writ respondent No.5 filed another Writ Petition being No.11099 of 2006 on 16.11.2006 before the High Court Division praying for declaration that the letter of allotment dated 16.11.1995 issued by RAJUK in favour of appellant was without lawful authority and of no legal effect and obtained a Rule Nisi. The appellant as well as RAJUK opposed both the Rules by filing Affidavit-in-Opposition. Upon hearing both the Writ Petitions by a Division Bench of the High Court Division both the Rules were discharged vide two separate judgments dated 05.11.2007 against which the respondent No.5 filed Civil Petition for Leave to Appeal No.713 of 2007 and Civil Petition for Leave to Appeal No.1331 of 2008 before this Division. Upon hearing both the aforesaid Civil Petitions for Leave to Appeal were dismissed by this Division vide judgments dated 27.11.2007 and 25.05.2009 respectively. Thereafter the writ-petitioner-appellant made several requests and representations to writ-

respondents No.2-4 for handing over physical possession of the aforesaid allotted plot and to execute lease deed in her favour, but did not get any response. Lastly, on 05.08.2009 the appellant made a representation in writing to the Chairman, RAJUK annexing thereto the aforementioned judgments requesting him to take necessary steps for handing over physical possession of the allotted plot to her upon evicting the illegal occupants therefrom and also to execute and register the lease deed in her favour. But the respondents did not take any step in this regard, nor make any response thereto. Hence the writ petitioner-appellant was constrained to file Writ Petition No.7817 of 2009 before the High Court Division on 17.12.2009 and obtained Rule and an order of injunction upon the writ respondents from transferring the disputed plot and from changing the nature and character of the property for a period of 03(three) months. The said order of injunction was extended from time to time and lastly on 15.02.2010 it was extended till disposal of the Rule.

4. The writ-respondent No.1 herein also respondent No.1-RAJUK contested the said Writ Petition by filing an Affidavit-in-opposition and contended that there are 10 apartments including parking space in the ground floor of the disputed plot which is occupied by the respondent and others and unless all the occupants of the flat are evicted therefrom, RAJUK will get no scope to hand over the vacant possession of the land by executing lease deed.

5. On the other hand, the writ-respondent No.5 also respondent No.5 herein filed affidavit-in-opposition contending, *inter alia*, that the land of disputed plot belonged to him which he purchased by four registered deeds dated 06.06.1980 and got mutated his name in the said land and paid up to date rent. The Dhaka City Survey was prepared without any objection by erstwhile DIT now RAJUK in the name of the respondent No.5 in Khatian No.1649 which is final proof of his ownership. Subsequently the respondent No.5 entered into an agreement with a developer company for construction of a residential building in accordance with the plan approved by RAJUK. Thereafter, when dispute arose he filed two Writ Petitions being No.3030 of 2005 and 11099 of 2006 and both the Rules issued in those Writ Petitions had been discharged on the ground of maintainability.

6. Being aggrieved he filed Civil Petitions for Leave to Appeal No.713 of 2007 and 1331 of 2008 before this Division which were also dismissed. Subsequently, he filed Title Suit No.373 of 2005 praying for declaration of title to the extent of .1020 acres of land appertaining to C.S. Plot No.268. Therefore, the present Writ Petition filed by the appellant is not maintainable during the pendency of the said suit.

7. Upon hearing the High Court Division discharged the Rule vide impugned judgment and order dated 15.02.2011. On being aggrieved and dissatisfied with the judgment and order dated 15.02.2011 passed by the High Court Division in Writ Petition No.7817 of 2009 the appellant filed Civil Petition for Leave to Appeal No.1354 of 2011 before this Division. Upon hearing on 24.01.2016, this Division granted leave and hence the instant Civil Appeal.

8. Mr. Kamal-Ul-Alam, learned senior Counsel appearing on behalf of the appellant contends that the judgments and orders of the High Court Division in Writ Petitions No.3030 of 2005 and 11099 of 2006 between the self same parties as affirmed by the judgments and orders of this Division in Civil Petitions for Leave to Appeal Nos.713 of 2007 and 1331 of 2008 respectively holding that the disputed plot allotted to the appellant is not situated in C.S. and S.A. Plot No.268 as claimed by the respondent No.5 and the said plot has not been released from acquisition made in L.A. Case No.10/63-64 and as such the High Court Division on the face of the aforesaid decisions of the Apex Court was in breach of Article

111 of the Constitution in passing the impugned judgment and order discharging the Rule issued in Writ Petition No.7817 of 2009. The learned senior Counsel contends next that the High Court Division was wholly wrong in law and acted beyond its jurisdiction in not giving effect to the binding force of the earlier decisions of the Appellate Division in Civil Petitions for Leave to Appeal No.713 of 2007 and 1331 of 2008 regarding the disputed plot of the case in hand holding that the aforesaid decisions of the Appellate Division although has got binding force but the fact of pendency of Title Suit No.373 of 2005 filed on 03.09.2005 by the respondent No.5 was not brought to the notice of the Appellate Division and as such the impugned judgment is liable to be set aside. The learned senior Counsel urges next that on the face of the decisions and findings in the Writ Petition Nos.3030 of 2005 and Writ Petition No.11099 of 2006 as affirmed by the Appellate Division in Civil Petition for Leave to Appeal No.713 of 2007 and Civil Petition for Leave to Appeal No.1331 of 2008 to the effect that C.S. Plot No.268 being a requisitioned and acquisitioned land the occupant therein will be treated as a trespasser under the principle of law enunciated in 9 BLC (AD) 56, and as such the High Court Division was wholly wrong in law in passing the impugned judgment and order discharging the Rule holding that the respondent No.5 is in possession of plot No.268 and as such direction for delivery of possession of the disputed C.S. Plot No.268 to writ-petitioner-appellant cannot be given unless the dispute is settled in Title Suit No.373 of 2005. The learned senior Counsel contends, in fine, that the High Court Division was wrong in law in discharging the Rule on total misconception of law as to applicability of the principle of *res judicata* in writ proceedings inasmuch as it is settled law that a decision in earlier writ petitions on the selfsame issues between the same parties operates as *res judicata* in subsequent proceedings either in suits or writ proceedings and a question decided in an earlier writ petition disposed of on merit cannot be reagitated in a subsequent suit between the same parties on the principle of *res judicata*.

9. On the other hand, Mr. Md. Imam Hasan, learned Counsel appearing for the respondents No.1-4 echoing with the same voice of the learned Counsel for the appellant submits that RAJUK is the original owner of the disputed plot by way of acquisition and the appellant took allotment of the said plot from RAJUK in accordance with law and RAJUK has no objection if the possession of the plot in question is handed over to the appellant.

10. However, none appears on behalf of the respondent No.5 to contest the appeal.

11. We have considered the submissions of the learned Counsel for both the sides, perused the impugned judgment and order dated 15.02.2011 passed by the High Court Division in Writ Petition No.7817 of 2009 as well as other materials on record.

12. It is undisputed that earlier the respondent No.5 filed Writ Petitions No.3030 of 2005 and 11099 of 2006 before the High Court Division regarding the allotment of the disputed plot in favour of the appellant but upon hearing both the Rules were discharged vide judgments and orders dated 05.11.2007. Against the judgment and order passed in Writ Petition No.3030 of 2005 the respondent No.5 filed Civil Petition for Leave to Appeal No.713 of 2007 before this Division which was dismissed upon hearing on 27.11.2007. Subsequently, while the respondent No.5 filed Civil Petition for Leave to Appeal No.1331 of 2008 before this Division challenging the judgment and order dated 05.11.2007 passed by the High Court Division in Writ Petition No.11099 of 2006 which was also dismissed on 25.05.2009.

13. While discharging the Rule in Writ Petition No.11099 of 2006 the High Court Division observed the following:

"It appears from the writ petition that the petitioner himself admitted that the land was handed over to the requiring body and in such circumstances the petitioner cannot claim the land by way of right and admittedly the said land in question was requisitioned in accordance with law. So the allegation of discrimination does not apply in the instant case.

In view of the decisions as referred to and the provision of law specially the Town Improvement Act 1953 and in view of the notification dated 30.06.2001 published in the Bangladesh Gazette on 02.08.2001 it appears that the land claimed by the petitioner is still a requisitioned property and in such circumstances the petitioner has no *locus standi* to challenge the impugned allotment made by the requiring body in accordance with law. Hence we find no merit in this Rule."

(underlines supplied by us)

14. Again, the High Court Division observed in the judgment dated 05.11.2007 passed in the Writ Petition No.3030 of 2005 as under:

"Furthermore the petitioner in the instant case miserably failed to show the nexus in between the plot No.5, Road No.29, Gulshan Model Town and C.S. Plot No.268 in any manner. Furthermore the petitioner categorically admits the said land was requisitioned under L.A. Case as evident in Annexure-H to the writ petition. He also failed to show any document that the said plot No.268 was released from requisition by the authority under any law. From a plain comparison of Annexure- H to the writ petition with Annexure-I to the affidavit-in-opposition it appears that only 14.68 acres of land were released out of 22.50 acres of land in 20 plots, but no land of plots namely 268, 267 or 270 has been released as per the gazette notification as evident in Annexure-I and as such the plot No.268, 267, 270 are still under requisition. Also the respondent No.2 annexed two inquiry slip wherein it transpires that the entire C.S. Plot No.268 has been requisitioned and the admitted predecessor-in-interest of the petitioner Hazera Khatun took entire compensation money as per the award register maintained by the authority and the same is under direct control of Kartipakkhya.

In a case reported in 9 BLC(AD) 56 (Abdul Huq vs. Government of the People's Republic of Bangladesh represented by the Secretary, Ministry of Land and others) their Lordships observed as follows:

> "Though the petitioners have been alleging to be in possession of the land but their possession are no better than that of trespassers as upon requisition of the lands, the authority has taken over the possession from the original owners and handed over to the requiring body that is RAJUK."

Since none of the plots namely C.S. Plots No.267, 268 or 270 has ever been released from requisition in any manner and since the impugned order challenged by the petitioner is mere a notice of appearance for submitting some papers to resolve a dispute relating to title and description and since the petitioner appeared and submitted two written replies therein, the petitioner cannot get any relief in this Rule as prayed for."

(underlines supplied by us)

15. More importantly, this Division while dismissing the Civil Petition for Leave to Appeal No.1331 of 2008 filed by the respondent No.5 against the judgment and order dated 05.11.2007 passed by the High Court Division in Writ Petition No.11099 of 2006 observed the following:

"We have perused the leave petition as well as the judgment and order dated

> 05.11.2007 passed in Writ Petition No.3030 of 2005 as well as the Annexures-3(C), 4 and 5 at pages 331, 332 and 335 of the paper book and having regard to the discussion made in the impugned judgment by the High Court Division and the submissions of the learned Advocate for the leave-petitioner we are of the view that the Plot No.5 of Road No.29 of Gulshan Residential Area is not situated in C.S. and S.A. Plot No.268 as claimed by the leave petitioner and the said plot No.268 has not been released from the acquisition made in L.A. Case No.10/63-64 as claimed by the leave-petitioner. Accordingly we do not find any merit in the leave petition."
>
> (underlines supplied by us)

16. It is transparent from the above that the High Court Division in Writ Petitions No.11099 of 2006 and 3030 of 2005 found that plot No.5, Road No.29, Gulshan Model Town is not situated in C.S. Plot No.268 and none of the plots namely C.S. Plots No.267, 268 or 270 has ever been released from requisition in any manner. Subsequently, this Division upon an elaborate discussion firmly established the above findings of the High Court Division in Civil Petition for leave to Appeal No.1331 of 2008 while the Civil Petition for Leave to Appeal No.713 of 2007 filed by the respondent No.5 against the judgment passed in Writ Petition No.3030 of 2005 was also dismissed by this Division. In view of the observations made by this Division in Civil Petition for leave to Appeal No.1331 of 2008 it is by now finally settled that respondent No.5 cannot claim any valid right and claim over the land of disputed plot of the case in hand while the respondent No.1 became the owner of the land of disputed plot by way of acquisition. Although in the present case the respondent No.5 claims to be in possession of the disputed plot in view of the settled legal proposition the status of the respondent No.5 in the disputed plot is no better than a mere trespasser.

17. It is the case of the appellant that she took the allotment of the disputed plot from the respondent No.1, RAJUK vide memo dated 16.11.1995. Now the pertinent question is that whether the appellant has acquired a valid right and title of the disputed plot. Since it has already been settled by this Division that the land of disputed plot was acquired by RAJUK in accordance with law and the said land was not delisted from the acquisition, it is our considered view that the appellant having taken allotment of the same from RAJUK has acquired a legitimate right and title over it.

18. There is another facet of the case that is the respondent No.5 instituted Title Suit No.373 of 2005 impleading the appellant as well as respondent No.1 along with others seeking declaration of title in the land of the disputed plot. Then a pertinent question arises whether the principle of *res judicata* is applicable in Writ Petition. It transpires from the record that while discharging the Rule issued in Writ Petition No.7817 of 2009 the High Court Division observed that the writ petition is not maintainable since a title suit is pending over the title of the land in question. The learned Counsel for the appellant strenuously claims that since High Court Division has already made decision regarding the right and title of the respondent No.5 in Writ Petitions No.11099 of 2006 and 3030 of 2005 filed by him, the same issue cannot be reopened in the Writ Petition No.7817 of 2009 inasmuch as it is barred by the principle of *res judicata*. In this regard, it is our considered view that the High Court Division committed illegality in passing the impugned judgment without taking into consideration that earlier in Writ Petitions No.11099 of 2006 and 3030 of 2005 the High Court Division found that the respondent No.5 has no right and title over the disputed plot. But in the case in hand, the High Court Division while dealing with the Writ Petition filed by the appellant held relying on the claim of the respondent No.5 to the effect that since the case involves the disputed question of facts as to the title over the disputed plot the same should be settled in Title Suit No.373 of 2005 filed by the respondent No.5 and as such the Writ

Petition is not maintainable. The above findings of the High Court Division is absolutely unwarranted inasmuch as the fresh consideration of title of the respondent No.5 in disputed plot which has already been decided earlier by the High Court Division in Writ Petitions No.11099 of 2006 and 3030 of 2005 is barred by the principle of *res judicata*.

19. The rationale behind the principle of *res judicata* has been elucidated by the Indian Supreme Court in the case of State of Karnataka and others vs. All India Manufacturers Organization and others, AIR 2006 SC 1846. The relevant portion is extracted below:

> "32. *res judicata* is a doctrine based on the larger public interest and is founded on two grounds: one being the maxim *nemo debet bis vexari pro una et eadem causa* (P. Ramanatha Aiyer, Advanced Law Lexicon (Vol.3 3rd Edn., 2005) at page 3170.) ("No one ought to be twice vexed for one and the same cause") and second, public policy that there ought to be an end to the same litigation (Mulla, Code of Civil Procedure (Vol.1, 15th Edn., 1995) at page 94. It is well settled that Section 11 of the Civil Procedure Code, 1908 (hereinafter "the CPC") is not the foundation of the principle of *res judicata*, but merely statutory recognition thereof and hence, the Section is not to be considered exhaustive of the general principle of law. (see Kalipada De v. Dwijapada Das) The main purpose of the doctrine is that once a matter has been determined in a former proceeding, it should not be open to parties to re-agitate the matter again and again. Section 11 of the CPC recognises this principle and forbids a court from trying any suit or issue, which is *res judicata*, recognising both 'cause of action estoppel' and 'issue estoppel'."
>
> (underlines supplied by us)

20. At this juncture, a plausible question albeit carrying a great importance peeps into our mind whether the principle of *res judicata* is applicable in case of a subsequent suit. In this regard, it has been observed by the Indian Supreme Court in oft-cited case of Gulab Gulabchand Chhotalal Parikh vs. State of Bombay AIR 1965 SC 1153 that-

> "73.....the provisions of section 11 CPC are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it will operate as *res judicata* in a subsequent regular suit. .....The nature of the former proceeding is immaterial**."**
>
> (underlines supplied by us)

21. It appears from the aforesaid decision that any previous decision on a matter in controversy in a legal proceeding including writ petition decided after full contest by the parties or after affording fair opportunity to the parties to prove their case will operate as *res judicata* in a subsequent regular suit. Therefore, in view of the above decision of the Indian Supreme Court we hold that since the right and title of the respondent No.5 in the disputed land has not been found by the High Court Division in Writ Petitions No.11099 of 2006 and 3030 of 2005 filed at the instance of the respondent No.5, subsequent suit being No.373 of 2005 instituted by the respondent No.5 for declaration of title so far as it relates to the disputed plot claimed by the appellant in Writ Petition No.7817 of 2009 is barred by the principle of *res judicata*.

22. Be that as it may, it transpires from the additional paper book filed by the appellant that the defendant No.3-appellant filed an application for rejection of plaint of Title Suit

No.373 of 2005 under Order VII Rule 11 of the Code of Civil Procedure, 1908, but the trial Court upon hearing on 28.02.2012 rejected the said application. Challenging the aforesaid order dated 28.02.2012 the appellant filed Civil Revision No.1516 of 2012 before the High Court Division and upon hearing the High Court Division on 15.05.2018 set aside the order 28.02.2012 passed by the trial Court and allowed the application for rejection of plaint of Title Suit No.373 of 2005.

23. While arguing the learned senior Counsel for the appellant emphatically claims that in Civil Petition for Leave to Appeal No.1331 of 2008 this Division held that the disputed plot is not situated in C.S. and S.A. Plot No.268 as claimed by the respondent No.5 and the said plot has not been released from acquisition made in L.A. Case No.10/63-64 and as such the High Court Division on the face of the aforesaid decision of the Apex Court was in breach of Article 111 of the Constitution. To address the said issue we need to advert to the provisions of Article 111 of the Constitution of Bangladesh which enunciates as follows:

> "Article 111. The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it."

24. In the case of Secretary, Posts and Telecommunications Division, Ministry of Posts and another vs. Shudangshu Shekhar Bhadra and others reported in 25 ALR(AD)(2022) 19 at paragraph 22 this Division very eloquently stated that:

> "<u>.....the provision of Article 111 of the Constitution enjoining upon all courts below to obey the law laid down by this Court, judicial discipline requires that the High Court Division should follow the decision of the Appellate Division and that it is necessary for the lower tiers of courts to accept the decision of the higher tiers as a binding precedent.</u>
>
> (underlines supplied)

25. In view of above, it is quite evident that the law declared by this Division regarding a subject matter is always binding on the High Court Division as well as other subordinate Courts. Since this Division in Civil Petition for Leave to Appeal No.1331 of 2008 has already categorically found that the respondent No.5 has no right and title in the disputed plot the impugned judgment passed by the High Court Division violates the provisions of Article 111 of the Constitution.

26. In the light of the aforesaid reasons as well as an elaborate discussion regarding the factual and legal aspects of the case the impugned judgment and order dated 15.02.2011 passed by the High Court Division in Writ Petition No.7817 of 2009 warrants interference by this Division. Therefore, we find merit in the submissions of the learned senior Counsel for the appellant. In the prevailing circumstances, the impugned judgment and order of the High Court Division cannot stand at all in the eye of law.

27. Accordingly, the instant Civil Appeal is **allowed**.

28. The judgment and order dated 15.02.2011 passed by the High Court Division in Writ Petition No.7817 of 2009 is set aside.

29. The respondents No.1-4 are hereby directed to hand over the possession of plot No.5, Road No.29, Gulshan Residential Area, Dhaka within 60(sixty) days in favour of the present appellant from the date of receipt of this order.

30. The respondents No.1-4 are also directed to complete all legal formalities including execution of all legal deeds and registration in favour of the appellant in accordance with law.

19 SCOB [2024] AD 10

APPELLATE DIVISION

Present:
Mr. Justice Hasan Foez Siddique, Chief Justice
Mr. Justice Obaidul Hassan
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Md. Abu Zafor Siddique
Mr. Justice Jahangir Hossain

CIVIL PETITION FOR LEAVE TO APPEAL NO. 2419 OF 2019
(From the judgment and order dated 18.02.2019 passed by the High Court Division in Writ Petition No. 609 of 2019)

Md. Taherul Islam (Tawhid) ... Petitioner
Vs.
The Speaker Bangladesh Jatiya Sangsad and others ...Respondents

For the petitioner : Mr. A.M. Mahbub Uddin, Senior Advocate, instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.

For the respondents : Mr. A.M. Amin Uddin, Attorney General with Mr. Sk. Md. Morshed, Additional Attorney General, Mr. Mohammad Mehedi Hasan Chowdhury, Additional Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General and Mr. Sayem Mohammad Murad, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record.

Date of hearing and judgment : The 01st day of August, 2023

Editors' Note:
In this case petitioner challenged the holding of office by taking oath by the Members of Parliament who were elected for the 11th National Parliament before expiration of the term of the previous Parliament. The petitioner alleged that by taking oath before dissolution of the 10th National Parliament, the MPs had violated the Article 123(3) read with Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh. The High Court Division summarily rejected the writ petition on the ground that Article 148(3) of the Constitution had been incorporated to maintain continuity of running the government for the best interest of democracy. A "deeming clause" exists under Article 148(3) is to facilitate the continuity of the government. It was also held that though, upon taking oath, the MPs in reality had not assumed office of members of parliament, yet they had assumed office by way of legal fiction created by the Constitution. Therefore, taking oath by the MPs before dissolution of previous parliament was not illegal. The Appellate Division, concurring with the finding reached at by the High Court Division (which has been reported in 19 SCOB [2024] HCD 66) dismissed the Civil Petition.

Key Words:
Article 123(3); Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh, Deeming Clause, Parliamentary Election, Member of Parliament, Legal Fiction

Deeming provision:
It is well settled position of law that a deeming provision is an admission of the nonexistence of the fact deemed. The Legislature is competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not even exist. It means that the Courts must assume that such a state of affairs exists as real, and should imagine as real the consequences and incidents which inevitably flow there from, and give effect to the same. ...(Para 20)

Correct way to interpret a "deeming" clause:
When the legislature enacts a "deeming" clause, the correct way to interpret the same is to find out for what purpose and upto what extent the legal fiction has-been created. It is the function of the Court to find out the limitation of the legal fiction, to delimit its boundaries and not to extend the frontier of legal fiction beyond what has been provided in the statute. ...(Para 29)

Article 56(3) and 57 of the Constitution of the Peoples' Republic of Bangladesh:
Even if the Parliament does not sit in its first meeting, there cannot be any vacuum in the running of the government in the country and although there may be a gap between one parliament and another, the continuity of the government cannot have any break:
When the election to the Parliament was held and the names of returned candidates were declared, it was incumbent upon the Hon'ble President of Bangladesh to appoint a Prime Minister first, from among the elected members of Parliament who appears to have commanded the support of the majority members. Therefore, when an election to national Parliament takes place and the names of the returned candidates are declared, the framers of the Constitution incorporated the provision of Article 56(3) for appointment of a member of parliament as Prime Minister, to keep run the continuity of the Government so that no break takes place the running of the government. The said provision was embodied in the Constitution even if the Parliament does not sit in its first meeting, there cannot be any vacuum in the running of the government in the country. Although there may be a gap between one parliament and another, the continuity of the government cannot have any break, and even if the Prime Minister becomes disqualified to continue as Prime Minister, he or she will still continue under Article 57 unless and until the next Prime Minister takes upon the office. The tenure of other Ministers is also the same under Article 58 according to which they will also continue to hold office until their successors enter upon such office. ...(Para 35)

Article 56(3) and 148 (3) of the Constitution of the Peoples' Republic of Bangladesh:
Once the names of elected members of Parliament returned by the Election Commission in the official gazette, it becomes necessary for them to take oath and this necessity arises because of the relevant provisions of the Constitution in order to form a new government. The intention of the legislature is transparent while going through Article 56(3) of the Constitution whereby the President is to have commanded majority support of the members of parliament, as Prime Minister of the country. Therefore, for such appointment of an MP as Prime Minister, the first sitting of the Parliament is not necessary to be held. Rather, it is the discretion of the Hon'ble President to appoint a

member as Prime Minister from among the elected members of parliament commanding the support of the majority. In the given circumstances, it is clear that latent intent of the legislature for incorporating the deeming clause under Article 148(3) of the Constitution is to maintain the continuity of the government. ...(Para 39)

<u>Article 148 (3) and 123 (3) of the Constitution of the Peoples' Republic of Bangladesh:</u>
"Deeming clause" under Article 148(3) was incorporated just to facilitate the continuity of the government. Though, upon taking oath, the MPs in reality have not assumed office of members of parliament, yet they have assumed office by way of legal fiction created by the Constitution and that legal fiction must be interpreted restricting the same to be used for the said purpose only. The legislature deliberately created this legal fiction so that the next executive government can be formed and appointed by the President. The said intention of the legislature has been elucidated in Article 123(3) which states that member of Parliament shall not assume office as members of parliament except after the expiration of the term of the previous parliament. It denotes that the MPs who took oath even before the first meeting of the Parliament shall not in fact or in reality assume such office of members of parliament before expiration of the tenure of the last parliament. ...(Para 40)

JUDGMENT

Obaidul Hassan, J:

1. This Civil Petition for Leave to Appeal (CPLA) is directed against the judgment and order dated 18.02.2019 passed by the High Court Division in Writ Petition No. 609 of 2019 summarily rejecting the same. The petitioner filed the aforesaid Writ Petition challenging the holding of office of the Members of Parliament (MPs) by the respondents No. 5-294 having taken their oaths in violation of Article 123(3) read with Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh.

2. The petitioner filed the aforesaid Writ Petition contending, inter alia, that 10th National Parliamentary Election was held on 05.01.2014 and the MPs elected in the said election took their oaths on 09.01.2014 after the publication of election result in the official gazette and subsequently cabinet was formed on 12.01.2014. The first meeting of the 10th National Parliament was held on 29.01.2014 and as per Article 72(3) of the Constitution, the tenure of the 10th National Parliament expired on 28.01.2019 after completion of five years term from the date of first meeting. The official website of Bangladesh Jatiya Sangshad also displays that the first meeting of the 10th National Parliament was held on 29.01.2014. The election of the 11th National Parliament was held on 30.12.2018 under the supervision of the Election Commission in 299 constituencies. In compliance with Article 19(3) of the Representation of the People's Order, 1972 the Election Commission declared the result of the returned candidates in the said election by gazette notification on 01.01.2019. Although Article 39(4) of the Constitution does not provide for any time limit to publish such gazette, the oaths of the newly elected MPs were administered at 11:00 a.m. on 03.01.2019 in a ceremonial manner and subsequently, on the same day the Hon'ble President expressed his decision to appoint Sheikh Hasina, MP as the Prime Minister of Bangladesh due to her commanding the support of the majority of members and invited her to form cabinet under her leadership. Thereafter, on 07.01.2019 the President appointed Sheikh Hasina, MP as Prime Minister by official gazette notification. On the same day another gazette was published pursuant to

Article 56(ii) of the Constitution and Rule 3(iv) of the Rules of Business, 1996 announcing the names of the Ministers, State Ministers and Deputy Ministers. Accordingly, they took oaths as Ministers, State Ministers and Deputy Ministers on 07.01.2019. The first session of the 11th National Parliament (জাতীয় সংসদ) was held on 30.01.2019.

3. According to Article 148(3) of the Constitution, the persons, who took oath on 03.01.2019 as members of Parliament, by virtue of taking oath, had already assumed office as members of Parliament. As such, they took the oath and assumed their office as MPs before expiration of the term of the previous Parliament which is set to be dissolved on 28.01.2019. Therefore, the day they took oaths, there were about six hundred members of Parliament, which is clearly in contradiction with the provisions of the Constitution and as such they cannot remain in office as members of Parliament.

4. Neither the Constitution nor the RPO put any time limit within which the publication of the returned candidates must be made. According to Article 39(4) of the Representation of the People's Order, 1972 the Election Commission shall have to publish the names of the retuned candidates after holding National Parliament Election although there is no provision requiring to publish the names of the returned candidates within any specified time. But the Election Commission hurriedly published the results only two days after the election. It is also contended that since the cabinet was formed even before the first meeting of the 11th National Parliament, the MPs who took oath as ministers also committed gross illegality in violation of the Constitution. Accordingly, a Rule was sought to issue against the respondents by the High Court Division in the form of quo warranto calling upon the said MPs, as to under what capacity they are holding such office of the members of Parliament in particular, when they entered office when the previous MPs were also existing in the said office as members of Parliament being the same is violative of Article 123(3) read with Articles 148(3) and 72(3) of the Constitution.

5. Before issuing Rule the High Court Division heard the learned Attorney General since the writ petitioner raised a serious constitutional issue. Upon hearing both sides the High Court Division was pleased to reject the Writ Petition being No. 609 of 2019 summarily by impugned judgment and order dated 18.02.2019.

6. Being aggrieved with the impugned judgment and order dated 18.02.2019 the petitioner preferred the instant Civil Petition for Leave to Appeal.

7. Mr. A.M. Mahbub Uddin, learned senior Counsel appearing on behalf of the petitioner taking us through the judgment and order dated 18.02.2019 passed by the High Court Division in Writ Petition No. 609 of 2019 as well as other materials on record contends that the High Court Division erred in law in totally misconceiving the case of the petitioner upon misreading the constitutional provisions enshrined in Article 148(3) in holding that a member of Parliament assumes office on the day of the first meeting of Parliament. The learned senior Counsel contends next that High Court Division relied on a misconceived understanding of the concept of 'Legal Fiction' to hold that clear language of Article 148(3) to the effect that a person assumed office after taking oath is not binding on a person by virtue of the principle of 'Legal Fiction'. The learned senior counsel submits next that according to Article 123(3) the respondents, who have been elected in the 11th National Parliamentary Election cannot assume office as MPS before expiration of the term of the previous Parliament which was scheduled to expire on 28th January 2019 but by taking oaths before the said period the respondents assumed the said office which violated the provision of Article 123(3), but the

High Court Division without considering the said issue most illegally passed the impugned judgment and order. The learned senior Counsel argues next that the High Court Division failed to appreciate that 10th Parliament first sat on 29.01.2014 and as per Article 72(3) of the Constitution the term of the 10th Parliament existed until 28.01.2019 but the respondents took oath and assumed office as MPs which was not only a nullity in law, but an absurdity as the MPs from the previous Parliament were still holding office, meaning that the number of MPs at the same time in office was higher than 345 as stipulated in Article 65(3A) of the Constitution.

8. Per contra, Mr. A.M. Amin Uddin, learned Attorney General appearing along with Mr. Sk. Md. Morshed, learned Additional Attorney General, Mr. Mohammad Mehedi Hasan Chowdhury, learned Additional Attorney General, Mr. Mohammad Saiful Alam, learned Assistant Attorney General and Mr. Sayem Mohammad Murad, learned Assistant Attorney General appearing for the respondents advance their submissions supporting the judgment of the High Court Division and vehemently oppose the prayer of the petitioners for granting of leave. The learned Attorney General along with his accompanying Counsels contend that it has not been challenged in the Writ Petition that the said MPs had been elected illegally in the 11th National Parliamentary Election or they were disqualified to become for any reason to become Members of Parliament. Therefore, in so far as the Writ Petition is concerned, it has only challenged the oath taking by the said MPs for which the said MPs had nothing to do since the oath taking ceremony is the matter of Parliament Secretariat. The learned Counsels for the respondents by referring the oath of MP stated in the 3rd Schedule of the Constitution, argue that the form of oath of MPs is quite unique and not similar to other oaths mentioned in the 3rd Schedule of the Constitution. The framers of the Constitution aptly incorporated the words “the duties upon which I am about to enter” in the form of oath of MPs. Drawing a subtle distinction between the words stated in the form of oath of MPs and those of other forms of oaths the learned Counsel for the respondents submit that the oath taken by the MPs categorically indicate that upon taking oath the MPs do not become MPs in reality rather they fictionally assume office of Members of Parliament for certain purpose. According to the provisions of the Constitution an MP will not assume office in reality until he sits in the Parliament and only when the first meeting of the Parliament takes place, an elected MP may assume office in reality. The learned Counsels submit next that the members of Parliament do not assume office in reality whenever they take oath, rather the Constitution has created a legal fiction as regards assumption of office by the Members of Parliament upon taking oath only for the purpose of forming a government or cabinet so that there is no break in the running of the government in the country.

9. We have perused the impugned judgment and order dated 18.02.2019 passed by the High Court Division in Writ Petition No. 609 of 2019, considered the submissions of the learned Counsels of the both sides and gone through the other materials on record.

10. It is admitted that the newly elected Members of Parliament in the 11th Parliamentary Election took their oaths on 03.01.2019 and the cabinet was formed on 07.01.2019 while the term of the 10th Parliament expired on 28.01.2019. The petitioner claims that taking oath during the validity period of earlier parliament by members of Parliament in the 11th Parliamentary Election is violative of proviso to Article 123(3) read with Articles 148(3) and 72(3) of the Constitution.

11. It is advantageous to know Article 123(3), Article 148(3) and 72(3) of the Constitution.

12. Article 123(3) lays down that- "(1)..... (2)..... (3) A general election of the members of Parliament shall be held- (a) in the case of a dissolution by reason of the expiration of its term, within the period of ninety days preceding such dissolution; and (b) in the case of a dissolution otherwise than by reason of such expiration, within ninety days after such dissolution: Provided that the persons elected at a general election under sub-clause (a) shall not assume office as members of Parliament except after the expiration of the term referred to therein. .....

13. Article 148 provides in the following- "(1)..... (2)..... (2A) If, within three days next after publication through official Gazette of the result of a general election of members of Parliament under clause (3) of article 123, the person specified under the Constitution for the purpose or such other person designated by that person for the purpose, is unable to, or does not, administer oath to the newly elected members of Parliament, on any account, the Chief Election Commissioner shall administer such oath within three days next thereafter, as if, he is the person specified under the Constitution for the purpose. (3) Where under this Constitution a person is required to make an oath before he enters upon an office he shall be deemed to have entered upon the office immediately after he makes the oath.

14. Article 72(3) states that-

> "(1).....
> (2).....
> (3) Unless sooner dissolved by the President, Parliament shall stand dissolved on the expiration of the period of five years from the date of its first meeting: ....." (underlines supplied by us)

15. From the above constitutional provisions, it appears that according to Article 123(3) the general election of the members of Parliament shall be held in case of dissolution of Parliament by reason of the expiration of its term, within the period of ninety days preceding such dissolution. Proviso to Article 123(3) puts an embargo on the members of Parliament so elected to assume the office as members of Parliament before expiry of the term of earlier Parliament. Article 148(3) provides that a member of Parliament shall be deemed to have entered upon the office immediately after taking oath. Article 148(2A) lays down that the oath of the newly elected members of Parliament has to be administered within three days after the publication of the result of general election in the official gazette. Article 72(3) provides that unless dissolved earlier by the President, the Parliament shall stand dissolved after expiry of five years from the date of its first meeting.

16. Admittedly the 1st meeting of the 10th Parliament was held on 29.01.2014 and accordingly the term of the said Parliament was scheduled to expire on 28.01.2019. It reveals from the record that the newly elected members of Parliament in 11th Parliament took oath on 03.01.2019. The petitioner asserts that the members of Parliament elected in the 11th Parliament entered upon their office as members of Parliament immediately after taking oath on 03.01.2019 while the term of 10th Parliament was still in force which contravenes the constitutional provisions as enshrined in proviso to Article 123(3) of the Constitution. To ascertain whether there was illegality or not in holding the office by the members of 11th Parliament the High Court Division discussed about the 'deeming clause' contemplated under Article 148(3) of the Constitution. Now let us see what is 'deeming clause'.

17. The term 'deem' is derived from the old English word 'domas' which meant 'judgment or law'. Webster's Ninth New Collegiate Dictionary provides the following meanings: 'to come to think or judge: consider; to have an opinion: believe.'

18. In Black's Law Dictionary, the word 'deem' has been defined in the following way:

> 'to treat (something) as if (1) it were really something else, or (2) it had qualities that it does not have.'

19. Bennion Statutory Interpretation (3rd ed. 1997, p. 735), states: 'Deeming provisions'- Acts often deem things to be what they are not. In construing a deeming provision, it is necessary to bear in mind the legislative purpose.

20. It is well settled position of law that a deeming provision is an admission of the nonexistence of the fact deemed. The Legislature is competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not even exist. It means that the Courts must assume that such a state of affairs exists as real, and should imagine as real the consequences and incidents which inevitably flow there from, and give effect to the same.

21. Mr. Mahmudul Islam in his book titled 'Interpretation of Statutes and Documents' (First edition, 2009) at pg 87 writes as under- "The legislature sometimes creates legal fiction by using words which are called 'deeming clause'. A legal fiction is one which is not at actual reality, but the legislature mandates and the courts accept it to be a reality, though in reality it does not exist. The effect of such deeming clause is that a position which otherwise would not obtain is deemed to obtain under the circumstances."

22. He further states at pg. 88 that- "The court has to determine the limits within which and the purpose for which legislature has created the fiction the court is to find out the limit of the legal fiction and not to extend the frontier of the legal fiction."

23. However, at pg. 89 he gave a clarification in the following way- "However, in construing the deeming clause, it should not be extended beyond the purpose for which it is created or beyond the language of the section by which it is created; it cannot be extended by importing another fiction."

24. The effect of such a deeming clause has been stated by Indian Supreme Court in State of Bombay Vs. Pandurang Vinayak Chaphalkar, AIR 1953 SC 244 as follows: "When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."

25. In the Bengal Immunity Company Limited Vs. The State of Bihar and Ors., AIR 1955 SC 661 it has been observed by a Bench of the Indian Supreme Court comprising of seven judges headed by the then acting Chief Justice Sudhi Ranjan Das in the following- "42. Legal fictions are created only for some definite purpose.....a legal fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field."

26. It has been also observed in the case of Prakash H. Jain Vs. Marie Fernandes, (2003)

8 SCC 431 that- "12.....it is by now well settled by innumerable judgments of various courts including this Court, that when a statute enacts that anything shall be deemed to be some other thing the only meaning possible is that whereas that the said thing is not in reality that something, the legislative enactment requires it to be treated as if it is so. Similarly, though full effect must be given to the legal fiction, it should not be extended beyond the purpose for which the fiction has been created and all the more, when the deeming clause itself confines, as in the present case, the creation of fiction for only a limited purpose as indicated therein."

27. Lastly, in the case of Pubali Bank Vs. The Chairman, First Labour Court, Dhaka and another, reported in 44 DLR (1992) 40 this Division comprising of four judges dealt with a question whether the Labour Court, 'deemed as a civil court' it was decided that the Labour Court acts as a civil court for limited purpose and it will not exercise the powers like those given in Order IX or Order XXXIX Rule 1 of the Code of Civil Procedure which the civil court may exercise in a suit.

28. In the case of Pubali Bank (supra) Justice Mustafa Kamal observed in the following- "26. The language employed in sub-section (2) of Section 36 has to be closely scrutinised. A Labour Court is not a Civil Court at all. It is only by a legal fiction or a statutory hypothesis that it is to be treated as a Civil Court.

29. When the legislature enacts a "deeming" clause, the correct way to interpret the same is to find out for what purpose and upto what extent the legal fiction has-been created. It is the function of the Court to find out the limitation of the legal fiction, to delimit its boundaries and not to extend the frontier of legal fiction beyond what has been provided in the statute. As was held in the case of Radha Kissen Chamria and others Vs. Durga Prasad Chamria, AIR 1940 PC 167, "As the analogy only arises by legal fiction, it must be limited to the purposes enacted by the context and cannot be given larger effect." Also it has been held in the case of Commissioner of Income Tax Vs. Vadilal Lallu Bhai. AIR 1973 (SC) 1016. "Legal fictions are only for definite purposes and they are limited to the purpose for which they are created and should not be extended beyond their legitimate field."

30. In the case of Radha Kissen Chamaria vs Durga Prashad Chamaria, reported in AIR 1940 PC 167, it has been dealt with "deeming clause" mentioned in Section 19(3) of the Bengal Public Demands Recovery Act, 1913, which provided that a certificate holder shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof. While discussing about the "deeming clause" under the aforesaid Section the Privy Council observed that the legal fiction created thereby was for a limited purpose of enabling the certificate holder to execute the decree and to satisfy his own claim out of the proceeds of such execution, but he was not in a position of an assignee of the decree so as to acquire all the rights of the original decree holder in the decree.

31. From the above it is well settled that the legal fiction must be extended to its logical conclusion and at the same time it should be construed strictly. The High Court Division in the impugned judgment observed that a deeming clause in the Constitution, has to be interpreted taking into consideration of various factors depending on the backdrop due to which the same was incorporated, legislative intent for incorporation of such clause vis a vis the manner of application of such deeming clause. We endorse the above observation of the High court Division.

32. Adverting to the present case we need to examine the provisions of the Constitution to retrieve the latent intention for purpose of the incorporating the "deeming clause" under Article 148 (3) of the Constitution. Part-V of our Constitution deals with the provisions relating to legislature. Article 65 of the Constitution provides for a Parliament for Bangladesh to be known as the House of Nation whereupon the legislative functions while Article 66 enumerates the qualifications and disqualifications for being member of Parliament.

33. Article 72(2) lays down that the Parliament shall be summoned to meet within thirty days after the declaration of the results of polling at any general election of members of Parliament. Accordingly, once gazette notification is published by the Election Commission declaring the names of the returned candidates, the Parliament has to resume its meeting within thirty days from the date of publication of the result. Article 72(3) provides that the Parliament shall stand dissolved on the expiry of the period of five years from the date of its first meeting unless dissolved earlier by the President. Article 74(1) states that in the first meeting of the Parliament, it shall elect its Speaker and Deputy Speaker.

34. Now let us look into the provisions regarding the formation of the government are subsumed under Chapter II of Part-IV of the Constitution containing Articles 55-58. According to Article 55 there shall be a cabinet for Bangladesh having the Prime Minister at its head and all executive power of the republic shall be exercised by, or on the authority of the Prime Minster. Article 56, enshrines the provisions as to how the Ministers, State Ministers and Deputy Ministers are appointed. Article 56(3) lays down that the President shall appoint as Prime Minister the member of Parliament, who appears to him to command the support of the majority of the members of Parliament.

35. From the above it is abundantly clear that when the election to the Parliamant was held and the names of returned candidates were declared, it was incumbent upon the Hon'ble President of Bangladesh to appoint a Prime Minister first, from among the elected members of Parliament who appears to have commanded the support of the majority members. Therefore, when an election to national Parliament takes place and the names of the returned candidates are declared, the framers of the Constitution incorporated the provision of Article 56(3) for appointment of a member of parliament as Prime Minister, to keep run the continuity of the Government so that no break takes place the running of the government. The said provision was embodied in the Constitution even if the Parliament does not sit in its first meeting, there cannot be any vacuum in the running of the government in the country. Although there may be a gap between one parliament and another, the continuity of the government cannot have any break, and even if the Prime Minister becomes disqualified to continue as Prime Minister, he or she will still continue under Article 57 unless and until the next Prime Minister takes upon the office. The tenure of other Ministers is also the same under Article 58 according to which they will also continue to hold office until their successors enter upon such office. What can be deduced from the foregoing discussion is that the architect of our Constitution arranged its various provisions with such a dexterity and placed each of its provision very neatly and coherently so that there is no break in the continuity of the government in any occasion.

36. Again, Article 123(3) enjoins the general election of the members of Parliament to be held in case of dissolution of Parliament by reason of the expiration of its term, within the

period of ninety days preceding such dissolution. Again, as per proviso to Article 123(3) the newly elected members of Parliament shall not assume the office as members of Parliament before expiry of the term of earlier Parliament. According to Article 148(1) a person elected or appointed to any office mentioned in the Third Schedule shall before entering upon the office make and subscribe an oath or affirmation in accordance with that Schedule. Article 148(2A) was incorporated in the Constitution through 14th Amendment to the Constitution which states that the taking of oath or administering of oath must be done within three days from publication of results of election in the official gazette by the Election Commission and an additional three days may be allotted to administer such oath to the members of the Parliament, by the Chief Election Commissioner if for any reason the person designated in the Constitution does not administer oath. Article 148(3) lays down that a member of Parliament shall be deemed to have entered upon the office immediately after taking oath. It reveals from the above that the framers of the Constitution in one place of the Constitution provided that the member of Parliament shall not assume his office before the expiry of the term of earlier Parliament while in another place an MP shall be deemed to have assumed his office once he takes oath even before the first meeting of parliament or before dissolution of the last Parliament. In view of the above position of law we need to have a glimpse into the form of oath taken by the member of Parliament.

37. The form of oath taken by the member of Parliament has been incorporated in the 3rd Schedule under serial No. 5. The oath is as follows- "5. Member of Parliament.– An oath (or affirmation) in the following forms shall be administered by the Speaker– "I, ..., having been elected a member of Parliament do solemnly swear (or affirm) that I will faithfully discharge the duties upon which I am about to enter according to law : That I will bear true faith and allegiance to Bangladesh : And that I will not allow my personal interest to influence the discharge of my duties as a member of Parliament."

38. It divulges from the above that unlike other oaths, the MPs take oath to discharge their duties upon which they do not enter immediately rather it denotes the duties upon which they are about to enter in future.

39. That apart, petitioner in paragraph 4 of the Writ Petition stated that though the first meeting of the 10th Parliament was held on 29.01.2014, the cabinet was formed before the said meeting, i.e. on 12.01.2014, and the MPs took oath even before i.e. on 09.01.2014. The same happened in case of other parliamentary election of Bangladesh and the 11th parliamentary election is no exception to that. Inasmuch as once the names of elected members of Parliament returned by the Election Commission in the official gazette, it becomes necessary for them to take oath and this necessity arises because of the relevant provisions of the Constitution in order to form a new government. The intention of the legislature is transparent while going through Article 56(3) of the Constitution whereby the President is to have commanded majority support of the members of parliament, as Prime Minister of the country. Therefore, for such appointment of an MP as Prime Minister, the first sitting of the Parliament is not necessary to be held. Rather, it is the discretion of the Hon'ble President to appoint a member as Prime Minister from among the elected members of

parliament commanding the support of the majority. In the given circumstances, it is clear that latent intent of the legislature for incorporating the deeming clause under Article 148(3) of the Constitution is to maintain the continuity of the government.

40. Now, talking about the 11th Parliamentary election the newly elected MPs took oath on 03.01.2019 and on the same day the President realized that Sheikh Hasina, the newly elected MP in the said election, was commanding the majority support of the elected MPs and for such satisfaction of the president under the Constitution, he is not required to wait until the first meeting of Parliament. Therefore, the provision of Article 148(3) of the Constitution has been incorporated to maintain continuity of running the government for the best interest of democracy. In the 11th Parliament after being appointed Prime Minister on 03.01.2019, she determined as to who would be the Ministers, State Ministers and Deputy Ministers in her cabinet and, accordingly such MPs and some non-MPs were also appointed as Ministers, State Ministers and Deputy Ministers by the President in accordance with the Constitution. It is manifest from the above that "deeming clause" under Article 148(3) was incorporated just to facilitate the continuity of the government. Though, upon taking oath, the MPs in reality have not assumed office of members of parliament, yet they have assumed office by way of legal fiction created by the Constitution and that legal fiction must be interpreted restricting the same to be used for the said purpose only. The legislature deliberately created this legal fiction so that the next executive government can be formed and appointed by the President. The said intention of the legislature has been elucidated in Article 123(3) which states that member of Parliament shall not assume office as members of parliament except after the expiration of the term of the previous parliament. It denotes that the MPs who took oath even before the first meeting of the Parliament shall not in fact or in reality assume such office of members of parliament before expiration of the tenure of the last parliament.

41. Admittedly, the MPs elected in the 11th parliamentary election did not sit in the first meeting of the parliament before expiration of the tenure of the last parliament. They sat in the first meeting of the parliament on 30.01.2019 i.e. two days after the expiration of the tenure of the 10th Parliament. Therefore, even though by way of legal fiction they have in the meantime assumed office of members of Parliament, in reality they have not assumed such office until and unless the first meeting of the 11th Parliament was held. This being the position, we do not find any substance in the submissions of the learned advocate for the petitioner that on the day the MPs in the 11th Parliament took oath, they assumed the office of MP and as such on that day there were more than 600 MPs in the parliament. In the light of the foregoing discussions we find that the High Court Division rightly rejected the application filed under Article 102(2)(a)(ii)and (b)(ii) of the Constitution of the People's Republic of Bangladesh by the petitioner in Writ Petition No. 609 of 2019. We do not find any reason to interfere with the observations of the High Court Division rather we are fully in agreement with the same.

42. In the premises made above, we hold that the High Court Division on proper appreciation of facts and law passed the impugned judgment and order for which it does not warrant any interference by this Division.

43. Accordingly, this Civil Petition must fail and as such the same is dismissed.

19 SCOB [2024] AD 21

APPELLATE DIVISION

Present:
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Md. Abu Zafor Siddique
Mr. Justice Jahangir Hossain

CIVIL APPEAL NO.232 OF 2014 WITH CIVIL PETITIONS FOR LEAVE TO APPEAL NO.2680 OF 2014 & 602 OF 2017
(From the judgments and orders dated 24.09.2014 and 12.02.2017 passed by the High Court Division in Writ Petitions No.7489 of 2014, 6951 of 2014 & 1948 of 2017)

A.B.M. Altaf Hossain **.....Appellant**
(In C.A. No.232 of 2014)

Mohammad Idrisur Rahman, Advocate **.....Petitioner**
(In C.P. No.2680 of 2014)

Md. Farid Ahmed Shibli **.....Petitioner**
(In C.P. No.602 of 2017)

-Versus-

Government of Bangladesh and others **.....Respondents**
(In all the cases)

For the appellant (In C.A. No.232 of 2014) : Mr. Probir Neogi, senior Advocate with Mr. Momtazuddin Fakir, senior Advocate, Mr. Motahar Hossain, senior Advocate, Mr. M. Sayed Ahmed, senior Advocate, Mr. Mahbub Shafique, Advocate, Ms. Anita Ghazi Rahman, Advocate, Ms. Suvra Chakravorty, Mr. Manzur-Al-Matin, Advocate, Mr. Imranul Kabir, Advocate and Mr. Khandaker Reza-E-Raquib, Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.

For the petitioner (In C.P. No.2680 of 2014) : Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For the petitioner (In C.P. No.602 of 2017) : Mr. Manzill Murshid, senior Advocate, instructed by Mr. Md. Mahboob Murshed, Advocate-on-Record.

For the respondents (In all the cases) : Mr. A.M. Amin Uddin, Attorney General with Mr. Mohammad Mehedi Hassan Chowdhury, Additional Attorney General, Mr. Md. Mojibur Rahman, Assistant Attorney General, Mr.

		Mohammad Saiful Alam, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.
Dates of hearing	:	12.01.2023, 16.02.2023, 23.02.2023, 09.03.2023, 30.03.2023 & 25.05.2023.
Date of judgment	:	14.06.2023

Editors' Note:

In these cases, non-appointment of two Additional Judges of the High Court Division as Judge of the High Court Division under article 95 of the Constitution despite positive recommendation from the Chief Justice of Bangladesh was challenged. After hearing, Appellate Division gave split verdicts on various issues.

Consequently, by majority decision, the Appellate Division held that the concerned authority may consider appointing Mr. A.B.M. Altaf Hossain as the permanent Judge of the High Court Division.

Key Words:

Article 48(3), 52, 55, 95 and 98 of the Constitution of Bangladesh; Interpretation of the Constitution; Consultation; Appointment of the Judges of the High Court Division; Antecedents; Judicial Independence; Basic Structure; 10 Judges Case

Ensuring the independence of judiciary and making it separate from the executive were two primordial intentions of our Constitution framers:

It is unmistakably evident that ensuring the independence of judiciary and making it separate from the executive were two primordial intentions of our Constitution framers. In the aforementioned case laws of our Apex Court such as "Masdar Hosen Case", "10 Judges case", "5th Amendment Case", "7th Amendment Case", "13th Amendment Case", "16th Amendment Case" these primal intentions of our Constitution Makers were pronounced recurrently.

...(Para 23, Per Justice Md. Nuruzzaman)

Articles 7, 7A, 7B and 111 of the Constitution:

`Basic structures' of the Constitution are not only unbendable but also any attempt for deviating from such provisions is a seditious offence. As consultation with the CJB with primacy is basic structure as per decision of the Apex Court, that automatically made an entry within the purview of Article 7A read with Article 7B and 7, as laws declared by the Appellate Division is binding under Article 111 of the Constitution.

...(Para 26-27, Per Justice Md. Nuruzzaman)

Subsequent to such clear-cut and patent verdict and accomplishment by the Government i.e. the executive making necessary rules on "consultation with primacy" and after the enactment of the Fifteenth Amendment of the Constitution in 2011, is there any scope at all to leave the matter of antecedent or conduct of a Judge of the High Court Division in the hands of the executives or to make their (executives) opinion dominant over the opinion of the CJB? The answer is a big no.

...(Para 30, Per Justice Md. Nuruzzaman)

Principle of natural justice too requires that if any decision taken against anyone he/she must know the reasons thereto and have the opportunity in presenting his/her defenses:

Our Apex Court in many cases decided that when someone striped with jobs he/she must get an opportunity to explain his views before being sacked. Principle of natural justice too requires that if any decision taken against anyone he/she must know the reasons thereto and have the opportunity in presenting his/her defenses, if any. The non-confirmation of Mr Md. Farid Ahmed Shibli and Mr. A.B.M. Altaf Hossain as permanent Judge of the Supreme Court is thus a clear violation of Principle of natural justice as well as settled case laws concerned of the Apex Court.

...(Para 57 & 58, Per Justice Md. Nuruzzaman)

Article 95(2)(a) of the Constitution ('has been an advocate' clarified):

On examination of the Annexures-'A, 'A-1' and'A-2' it appears that after being enrolled in the High Court Division of the Supreme Court of Bangladesh on 18.06.2000, the writ petitioner stayed in the United Kingdom (UK) until 13.10.2005 on which date the writ petitioner was called to the Bar of England and Wales. Thus, it is evident that after the date of enrolment as an advocate in the High Court Division on 18.06.2000 the writ petitioner stayed in UK for a period of minimum 5(five) years upto13.10.2005. Therefore, the writ petitioner was appointed as an Additional Judge of the Supreme Court of Bangladesh on 13.06.2012 having only 7(Seven) years of practice in the High Court Division which falls short of the necessary requirement for being appointed as a Judge. Apart from this, the writ petitioner did not mention anywhere in the writ petition when he returned back in Bangladesh and started practice as an advocate in the Supreme Court of Bangladesh. Therefore, it is crystal clear that at the time of his appointment as an Additional Judge of the High Court Division on 13.06.2012 the writ petitioner did not have the requisite qualification as per Article 95(2)(a) of the Constitution. In the prevailing situation, the executive was quite in right standing not recommending the appellant for appointment as a permanent Judge.

...(Para 92, Per Justice Obaidul Hassan, Minority View, supported by Justice Md. Ashfaqul Islam)

Article 48, 51 and 95 of the Constitution (Writ not maintainable):

If we read together the provision of Article 48 and the provision of Article 51 of the Constitution, we find a clear picture regarding the powers and prerogatives of the President of the Republic. The President shall exercise his functions at the advice of the Prime Minister and the advice whatsoever given or not cannot be questioned as well as the action taken by the President is also immuned from being answerable to any Court. Thus, the writ petition of the appellant is not maintainable. Because in the writ petition the petitioner has challenged the action of the President. The appellant-writ-petitioner filed the writ petition challenging his "non appointment under Article 95 of the Constitution" which is totally barred under the provision of Article 51 of the Constitution. ...(Para 105, Per Justice Obaidul Hassan, Minority View)

Concept of Independence of Judiciary is a basic structure of our Constitution:

The concept of independence of judiciary is that the Judiciary should be free from other branches of the Government. It should have freedom from fear and favour of the other

two organs. The concept has its origin in the doctrine of separation of power. Defining the Independence of Judiciary by emphasizing only the creation of Judiciary as an autonomous institution separate from other branches is not sufficient unless the core idea of judicial independence is exhibited, which is the independent power of the judges to decide a case before them according to the rule of law uninfluenced by any other factors. Independence of the Judiciary is important for the sole reason of safeguarding the rights and privileges of the people and thereby providing equity and justice to all. The Rule of Law, which explains the supremacy of the Constitution, can only be achieved when there is an independent and impartial judiciary at the top level to ensure proper interpretation and implementation of the Rule of Law. For this reason, it is so important to maintain the Independence of Judiciary and thus protect the democracy and as such the concept of Independence of Judiciary is a basic structure of our Constitution. ...(Para 126, Per Justice Borhanuddin)

<u>Opinion of the Chief Justice shall have primacy over executive:</u>

It is significant to mention here that while recommending a candidate for the higher judiciary, the Chief Justice requires to evaluate the calibre and legal ability of the candidate. Regarding professional attainments, legal soundness, ability, skill etc of the candidate be evaluated only by the Chief Justice in the matter of appointment under Article 95 of the Constitution. However, since the judiciary does not have such mechanism to evaluate the antecedent and background of a candidate, the Chief Justice may not express his/her opinion about the conduct, character and antecedent of the candidate. But the Executive with its sufficient machineries can check the antecedent and background of the candidate and form its opinion on that aspect. If the opinion of the Executive placed before the Chief Justice with all particulars including the conduct, character and antecedent of such candidate, the Chief Justice can evaluate the fitness of the candidate in all aspects. Therefore, in all circumstances, the opinion of the Chief Justice has the right of primacy in appointing the Judges under the provisions of Constitution. If the opinion of the Executive prevails over the opinion of Chief Justice in matters concerning appointment of Judges, then the Independence of Judiciary which is a basic structure of the Constitution as well as the power of strength for all-particularly for the poor, the downtrodden and the average person confronting the wrath of the Government will be a misnomer.

...(Para 133 & 134, Per Justice Borhanuddin)

<u>Writ Petition is maintainable:</u>

Based on the decisions above, my considered view is that since reasons would form part of the advice, the Court would be precluded from calling for their disclosure but Article 48(3) of the Constitution is no bar to the production of all the materials on which the advice was based. Accordingly, I am of the view that the writ petition filed by the appellant is very much maintainable.

...(Para 153 & 154, Per Justice Borhanuddin)

<u>In judicial review, court can examine whether in a given case the authority concerned has acted bonafide, reasonably, just and fairly:</u>

It is now well settled that judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the

decision making process itself and further, that in judicial review, court can examine whether in a given case the authority concerned has acted bonafide, reasonably, just and fairly and also within its jurisdiction. ...(Para 171, Per Justice M. Enayetur Rahim)

The court cannot declare judicial hands off. So long as the question arises whether an authority under the constitution has acted with the limit of its power or exceeded it or the power has been exercised without application of mind and mechanically or the order in question is a *mala fide* one or the order has been passed on some extraneous consideration or how far the order is fair and reasonable it can certainly be examined and decided by the court in judicial review. The court cannot be debarred to examine the decision making process and the correctness of the decision itself.

...(Para 186, Per Justice M. Enayetur Rahim)

Article 51of the Constitution (Writ Petition is maintainable):

The writ petition filed by the present appellant is not barred in view of the provision of article 51 of the Constitution. This article, in my opinion gives the President personal immunity from any kind of civil and criminal proceedings during his term of office. This immunity does not debar any aggrieved person to take any proceedings against the decision taken by the Government in view of provision of the 2nd part of the article 51(1). ...(Para 189, Per Justice M. Enayetur Rahim)

Effective consultation:

'Consultation' means 'effective consultation'. Such consultation of the President with the Chief Justice for the purpose of appointment of Judges in the Supreme Court is not a mere formalities, in other words it's not 'chatting at the tea table'; rather, it has a great sanctification, significance, importance, consequence and far reaching effect.

...(Para 196, Per Justice M. Enayetur Rahim)

Articles 95, 98 and 116 of the Constitution (Opinion of the Chief Justice shall have primacy):

It is true that 'consultation' was considered in the light of article 116 of the Constitution but, nevertheless the same principle is being applied in the matter of appointment of Judges of the Supreme Court under articles 98 and 95 of the Constitution because without the independence of the Supreme Court there cannot be any independence of the subordinate courts and without consultation and primacy, the separation of judiciary from the executive will be empty words. The principle of consultation with primacy of opinion of the Chief Justice is no longer res-integra and being an integral part of independence of judiciary the same is inherent in the very scheme of the Constitution. There has been unbroken and continuous convention of consultation with the Chief Justice in the matter of appointment of Judges.

...(Para 261, Per Justice Md. Abu Zafor Siddique)

Article 95(2)(a) of the Constitution ("Advocate cannot be read as practicing Advocate):

The word "practicing" has not been mentioned anywhere in this Article. According to accepted principles and rules of interpretation, it cannot be presumed that the word "Advocate" as used in the Constitution meant "Practicing Advocate." To read the word

"practicing" before the word "Advocate" in Article 95(2)(a) would mean adding something to the Constitution that is not already there and would amount to replacing the wisdom of the Constitution's framers, who were elected leaders of our War of Liberation in our nation with our own wisdom. This is completely unacceptable.

...(Para 296, Per Justice Jahangir Hossain)

COURT'S ORDER

We, therefore, sum up as under:

(a) **The Chief Justice of Bangladesh in exercise of his functions as consultee shall take aid from the other senior Judges of the Supreme Court at least with two senior most Judges of the Supreme Court before giving his opinion or recommendation in the form of consultation to the President.**

(b) **In the light of the observations made in S.P. Gupta, Ten Judges' cases, and the article mentioned in paragraph-17, it is evident that in case of appointment of a Judge of the Supreme Court under Articles 95 and 98 of the Constitution the opinion of the Chief Justice regarding legal acumen and professional suitability of a person is to be considered while the opinion of the Prime Minister regarding the antecedents of a person is also to be considered. If divergent opinions from either side of the two functionaries of the state occur the President is not empowered to appoint that person as Judge. The opinion of any functionary will not get primacy over the others.**

(c) **If any bad antecedent or disqualification is found against any Additional Judge, who is under consideration of the Chief Justice to be recommended for appointment under the provision of Article 95 of the Constitution, it is obligatory for the executive to bring the matter to the notice of the Chief Justice prior to the consultation process starts.**

(d) **After recommendation is made by the Chief Justice to the President, even if, at that stage it is revealed that antecedent of any recommended candidate is not conducive to appoint him as a Judge under Article 95 of the Constitution, it shall be obligatory for the executive to send the file of that Additional Judge or the person, back to the Chief Justice for his knowledge, so that the Chief Justice can review his earlier recommendation regarding the such candidate.**

(e) **If the Chief Justice again (2nd time) recommends the same Judge/person for appointment under Article 95, whose antecedent has been placed before him for reconsideration, this Court expects that, the President of the Republic would show due respect to the latest opinion of the Chief Justice.**

... (Para 311)

JUDGMENT

1. Since everyone of us has delivered separate judgments those are produced below. However, a common Court's order has been passed which is stated at the end of the judgments.

2. Md. Nuruzzaman J. I have had the privilege of going through the Judgment proposed to be delivered by my learned brothers, Obaidul Hassan J., Borhanuddin J., M. Enayetur Rahim J., Md. Ashfaqul Islam J., Md. Abu Zafor Siddique and Jahangir Hossain J.

3. Concurring with the final decision of the appeal, I would like to express my own views. The facts as has been fully narrated by my learned brothers, I am of the view that further narrating the facts would lead to repeat the same.

4. The constitutional provisions for appointing the judges of the Supreme Court of Bangladesh at time of the appointment and then non-appointment of the judges concerned as illustrated in the Constitution of Bangladesh are as follows:

> Additional Supreme Court Judges
> 98. Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period :
> Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article.
>
> Appointment of Judges
> 95. (1) The Chief Justice shall be appointed by the President and the other Judges shall be appointed by the President after consultation with the Chief Justice.
> (2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and –
> (a) has, for not less than ten years, been an advocate of the Supreme Court ; or
> (b) has, for not less than ten years, held judicial office in the territory of Bangladesh ; or
> (c) has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.
> (3) In this article, "Supreme Court" includes a court which at any time before the commencement of this Constitution exercised jurisdiction as a High Court in the territory of Bangladesh.

5. From the plain reading of the above stated Constitutional framework for appointing judges of the supreme court of Bangladesh the subtle thing that should not be averting gaze is that while appointing Additional Judges under Article 98, there is no constitutional obligation for the President consulting with the Chief Justice of Bangladesh and such consultation is mandatory while appointing judges under Article 95. Well, there was such a consulting precondition within the purview of Article 98 in the original constitution of 1972 and which was eliminated through 4th amendment of the Constitution. Nevertheless, the Constitution too did not impose that the CJB should not be consulted and as a convention the CJB usually

consulted prior to the appointment of such judges. For instance, we can recapitulate the unpleasant incident of 1994 for appointing of some judges without consulting the CJB and after serious repercussions from every corner of the Bench-Bar and citizens, that appointment was finally revoked and till date the same is maintained religiously. Whatever may be the case, the Constitutional scheme is such that the executive organ shall appoint a judge of the Supreme Court after eventual scrutiny of antecedents as well as legal acumen of the person concerned with or without consultation with CJB.

6. Though it is the President who officially appoints the judges of the Supreme Court, however, in reality it is the advice of the Prime Minister. Because, as per Article 48(3)-

> "(3) In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister:
> Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court."

7. The meaning, understanding and effects of this mandatory consultation process was epically identified in the epoch-making judgment of this Division in the case of Secretary, Ministry of Finance, Government of Bangladesh Vs. Md. Masdar Hossain & others reported in 2000 20 BLD (AD) 104 (popularly known as Masdar Hossain case) as hereunder:

> "...we pause here and reflect on the words "in consultation with the Supreme Court" contained in Article 116. We have no doubt in our mind that the President in Article 116, as Syed Ishtiaq Ahmed rightly points out, in effect means the Prime Minister or the Chief Political Executive of the country, in view of Articles 48(3) and 55(2). The President wields control over the Presiding Officers of subordinate courts in a wide variety of fields. The Prime Minister has therefore become in reality the real wielder of power in this regard. The Prime Minister being a political person on whom is vested the executive power of the Republic needed a check on such a sweeping and absolute power. Dr. Kamal Hossain rightly termed the words "in consultation with the Supreme Court" As a pillar which held up the independence of the judiciary as a basic structure of the Constitution. In order that this pillar may not end up as a bamboo pillar, the word "consultation" has to be given some teeth, or else, as Syed Ishtiaq Ahmed rightly pointed out, Articles 116 and 116A will be only mocking birds."

8. Though the above observations directly relates to the Articles connected with the judicial officers of the district judiciary, however, the meaning, understanding and effects are absolutely identical with Article 95.

9. As appointment of judges in the Supreme Court is both a constitutional post and warrant high esteem across the citizens, it is impliedly ordained by the Constitution itself that prior to such appointment all sorts of antecedents of the judge of the Supreme Court on the cards be examined comprehensively. After having such clean chit or certificate of spotless records and fulfilling legal, academic and other mandatory requirements, if a person is appointed as Additional Judge of the Supreme Court, he/she comes within judicial and administrative domain of the Chief Justice for the two (02) years of temporary period.

10. Now, getting back on the very basic question posted above, my understanding is that the constitution makers included consultation process in the Article 95 and later excluded in the Article 98 to give extraordinary weightage to obligatory consultation procedure while appointing a judge permanently. Because, this time that additional judge effectively served two years on the open Court under oath and within the direct surveillance of the senior judges of the Supreme Court and the Chief Justice himself. He/she had to dispose adequate cases and write judgments and as a convention, the quality and integrity of those decisions are to be examined by the senior most judges of both the Divisions of the Supreme Court including the CJB. In other words, while appointing permanently, a person having prior clean chit about his/her antecedents, fulfilling constitutional requirements and other jobs as stated above done successfully, then the CJB recommend his/her name to the President for appointing as a Judge of the Supreme Court of Bangladesh.

11. Well, albeit the CJB's recommendation, the Executive could differ, at least for practical purposes. If there are diverged opinions concerning a person's appointment in the Supreme Court what should the President do? Whose opinion should get preference?

12. Here comes the idea of primacy of opinion between executive and judiciary in the matters of exclusive judicial arena and presence of a workable mechanism for scientifically rational resolution of difference of opinion. In this context our highest Court in the case of "Bangladesh represented by the Secretary, Ministry of Justice and Parliamentary Affairs and others (In. C. P. Nos. 2221 & 2222 of 2008), Justice Syed Md. Dastagir Hossain and others (In. C. P. Nos. 2046 & 2056 of 2008) vs. MD. IDRISUR RAHMAN, ADVOCATE AND OTHERS (In. C. P. Nos. 2221 of 2008), MD. SHAMSUL HUDA AND OTHERS (In. C. P. Nos. 2222 of 2008), MD. SHAMSUL HUDA, ADDITIONAL JUDGE AND OTHERS (In. C. P. Nos. 2046 of 2008) and MD. IDRISUR RAHMAN, ADVOCATE AND OTHERS (In. C. P. Nos. 2056 of 2008) reported in 29 BLD (AD) 79 popularly known as `10 Judges Case' observed hereunder:

> "It has been asserted by the writ petitioners that there is continuous and unbroken convention of consultation with the Chief Justice of Bangladesh regarding appointment of Judges and that has not been denied by the Government by filing any counter affidavit. It is true that there has been unbroken and continuous convention of consultation excepting a breach in 1994 which was subsequently cured by consulting the Chief Justice and by issuing a fresh letter of appointment of the Judges by cancelling the earlier one which was issued without consulting the Chief Justice of Bangladesh. Therefore, the consultation with the Chief Justice must be effective consultation with its primacy.
>
> In the case of S.P. Gupta and others Vs. President of India and others reported in AIR 1982 (SC) 149, the case of Supreme Court Advocates-on-Record Association Vs. Union of India reported in AIR 1994 page 269 and Special Reference No. 1 of 1998 and the case of Al-Jehad Trust Vs. Federation of Pakistan reported in P.L.D. 1996 Vol-1 page 324 the matter of consultation with the Chief Justice in the matter of appointment of Judges to the higher Judiciary was considered and it was held that consultation with the Chief Justice is a pre-requisite and the opinion of the Chief Justice shall have primacy."

13. One point must be mentioned here that at the time of accruing the cause of action and

finally disposal of the `10 Judges Case' there was no incorporation of consultation process neither in Article 98 nor in 95. Nevertheless, with the interpretation of the Constitution the Apex court decided that mandatory consultation with the CJB having primacy is a basic structure of the Constitution.

14. In the `10 Judges Case' His Lordship Mr Justice Tafazzul Islam observed that:

> "As it appears in view of the provisions of Article 94(4) of the Constitution and the interpretation of the words "shall be independent" as contained in Article 116A of the Constitution as given in Masdar Hossain's case, 20 BLD(AD) 104 and also the principles laid down in Sankar Chand's case, : MANU/SC/0065/1977 : AIR 1977 S.C. 2328, wherein the Supreme Court of India interpreting Article 50 of Indian Constitution, which is similar to Article 22 of our Constitution, held that a basic pillar of the Constitution cannot be demolished or curtailed or diminished in any manner except by and under the provision of the Constitution and the Appellate Division applied the above view in Anwar Hossain's case, 41 DLR (AD) 165 and that there is also no bar either in Article 95 or Article 98 or any other provision of the Constitution in respect of consultation with the Chief Justice and further the primacy of the opinion of the Chief Justice is in no way in conflict with Article 48(3) of the Constitution and the advice of the Prime Minister is subject to Articles 22 , 94(4) , 95 , 98 , 116 and 116A of the Constitution and accordingly the Prime Minister, on the basis of Articles 48(3) and 55(2) of the Constitution, cannot advice contrary to the basic feature of the Constitution so as to destroy or demolish the independence of judiciary and as such consultation with the Chief Justice with primacy of his opinion is an integral part of independence of judiciary which is ingrained in the very concept of the independence of judiciary embedded in the principle of Rule of Law."

15. This Division further observed that:

> "Therefore it follows that consultation with the Chief Justice with primacy is an essential part of independence of judiciary which is ingrained in the very concept of independence embedded in the principle of Rule of Law and separation of judiciary from the executive and is not in conflict with Article 48(3) of the Constitution."

16. In the case of Anwar Hossain Chowdhury and others Vs. Bangladesh reported in 41 DLR (AD) 165, commonly referred as `8th amendment case' it was held that:

> "This point may now be considered. Independence of judiciary is not an abstract conception. Bhagwati, J: said `if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the Law and thereby making the Rule of Law meaningful and effective.'
>
> He said that the Judges must uphold the core principle of the Rule of Law which says-`Be you ever so high, the Law is above you.' This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the Rule of Law as a dynamic concept and delivery of social justice to the vulnerable Sections of the Community. It is this principle of independence of the judiciary which must be

> kept in mind while interpreting the relevant provisions of the Constitution (S.P. Gupta and others Vs. president of India and others AIR 1982 SC at pate 152)."
>
> Independence of the Judiciary, a basic structure of the Constitution, is also likely to be jeopardised or affected by some of the other provisions in the Constitution. Mode of their appointment and removal, security of tenure particularly, fixed age for retirement and prohibition against employment in the service of the Republic after retirement or removal are matter of great importance in connection with the independence of Judges. Selection of a person for appointment as a Judge in disregard to the question of his competence and his earlier performance as an Advocate or a Judicial Officer may bring in a "Spineless Judges" in the words of President Roosevelt; such a person can hardly be an independent Judge."

17. These views of the Apex Court of this land were reiterated in the "Masdar Hosen Case", "10 Judges case", "5th Amendment Case", "7th Amendment Case", "13th Amendment Case", "16th Amendment Case" and so on.

18. Let's travel through the memory lane of the foundation of the constitution of Bangladesh. What our Constitution makers of the Constituent Assembly of 1972 thought concerning the independence of judiciary and separation of it from the executive?

19. Deputy Leader of the Constituent Assembly and the Acting President of Bangladesh during the liberation war of Bangladesh Syed Nazrul Islam on 19.10.1972 said that:

> "মাননীয় স্পীকার সাহেব, গণতন্ত্রের সবচেয়ে বড় কথা হচ্ছে separation of judiciary from the executive, অর্থাৎ আইনের শাসন এমনভাবে প্রবর্তন করতে হবে, যেন আইনবিভাগ পরিপূর্ণভাবে নিরপেক্ষ থাকে এবং মর্যাদা এবং স্বাধীনতার সঙ্গে তার কর্তব্য পালন করতে পারে। এই শাসনতন্ত্রে আমাদের আইনবিভাগকে শুধু আলাদা করাই নয়, তাকে পরিপূর্ণ মর্যাদা দেওয়ার জন্য যে ব্যবস্থা গ্রহণ করা হয়েছে, তাতে আইনের শাসন সম্বন্ধে আমাদের মনে কোন সংশয় থাকা বাঞ্ছনীয় নয়।"

20. Sirajul Haque, Advocate, Member of the Constituent Assembly on 30.10.1972:

> "যে 'জুডিসিয়াল সিস্টেম' আমরা দিয়েছি, আমি গর্বের সঙ্গে বলতে পারি, বন্ধুরাষ্ট্র ভারতবর্ষও এখন পর্যন্ত তা দিতে পারেনি। কেননা, ভারতবর্ষে এখনও 'জুডিসিয়ারিকে সম্পূর্ণ পৃথক করা সম্ভব হয়নি। আর, আমরা চেষ্টা করেছি, আলাদা করার। শুধু হাইকোর্ট নয়, সুপ্রীম কোর্ট নয়- আমাদের নিম্নতম 'জুডিসিয়ারি'কেও 'এক্সিকিউটিভ' থেকে আলাদা করবার জন্য আমাদের সংবিধানে ব্যবস্থা করেছি। সুতরাং অভিযোগ সত্য নয়।"

21. Chairman of the Draft Constitution Committee and Law Minister Dr Kamal Hossain said on 12.10.1972:

> "আইনের শাসন নিশ্চিত করার উদ্দেশ্যে স্বাধীন বিচারবিভাগ প্রতিষ্ঠার ব্যবস্থা করা হয়েছে। বিচারবিভাগের শীর্ষদেশে রয়েছে সুপ্রীম কোর্ট। সুপ্রীম কোর্টের দুইটি বিভাগ থাকবে। হাইকোর্ট বিভাগ এবং আপীল বিভাগ। এই আপীল বিভাগ হবে দেশের চূড়ান্ত আপীলের ক্ষেত্র। নির্বাহী

বিভাগ থেকে বিচারবিভাগকে পৃথক করারও ব্যবস্থা করা হয়েছে।"

22. And on 30.10.1972:

"বিচারবিভাগ সম্বন্ধে আর একটা কথা বলতে হয়। নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করার কাজটা সরাসরিভাবে আমরা করে দিয়েছি। প্রশ্ন তোলা হয়েছে যে, আমরা তা করিনি। কিন্তু আমরা প্রথম দিকে মূলনীতির মধ্যে তা করে দিয়েছি। তারপর, আবার যদি একটু কষ্ট করে ১১৪ এবং ১১৫ অনুচ্ছেদ তাঁরা দেখেন, তাহলে বুঝতে পারবেন যে, এটার বিধান করা হয়েছে। দু' জায়গায় করলাম কেন, এ প্রশ্ন উঠতে পারে। ভবিষ্যতে যে আইন করা হবে, তা যেন এই বিধান অনুসারে করা হয়, সেজন্য এই ব্যবস্থা। অধস্তন আদালত এবং ফৌজদারী আদালতের ম্যাজিস্ট্রেটদেরকে আমরা সুপ্রীম কোর্টের আওতায় নিয়ে এসেছি।

নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করার দাবী আমাদের বহুদিন আগের পুরনো দাবী। আমরা অতীতে দেখেছি, নির্বাহী বিভাগের অধীনে বিচারবিভাগ থাকার ফলে কীভাবে তাঁদের প্রভাবিত করা হয়েছে, কীভাবে ভয় দেখানো হয়েছে।

আইয়ুবের আমলে আমার মনে আছে, একজন জেলা-জজ সরকারের বিরুদ্ধে একটা "ইনজাংশন' নিয়েছিলেন। সেজন্য তাঁকে সন্দ্বীপে বদলী করা হয়। কাজেই এ দেশের জাগ্রত জনতা নির্বাহী বিভাগ থেকে বিচারবিভাগের পৃথকীকরণের দাবী তুলেছেন।

কীভাবে অতীতে বিচারবিভাগের স্বাধীনতা খর্ব করা হয়েছে, তার বহু নজীর আছে। সেজন্য আইনজীবী ছাড়াও এ দেশের জনসাধারণ দিনের পর দিন বিচারবিভাগকে নির্বাহী বিভাগ থেকে পৃথক করার দাবী জানিয়ে এসেছেন। আমরাই সে দাবী করেছি এবং এখন যেহেতু সুযোগ পেয়েছি, তাই সে দাবী আমরা মেনে নিয়েছি। দাবী-দাওয়া আমরাই। করতাম। তখন আমরা দাবী-দাওয়া মেনে নেওয়ার সুযোগ পাইনি। এতদিন পরে আমরা এ সব দাবী-দাওয়া পূরণ করার সুযোগ পেয়েছি। আমার মনে হয়, কোন-না-কোন সদস্য এর উপর একটা-না-একটা প্রস্তাব পাস করেছেন। তাই আজকে আমরা মেনে নিলাম যে, নির্বাহী বিভাগ থেকে বিচারবিভাগকে পৃথক করা হোক ।"

23. From these speeches of our Constitutional maker it is unmistakably evident that ensuring the independence of judiciary and making it separate from the executive were two primordial intentions of our Constitution framers. In the aforementioned case laws of our Apex Court such as "Masdar Hosen Case", "10 Judges case", "5th Amendment Case", "7th Amendment Case", "13th Amendment Case", "16th Amendment Case" these primal intentions of our Constitution Makers were pronounced recurrently.

24. Not only that, through the 15th Amendment of the Constitution in the year of 2011, a separate Article was inserted regarding `Basic Structure' of the Constitution of Bangladesh. It is as follows:

"Basic provisions of the Constitution are not amendable

7B. Notwithstanding anything contained in article 142 of the Constitution, the preamble, all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means."

25. These firm notions of the legislature was further reinforced through inserting another Article which is as follows:

> "Offence of abrogation, suspension, etc. of the Constitution
> 7A. (1) If any person, by show of force or use of force or by any other un-constitutional means-
> (a) abrogates, repeals or suspends or attempts or conspires to abrogate, repeal or suspend this Constitution or any of its article ; or
> (b) subverts or attempts or conspires to subvert the confidence, belief or reliance of the citizens to this Constitution or any of its article, his such act shall be sedition and such person shall be guilty of sedition.
> (2) If any person-
> (a) abets or instigates any act mentioned in clause (1) ; or
> (b) approves, condones, supports or ratifies such act,
> his such act shall also be the same offence.
> (3) Any person alleged to have committed the offence mentioned in this article shall be sentenced with the highest punishment prescribed for other offences by the existing laws."

26. These two Articles read with the Article 7 give us this certain impression that `basic structures' of the Constitution are not only unbendable but also any attempt for deviating from such provisions is a seditious offence.

27. As consultation with the CJB with primacy is basic structure as per decision of the Apex Court, that automatically made an entry within the purview of Article 7A read with Article 7B and 7, as laws declared by the Appellate Division is binding under Article 111 of the Constitution.

28. One thing that agitated our judicial mind is that the State did not even challenge the decision of the Apex Court relating to the mandatory consultation process with primacy rather executed the same by taking both legislative actions by making necessary rules viz.

29. Rule 8A of the "বাংলাদেশ জুডিসিয়াল সার্ভিস (সার্ভিস গঠন, সার্ভিস পদে নিয়োগ এবং সাময়িক বরখাস্তকরণ ও অপসারণ) বিধিমালা, ২০০৭"; Rule 11 of the "বাংলাদেশ জুডিসিয়াল সার্ভিস (কর্মস্থল নির্ধারণ, পদোন্নতি, ছুটিমÄyরী, নিয়ন্ত্রণ, শৃঙ্খলা-বিধান এবং চাকুরীর অন্যান্য শর্তাবলী) বিধিমালা, ২০০৭" and Rule 29 of the "বাংলাদেশ জুডিসিয়াল সার্ভিস (শৃঙ্খলা) বিধিমালা, ২০১৭" and took executive steps in accordance through passing orders. In the said rules of the Judicial Service, the effect of consultation with primacy of the Supreme Court has accommodated in unambiguous terms and identical languages. For proper appreciation of the matters of consultation and primacy exact version of "বাংলাদেশ জুডিসিয়াল সার্ভিস (শৃঙ্খলা) বিধিমালা, ২০১৭ এর বিধি-২৯" is shown hereunder-

> "২৯. সুপ্রীম কোর্টের পরামর্শের কার্যকরতা
> (১) উপযুক্ত কর্তৃপক্ষ সুপ্রীমকোর্টের পরামর্শ অনুসারে এই বিধিমালায় নির্ধারিত সময়ের মধ্যে প্রয়োজনীয় সকল পদক্ষেপ গ্রহন করিবে।
> (২) উপ-বিধি (১) এ বর্ণিত উপযুক্ত কর্তৃপক্ষের প্রস্তাব ও সুপ্রীম কোর্টের পরামর্শ অভিন্ন না হইলে সেইক্ষেত্রে সুপ্রীম কোর্টের পরামর্শ প্রাধান্য পাইবে।"

30. Well, subsequent to such clear-cut and patent verdict and accomplishment by the Government i.e. the executive making necessary rules on "consultation with primacy" and after the enactment of the Fifteenth Amendment of the Constitution in 2011, is there any scope at all to leave the matter of antecedent or conduct of a Judge of the High Court Division in the hands of the executives or to make their (executives) opinion dominant over the opinion of the CJB? The answer is a big no.

31. Now, let's recapitulate the Apex Court's ruling on mandatory consultation with the CJB with primacy in the `10 Judges Case'. After examining the provisions of the Constitution along with a virtual travel through the mind of best legal faculties of the subcontinent this Division reached in a decision that consultation with the CJB coupled with primacy over the opinion of the executive while appointing a judge in the Supreme Court, is a basic structure of the Constitution. However, the very next moment they invented a strange device that is a dichotomized consultation process. The nature of this bifurcated consultation process is such that it was divided in twofold stages:

1) Judicial acumen and
2) Antecedents.

32. Concerning judicial acumen of a potential Judge of the Supreme Court, CJB's opinion shall get primacy and the matters of antecedents of such person executive shall say the final words. Well, if that is the theory, then let's visualize a scenario where CJB recommends a person for appointment, but executive denied, then how it will be resolved? There is no answer to this question in the said bifurcated consultation process as formulated by the Division. It's a supreme judicial impasse and obvious result of such stand-off is that it is the executive that have the final words and getting primacy over the opinion of the CJB, in harsh reality.

33. It is absolutely undisputed that the CJB recommended both of the appellant and the petitioner for being appointed as judge of the Supreme Court after completion of two years tenure as Additional Judge. What we have seen in the two matters in question is that the executive disagreed with the CJB's recommendation and finally both of them were dropped from the list of appointments concerned without knowing their faults. As there were no explanation of such non-appointments, the persons were not able to defend themselves, in addition, there were no such grievance mitigating mechanisms they could resort. Even the CJB were in darkness regarding the causes of the negation of his recommendations. These are absolute embarrassments for the post of CJB too. These are the outcome of the bifurcated consultation process.

34. In the logical fields Hegelian Dialectics is commonly accepted as a best practice in resolving theoretical arguments. "Hegel's dialectics" refers to the special dialectical method of argument employed by the 19th Century German philosopher, G.W.F. Hegel. In a few words it is an interpretive method in which the contradiction between a proposition (thesis) and its opposition (antithesis) is resolved at a higher level of truth (synthesis).

35. Like other "dialectical" methods, relies on a contradictory process between opposing sides. Whereas Plato's "opposing sides" were people (Socrates and his interlocutors), however, what the "opposing sides" are in Hegel's work depends on the subject matter he discusses. In his work on logic, for instance, the "opposing sides" are different definitions of logical concepts that are opposed to one another. In the *Phenomenology of Spirit*, which presents Hegel's epistemology or philosophy of knowledge, the "opposing sides" are different definitions of consciousness and of the object that consciousness is aware of or claims to know. As in Plato's dialogues, a contradictory process between "opposing sides" in Hegel's dialectics leads to a linear evolution or development from less sophisticated definitions or views to more sophisticated ones later. The dialectical process thus constitutes Hegel's method for arguing against the earlier, less sophisticated definitions or views and for the more sophisticated ones later. Hegel regarded this dialectical method or "speculative mode of cognition" as the hallmark of his philosophy.

36. If we take the CJB's affirmative opinion as `Thesis' and the executive's negative wish as `Anti-thesis', then there must be a `Synthesis' for resolving such a supreme dilemma. Otherwise, that won't be a logical as well as scientific resolution of dispute. And such a framework for these types of scientifically rational resolution of difference of opinion is a sine qua non for a democratic, civilized and modern welfare state.

37. As the subdivided consultation process lacks a 'Synthesis', it became a half-baked one and anything half-baked is not good for health, for taste as well.

38. Well, apart from epistemological aspect, 'Synthesis' is necessary for some practical purposes too. For example, some objectionable or unethical information regarding a potential judge could be received to the end of the executive that were unnoticed by the head of the judiciary during his/her tenure as an additional judge.

39. For better understanding we can study such a 'Synthesis' mechanism devised by one of our neighboring country India's Supreme Court. When there arise such type of divergence of opinion between judiciary and executive regarding the appointment of a judge in the High Courts and Supreme Court of India, then the executive send back the recommendation with written explanation along with other materials including various intelligence wings reports. Then the matter is reconsidered by the judiciary. After such consideration, if the judiciary reiterate the recommendation, then it is mandatory for the executive. In this way, not only the imperative of having a 'Synthesis' is being fulfilled but also the primacy of the judiciary is upheld. We can run through some of such "Reiterated Resolutions" uploaded in the official web site of the Supreme Court of India in this web address: https://main.sci.gov.in/collegium-resolutions.

40. It is to be noticed from the collegiums regulations found in the above mentioned wed address that the `Classified Intel Reports' were provide to the judiciary in writing and excerpts from thereto were disclosed publicly by the Apex Court Body for clarifications. The Apex Court Body duly reconsidered the executive's view based on Intel Reports, re-discussed with the concerned body or person and then reiterated its recommendation to the executive.

41. A logical and befitting 'Synthesis' could be as such:

If there is a disagreement between the judiciary and executive, the reasons of such incongruity along with all the connected papers or audio-visual substances be referred to the CJB immediately. After getting such intimations from the executive, the CJB along with two senior most judge of this Division shall enquire into the matters giving parties concerned an opportunity for self defence and form an opinion which shall be mandatory for the executive.

42. One thing must be borne in mind and act of functionaries of the country is that in a state of written constitution, neither the Government nor the Legislature or the Judiciary are Sovereign, it is only the Constitution that is Sovereign and Supreme. Because, constitution is the highest formal expression of the people. Article 7 of the Constitution ordains as follows:

> "Supremacy of the Constitution
>
> 7. (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.
>
> (2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

43. We too have a written Constitution. Our Legislature cannot legislate in contravention of the provisions of the Constitution. Government too cannot act violating the Constitution.

44. Now consider another aspect of these cases which is related with Article 48(3). As we pointed earlier that though the President officially appoints the Judges of the Supreme Court, as per constitutional binding regarding the appointment of Judges of Supreme Court, the President acts only in accordance with the advice of the Prime Minister. We already graphically illustrated that in our Constitutional framework Constitution only is sovereign entity not the executive or legislature or judiciary; independence of judiciary and separation of judiciary from executive and concerning the appointment of Supreme Court Judges mandatory consultation with the CJB with primacy are basic structures of our Constitution and the basic structures shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.

45. In the `10 Judges case' this Division firmly decided that:

> "Therefore the expression "independence of judiciary" is also no longer res-integra rather has been authoritatively interpreted by this Court when it held that it is a basic pillar of the Constitution and cannot be demolished or curtailed or diminished in any manner accept by and under the provision of the Constitution. We find no existing provision of the Constitution either in Articles 98 or Article 95 of the Constitution or any other provision which prohibits consultation with the Chief Justice. Therefore, consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the constitution. The Prime minister in view of Article 48(3) and 55(2) cannot advice contrary to the basic feature of the constitution so as to destroy or demolish the independence of judiciary. Therefore the advice of the Prime

minister is subject to the other provision of the Constitution that is Articles 95, 98, 116 of the constitution.**"**

46. And in the operative part of the judgment of "10 Judges Case" it was held that:

"3. Independence of judiciary affirmed and declared by the Constitution is a basic structure of the Constitution and cannot be demolished or diminished in any manner. There is no provision in the Constitution either authorising the President or for that matter the Prime Minister in view of Article 48(3) of the Constitution to curtail or diminish such independence.

4. Consultation with the Chief Justice with primacy of his opinion in the matter of appointment of Judges and the administration of judiciary is an essential part of independence of judiciary ingrained in the very concept of independence embedded in the principle of rule of law and separation of judiciary from the executive and is in no way in conflict with Article 48(3)."

47. There raised a question regarding Mr A.B.M. Altaf Hossain by the learned Attorney General as to that before elevation to the Supreme Court his aggregated tenure as a practicing Advocate in the Supreme Court was less than 10 years in actual fact, though his date of enrolment as an Advocate of the Supreme Court was beyond that period. This question visualizes that before elevating him the executive did not bother to probe his antecedents though the related documents concerning his tenure as a practicing Advocate in the Supreme Court were in the public domain. It indicates that he was appointed at the whim of the executive without prior verifying his credentials.

48. Appointment as a Judge in the Supreme Court is not a `hire and fire' type of job. It is one of the topmost appointments of the Country from the normative view point as well as from public confidence and requires citizen's esteem. Therefore, vast legal experiences with appropriate academic requirements are *sine qua non* for this post. This should not be taken as an entry post in the Supreme Court. The entry post in our judicial system is the post of Assistant Judge and membership in District Bar Association. As per service Rules a person can apply for such posts up to 30 years of age and in some instance that could be 32 years and on an average 1 - 1.5+ years needed for such a person to be appointed as a judicial officer by the Bangladesh Judicial Service Commission. After overcoming many service related barriers for usually 15-20 years (with some exceptional cases with less service tenure) that person could become a District and Sessions Judge. High Court Division of the Supreme Court usually hears appeal, revision etc from the judgments and orders of the District and Sessions Judges, that is, Judges of the High Court Division not only judges the District and Sessions Judges but also have superintendence and control over all courts and tribunals subordinate to it as per Article 109 of the Constitution. And while Judges from the Bangladesh Judicial Service are elevated to the Supreme Court they are to be District Judges invariably, at least in practice, though as per Article 95(2)(b) Members of District Judiciary shall not be qualified for appointment as a Judge unless he/she has, for not less than ten years, held judicial office in the territory of Bangladesh.

49. On the other hand, in our legal system a person can be enrolled as an Advocate of the High Court Division of the Supreme Court well before aged 30 years. The appellant herein was enrolled in the High Court Division at the age of almost 26. There are lots of instances where advocates were enrolled at the High Court Division even earlier ages than the appellant.

50. In such circumstances, I'm quite unable to understand how the requirement of 10 years' practice under Article 95(2)(a) of the Constitution suffice with simplicities the period of enrolment for 10 years instead of actual continuous or aggregate experience at the Bar. It mandatorily be continuous or aggregate experience without fail.

51. Moreover, our Constitution did not ordain that it should be 10 years rather qualified with `not less than ten years'. Thus, our Constitution makers bestowed a higher degree of discretion upon the 'Judge Makers' of our legal system and that responsibility have to be discharged with utmost sincerity and responding the call of the conscience.

52. The works of the judges are the art of judging a case impartially, writing judgments and orders thereon and presiding over the court. After 25-30 years of investing in these arts, at the fag end of their career a judicial officer could become a Judge of the Supreme Court. Therefore, while appointing judges having direct lack of the above mentioned arts of judging, there age of actual experience in legal arena, coupled with merit and other extraordinary qualities must be borne in mind of the appointing authorities.

53. Now, let's consider the case of Mr Md Farid Ahmed Shibly. Being appointed as a Munsif, the name of the then entry post in the judicial service, in the year of 1983 he got promotions as Sub-Judge (now Joint District Judge), Additional District Judge and District Judge in the year of 1994, 1999 and 2004 respectively. After serving as District and Sessions Judge, Gazipur; Secretary, Bangladesh Judicial Service Commission and Registrar, Supreme Court (now Registrar General) he was elevated as an Additional Judge of the Supreme Court.

54. His portfolio suggests that prior to elevation his service record was clean and excellent on both counts of on the Bench and administrative affairs.

55. In our country while a labourer are to be dismissed he has to be served a show cause notice to explain his/her defences under the Labour Laws. However, an Additional judge of the Supreme Court can lost his job without knowing the reasons.

56. Non-confirmation of an Additional judge of the Supreme Court as permanent Judge is of course stigmatic. Because, such a news of non-confirmation become a national daily newspaper, TV, radio and electronic media headlines. Everyone who read, watch and hear this news want to know why that person was not confirmed, there must be some problem with him etc.

57. Our Apex Court in many cases decided that when someone striped with jobs he/she must get an opportunity to explain his views before being sacked. Principle of natural justice too requires that if any decision taken against anyone he/she must know the reasons thereto and have the opportunity in presenting his/her defenses, if any.

58. The non-confirmation of Mr Md. Farid Ahmed Shibli and Mr. A.B.M. Altaf Hossain as permanent Judge of the Supreme Court is thus a clear violation of Principle of natural justice as well as settled case laws concerned of the Apex Court.

59. I am agreeing with the opinion of the learned brothers Borhanuddin J., M. Enayetur Rahim J., Md. Ashfaqul Islam J., Md. Abu Zafor Siddique J. and Jahangir Hossain J., to consider the case of the appellant by the appropriate authority.

60. However, I am of the view that the leave petitioner's case may also be considered by the appropriate authority.

61. Obaidul Hassan, J. The Civil Appeal and both the Civil Petitions for Leave to Appeal involving similar question of laws and almost identical facts having been heard together are now being disposed of by this common judgment.

62. **Civil Appeal No. 232 OF 2014:**

The instant Appeal by leave granting order dated 06.11.2014 passed by this Division in Civil Petition for Leave to Appeal No.2626 of 2014 filed against the judgment and order dated 24.09.2014 passed by the High Court Division in Writ Petition No.7489 of 2014 summarily rejecting the Writ Petition.

63. The appellant as petitioner filed the Writ Petition No. 7489 of 2014 challenging non-appointment of the petitioner as Judge of the High Court Division of the Supreme Court of Bangladesh in violation of Article 95 of the Constitution and the principle settled by the Appellate Division of the Supreme Court of Bangladesh in the case of Bangladesh & Ors. vs. Md. Idrisur Rahman, Advocate & Ors. reported in 29 BLD(AD)79 despite of the recommendation of the Hon'ble Chief Justice of Bangladesh without any reason.

64. The petitioner filed the aforesaid Writ Petition stating, *inter alia,* that he was a practicing Advocate of this Court and was holding requisite qualifications to be appointed as a Judge of the High Court Division of the Supreme Court of Bangladesh. He did his graduation and post-graduation on Law from the University of Rajshahi securing 1st Class in LL.M. He also acquired graduation and post-graduation diploma on Law from the UK. He was called to the Bar as a Barrister by the prestigious Society of Lincoln's Inn, London, U.K. He was enrolled with the Bangladesh Bar Council as an Advocate on 06.12.1998 and was permitted to practice in the High Court Division on 18.06.2000 and the Appellate Division on 18.05.2011. He acted as the Deputy Attorney General for Bangladesh and as Member of the Board of Governors of Bangladesh Open University. Considering his such qualifications and good antecedents, the President of Bangladesh appointed him as the Additional Judge of the Supreme Court of Bangladesh, High Court Division along with five other Additional Judges under Article 98 of the Constitution, vide notification No.10.00.0000.128.011.010.2012-816 dated 13.06.2012. Accordingly, he took oath of office on 14.06.2012 and had been functioning as Judge since then until his name was dropped by the impugned action. During this period, he delivered numerous judgments which have been highly acclaimed by the Bar and the Bench. Before expiry of two years' tenure of Additional Judge, the petitioner along with five other Additional Judges, submitted ten judgments authored by each of them as required by the Honourable Chief Justice of Bangladesh and the said judgments were distributed among the senior most Judges of the Appellate Division for their opinion. On being satisfied with the performance and integrity and all other aspects of all the six Additional Judges including the petitioner the Honourable Chief Justice recommended all of them for appointment as permanent Judges of the High Court Division under Article 95 of the Constitution and such fact of recommendation by the Chief Justice had been widely published in the daily newspapers. However, the name of the petitioner was dropped from the list of permanent Judges, although other five Additional Judges were duly appointed by the President, vide Gazette Notification No.10.00.0000.128.011.010.2012-472 dated 09.06.2014. Thereafter, the petitioner tried his best to know the reasons, but could not know anything, though, pursuant to the said appointment notification, his colleague Additional Judges had been sworn in as permanent Judges by the Honourable Chief Justice and have been functioning as such in the High Court Division. The executive most arbitrarily dropped the name of the petitioner from the list of six Additional Judges even after recommendation by the Honourable Chief Justice and the said impugned order affected the very independence of

the Judiciary, which is one of the basic structures of the Constitution as well as the same has labelled a stigma with the integrity and quality of the petitioner. In such a situation, the writ petitioner moved before the High Court Division.

65. Upon hearing the Writ Petition, the High Court Division rejected the same summarily by judgment and order dated 24.9.2014.

66. Against the judgment and order dated 24.09.2014 passed by the High Court Division the writ petitioner filed the Civil Petition for Leave to Appeal No.2626 of 2014 and after hearing the parties this Division granted leave by an order dated 06.11.2014 and hence the instant Civil Appeal.

67. **Civil Petition for Leave to Appeal No. 602 OF 2017:**

The Civil Petition for Leave to Appeal is directed against the judgment and order dated 12.02.2017 passed by the High Court Division in Writ Petition No. 1948 of 2017.

68. The case of the petitioner in Civil Petition for Leave to Appeal No. 602 of 2017 is that the petitioner is a law abiding citizen and permanent resident of Bangladesh. He had obtained B.S.C. Degree from Sunamgonj College under the University of Chittagong in the year 1977. He had obtained LL.B. Degree from the University of Dhaka in 1981. Subsequently, he was appointed as Munsif by the Government of Bangladesh vide Memo dated 5th July, 1983 and his service was confirmed as of his joining date on 17.07.1983. Thereafter, he was promoted to the post of Sub-Judge from the post of Assistant Judge on 31.05.1994 and then he was appointed as the Assistant Sessions Judge. Later on, he was promoted to the post of Additional District & Sessions Judge and subsequently he was appointed as the Additional Registrar, Appellate Division, Supreme Court of Bangladesh vide Memo dated 15.01.2002. Thereafter he was promoted to the post of District Judge and posted *in situ*. On 15th May, 2008, the petitioner was appointed as the District & Sessions Judge, Gazipur. Subsequently, the petitioner was transferred to and posted on deputation as the Secretary, Bangladesh Judicial Service Commission Secretariat vide Memo dated 05.07.09. Thereafter the petitioner was appointed as the Registrar, Supreme Court of Bangladesh and served there until his elevation as an Additional Judge of the Supreme Court. The petitioner has performed many important responsibilities at different positions throughout his long career. Having been satisfied with his academic and professional performance, the Honourable President of the People's Republic of Bangladesh after consultation with the Honorable Chief Justice of Bangladesh appointed him as an Additional Judge of the High Court Division of Supreme Court of Bangladesh along with 9 (nine) other Additional Judges under Article 98 of the Constitution of the People's Republic of Bangladesh for a period of two years vide notification dated 9th February, 2015 and he was sworn in by the Honourable Chief Justice of Bangladesh on 12.02.2015 as an Additional Judge of the Supreme Court of Bangladesh. After appointment as Additional Judge, he rendered his service most honestly, sincerely and diligently to the full satisfaction of the Chief Justice of Bangladesh and others. The petitioner delivered many substantial judgments in previous two years, which was appreciated by many. During his tenure as an Additional Judge none raised any objection to his integrity and merit whatsoever. As an Additional Judge the petitioner performed his function as a second judge in the Division Benches of High Court Division. He, as a second judge, contributed in different jurisdictions and also to the legal arena in the Country. He had never compromised justice and always upheld unimpeachable integrity. Having been satisfied on the performance and all other requisite qualifications, the Chief Justice of Bangladesh recommended the name of the petitioner as well as those of the eight others to the Honourable President for

appointment as the Judges of the High Court Division after forming opinion on their suitability, integrity and merit. The Hon'ble President, however, appointed eight others under Article 95 of the Constitution except the petitioner without communicating any reason to the Chief Justice. The appointment of the eight Judges had been published vide Notification dated 7th February, 2017. A news item was published on 9th February, 2017 in the daily newspaper titled 'Jugantor' in respect of confirmation of appointment of eight Additional Judges in the High Court Division. The said news item also reported that the Honourable Chief Justice of Bangladesh recommended the name of the petitioner along with eight others Additional Judge to the Honourable President for appointment as a Judge of the High Court Division of the Supreme Court of Bangladesh under Article 95 of the Constitution. Despite such recommendation of the Chief Justice, the Government has not the petitioner as Judge of the High Court Division. Finding no other efficacious remedy the petitioner filed the Writ Petition No. 1948 of 2017. The petitioner by filing the Writ Petition No. 1948 of 2017 before the High Court Division has called in question the legality and constitutionality of dropping him from the list of the Additional Judges to be appointed permanently as Judges of the High Court Division of the Supreme Court of Bangladesh under Article 95 of the Constitution and the principle settled by this Division in the case of Bangladesh Vs. Idrisur Rahman 29 BLD (AD) 79 despite the recommendation of the Honourable Chief Justice of Bangladesh without any reason.

69. Upon hearing the High Court Division disposed of the Writ Petition No. 1948 of 2017 with some observations by judgment and order dated 12.02.2017 and hence the Civil Petition for Leave to Appeal No. 602 of 2017.

70. Mr. Probir Neogi along with Mr. Momtazuddin Fakir, Mr. Motahar Hossain, Mr. M. Sayed Ahmed all senior Advocates and Mr. Mahbub Shafique, Ms. Anita Ghazi Rahman, Ms. Suvra Chakravorty, Mr. Manzur-Al-Matin, Mr. Imranul Kabir and Mr. Khandaker Reza-E-Raquib, all Advocates appearing for the appellant in Civil Appeal No. 232 of 2014 contended that the appellant had been denied confirmation in clear and flagrant violation of the provisions of the Constitution and law declared by the Appellate Division inasmuch as there is an expressed provision in Article 95(1) of the Constitution that the Judges of the Supreme Court of Bangladesh shall be appointed by the Hon'ble President of the People's Republic of Bangladesh after consultation with the Hon'ble Chief Justice and the Chief Justice having recommended the appellant as Judge of the High Court Division for confirmation and appointment under Article 95, the dropping of the name of the appellant without any cogent reason is totally unconstitutional. The learned Counsels for the appellant contended next that by the illegal action of the executive the independence of the judiciary has been diminished and since the independence of the Judiciary is a basic structure of our Constitution and under Article 7B of the Constitution it cannot be amended by the parliament and there being no provision in the Constitution authorizing the President under Article 48(3) to curtail or diminish the independence of judiciary, non-appointment of the appellant ignoring the recommendation/opinion of the Chief Justice was an act of flagrant violation of the basic structure of the Constitution. The learned Counsels for the appellant argued next that no question has ever been raised against the antecedents of the appellant rather having found the performance of appellant satisfactory as an Additional Judge, the Chief Justice has recommended the appellant for confirmation/appointment under Article 95 of the Constitution inasmuch as the consultation process being initiated by the executive whose opinion in the matter of antecedents being already there and the Chief Justice in the process of consultation had the benefit of examining the opinion of the executive and since the Chief Justice recommended the appellant for appointment disregarding/overruling such opinion,

there is no scope on the part of the executive to drop the name of the appellant from the list of the Judges to be appointed under Article 95. Thus, the action of the executive denying confirmation/appointment of the appellant is wholly unconstitutional, arbitrary and naked interference in the affairs of the judiciary inasmuch as an act done without any lawful authority. The learned Counsels for the appellant submitted further that under Article 95(1) of the Constitution since the judges of the Supreme Court shall be appointed by the President after consultation with the Chief Justice, the recommendation of the Chief Justice shall get primacy over the opinion of the executive in the matter of appointment of Judges, therefore, the executive was under serious constitutional obligation not to drop the name of the appellant but to confirm him pursuant to the recommendation of the Chief Justice who is the best person to judge and assess the ability and competence of the appellant and the appellant has maintained highest professional standard as an Additional Judge and delivered some brilliant judgments as an author Judge, therefore, the Appeal is liable to be allowed. The learned Counsels submitted next that the executive by not appointing the appellant after recommendation of the Chief Justice has reduced and diminished the power, position and role of the Chief Justice inasmuch as it was an act of undermining the authority of the head of the judiciary as well since in the impugned judgment of the High Court Division there is an observation that no way out was given in the Ten Judges' case when the question of difference of opinion between the Chief Justice and the executive would arise, therefore to resolve the said issue and also to find a way out in such situation it is essential to allow the instant Appeal by reviewing the Judgment of the Ten Judges' case. The learned counsels for the appellant fortified their arguments by putting reliance on some case laws decided in the Secretary, Ministry of Finance Vs. Md. Masdar Hossain and others, 52 DLR (AD) 82; S.P. Gupta Vs. Union of India (UOI) and ors, AIR 1982 SC 149; Raghib Rauf Chowdhury Vs. Government of Bangladesh, 69 DLR 317; Bangladesh and others Vs. Idrisur Rahman, Advocate and others, 29 BLD (AD) 97 etc.

71. Mr. Manzill Murshid, learned senior Advocate appearing for the petitioner in Civil Petition for Leave to Appeal No. 602 of 2017 submitted that the petitioner being a member of Bangladesh Judicial Service served from 17.7.1983 to 10.2.2015 holding different posts and at the fag-end of the service he had been the Registrar of Bangladesh Supreme Court wherefrom he was appointed as an Additional Judge of the High Court Division under Article 98 of the Constitution and took oath on 12th February, 2015. Although all Additional Judges who had been appointed along with the petitioner were confirmed and appointed as Judge of the High Court Division the petitioner was dropped from the list vide notification dated 07.02.2017 of the Ministry of Law, Justice and Parliamentary Affairs. The learned senior Counsel contended next that after issuance of the impugned notification dated 07.02.2017 the petitioner came to know from a news caption of 'The Daily Jugantor' published on 09.02.2017 that the then Chief Justice recommended all Additional Judges including the petitioner for appointment under Article 95 of the Constitution but in violation of the constitutional provisions the executive dropped the petitioner without showing any cogent reason. The learned senior Counsel contended next that according to Article 95(1) of the Constitution, a Judge shall be appointed by the President after consultation with the Chief Justice and in the instant case the Honourable Chief Justice recommended the name of the petitioner along with eight others but disregarding that recommendation of the Chief Justice, the petitioner alone was dropped out which is a clear violation of the constitutional provision of Article 95. Therefore, the petitioner is entitled to be appointed as a Judge of the High Court Division. The learned senior Counsel submitted next that the process by which the Judges of the Supreme Court are appointed, is the key to both reality and perception of the independence of judiciary and the whole constitutional scheme is to shut the doors of

interference against the executive under lock and key and therefore the prudence demands that after shutting the door of interference the key should not be left in possession of the executives. Disregarding the recommendation of the Chief Justice by the executive means snatching the very key of the door of interference by the executive away from the control of the judiciary which is tantamount to a denial of the very concept and basic principle of the independence of judiciary. The learned senior Counsel for the petitioner argued next that according to Article 48(3) of the Constitution in exercise of all functions, save only that of appointing the Prime Minister and the Chief Justice, the President shall act in accordance with the advice of the Prime Minister. Under Article 95 of the Constitution in appointing Judges of both Division of the Supreme Court, the President shall consult the chief Justice and act in accordance with the advice of the Prime minister. In the Ten Judges' case it is held that consultation with the Chief justice and primacy of the opinion of the Chief Justice is in no way in conflict with Article 48(3) of the Constitution. In view of Articles 48(3) and 55(2) the Prime Minister cannot advice the President anything contrary to the basic principle and structure of the Constitution. The independence of judiciary being the basic principle and structure of our Constitution, consultation with the Chief Justice in the matter of appointment of Judges with its primacy should be considered as an essential part thereof. After the decision of Ten Judges' case Article 95 was amended by way of 15th Amendment in 2011 and it becomes imperative for the executive to consult the Chief Justice in appointing Judge of the High Court Division and in this regard the opinion of the Chief Justice will get primacy. The learned senior Counsel contended next that it is held in the landmark Masder Hossain's case (52 DLR(AD) 82) that in exercising control and discipline of persons employed in the judicial service and magistrates exercising judicial functions under article 116 the views and opinion of the Supreme Court shall have primacy over those of the executive. The Government did not even challenge the above decision concerning the consultation with primacy. The learned senior Counsel contended further that in the Ten Judges' case (17 BLT(AD) 231) it has been observed that the term 'consultation' was considered in Masdar Hossain's case in the light of Article 116 of the Constitution but nevertheless the same principle all the more applies in the matter of appointment of Judges of the Supreme Court under Articles 98 and 95 of the Constitution because without the independence of the Supreme Court there cannot be any independence of the subordinate Courts and minus the consultation and primacy the separation of judiciary from the executive will be empty words. The learned senior Counsel contended next that the petitioner came across 32 years holding different posts in the subordinate judiciary during which all matters including antecedents had been subject to scrutiny and supervision of the Supreme Court under Articles 109, 116, 116A of the Constitution. During the petitioner's such long career in the judiciary he did never ever face any proceeding or complaint on matter of discipline or antecedent. There is no statement from the executive that the government ever consulted the Chief Justice on any matter of antecedent of the petitioner. Thus, on any vague plea of antecedent, it would be unjust to deprive the petitioner of his legitimate right or expectation of being appointed under Article 95 of the Constitution. The learned senior Counsel contended further that the petitioner was initially appointed as an Additional Judge under Article 98 of the Constitution and at that time the President on all areas including antecedents and judicial performance consulted the Chief Justice. At that time no adverse report or allegation revealed from the petitioner's service record or conduct as a result he was appointed as an Additional Judge under Article 98 of the Constitution. In such a situation, in the process of appointment under Article 95 of the Constitution the petitioner was not supposed to be subjected again to any further scrutiny what so ever. The learned senior Counsel further submitted that the petitioner as an Additional Judge under Article 98 had performed all judicial works satisfactorily and since the Honourable Chief Justice had recommended his name along with eight others for

appointment under Article 95, he has, therefore, not only a legitimate expectation rather acquired a constitutional right for being confirmed and appointed under Article 95 of the Constitution with effect from 07.02.2017 or 11.02.2017 because of the fact that such convention being followed in this country for more than over last 60 years. The learned senior Counsel, in fine, submitted that for doing complete justice under Article 104 of the Constitution the executive is required to be directed to appoint the petitioner as a Judge of the High Court Division within a specific deadline giving all arrear remunerations, benefits and privileges with service-continuity with effect from 11.02.2017.

72. *Per contra*, Mr. A.M. Amin Uddin, Attorney General with Mr. Mohammad Mehedi Hassan Chowdhury, Additional Attorney General, Mr. Md. Mojibur Rahman, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General appearing for the respondents in all the cases strenuously opposed the submissions made on behalf of the appellant and the petitioner. They submitted that in the case of Bangladesh and others Vs. Md. Idrisur Rahman and others reported in 29 BLD (AD) 79 this Court having held that the opinion of the executive will have dominance in the matter of antecedent of a Judge of the High Court Division and in the instant case considering the antecedent of the appellant the Honourable President of Bangladesh has not appointed him as a permanent Judge of the High Court Division and the same does not require any interference by this Court as well. The learned Attorney General along with Deputy Attorney General and Assistant Attorney General for the respondents contended next that the Honourable President appointed the appellant in the year 2012, the Honourable President having not appointed him as permanent Judge in the year 2014, and in the meantime there has been no change of Government, it cannot be said that the appellant was victim of political reasons and there is nothing to show that for an ulterior reason the appellant has not been appointed as a permanent Judge and as such there is no merit of this Appeal. The learned Attorney General argued next that Article 95(2)(a) of the Constitution requires that to be elevated in the Bench an advocate must have 10 years' practicing experience in the Supreme Court of Bangladesh. By referring Al- Jehad Trust case reported in PLD 1996 SC 324 the learned Attorney General submitted that the requirement of 10 years' practice under Article 193(2)(a) of the Constitution of Pakistan relates to the experience/ practice at the Bar and not simpliciter the period of enrolment. By referring the Mahesh Chandra Gupta's case reported in (2009) 8 SCC 273 the learned Attorney General submitted next that the decision of Indian Supreme Court passed in the aforesaid case is not applicable in the case in hand. The facts of the instant case is totally distinguishable from the Mahesh Chandra Gupta's case. In the case of Mahesh Chandra Gupta, the petitioner prayed for issuance of *Quo waranto* directing an Additional Judge of Allahabad High Court (Respondent No. 3 of Mahesh Chandra Gupta's case) for showing cause upon what authority the respondent No. 3 was holding his office and to justify the constitutionality of his appointment as a judge of the Allahabad High Court. In the said case the issue was that, if a person after having remained an advocate for some time, ceases to practice and employs himself for earning, and thereafter holds an office of a Member of the Tribunal, the period of his holding the office as a Member of Tribunal cannot be computed or taken into account with the aid of Explanation (aa) to Article 217(2)(b) of the Constitution of India. Applying the principles with regard to entitlement to practice and computability of the period during which respondent No. 3 has worked in ITAT (Income Tax Appellate Tribunal), the Supreme Court of India held that he stood qualified for appointment as a Judge of the Allahabad High Court. Therefore, the decision of Mahesh Chandra Gupta's Case is not applicable in the instant Civil Appeal. The learned Attorney General contended next that from the Annexures-A, A-1 & A-2, it appears that after being enrolled in the High Court Division of the Supreme

Court of Bangladesh on 18.06.2000, the appellant stayed in the United Kingdom (UK) at least till 13.10.2005 on which date he was called to the Bar of England and Wales. Therefore, it is apparent that after the date of enrolment in the High Court Division on 18.06.2000 the appellant stayed in UK for a period of minimum 5(five) years till 13.10.2005. Accordingly, the appellant was elevated in the Bench as an Additional Judge of the Supreme Court of Bangladesh on 13.06.2012 having only 7 (seven) years' of practice in the High Court Division instead of 10 years' practicing experience. Apart from this the appellant did not mention anywhere in the Writ Petition when he returned back in Bangladesh and started practice as an advocate in the Supreme Court of Bangladesh. Last but not least, the learned learned Attorney General argued that according to Article 48(3) of the Constitution the Honourable President is required to act as per advice of the Honourable Prime Minister regarding the appointment of Judges in the High Court Division and the communication between the Honourable Prime Minister and the Honourable President regarding appointment of Judge is privileged one and it cannot be inquired into before any court of law and hence, after consultation with the Honourable Chief Justice as per Article 95 of the Constitution when the Honourable President takes advice from the Honourable Prime Minister and takes decision as per the direction of the Honourable Prime Minister then as per Article 48(3) the whole process of appointing/confirming Judges becomes a privileged one and the same cannot be inquired into before any court of law and as such the Civil Appeal and other Civil Petitions for leave to Appeal are liable to be dismissed.

73. At this juncture, let us have a brief overview of the constitutional scheme of our country as regards appointment of Judges of the Supreme Court.

74. Article 98 of the Constitution empowers the President to appoint Additional Judges to the Supreme Court for a period not exceeding two years. Article 98 provides that-

> "98. Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period:
>
> Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article."
>
> Article 95(1) of our original Constitution enshrines that-
>
> "95(1) The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice."

75. Thus, Article 95(1) of our original Constitution had the provision requiring the President to consult with the Chief Justice in case of appointment of Judges of the Supreme Court. Later, through the 4th Amendment Article 95(1) was amended omitting the provision of requirement of consultation with the Chief Justice while appointing the Judges of the Supreme Court. Even though through judicial pronouncement in various cases including the case of Bangladesh and others vs. Md. Idrisur Rahman, Advocate & others, reported in 29 BLD(AD) 79 (popularly known as Ten Judges' Case) in view of the longstanding and consistent constitutional convention and practice the requirement of consultation with the Chief Justice was established. Again, with the enactment of 15th Amendment to the

Constitution, the provision of Article 95(1) contained in the original Constitution had been restored requiring the President to appoint the Judges of the Supreme Court in consultation with the Chief Justice. It is apparent from the record that the cause of action in the case in hand arose on 09.06.2014 while 15th Amendment was enacted in the year 2011. Therefore, it is settled position of law that in case of appointment of Judges of the Supreme Court by the President the requirement of consultation with the Chief Justice is essential and in the case in hand the provision of consultation with the Chief Justice being essential there is no controversy as regards doing the same. In the above backdrop we do not dilate our discussion on the issue whether the consultation with the Chief Justice is imperative or not.

76. Under the constitutional scheme of our country the President is the Constitutional head of the State and of the executive government. Article 48 of the Constitution lays down that-

> "48.(2) The President shall, as Head of State, take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by any other law.
> (3) In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95, the President shall act in accordance with the advice of the Prime Minister:
> Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court."

77. So, according to Article 48(3) of the constitution, except in the case of appointing the Prime Minister and the Chief Justice, the President, while exercising, all his functions shall act as per the advice of the Prime Minister. According to Article 48(3) of the constitution the question whether any, and if so what, advice has been tendered by the Prime minister to the President shall not be inquired into by any court. In the democratic form of government existing in our country, the President is normally vested with the executive power of the State which, in fact, is to be exercised by the Council of Ministers since the President is to act on the advice of the ministers led by the Prime Minister. In this regard Article 55(1)(2) of the Constitution is relevant to extract below:

> "55. (1) There shall be a Cabinet for Bangladesh having the Prime Minister at its head and comprising also such other Ministers as the Prime Minister may from time to time designate.
> (2) The executive power of the Republic shall, in accordance with this Constitution, be exercised by or on the authority of the Prime Minister."

78. Article 52 lays down that the President may be impeached on a charge of violating this Constitution or of grave misconduct, preferred by a notice of motion signed by Majority of the total members of Parliament in the manner prescribed in Article 52. The president is thus duty bound to act in consultation with the Prime Minister. In view of the above discussion it is evident that while appointing the Judge of the Supreme Court under Articles 95(1) and 98 the president is to consult the Prime Minister for his/her advice as well as the Chief Justice. Now an issue arises that which consultation between the two functionaries will get the primacy.

79. In the case of S.P. Gupta and others vs. President of India and others, reported in AIR1982 SC 149, P.N. Bhagwati, J. observed in the following:

> "29.....If we look at the raison detre of the provision for consultation enacted in cl.(1) of Art. 217, it will be obvious that the opinion given by the Chief Justice of the High Court must have at least equal weight as the opinion of the Chief Justice of India, because Ordinarily the Chief Justice of the High Court would be in a better position to know about the competence, character and integrity of the person recommended for appointment as a Judge in the High Court. The opinion of the Governor of the State, which means the State Government would also be entitled to equal weight, not in regard to the technical competence of the person recommended and his knowledge and perception of law which the Chief Justice of the High Court would be the proper person to express an opinion, but in regard to the, character and integrity of such person, his antecedents and his social philosophy and value-system. So also the opinion of the Chief Justice of India would be valuable because he would not be affected by caste, communal or other parochial considerations and standing outside the turmoil of local passions and prejudices, he would be able to look objectively at the problem of appointment. There is therefore, a valid and intelligible purpose for which the opinion of each of the three constitutional functionaries is invited before the Central Government can take a decision whether or not to appoint a particular, person as a Judge in a High Court. The opinion of each of the three constitutional functionaries is entitled to equal weight and it is not possible to say that the opinion of the Chief Justice of India must have primacy over the opinions of the other two constitutional functionaries. If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance, amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept his opinion. But as we pointed out earlier, it is only consultation and not concurrence of the Chief Justice of India that is provided in cl.(1) of Art.217. When, during debates in the Constituent Assembly, an amendment was moved that the appointment of a Judge of a High Court or the Supreme Court should be made with the concurrence of the Chief Justice of India, Dr. B.R. Ambedkar made the following comment which is very significant:
>
> > "With regard to the question of the concurrence of the Chief Justice, it seems to me that those advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that that is also a dangerous proposition."

80. It is, therefore, clear that where there is difference of opinion amongst the constitutional functions regarding the appointment of a Judge to a High Court. The opinion of none of the constitutional functionaries is entitled to primacy but after considering the opinion of each of the constitutional functionaries and giving it due weight, the Central Government is entitled to come to its own decision as to which opinion It should accept in

deciding whether to appoint the person as a Judge. Also, where a Judge of the Supreme Court is to be appointed, the Chief Justice of India is required to be consulted. However, again, it is not concurrence, but only consultation and the Central Government is not bound to act in accordance with the opinion of the Chief Justice of India. The ultimate power of appointment rests with the Central Government and that is in accordance with the constitutional practice prevailing in all democratic countries. Even in the United Kingdom, a country from which we have inherited our system of administration of justice and to which many of our anglophiles turn with reverence for inspiration and guidance, the appointment of High Court Judges is made by or on the advice of the Lord Chancellor, who is a member of the Cabinet while appointments to the Court of appeal and the House of Lords and to the offices of Lord Chief Justice Master of the Rolls and President of the family Division are made on the advice of the Prime Minister after consultation with the Lord Chancellor. Thus, the appointment of a Judge belonging to the higher echelons of judicial service is wholly in the hands of the Executive. So also, in the commonwealth countries like Canada, Australia and New Zealand, the appointment of High Court and Supreme Court Judges is made by the Executive. This is, of course, not an ideal system of appointment of Judges, but the reason why the power of appointment of Judges is left to the Executive appears to be that the Executive is responsible to the Legislature and through the Legislature, it is accountable to the people, who are consumers of justice. The power of appointment of Judges is not entrusted to the Chief Justice of India or to the Chief Justice of a High Court because they do not have any accountability to the people and even if any wrong or improper appointment is made, they are not liable to account to anyone for such appointment. The appointment of a Judge of a High Court or the Supreme Court does not depend merely upon the professional or functional suitability of the person concerned in terms of experience or knowledge of law though this requirement is certainly important and vital and ignoring it might result in impairment of the efficiency of administration of justice, but also on several other considerations such as honesty, integrity and general pattern of behaviour which would ensure dispassionate and objective adjudication with an open mind, free and fearless approach to matters in issue, social acceptability of the person concerned to the high Judicial office in terms of current norms and ethos of the society, commitment to democracy and the rule of law, faith in the constitutional objectives indicating his approach towards the Preamble and the Directive Principles of State Policy, sympathy or absence thereof with the constitutional goals and the needs of an activist judicial system. These various considerations, apart from professional and functional suitability, have to be taken into account while appointing a Judge of a High Court or the Supreme Court and it is presumably on this account that the power of appointment is entrusted to the Executive."

81. In the case of S.P. Gupta, S.M.F.Ali, J. observed in the following:

> "Independence of judiciary is doubtless a basic structure of the constitution, but the said concept of independence has to be confined within the four corners of the Constitution and cannot go beyond the Constitution. While this absolute judicial power has been conceded by the Constitution to the judiciary, a certain amount of executive control has already been vested in the higher judiciary in respect of the subordinate judiciary. This executive power is not absolute and has to be exercised in consultation with the CJI in the case of appointment of Supreme Court Judges, as also in the consultation with the CJI and the Governor of the States concerned in case of the appointment of Chief Justice of the High Courts,–in the case of appointment of High Court Judge, the Chief Justice of the concerned High Court is also to be consulted. The consultation contemplated by the Constitution must be full and effective and

by convention the view of the concerned CJ and CJI should always prevail unless there are exceptional circumstances which may impel the President to disagree with the advice given by the constitutional authorities. Thus, in fine, the doctrine of separation of power so far as our Constitution is concerned, reveals an artistic, blending and an adroit admixture of judicial and executive functions.

In the American Constitution by virtue of the fact that the entire judicial power is vested in the Supreme Court or other courts, the appointments have to be made by the Supreme Court, unlike the provisions of Indian Constitution where appointments are to be made by the President in consultation both with judicial and executive authorities as indicated above. Therefore, in expounding the concept of separation, the essential distinctive features which differentiate Indian Constitution from the American Constitution must be kept in mind.

So far as framers of Indian Constitution are concerned, they had deliberately rejected the theory of complete insulation of the judicial system from the executive control. The Indian Constitution has devised a wholesome and effective mechanism for the appointment of judges which strikes a just balance between the judicial and executive powers so that while the final appointment vests in the highest authority of the executive, the power is subject to a mandatory consultative process which by convention is entitled to great weight by the President. Apart from these safety valves, checks and balances at every stage, where the power of the President is abused or misused or violate any of the constitutional safeguards it is always subject to judicial review. The power of judicial review, which has been conceded by the Constitution to the judiciary, is the safest possible safeguard not only to ensure independence of judiciary but also to prevent it from the vagaries of the executive.

The Indian Constitution fully safeguards the independence of Judges as also of the judiciary by a three-fold method-

(1) by guaranteeing complete safety of tenure to judges except removal in cases of incapacity or misbehaviour which is not only a very complex and complicated procedure but a difficult and onerous one.

(2) by giving absolute independence to the Judges to decide the cases according to their judicial conscience without being influenced by any other consideration and without any interference from the executive.

(3) so far as the subordinate judiciary is concerned the provisions of Arts. 233-236 vest full and complete control over them in the High Court.

In the case of S.P. Gupta, Desai, J. also observed in the following:

(4)

"Independence of judiciary under the Constitution has to be interpreted within the framework and the parameters of the Constitution. There are various provisions in the Constitution which indicate that the Constitution has not provided something like a 'hands off attitude' to the judiciary. The power of appointment of High Court Judges and the Judges of the Supreme Court vests in the President and the President being a constitutional head he is

constitutionally bound to act according to the advice of the Council of Ministers. Arts. 32(3), 133(3), 138, 139, 140, 130, 230, 231, 237, 225, 126, 127(1), 128 confer power on other constitutional institutions such as the executive which when it acts within the limits of power will have a direct impact on the functioning of the judiciary. This conspectus of articles, not meant to be exhaustive, do indicate that Parliament has power to regulate Court's jurisdiction. Undoubtedly judiciary, the third branch of the Government cannot act in isolation. They are ensured total freedom, of course, after entering the office, from any overt or covert pressure or interference in the process of adjudicating causes brought before them and to this end they are ensured tenure, pay, pension, privileges and certain basic conditions of service. The judiciary like any other constitutional instrumentality has, however, to act towards attainment of constitutional goals. The independence of judiciary is not to be determined in all its ramifications as some a priori concept but it has to be determined within the framework of the Constitution. True, that the thrust is to ensure that adjudications are untrammeled by external pressures or controls and independence of judiciary under the Constitution is confined to the adjudicatory functions of the Courts and tribunals and they are insulated from executive control in that behalf. It is not unlikely that the total insulation may breed ivory tower attitude. It is not as if judicial independence is an absolute things like a brooding omnipresence. One need not too much idolise the independence of judiciary so as to become counter-productive.

While undoubtedly political packing must be abhorred, in putting the independence of judiciary on pedestal one cannot lose sight of the fact that the judiciary must keep pace with the changing mores of the day, its decision must be informed by values enshrined in the Constitution, the goals set forth in the fundamental law of the land, peoples' yearning desire for a chance for the better and the promised millennium. An activist role in furtherance of the same is a sine qua non for the judiciary. If value packing connotes appointment of persons otherwise well qualified as required by the constitution but having the additional qualification of awareness of the high priority task of eradication of poverty removal of economic disparity, destroying the curse of illiteracy, ignorance, exploitation, feudal overlordship, coupled with conscious commitment to administering socio-economic justice, establishment of a just social order, an egalitarian society, then not only the value packing is not to be frowned upon nor thwarted by entrenched establishment prone people but it must be advocated with crusader's zeal. And judiciary cannot stand aloof and apart from the mainstream of society. This will ensure its broad accountability to injustice ridden masses and therefore it is not unnatural that the status quoists can enter their caveat to value packing, but which does not commend. While appointing each individual the constitutional philosophy of each individual ought to be a vital consideration and if this is labelled as value packing, it is neither unethical nor unconstitutional nor a weapon to strike at independence of judiciary."

82. In the Ten Judges' Case this Division passed by the following short order on 2nd March 2009:

"For reasons to be recorded later in details, we hereby pass the following short order: -

> 1. In the matter of appointment of Judges under Articles 98 and 95 of the Constitution the Convention of consultation having been recognized and acted upon has matured into Constitutional Convention and is now a Constitutional imperative.
> 2. Such consultation is inherent in our Constitutional scheme and is ingrained in the principle of independence of judiciary being essentially the basic structure of our Constitution embedded in the principle of Rule of Law.
> 3. In the matter of selection of the Judges the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment and in the area of antecedents the opinion of the executive should be dominant. Together, the two should function to find out the most suitable candidates available for appointment through a transparent process of consultation.
> 4. Oath under Articles 98 and 95 of the Constitution are separate and distinct and are required to be administered and made before one enters upon an office and a Judge will be deemed to have entered upon the office immediately after he makes the Oath and not before, in both cases....."

83. Recently an Article has been published in a foreign law journal namely, 'Mazellaws Digest' titled "Judicial Independence vs. Constitutional Supremacy-A study of Bangladesh's struggle to maintain legal integrity." Author's view relevant to the present case is given below:

> "The basic structure doctrine is one which preserves the principles of the Constitution that effectively devises the ways in which the nation is expected to build itself. However, at the end of the day, the basic structure doctrine is one of abstractive value. While it should be recognised that principle of the independence of the judiciary speaks not only to one of the basic structures of the Constitution of Bangladesh, but also to a principle enshrined in many constitutions across the world, it ought to be noted that at the end of the day the application of the principle is based on abstraction and is a principle that was presumably in the mind of the constituent assembly during the construction of the constitution itself.
>
> If a recommendation regarding the confirmation of a Justice of the Supreme Court (High Court Division) proposed by the Chief Justice of Bangladesh to the President of the People's Republic of Bangladesh is not fully affirmed, there are several things to consider. To address this matter, it is important to analyse the text of the Constitution that delineates these powers to the office of the President.
>
> In Article 51 of the Constitution, the matter is effectively defined. The President is not answerable to the Court in the exercise of his duties. Among his duties, according to Articles(s) 94, 95 and 98, is the duty to confirm the appointment of judges to the High Court Division of the Supreme Court. If we are to follow the letter of the law, the prescription of Article 51 is clear in that the President is not answerable to the Court in the exercise of this duty. However, per Article 48, the President is expected to act in accordance with the advice of the Prime Minister. Additionally, this provision prescribes that this advice is ultimately privileged communication that the Court has no authority to investigate. As such, the President is allowed to act in accordance

with his conscience and wisdom to choose to affirm only those they deem fit to execute the duties for which they are appointed. Therefore, by Constitutional authority, it is the prerogative of the President to act as they deem fit in the execution of such duties.

While it has been argued that in disregarding the recommendation of the Chief Justice in appointment of judges, there is the potential for threat to the independence of the judiciary, it is also equally true that the Constitution in its grand wisdom permits this specific effect. It is, however, important to recognise two facts. First, the preservation of judicial independence is a fundamental and basic structure of the Constitution and deserves the utmost reverence. However, the mode that this preservation could take place is ultimately debatable. Second, the letter of the Constitution, which by virtue of Article 7 is supreme to all, is thus superior to any abstract principle. Assuming that the constituent assembly was aware of the principle of judicial independence when articulating the functions of the office of the President and the functionality of the Supreme Court, and the office of the Chief Justice, the letter of the Constitutional text must be assumed to be the intended will of the Constitution. In effect, considering that no part of the Constitution is deemed inferior to any other (a principle opined on by H.M. Seervai in his seminal text on the Constitution of India), it is important to realise that the basic structure doctrine, or the abstraction of the principle of judicial independence, cannot take precedence over the prescribed text enshrined in the Constitution.

To this effect, it is presumed that the constituent assembly, in its wisdom, was cognizant of this basic structure, but still enshrined Article 48, which enshrines that the advice of the Prime Minister on which the President relies in the execution of his duties, including the appointment of judges, is privileged communication, not to be investigated by any court. Hence, this court, or any other, is unable to challenge any such decision. Considering the text of Article(s) 48 and 52(2), the privilege communication may be investigated only if the parliament deems it to be appropriate.

So, in the event that a recommendation of the appointment of an individual to the Supreme Court (High Court Division) is disregarded, the office of the Chief Justice has no other recourse but to merely seek clarification from the office of the President. In such a case, the office of the President is not bound to respond in detail. Only if the Parliament deems such an investigation to be fit, they may choose to enquire this matter with the office of the President.

In maintaining this course of action, three core benefits are accrued. First, the letter of the Constitution is not undermined by a possible interpretation of a principle that is abstracted on to the Constitution itself. Second, the integrity of the office of the President is preserved, while paying heed to the need for judicial independence. Finally, this returns the ultimate power of arbitration of the matter on to the Parliament, in recognition of parliamentary sovereignty– effectively returning the power of such arbitration to the representation of the collective will of the people of Bangladesh.

Ultimately, this is a compromise. This does still create avenues for judicial independence to be impeded by the whims of the office of the President and

> potentially, the office of the Prime Minister, who ultimately may have political motivations. However, the Constitution as it stands, is superior to any will or vision any other body may strive towards. Hence, any decision on the matter must be in accordance with the existing provisions of the Constitution. Perhaps a revision of the procedures regarding such matters is well due; but at this juncture, the letter of the Constitution must prevail."
>
> [Source: http://www.mazellaws.com/publication/blogs/judicial-independence-vs-constitutional-supremacy-a-study-of-bangladeshs-struggle-to-maintain-legal-integry]

84. In the case in hand, the claim of the appellant is that even though the Hon'ble Chief Justice recommended the names of six judges including the appellant for appointment as permanent judge only five Judges were appointed by the President dropping the appellant due to oblique purpose. As it has been discussed earlier that the president shall act in consultation with the Prime Minister while discharging his functions. In the instant case the President did not appoint the appellant as the opinion of the executive was not found to be positive. Now a question arises whether the said opinion is ordered to be disclosed. According to proviso to Article 48 of the Constitution anything about the advice rendered by the Prime Minister to the President shall not be enquired into in any court. In fact, it is the maker of constitution who gave such indefeasible protection to the advice of the executive of state. Article 51 provides that the President shall not be answerable in any court for anything done or omitted by him in the exercise or purported exercise of the functions of his office.

85. The learned Counsels on behalf of the appellant referring the Ten Judges' case contends that in that case the Judges were appointed as Additional Judges for two years and thereafter they had not been appointed by the President as permanent Judges, the Appellate Division finally directed to consider the cases of Ten Judges for appointment in terms of guideline as formulated by the said Division. In this regard, it is our considered opinion that the said ten Judges were appointed as Additional Judges for two years in the regime of one political government but at the expiry of two years another government came to the power. So, their non-appointment as permanent judges is undoubtedly motivated by the political reason. But in the case in hand the appellant was appointed as Additional Judge in a regime of a political government and subsequently he has not been appointed as permanent judge in the regime of the same government. Thus, there is no question of political motivation in case of dropping the name of the appellant.

86. Now adverting to the qualification for appointment as a Judge of the Supreme Court we will look into the constitutional provisions of India, Pakistan *vis-a-vis* Bangladesh.

87. Article 217(2) of the Indian Constitution is extracted below:

> "(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and-
> (a) has for at least ten years held a judicial office in the territory of India; or
> (b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession."

88. Likewise, Article 193(2) of the Pakistan Constitution provides that-

> "2. A person shall not be appointed a Judge of a High Court unless he is a citizen of Pakistan, is not less than forty-five years of age, and-

> a. he has for a period of, or for periods aggregating, not less than ten years been an advocate of a High Court (including a High Court which existed in Pakistan at any time before the commencing day); or
> b. he is, and has for a period of not less than ten years been, a member of a civil service prescribed by law for the purposes of this paragraph, and has, for a period of not less than three years, served as or exercised the functions of a District Judge in Pakistan: or
> c. he has, for a period of not less than ten years, held a judicial office in Pakistan."

89. Keeping analogy with the legal system of the sub-continent Article 95(2) of our Constitution enumerates the qualifications of a person to be appointed as a Judge of the Supreme Court. Article 95(2) provides that-

> "95. (2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and
> (a) has, for not less than ten years, been an advocate of the Supreme Court; or
> (b) has, for not less than ten years, held Judicial office in the territory of Bangladesh; or
> (c) has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.

90. Thus, according to Article 95 of our Constitution the qualification of an advocate for being appointed as a Judge of the Supreme Court is that he should be citizen of Bangladesh and has been an advocate of the Supreme Court of Bangladesh for at least ten 10 years.

91. In Al-Jehad Trust case reported in PLD 1996 SC 324, Para-7 the Supreme Court of Pakistan held that-

> "That the requirement of 10 years practice under Article193(2)(a) of the Constitution relates to the experience/ practice at the Bar and not simpliciter the period of enrolment".

92. Now, let us examine whether the appellant being an advocate has fulfilled the requirement of law as enumerated in Article 95(2) of the Constitution. It appears that in the instant Civil Appeal, the writ petitioner has stated that he was enrolled in the High Court Division of the Supreme Court of Bangladesh on 18.06.2000. It is apparent from Annexure-'A-2' of Writ Petition that the writ petitioner has obtained Bachelor of Laws with Honors from the University of Wolverhampton on 25.06.2004 and from Annexure-'A-l' of Writ Petition, it appears that the writ petitioner has obtained Postgraduate Diploma from the City University, London on 09.09.2005. Again, on plain reading of Annexure-'A', it appears that the petitioner was called to the Bar of England and Wales on 13.10.2005. Therefore, on examination of the Annexures-'A, 'A-1' and'A-2' it appears that after being enrolled in the High Court Division of the Supreme Court of Bangladesh on 18.06.2000, the writ petitioner stayed in the United Kingdom (UK) until 13.10.2005 on which date the writ petitioner was called to the Bar of England and Wales. Thus, it is evident that after the date of enrolment as an advocate in the High Court Division on 18.06.2000 the writ petitioner stayed in UK for a period of minimum 5(five) years upto13.10.2005. Therefore, the writ petitioner was appointed as an Additional Judge of the Supreme Court of Bangladesh on 13.06.2012 having only 7(Seven) years of practice in the High Court Division which falls short of the necessary requirement for being appointed as a Judge. Apart from this, the writ petitioner did not mention anywhere in the writ petition when he returned back in Bangladesh and started

practice as an advocate in the Supreme Court of Bangladesh. Therefore, it is crystal clear that at the time of his appointment as an Additional Judge of the High Court Division on 13.06.2012 the writ petitioner did not have the requisite qualification as per Article 95(2)(a) of the Constitution. In the prevailing situation, the executive was quite in right standing not recommending the appellant for appointment as a permanent Judge.

93. In the present case Chief Justice of Bangladesh recommended the names of 6 persons out of those, 5 persons have been made confirmed under Article 95 of the Constitution. So it cannot be said that the Executive has ignored the recommendation of the Chief Justice of Bangladesh violating the observation given in the Ten Judges Case. In the present case the opinion of the Chief Justice of course has been given due importance in case of 5 persons (Judges).

94. In the case in hand it appears that the basic qualification of having 10 years practice to be appointed as a Judge of the High Court Division was found absent in case of the appellant A.B.M. Altaf Hossain. So the Chief Justice of Bangladesh recommended Mr. A.B.M. Alataf Hossain without being aware regarding this fact. The appellant was appointed as Additional Judge of the Supreme Court by the President of the Republic under the provision of Article 98 of the Constitution. The President need not consult with the Chief Justice in exercising his power under Article 98 of the Constitution thought after the Ten Judges Case it has become a practice to consult the Chief Justice prior appointment of any person as Additional Judge under Article 98 of the Constitution. Thus, it might have been presumed by the Chief Justice that Altaf Hossain the appellant had the requisite qualification of 10 years practice at the time of his appointment under Article 98 of the Constitution. The persons concerned in the government, who are in the helm of the affairs in the process of appointment of Judges of the Supreme Court, should have brought this matter to the notice of the Chief Justice before consultation by the President with him as per provision of Article 95 of the Constitution. However, it cannot be said that primacy of the opinion of the Chief Justice has been totally ignored in the appointment of 5 out of 6 persons under Article 95 of the Constitution. We have already discussed that 5 persons out of 6 were given appointment under Article 95 of the Constitution as their names were recommended by the Chief Justice, and only one person has been dropped by the President after consulting with the Chief Justice and being advised by the Prime Minister. We find no illegality in it.

95. In this regard we may get strength from the decision given in the case of *Shanti Bhushan and ors. vs. Union of India and ors.,* reported in (*2009) 1 SCC 657* it has been held that-

> "Person, who is not found suitable for being appointed on some post, should not be given extension."

96. In the case of *Hassan M.S. Azim vs. Bangladesh*, reported in *21 BLC(AD) 201*, this Division concurred with the observation of the High Court Division that the 'President is obliged to act in accordance with the advice of the Prime Minister'. The judgment of this case was pronounced by the High Court Division on 26.10.2010 and the Appellate Division judgment was pronounced on the 5th November, 2015. After pronouncement of the judgment in the Ten Judges' Case as well as after 15th amendment of the Constitution came in existence.

97. 38. We have seen the record of the case in a chamber of one of our brothers. It is clear that the President has appointed 5 Additional Judges as permanent Judge under Article 95 of

the Constitution out of 6 Additional Judges at the advice of the Prime Minister.

98. The observation made by Mr. Justice Md. Abdul Matin in the case of *Bangladesh and others vs. Md. Idrisur Rahman, Advocate and others,* reported in *29 BLD(AD)79* that as follows:

> "157. It is true that "consultation" was considered in the light of Article 116 of the Constitution but nevertheless the same principle all the more applies in the matter of appointment of judges of the Supreme Court under Articles 98 and 95 of the Constitution because without the independence of the Supreme Court there cannot be any independence of the subordinate courts and minus the consultation and primacy the separation of judiciary from the executive will be empty words.
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> 158.....
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> 159. This word "independent" also occurs in Article 116A of the Constitution which runs as under:
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> > "116A. Subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions."
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> 160. The expression "shall be independent" came up for consideration in the aforementioned case of Secretary, Ministry of Finance Vs. Mr. Md. Masdar Hossain and this Court considered both Article 94(4) as well as 116A of the Constitution quoted above and held as under:
>
> > "The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence, as emphasized by the learned Attorney General, is subject to the provisions of the Constitution, but we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence. Article 115, Article 133 or Article 136 does not give either the Parliament or the President the authority to curtail or diminish the independence of the subordinate judiciary by recourse to subordinate legislation or rules. What cannot be done directly, cannot be done indirectly."
>
> 161. Therefore the expression "independence of judiciary" is also no longer res-integra rather has been authoritatively interpreted by this Court when it held that it is a basic pillar of the Constitution and cannot be demolished or curtailed or diminished in any manner accept by and under the provision of the Constitution. We find no existing provision of the Constitution either in Articles 98 or 95 of the Constitution or any other provision which prohibits consultation with the Chief justice. Therefore consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the Constitution. The Prime Minister in view of Article 48(3) and 55(2) cannot advice contrary to the basic feature of the constitution so as to destroy or demolish the independence of judiciary. Therefore the advice of the Prime Minister is subject to the other provision of the Constitution that is Articles 95, 98, 116 of the Constitution.
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> 162-165.....
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> 166. Therefore it follows that consultation with the Chief Justice with primacy is an essential part of independence of judiciary which is ingrained in the very

> concept of independence embedded in the principle of rule of law and separation of judiciary from the executive and is not in conflict with Article 48(3) of the Constitution.
> 167. The judiciary is a cornerstone of our Constitution, playing a vital role in upholding the rule of law. Government must be conducted in accordance with the law and, for there to be confidence that this happens in practice, the law must be administered by a judiciary that is independent of Government. The process by which Judges are appointed is therefore key to both the reality and the perception of independence. The whole scheme is to shut the doors of interference against executive under lock and key and therefore prudence demands that such key should not be left in possession of the executive.

99. The observation made by his Lordship Mr. Justice Md. Abdul Matin has been reflected in the judgment of *Raghib Rauf Chowdhury vs. Government of Bangladesh and others*, reported in *69 DLR(HCD) 317, Paragraph-46*.

100. The President of the Republic is elected under the provision of Article 48(1) of the Constitution by the Members of Parliament in accordance with law. As per Article 48(2) of the Constitution the President exercise the powers and perform the duties as per the Constitution. Article 48(2) of the Constitution runs as follows:

> "The President shall, as Head of State, take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on him by this Constitution and by any other law."

101. The President exercises his powers at the advice of the Prime Minister which has been mentioned in Article 48(3) of the Constitution. Article 48(3) of the Constitution runs as follows:

> "In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of Article 95, the President shall act in accordance with the advice of the Prime Minister."
> In the proviso of Article 48(3) it has been mentioned that "provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any court."

102. Similar provision has been made for the President of India in Article 74 of the Indian Constitution and there is a little bit difference between the provision of Article 48(3) of the Constitution of People's Republic of Bangladesh and Article 74 of the Constitution of India. The provision of Article 74 of the Constitution of India runs as follows:

> "**Council of Ministers to aid and advise President**-(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.
> Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.
> (2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."

103. In the Constitution of the Islamic Republic of Pakistan similar provision is available. The contents of Article 48(1) and (4) of the Constitution of the Islamic Republic of Pakistan runs as follows:

> "48(1) In the exercise of his functions, the President shall act in accordance

> with the advice of the Cabinet or the Prime Minster.
> Provided that the President may require the Cabinet or, as the case may be, the Prime Minister to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.
> (2).....
> (3) Omitted.
> (4) The question whether any, and if so what, advice was tendered to the President by the Cabinet, the Prime Minister, a Minister or Minister of State shall not be inquired into in, or by, any court, tribunal or other authority."

104. In all democratic countries where parliamentary democracy is in existence President of the country enjoys some immunity. By the Articles 51(1) and (2) the President of the People's Republic of Bangladesh has been given immunity. The contents of Article 51(1) and (2) of the Constitution runs as follows:

> "51.(1) Without prejudice to the provisions of article 52, the President shall not be answerable in any court for anything done or omitted by him in the exercise or purported exercise of the functions of his office, but this clause shall not prejudice the right of any person to take proceedings against the Government.
> (2) During his term of office no criminal proceedings whatsoever shall be instituted or continued against the President in, and no process for his arrest or imprisonment shall issue from, any court."

105. If we read together the provision of Article 48 and the provision of Article 51 of the Constitution, we find a clear picture regarding the powers and prerogatives of the President of the Republic. The President shall exercise his functions at the advice of the Prime Minister and the advice whatsoever given or not cannot be questioned as well as the action taken by the President is also immuned from being answerable to any Court. Thus, the writ petition of the appellant is not maintainable. Because in the writ petition the petitioner has challenged the action of the President. The appellant-writ-petitioner filed the writ petition challenging his "non appointment under Article 95 of the Constitution" which is totally barred under the provision of Article 51 of the Constitution.

106. For a smooth functioning and to establish a transparent judiciary, one of the organ of the State, the Executive shall come forward to assist the Chief Justice with all sorts of support including the materials, if any, in their hands against any person, who is under consideration to be appointed as Judge of the Supreme Court under Article 95 of the Constitution. At the time of appointment of the Additional Judges under the provision of Article 98 of the Constitution the Chief Justice is not required to be consulted as per Constitution, but practice has been developed to consult with the Chief Justice. The President alone can appoint the Judges of the Supreme Court in accordance with the Constitutional provisions. He is to consult with the Chief Justice and to take advice from the Prime Minister. The persons working with the executive, who are at the helm of affairs of the appointment of the Judges of the Supreme Court and provide assistance to the President in selecting the Judges, they are responsible to take all necessary information including antecedent of the person who are supposed to be appointed to the Supreme Court as per provision of Article 98 of the Constitution. When the question comes to appointment of the Judges under the provision of Article 95 of the Constitution the practice in our country is that the Chief Justice recommends the names of the Additional Judges already appointed and discharging their functions as *puisne* Judges in the High Court Division. Since at the time of initial appointment under the provision of Article 98 of the Constitution the antecedents of the aforesaid persons presumably have been checked by the executive, usually the Chief Justice does not go to

enquire the antecedent of any Judge afresh and of course it is not his function at all. The Chief Justice will see the legal accumen only of the incumbent Additional Judge and make his recommendation on that basis. Common practice is that, after expiry of two years or some more periods the Chief Justice recommends the names of the Additional Judges to the President, considering their performance in the Court, for appointment, under Article 95 of the Constitution.

107. The intention of the legislature has been expressed in Article 95(2) regarding qualification and disqualification of the person, who are eligible for appointment as a Judge of the Supreme Court. In Article 95(2) of the Constitution runs as follows:

> "95(2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and-
> (a) has, for not less than ten years, been an advocate of the Supreme Court; or
> (b) has, for not less than ten years, held judicial office in the territory of Bangladesh; or
> (c) has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court."

108. In the case in hand Article 95(2)(a) of the Constitution is more relevant. It has been mentioned that if any person is not an Advocate of the Supreme Court for 10 years he will be disqualified to become a Judge of the Supreme Court. In our view, this 10 years advocacy means continuous 10 years legal practice in the Supreme Court or aggregating of 10 years legal practice in the Supreme Court. Since it appears from a simple arithmetic calculation that the appellant did not have 10 years continuous practice in the Supreme Court, which we have discussed earlier, he was not qualified to become a Judge under Article 98 of the Constitution.

109. The President is the only authority to appoint the Judges of the Supreme Court either under Article 98 or 95 of the Constitution in accordance with the constitutional provision. There is no other authority in the country to appoint Judges of the Supreme Court. In the case in hand as per Article 95 of the Constitution President consulted with the Chief Justice and the recommendation of the Chief Justice has been implemented in major portion except the recommendation for the appellant, thus it can be said that the President did not commit any illegality by not giving appointment to the appellant in the post of permanent Judge of the High Court Division of the Supreme Court of Bangladesh under Article 95 of the Constitution of the People's Republic of Bangladesh.

110. It has been observed in the Ten Judges' Case that the advice of the Prime Minister is subject to the other provision of the Constitution that is Article 95, 98 and 116 of the Constitution. The contents of Article 116 of the Constitution runs as follows:

> "The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court."

111. Supreme Court does not mean the Chief Justice alone. Supreme Court means-the Supreme Court of Bangladesh under Articles 152 and 94 of the Constitution. But in Article 95 the words 'Supreme Court' is absent, the President is only obliged to consult with the Chief Justice not the Supreme Court.

112. From the above discussions, we would like to observe as under:

(a) <u>The Chief Justice of Bangladesh in exercise of his functions as consultee shall take aid from the other senior Judges of the Supreme</u>

Court at least with two senior most Judges of the Supreme Court before giving his opinion or recommendation in the form of consultation to the President.

(b) In the light of the observations made in S.P. Gupta, Ten Judges' cases, and the article mentioned in paragraph-17, it is evident that in case of appointment of a Judge of the Supreme Court under Articles 95 and 98 of the Constitution the opinion of the Chief Justice regarding legal acumen and professional suitability of a person is to be considered while the opinion of the Prime Minister regarding the antecedents of a person is also to be considered. If divergent opinions from either side of the two functionaries of the state occur the President is not empowered to appoint that person as Judge. The opinion of any functionary will not get primacy over the others.

(c). If any bad antecedent or disqualification is found against any Additional Judge, who is under consideration of the Chief Justice to be recommended for appointment under the provision of Article 95 of the Constitution, it is obligatory for the executive to bring the matter to the notice of the Chief Justice prior to the consultation process starts.

(d). After recommendation is made by the Chief Justice to the President, even if, at that stage it is revealed that antecedent of any recommended candidate is not conducive to appoint him as a Judge under Article 95 of the Constitution, it shall be obligatory for the executive to send the file of that Additional Judge or the person, back to the Chief Justice for his knowledge, so that the Chief Justice can review his earlier recommendation regarding the such candidate.

(e). If the Chief Justice again (2nd time) recommends the same Judge/person for appointment under Article 95, whose antecedent has been placed before him for reconsideration, this Court expects that, the President of the Republic would show due respect to the latest opinion of the Chief Justice.

(emphasis added)

113. In the Ten Judges' Case it has been observed that-

> "11. As to the legitimate expectation of the Additional Judges it is held that they only have the right to be considered for appointment under Article 95(1) of the Constitution."

114. We have discussed earlier that their Lordships in the said case in the form of direction asked the authority to consider the cases of the Ten Judges as per guideline they formulated. But it is clear that this Division did not give any direction to the government to appoint them as Judges of the Supreme Court. Fortunately, after the judgment of the Ten Judges' Case the Judges, who were dropped earlier were given appointment in a regime of political government favourable to them otherwise they would not have been given permanent appointment.

115. With the above observations, the Civil Appeal No. 232 of 2014 and Civil Petition for Leave to Appeal No. 602 of 2017 are disposed of.

116. No order in respect of Civil Petition for Leave to Appeal No. 2680 of 2014 as it has been abated at the death of the sole petitioner.

117. **Borhanuddin, J:** I have had the privilege of going through the judgment and order proposed to be delivered by my learned brothers Obaidul Hassan, J., M. Enayetur Rahim, J., Md. Ashfaqul Islam, J., Md. Abu Zafor Siddique, J. and Jahangir Hossain, J.

118. Concurring with the ultimate decision of the appeal, I would like to express my brief opinion on the point 'whether dropping the name of the appellant ignoring the opinion/recommendation of the Chief Justice of Bangladesh for confirmation and appointment under Article 95 of the Constitution is without lawful authority and violative of the Constitution.'

119. Facts in a nutshell are that considering qualification and antecedents, the Hon'ble President of Bangladesh appointed the appellant as Additional Judge of the Supreme Court of Bangladesh, High Court Division alongwith 5 other Additional Judges under Article 98 of the Constitution of Bangladesh vide Notification dated 13.06.2012. The Chief Justice administered them oath of office on 14.06.2012. Before expiry of 2(two) years tenure of the said Additional Judges, the Chief Justice being satisfied with their performance and integrity recommended all of them for appointment as permanent Judge of the High Court Division under Article 95 of the Constitution. Though 5(five) of them were duly appointed as permanent Judge by the President vide Gazette notification dated 09.06.2014 but the name of the appellant was dropped from the list ignoring recommendation of the Chief Justice. As such, the appellant as petitioner invoked the writ jurisdiction under Article 102 of the Constitution on the plea that dropping the name of the appellant for appointment under Article 95 of the Constitution ignoring recommendation of the Chief Justice affected very independence of the judiciary.

120. Upon hearing learned Advocate for the writ-petitioner, a Division Bench of the High Court Division rejected the writ petition summarily vide order dated 24.09.2014.

121. Being aggrieved and dissatisfied with the order passed by the High Court Division, the writ-petitioner preferred Civil Petition for Leave to Appeal No.2626 of 2014 invoking Article 103 of the Constitution. After hearing the parties, this Division granted leave vide order dated 06.11.2014.

122. Consequently, instant civil appeal arose.

123. For proper appraisal, it is necessary to discuss the relevant Constitutional provisions relating to the appointment of Judges under Article 98 and 95 of the Constitution which are as under:

> ***"98.Additional Supreme Court Judges:*** *Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or, if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period :*
>
> *Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under Article 95 or as an Additional Judge for a further period under this Article."*
>
> *(emphasis supplied)*

-AND-

> ***"95(1). Appointment of Judges:*** *The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice."*
>
> *(emphasis supplied)*

124. It is pertinent to mention here that in the unamended Article 95(1) of the Constitution provision of consultation with the Chief Justice of Bangladesh by the President was there but lateron said provision was omitted through Constitutional 4th Amendment Act. Thereafter, by the Constitutional 15th Amendment Act the original provision of Article 95(1) was again restored. Thus, now the provision of consultation with the Chief Justice of Bangladesh by the President in appointing Judge under Article 95(1) is a Constitutional requirement. It is not disputed that the then Chief Justice of Bangladesh has recommended name of the appellant for appointment under Article 95(1) of the Constitution.

125. Appellant's contention is that dropping of his name ignoring recommendation of the Chief Justice for appointment under Article 95(1) of the Constitution affects the independence of judiciary.

126. The concept of independence of judiciary is that the Judiciary should be free from other branches of the Government. It should have freedom from fear and favour of the other two organs. The concept has its origin in the doctrine of separation of power. Defining the Independence of Judiciary by emphasizing only the creation of Judiciary as an autonomous institution separate from other branches is not sufficient unless the core idea of judicial independence is exhibited, which is the independent power of the judges to decide a case before them according to the rule of law uninfluenced by any other factors. Independence of the Judiciary is important for the sole reason of safeguarding the rights and privileges of the people and thereby providing equity and justice to all. The Rule of Law, which explains the supremacy of the Constitution, can only be achieved when there is an independent and impartial judiciary at the top level to ensure proper interpretation and implementation of the Rule of Law. For this reason, it is so important to maintain the Independence of Judiciary and thus protect the democracy and as such the concept of Independence of Judiciary is a basic structure of our Constitution.

127. In the case of *Anwar Hossain Chowdhury Vs. Government of People's Republic of Bangladesh*, reported in 41 DLR (AD)(1989) 165, this Division observed:

> *"This point may now be considered. Independence of Judiciary is not an abstract concept. Bhagwati, J.: said 'if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the state within the limit of the law and thereby making the Rule of Law a meaningful and effective.' He said that the Judges must uphold the core principle of the Rule of Law which says, 'Be you ever so high, the law is above you.' this is the principle of Independence of Judiciary which is vital for the establishment of real participatory democracy, maintenance of the Rule of Law as a dynamic concept and delivery of Social Justice to the vulnerable sections of the community. It is this principle of Independence of Judiciary which must be kept in mind while interpreting the relevant provisions of the Constitution. (S.P. Gupta*

and others vs. President of India and others AIR 1982 SC at page-152).”

128. Again, in the case of *Secretary, Ministry of Finance vs. Mr. Md. Masdar Hossain and others*, reported in 20 BLD (AD)(2000) 104, this Division held:

> *“The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116 A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence, as emphasized by the learned Attorney General, is subject to the provisions of the constitution, but we find no provisions of the constitution which curtails, diminishes or otherwise abridges this independence. Article 115, Article 113 or Article 136 does not give either the Parliament or the President the authority to curtail or diminish the independence of the subordinate judiciary by recourse to subordinate legislation or rules. What cannot be done directly cannot be done indirectly.”*

129. Further, in the case of *Supreme Court Advocate-on-Record Association and another Vs. Union of India (popularly known as Fourth Judges Case)*, reported in (2016) 5 SCC 01, the Supreme Court of India also expressed its view in the following manner:

> *“The Rule of Law is recognized as a basic feature of our Constitution. It is in this context that the aphorism, ‘Be you ever so high, the law is above you’, is acknowledged and implemented by the Judiciary. If the Rule of Law is a basic feature of our Constitution, so must be the independence of the judiciary since the ‘enforcement’ of the Rule of Law requires an independent judiciary as its integral and critical component.”*

130. From the above referred cases, it is crystal clear that the Independence of Judiciary is a ‘Basic Structure’ of our Constitution which cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution.

131. In the context of the case in hand, it requires to discuss what is the effect of recommendation of the Chief Justice in appointing Judges under Article 95(1) of the Constitution.

132. In the case of *Supreme Court Advocates-on-Record Association and another vs. Union of India (popularly known as Second Judges Case)*, reported in AIR 1994 SC 268, the Supreme Court of India observed:

> *“In practice, whenever the Council of Ministers both at central and state level, as the case may be, plays a major role in its self-acclaimed absolute supremacy in selecting and appointing the Judges, paying no attention to the opinion of the CJI, they may desire to appoint only those who share their policy performances or show affiliation to their political philosophy or exhibit affinity to their ideologies. This motivated selection of men and women to the judiciary certainly undermines public confidence in the Rule of Law and resultantly the concept of Separation of Judiciary from the Executive as adumbrated under Article 50 and the cherished concept of Independence of Judiciary untouched by the Executive will only be forbidden fruits or a*

> *myth rather than a reality. In this situation, the consultation with the CJI will be an informal one for the purpose of satisfying the constitutional requirements. As it has been pointed out in the Gupta's case (AIR 1982 SC 149) that the judiciary may be the weakest among the constitutional functionaries, for the simple reason that it is not possessed of the long sword (that is the power of enforceability of its decisions)or the long purse (that is the financial resources), but if the opinion of executive is to prevail over, the opinion of CJI in matters, concerning judiciary on account of that reason, then the independent judiciary which is a power of strength for all – particularly for the poor, the downtrodden and the average person confronting the wrath of the Government will be a misnomer."*

133. It is significant to mention here that while recommending a candidate for the higher judiciary, the Chief Justice requires to evaluate the calibre and legal ability of the candidate. Regarding professional attainments, legal soundness, ability, skill etc of the candidate be evaluated only by the Chief Justice in the matter of appointment under Article 95 of the Constitution. However, since the judiciary does not have such mechanism to evaluate the antecedent and background of a candidate, the Chief Justice may not express his/her opinion about the conduct, character and antecedent of the candidate. But the Executive with its sufficient machineries can check the antecedent and background of the candidate and form its opinion on that aspect. If the opinion of the Executive placed before the Chief Justice with all particulars including the conduct, character and antecedent of such candidate, the Chief Justice can evaluate the fitness of the candidate in all aspects. Therefore, in all circumstances, the opinion of the Chief Justice has the right of primacy in appointing the Judges under the provisions of Constitution.

134. If the opinion of the Executive prevails over the opinion of Chief Justice in matters concerning appointment of Judges, then the Independence of Judiciary which is a basic structure of the Constitution as well as the power of strength for all-particularly for the poor, the downtrodden and the average person confronting the wrath of the Government will be a misnomer.

135. In the case of *Supreme Court Advocate-on-Record Association and another vs. Union of India (popularly known as Second Judges Case)*, reported in AIR 1994 SC, 268 the Supreme Court of India held that:

> *"Then the question which comes-up for consideration is, can there be an Independent Judiciary when the power of appointment of Judges vests in the Executive? To say yes, would be illogical. The Independence of Judiciary is inextricable linked and connected with the constitutional process of appointment of Judges of the higher Judiciary. 'Independence of Judiciary' is the basic feature of our Constitution and if it means what we have discussed above, then the framers of the Constitution could have never intended to give this power to the Executive. Even otherwise the Governments - Central or the State - are parties before the Courts in large number of cases. The Union Executive have vital interests in various important matters which come for adjudication before the Apex-Court. The Executive - in one from the other - is the largest single-litigant before the Courts. In this view of the matter the Judiciary being the mediator - between the people and the Executive - the framers of the Constitution could not have left the final authority to appoint the Judges of the Supreme Court and of the High Courts in the hands of the Executive. This Court in*

S.P. Gupta's case (AIR 1982 SC 149) proceeded on the assumption that the Independence of Judiciary is the basic feature of the Constitution but failed to appreciate that the interpretation, it gave, was not in conformity with the broader facets of the two concepts - 'Independence of Judiciary' and 'Judicial Review' - which are inter-linked."

136. Finally, the point mentioned above considered in the case of *Supreme Court Advocates-on-Record Association vs. Union of India (popularly known as Second Judges Case)*, reported in AIR 1994 SC 268 before a Bench of nine Judges in which by majority of seven to two, the Supreme Court of India held:

"When an argument was advanced in Gupta's case (AIR 1982 SC 149) to the effect that where there is difference of opinion amongst the Constitutional functionaries required to be consulted, the opinion of the CJI should have primacy, since he is the head of the Indian Judiciary and paterfamilias of the judicial fraternity, Bhagwati, J. rejected that contention posing a query, as to the principle on which primacy can be given to the opinion of one constitutional functionary, when Clause-(1) of Article 217 places all the three constitutional functionaries on the same pedestal so far as the process of consultation is concerned. The learned Judge by way of an answer to the above query has placed the opinion of the CJI on par with the opinion of the other constitutional functionaries. The above answer, in our view, ignores or overlooks the very fact that the judicial service is not the service in the sense of employment, and is distinct from other services and that "the members of the other services... cannot be placed on par with the members of the judiciary, either constitutionally or functionally". (See All India Judges' Association and others case (1993(4) JT (SC) 618) (supra). There are innumerable impelling factors which motivate, mobilize and import momentum to the concept that the opinion of the CJI given in the process of 'consultation' is entitled to have primacy, they are:

(1) The 'Consultation' with the CJI by the President is relatable to the judiciary and not to any other service.

(2) In the process of various Constitutional appointments 'consultation' is required only to the judicial office in contrast to the other high ranking constitutional offices. The prior 'consultation' envisaged in the first proviso to Article 124(2) and 217(1) in respect of judicial offices is a reservation or limitation on the power of the President to appoint the Judges to the superior courts.

(3) The 'consultation' by the President is a sine-qua-non or a condition precedent to the exercise of the constitutional power by the President to appoint Judges and this power is inextricably mixed up in the entire process of appointment of Judges as an integrated process. The 'consultation' during the process in which an advice is sought by the President cannot be easily brushed aside as an empty formality or a futile exercise or a mere casual one attached with no sanctity.

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(5) Article 124 and 217 do not speak in specific terms requiring the President to consult the executive as such, but the executive comes into play in the process of appointment of Judges to the

higher echelon of judicial service by the operation of Articles 74 and 163 of the constitution. In other words, in the case of appointment of Judges, the President is not obliged to consult the executive as there is no specific provision for such consultation.

(6)The President is constitutionally obliged to consult the CJI alone in the case of appointment of a Judge to the Supreme Court as per the mandatory proviso to Article 124(2) and in the case of appointment of a Judge to the High Court, the President is obliged to consult the CJI and the Governor of the State and in addition the Chief Justice of the High Court concerned, in case the appointment relates to a Judge other than the Chief Justice of that High Court. Therefore, to place the opinion of the CJI on par with the other constitutional functionaries is not in consonance with the spirit of the Constitution, but against the very nature of the subject matter concerning the judiciary and in opposition to the context in which 'consultation' is required. After having observed that the 'consultation' must be full and effective by Bhagwati, J. in Gupta's case there is no conceivable reason to hold that such 'consultation' need not be given primacy consideration.----------"

137. In the same case the Supreme Court of India further observed:

"The majority view in S.P. Gupta (AIR 1982 SC 149) to the effect that the executive should have primacy, since it is accountable to the people while the judiciary has no such accountability, is an easily exploded myth, a bubble which vanishes on a mere touch. Accountability of the executive to the people in the matter of appointments of superior Judges has been assumed, and it does not have any real basis. There is no occasion to discuss the merits of any individual appointment in the legislature on account of the restriction imposed by Articles 121 and 211 of the Constitution. Experience has shown that it also does not form a part of the manifesto of any political party, and is not a matter which is, or can be, debated during the election campaign. There is thus no manner in which the assumed accountability of the executive in the matter of appointment of an individual judge can be raised, or has been raised at any time. On the other hand, in actual practice, the Chief Justice of India and the Chief Justice of the High Court, being responsible for the functioning of the courts, have to face the consequence of any unsuitable appointment which gives rise to criticism levelled by the ever vigilant Bar. That controversy is raised primarily in the courts. Similarly, the Judges of the Supreme Court and the High Courts, whose participation is involved with the Chief Justice in the functioning of the courts, and whose opinion is taken into account in the selection process, bear the consequences and become accountable. Thus, in actual practice, the real accountability in the matter of appointments of superior Judges is of the Chief Justice of India and the Chief Justices of the High Courts, and not of the executive which has always held out, as it did even at the hearing before us that, except for rare instances, the executive is guided in the matter of appointments by the opinion of the Chief Justice of India."

138. The aforementioned discussions leads to an inescapable conclusion that all the factors mentioned above come together to support the view that the Executive will not be justified in enjoying the supremacy over the opinion of the Chief Justice in the matter of appointing Judges to the superior judiciary. Therefore, to place the opinion of the Chief Justice at per with the other constitutional functionary is not in consonance with the spirit of the Constitution.

139. It is very important to discuss the matter at this stage that the opinion/recommendation rendered by the Chief Justice in appointing Judges in the higher judiciary under Article 95(1) of the Constitution must be effective, meaningful, purposive, consensus oriented and leaving no room for complaint of arbitrariness or unfair play.

140. The Supreme Court of Pakistan in the case of *Al- Jehad Trust vs. Federation of Pakistan*, reported in PLD 1996 Supreme Court 324, held:

> *"The words 'after consultation' employed inter alia in Articles 177 and 193 of the Constitution connote that the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive."*

141. The Supreme Court of India in the case of *Special Reference No.1 of 1998*, reported in AIR 1999 Supreme Court 1, observed in the following manner:

> *"The expression 'consultation with the Chief justice of India' in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole, individual opinion of the Chief Justice of India does not constitute 'consultation' within the meaning of the said Articles."*

142. Based upon above discussions and the referred cases, I am of the view that since the Chief Justice, the head of the judiciary and paterfamilias of the Judicial fraternity, the opinion/recommendation tendered by him in appointing Judges in the higher Judiciary has primacy and as such to uphold the power, position and role of the judiciary i.e. the Independence of Judiciary, the opinion/recommendation so tendered by the Chief Justice in appointing Judges under Article 95(1) of the Constitution is not a mere formalities at all, rather it has a great significance, importance and consequence and at the same time the Chief Justice before giving his opinion/recommendation to the President should take aid from the other two Senior Judges of the Appellate Division, next to the Chief Justice, so that no room for complaint of arbitrariness or unfair play occurs.

143. The view taken in the case of *S.P. Gupta and others vs. President of India*, reported in AIR 1982 SC 149, that the opinion of the executive relating to antecedent of the candidate is to prevail over the opinion of the Chief Justice is overruled in the Second Judges Case. The case of Gupta's was decided in the year of 1981 and the Second Judges Case was decided in the year of 1994. Since Gupta's case was an earlier one and the Second Judges Case was later one and by the Second Judges case, the view taken by the Gupta's case was overruled as such, I respectfully unable to concur with the view expressed by one of my brother relying Gupta's case on the point of primacy of the opinion in appointing judges in the higher judiciary.

144. WHETHER ARTICLE 48(3) OF THE CONSTITUTION IS A BARRIER FOR JUDICIAL REVIEW:

In defence of the impugned order dated 09.06.2014, learned Attorney General submits that barring appointment of the Prime Minister and the Chief Justice, the President is under obligation to act in accordance with the advice of the Prime Minister and contents of the advice cannot be enquired into in any Court. Refereeing the case of *Bangladesh and others vs. Md. Idrisur Rahman and others*, reported in 29 BLD (AD) 79, learned Attorney General submits that the opinion of the executive shall have dominance in the matter of antecedent of a candidate (Judge) and considering the incident of the appellant the President of Bangladesh did not appoint him as a permanent Judge of the High Court Division. On the query of the Court, learned Attorney General referring Article 48(3) of the Constitution submits that the basis of advice tendered by the Executive to the President cannot be enquired into in any Court.

145. No documents/papers were placed before us to examine the basis by which the advice was tendered by the executive to drop the name of the appellant ignoring recommendation of the Chief Justice.

146. Article 48(3) of the Constitution is reproduced below:

> *"In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to Clause(3) of Article 56 and the Chief Justice pursuant to Clause(1) of Article 95, the President shall Act in accordance with the advice of the Prime Minister:*
> *Provided that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be enquired into in any Court."*

147. Article 74(2) of the Constitution of India is almost similar with the proviso attached to Article 48(3) of our Constitution.

148. Article 74(2) of the Constitution of India is as follows:

> *"74(2) the question whether any, and if so what, advice was tendered by the Ministers to the President shall not be inquired into in any Court."*

149. This provision of Article 74(2) of the Indian Constitution has been elaborately discussed in the case of *S.R. Bommai and others vs. Union of India (UOI) and others*, reported in AIR 1994 SC 1918, and their lordships held:

> *"Article 74(2) is not a barrier for judicial review. It only places limitation to examine whether any advice and if so what advice was tendered by the Council of Ministers to the President. Article 74(2) receives only this limited protective canopy from disclosure, but the material on the basis of which the advice was tendered by the council of Ministers is subject to judicial scrutiny."*

150. In United States of America the primacy to the executive privilege is given only where the court is satisfied that disclosure of the evidence will expose military secrecy or of the document relating to foreign relations. In other respects the court would reject the assertion of executive privilege. In *United States v. Reynolds 1935 (345) U.S. 1, Environmental Protection Agency v. Patsy T. Mink 410 U.S. 73 (35) L Ed. 2nd 119, Newyork Times v. U.S. (1971) 403 U.S. 713 (Pentagon Papers case) and U.S. v. Richard M. Nixon* (1974) 418 U.S. 683: 41 L. Ed. 2nd 1035 what is known as Watergate Tapes case, the Supreme Court of U.S.A. rejected the claim of the President not to disclose the conversation he had with the officials.

151. Judicial review is a basic feature of the Constitution. This Court has constitutional duty and responsibility to exercise judicial review as centennial que vive. Judicial review is not concerned with the merits of the decision, but with the manner in which the decision was

taken.

152. In the case of *R.K. Jain vs. Union of India (UOI) and others*, reported in AIR 1993 SC 1769, the Supreme Court of India observed:

> *"The Administrative Procedure Act 5, Article 52 was made. There under it was broadly conceded to permit access to official information. Only as stated here in before the President is to withhold top secret documents pursuant to executive order to be classified and stamped as 'highly sensitive matters vital to our national defence and foreign policies'. In other respects under the Freedom of Information Act, documents are accessible to production. In the latest Commentary by McCormick on Evidence, 4th Ed. By John W. Strong in Chapter 12, surveyed the development of law on the executive privilege and stated that at p.155, that once we leave the restricted area of military and diplomatic secrets, a greater role for the judiciary in the determination of governmental claims of privilege becomes not only desirable but necessary – Where these privileges are claimed, it is for the judge to determine whether the interest in governmental secrecy is outweighed in the particular case by the litigant's interest in obtaining the evidence sought. A satisfactory striking of this balance will, on the one hand, require consideration of the interests giving rise to the privilege and an assessment of the extent to which disclosure will realistically impair those interests. On the other hand, factors which will affect the litigant's need will include the significance of the evidence sought for the case, the availability of the desired information from other sources, and in spa instances the nature of the right being asserted in the litigation."*

153. Based on the decisions above, my considered view is that since reasons would form part of the advice, the Court would be precluded from calling for their disclosure but Article 48(3) of the Constitution is no bar to the production of all the materials on which the advice was based.

154. Accordingly, I am of the view that the writ petition filed by the appellant is very much maintainable.

155. Another fold of argument advanced by the learned Attorney General that the appellant failed to qualify the criteria for appointment as a Judge as enumerated in Article 95(2)(a) of the Constitution i.e. when appointed as an Additional Judge under Article 98 the appellant was not a practicing Advocate of the Supreme Court for 10(ten) years. In this context I share the views expressed by my brothers Md. Abu Zafor Siddique, J. and Jahangir Hossain, J.

156. I am also share the view of my brothers M. Enayetur Rahim, J., Md. Abu Zafor Siddique, J. and Jahangir Hossain, J. that the case of the appellant may be considered by the appropriate authority concerned.

157. With the above observations, the Civil Appeal No.232 of 2014 is hereby disposed of.

158. Civil Petition for Leave to Appeal No.602 of 2017 is also disposed of in the light of the judgment and order passed in Civil Appeal No.232 of 2014.

159. No order in respect of Civil Petition for Leave to Appeal No.2680 of 2014 as it has been abated at the death of sole petitioner.

160. However, no order as to costs.

161. **M. Enayetur Rahim, J:** I have had the opportunity to go through the main judgment proposed to be delivered by my learned brother Obaidul Hasan, J. as well as the individual views/opinions expressed by learned brothers Md. Ashfaqul Islam, J. Md. Abu Zafor Siddique, J. and Jahangir Hossain, J.

162. I am in agreement with the ultimate decision and observations made by my learned brother Obaidul Hasan, J.

163. However, on some issues I would like to express my own opinions.

164. On behalf of the respondents, the question of maintainability of the writ petition has never been agitated and leave was not granted on the said issue. However, my learned brother Obaidul Hasan, J has opined that in view of the provision of article 51 of the Constitution the writ petition is not maintainable.

165. Article 51 of the Constitution is as follows:

> *"51.(1) Without prejudice to the provisions of article 52, the President shall not be answerable in any court for anything done or omitted by him in the exercise or purported exercise of the functions of his office, but this clause shall not prejudice the right of any person to take proceedings against the Government*
> *(2) During his term of office no criminal proceedings whatsoever shall be instituted or continued against the President in, and no process for his arrest or imprisonment shall issue from, any court."*

166. Upon meticulous examination of the above provision of the constitution, it is my considered view that article 51(1) consist of two parts. First part is, the President shall not be answerable in any court for anything done or omitted by him in the exercise or purported exercise of the functions of his office. Second one is, despite the above provision the right of any aggrieved person to take proceedings against the Government has been guaranteed.

167. Article 51(2) speaks that during the term of office of the president, no criminal proceedings whatsoever shall be instituted or continued against the President, and no process for his arrest or imprisonment shall be issued from any Court.

168. Article 48(3) of the constitution speaks that President in the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of article 56 and the Chief Justice pursuant to clause (1) of article 95 shall act inaccordance with the advice of the Prime Minister.

169. Article 55(4) of the constitution requires that all executive actions of the Government shall be taken in the name of the President.

170. If we read article 48(3) and 55(4) of the constitution together, then it is abundantly clear that except in two occasions, the decision of the President is nothing but the decision of the executive including the appointment of Judge(s), Additional Judge(s) of both the Divisions of the Supreme Court.

171. It is now well settled that judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the

decision making process itself and further, that in judicial review, court can examine whether in a given case the authority concerned has acted bonafide, reasonably, just and fairly and also within its jurisdiction.

172. In the case of **Hyundai Corporation vs. Sumikin Bussan Corporation and others, reported in 54 DLR(AD), 88** this Division has observed that:

> *"Transparency in the decision making as well as in the functioning of the public bodies is desired and the judicial power of review is to be exercised to rein in any unbridled executive functioning."*

173. In the case of **Tata Cellular vs. Union of India, AIR 1966 (SC) 11,** wherein the Supreme Court of India has been held to the effect:

> *"The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.*
>
> . . . . . .
>
> *Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision making process itself."*

174. From the records it reveals that prayers made in the present writ petition by the appellant and writ petition NO.1543 of 2003, heard along with writ petition Nos.3217 & 2975 of 2003 are also most similar and identical.(**Ten Judges' cases**)

175. This Division in deciding the Civil Petition for leave to appeal Nos.2221 and 2222 of 2008 with Civil Petition for leave to appeal Nos.2046 and 2056 of 2008 **[Bangladesh and others vs. Md. Idrisur Rahman and others, 29 BLD (AD), 29]**, which had arisen out of the judgment passed in above mentioned 'Ten judges' cases' has held that judicial review only limited purpose is available in matter of appointment of judges.

176. It is pertinent to discuses here that the President of our country has been given the power of pardon and reprieves under article 49 of the Constitution of the People's Republic of Bangladesh.

177. No doubt President's such power of granting pardon is very wide and does not contain any limitation as to the time and occasion on which and the circumstances in which such power could be exercised. The pardoning power granted to the President was historically a sovereign power, politically a residency power and harmonistically an aid of intangible justice. However, the judicial review of the pardoning power is a classic illustration of evolution of law through judicial interpretation. Starting with extreme hesitation to even look into the subject, the trend has now shifted towards a more balance and middle path approach. In the case of **Chandra Rabha vs. Khagendra Nath, MANU/SC/0190/1960** the Supreme Court of India has clearly made a distinction between judicial and executive power, which according to it operates a different plans, and one does not affect the other.

178. Article 72 and Article 161 of the constitution of India are similar to article 49 of our Constitution. Article 72 and 161 of the constitution of India have conferred power upon the president of India and the Governor of the States respectively to give pardon or remit sentence of a convict.

179. In the case of **Maru Ram vs. Union of India reported in AIR(SC),1980, 2147**, it has been held that:

> *"Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or malafide. Only in these rare cases will court examine the exercise."*

180. In the case of **Kehar Singh vs. Union of India reported in Air 1989(SC) 653,** it has been held that:

> *"Upon the consideration to which we had adverted, it appears to us clear that the question as to the area of Presidents power under Art, 72 falls squarely within the judicial domain and can be examined by the Court."*

181. In the case of **Swaran Singh vs. State of UP, reported in (1998) SCC 75,** it has been held that:

> *"In view of the said aforesaid settled legal proposition, we cannot accept the rigid contention of the learned counsel of the third respondent that this court has no power to touch the order passed by the Governor under Article 161 of the Constitution. If such power was exercised arbitrary, malafide or in absolute disregard of the finer canons of the constitutionalism, the byproduct order cannot get the approval of law and in such cases, the judicial hand must be stretched to it."*

182. In the above case the Supreme Court of India ultimately quashed the order of remission of sentence of convict Shri Doodh Nath, an MLA of Uttar Pradesh, on the ground that governor was not posted with material facts and thereby, he was apparently deprived of the opportunity to exercise the powers in a fair and just manner. And the supreme court of India held that: "the order now impugned fringes on arbitrariness."[Underlines supplied]

183. In the case of **Shatapal vs. State of Haryana, reported in AIR 2000 (SC) 1702,** similar view has been reiterated. In the said case also the order granting pardon was set aside on the ground that Governor had not applied his mind to the material on record and has mechanically passed the order just to allow the prisoner to overcome the conviction and sentence passed by the court.

184. In deciding the merit of the above appeal, the Supreme Court of India categorically held that:

> *"There cannot be any dispute with the proposition of law that the power of granting pardon under Article 161 is very wide and do not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power*

> *under Article 161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is a malafide one or the Governor has passed the order on some extraneous consideration."* [underlines supplied]

185. In the **Airport Authority case MANU/SC/0048/1979(1979) IILLJ217SC** the Supreme Court of India has held that:

> *"Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement.*
> *It is the pride of our constitutional order that all power, whatever its source, must, in its exercise, anathematize arbitrariness and obey standards and guidelines intelligible and intelligent and integrated with the manifest purpose of the power. From this angle even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of presidential power."*

186. In view of the above propositions, the court cannot declare judicial hands off. So long as the question arises whether an authority under the constitution has acted with the limit of its power or exceeded it or the power has been exercised without application of mind and mechanically or the order in question is a *mala fide* one or the order has been passed on some extraneous consideration or how far the order is fair and reasonable it can certainly be examined and decided by the court in judicial review. The court cannot be debarred to examine the decision making process and the correctness of the decision itself.

187. A Division Bench of the High Court Division in the case of **Sarwar Kamal vs. The State, reported in 64 DLR(2012) page-329** has observed:

> "**.....***the action of the president or the Government, as the case may be, must be based on some rational, reasonable, fair and relevant principle which is non discriminatory and it must not be guided by any extraneous or irrelevant considerations. It is well settled that all public power including constitutional power shall never be exercisable arbitrarily or malafide and ordinarily, guideline for fair and equal execution are guarantors of the valid play or power and when the mode of power of exercising a valid power is improper or unreasonable, there is an abuse of power"*. [Underlines supplied]

188. It is pertinent to mention here that being aggrieved by the aforesaid judgment convict Sarwar Kamal filed criminal petition for leave to appeal No.474 of 2012 before this Division, which was dismissed for default and eventually, application for restoration was rejected.

189. In view of the above propositions as discussed above, I have no hesitation to hold that the writ petition filed by the present appellant is not barred in view of the provision of article 51 of the Constitution. This article, in my opinion gives the President personal immunity from any kind of civil and criminal proceedings during his term of office. This

immunity does not debar any aggrieved person to take any proceedings against the decision taken by the Government in view of provision of the 2nd part of the article 51(1).

190. Further, if it is hold that the writ petition is not maintainable, then question would be that in what extent Court can make observations and give directions on such writ petition.

191. Thus, I am in respectful disagreement with the observation of my learned brother Obaidul Hasan, J. that in view of article 51 of the constitution the writ petition is not maintainable.

192. Article 95(1) of our constitution enshrined that the judges of the both the Division of the Supreme Court shall be appointed by the president after '**consultation**' with the Chief Justice.

193. However, reality is that no guideline(s) or rule(s) is provided or framed for the President to exercise his power of consultation with the Chief Justice for appointment of the Judges.

194. In the **'Ten Judges'** case High Court Division dealt with the word '**consultation**' and its scope and purport. The High Court Division observed **[61 DLR, 523]**:

> *"Consult', according to Chambers Dictionary, means to ask advice of : to look up for information or advice: to consider wises, feelings to discuss.* ***In R Pushpam vs State of Madras AIR 1953 Mad 392*** *it was observed "The word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution; would provide rational, legal constitutional yardstick to measure and ascertain the scope and content of consultation as contemplated by Article 217(1). It must not be forgotten that the consultation is with reference to the subject matter of consultation and therefore relevant facets of the subject matter must be examined, evaluated and opined upon to complete the process of consultation. It is necessary that consultation shall be directed to the essential points and to the core of the subject involved in the discussion. The consultation must be enabling the consulter to consider the pros and cons of the question before coming to a decision. A person consults another to be elucidated on the subject matter of the consultation."*[underlines supplies]
>
> . . . . . .
>
> In **SP Gupta's case Bhagwati J**, observed as follows:
>
> *"The question immediately arises what constitutes 'consultation' within the meaning of clause(2) of Article 124, clause(1), Article 217. Fortunately, this question is no longer res integra and it stands concluded by the decision of this Court in Sankalchand Sheth's case (AIR 1977 SC 2328) (supra). It is true that the question in Sankalchand Sheth's case (supra) related to scope and meaning of 'consultation' in clause(1) of Article 222, but it was common ground between the parties that 'consultation' for the purpose of clause(2) of Article 124 and clause(1) of Article 217 has the same meaning and content as 'consultation', in clause(1) of Article 222."*
>
> And
>
> *"Krishna Iyer J. speaking on behalf of himself and Fazal Ali J also pointed out that "all the materials in the possession of one who consults must be unreservedly placed before the consultee" and further "a reasonable opportunity for getting information taking other steps and getting prepared for tendering effective and meaningful advice must be given to him" and consultant in turn must take the matter seriously since the subject is of grave importance."*

195. In ***Al-Jahed Trust* case** the Supreme Court of Pakistan approved the majority views with certain modification of the *Second Judges*' Case. The unanimous views are as follows:

> "*The words "after consultation" employed, inter alia, in Articles 177 and 193 of the Constitution connote that the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play".*

196. In view of the above propositions **'Consultation'** means **'effective consultation'**. Such consultation of the President with the Chief Justice for the purpose of appointment of Judges in the Supreme Court is not a mere formalities, in other words it's not 'chatting at the tea table'; rather, it has a great sanctification, significance, importance, consequence and far reaching effect.

197. In the **Ten Judges'** cases this Division categorically held that:

> "*In the matter of selection of the Judges the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment and in the area of executive should be dominant. Together, the two should function to find out the most suitable candidates available for appointment through a transparent process of consultation."*

198. In view of the above, to avoid any controversy in the appointment of judges' it is desirable that at the time of consultation the executive should place all materials relating to the antecedents before the Chief Justice and Chief Justice shall also place necessary opinions as to his satisfaction in the area of legal acumen and suitability for the appointment.

199. It is expected that in the process of consultation the President and Chief Justice will reach a consensus and outcome of such consensus cannot be frustrated or dismissed on any unreasonable plea or on some extraneous consideration in the grab of exercising the power under article 48(3) of the constitution. If the positive outcome or consensus of the consultation is negated, then the position and image of both the President and Chief Justice will be undermined.

200. In the **second Judge's case JS Verma, J.** opined that:

> "*in order to ensure effective consultation between all the constitutional functionaries involved in the process the reasons for disagreement, if any must be disclosed to all others. All consultations with the everyone involved must be in writing and transmitted to all concerned, as a part of the record."[Underlines supplied]*

201. In view of the above, it will be not a luxurious and unjust expectation that our Constitutional authorities involved in the process of appointment of Judge shall follow the above method, until relevant law or rules have been made.

202. In this particular case from the records, as we have seen, it reveals that the name of the appellant was recommended by the Chief Justice. However, reasons are not available in the record for not appointing him and under the Constitutional scheme, the Court has no authority to make an inquiry of privilege communication, verbally or written as the case may be, between the Prime Minister and the President.

203. However, I am agreed with the wish as expressed by my learned brothers Md. Ashfaqul Islam J, Md. Abu Zafor Siddique J, and Jahangir Hossain J, that the case of the appellant be considered by the authority.

204. **Md. Ashfaqul Islam, J:** I have had the occasion of going through the Judgments proposed to be delivered by my learned brothers, Obaidul Hassan, J., Md. Abu Zafor Siddique, J. and Jahangir Hossain, J. Upon a thorough assessment and overall aspects of the issue facing us I am in agreement with the findings and decision of my brother Obaidul Hassan, J and record my reasons as under:

205. Repetition of fact is not necessary as his lordship has given an elaborate and exhaustive deliberation upon the same. The facts only which are necessary to be discussed in this context, would be addressed.

206. The cardinal question before us is whether even after the recommendation of the Chief Justice upon effective consultation to appoint a Judge under Article 95(1) of the Constitution the executive is left with the choice to drop any name so recommended by the Chief Justice to be appointed as the Judge of the Supreme Court under Article 95(1) of the Constitution.

207. Consequently, the provisions of the Constitution governing the appointment of Judges (Article 95), the appointment of Additional Judges of the Supreme Court (Article 98) together with the limitation of the power of the President under Article 48(3) have to be considered as they have significantly focused on the issue.

208. Inevitably, the interpretation of the above provisions in this context has to be made by taking recourse to the methods which are suggested by the Constitution itself to be followed in so doing. It has to be noted that the provisions of the Constitution as stated above are the outcome of the positive and cohesive thinking of the framers of the Constitution which they in their wisdom thought it proper to be incorporated in the Constitution in the manner as they exist in the Constitution to meet different situations, exigencies and requirements. Otherwise those provisions would not have been there.

209. Keeping primarily in mind what I have discussed let me now dwell upon the issue before me. The appointment of the Judges of both the Divisions of the Supreme Court by recommending and selecting names of the eligible persons apparently seems to be noble as it endeavors in the process of appointment to uphold the primacy of the Chief Justice of Bangladesh in the searching who are the best choice to become member of their own fraternity. Pertinently, it has to be mentioned that no implied limitation, can be applied while interpreting a written Constitution like ours when the limitations are clearly spelled out in the provision of the Constitution itself.

210. A rock solid basis of the Constitution requiring a very intrinsic interpretation is Article 48(3) and its proviso which has to be considered in this regard. Under Article 48(3) excepting the appointment of the Prime Minister and the Chief Justice, the President shall be acting in accordance with the advice of the Prime Minister. So the express Constitutional provision which limits the power of the President under Article 48(3) is unquestionable. Mr. Mahmudul Islam in his book 'Constitutional Law of Bangladesh' stated that-

> "Art. 48(3) provides that the question whether any, and if so what, advice has been tendered by the Prime Minister to the President shall not be inquired into by any court as it is politically undesirable to have a disclosure of the advice tendered. Because of this provision there can be no remedy in court if a President chooses to act without or against the advice of the Prime Minister. It is true that the possibility of impeachment for violating the Constitution will

> act as a deterrent, but "this fear in the world of political intrigues that are incidental to the game of power-politics, is not, after-all such an effective brake upon the designs of an irresponsible President." If the government produces the papers showing the advice tendered, the court may look into such papers and can come to its findings on the basis of such papers." India v. Jyoti Prakash, AIR 1971 SC 1093.

211. The power of the appointment of the Judges of the Supreme Court lies with the President who exercises the power within the limitations of Article 48(3) of the Constitution. The President appoints additional judges of the Supreme Court and the Judges of the Supreme Court under Articles 98 and 95 of the Constitution respectively. When the President is satisfied that the number of Judges of the Supreme Court should be increased he makes appointment. Before the Fourth Amendment of the Constitution, the Chief Justice was to be consulted while making the appointment of the Judges of the Supreme Court. Though the said provision of Constitution had been amended by the Fourth amendment ignoring consultation with the Chief Justice for the appointment of Judges even then the 'convention' of consulting with the Chief Justice before making any appointment of the Judges of the Supreme Court had been followed consistently. A deviation that happened in 1994 was cured forthwith reaffirming the convention as it used to be followed before. The fifteenth amendment, however, reproduced the provision of consultation with the Chief Justice in the matter of appointment of the judges of the Supreme Court.

212. While appreciating the core issue before us regard has to be taken whether Article 95(1) of the Constitution under which judges of the Supreme Court is appointed should be construed giving a strict interpretation employing a sense of rigidity or it should be interpreted and viewed with a liberal and flexible vision by taking into account some other related Constitutional Provisions and also from the perspective of some realities and unimpeachable circumstances.

213. My approach on the point is somewhat different. I would like to embark upon some express constitutional aspects having an indelible ingrained meaning and status universal in nature, to appreciate the entire issue facing us.

214. Let me first focus upon the different views taken by the superior Courts of home and abroad on the norms of the interpretation of the Constitutional provisions. It is generally said that the principles relating to interpretation of statutes are applicable in interpreting the provisions of Constitution. In the decision of Commissioner of Tax vs. Gulistan Cinema 28 DLR (AD) 14, Kemaluddin Hossain, J observed:

> "The rule of interpretation of the Constitution is same as the interpretation of a Statute."

215. In the case of Syed Ghulam Ali Shah V. State 22 DLR (SC) 247 M R Khan, J observed what should be the mode of interpretation of the Constitutional provisions in the following manner,

> "Now it is another well recognized cannon of interpretation that a provision of a Constitution Act should not be construed in a narrow or restricted sense, but widest possible construction should be given to it according to the ordinary meaning of the word used and each general word should be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in the same."

216. Same view was taken in Mohammad Nur Hussain -Vs- Province of East Pakistan PLD 1959 (SC) 470.

217. Mr. Mahmudul Islam, Senior Advocate, Supreme Court in his Constitutional Law of Bangladesh while giving his deliberation on liberal interpretation of the Constitution has found, "If two constructions are possible, the court shall adopt that which implements, and discard that which stultifies the apparent intention of the framers of the Constitution. The rule of strict construction applied to penal and fiscal statutes is not applicable in the matter of Constitutional interpretation. Constitutional enactment should be interpreted liberally and not in any narrow or pedantic sense".

218. Likewise Seervai in his 'Constitutional Law of India' on the same point found, "well established rules of interpretation require that the meaning and intention of the framers of a Constitution be it a parliament or a Constituent Assembly- must be ascertained from the language of that Constitution itself; Seervai further viewed that the golden rule in construing a Constitution conferring the most liberal construction should be put upon the words so that they may have effect in their widest amplitude."

219. In the famous case of A.K. Gopalan-V- State of Madras AIR 1950 (SC) 27, Justice B.K. Mukherjea expressed his view in the manner:

> "The Constitution must be interpreted in a broad and liberal manner giving effect to all its parts, and the presumption should be that no conflict or repugnancy was intended by its framers. In interpreting undoubtedly apply which are applicable in construing a statute, but the ultimate result must be determined upon the actual words used not in vaccuo but as occurring in a single complex instrument in which one part may throw light on the other."

220. In the land mark decision of S.C. Advocate-on-Record Association vs. Union of India reported in AIR 1994 (SC) 268 Supreme Court of India in an unambiguous term interpreted the provision of the Constitution. In that decision it was held that the general Rule governing statutory interpretation that statute should be read as having a fixed meaning, speaking from the date of enactment is not applicable in the case of Constitutional interpretation. It is undoubtedly that terms of the Constitution are to be interpreted by reference of their meaning when it was framed, but it does not mean that they are to be read as comprehending only such manifestation on the subject matter named as were known to the framer.

221. In that decision Justice S. Ratnavel Pandian observed:

> "The proposition that the provisions of the Constitution must be confined only to the interpretation which the framers, with the conditions and outlook of their time would have placed upon them would not be tenable and is liable to be rejected for more than one reason-firstly, some of the current issues could not have been foreseen; secondly, others would not have been discussed and thirdly, still others may be left over as controversial issues, i.e. termed as deferred issues with conflicting intentions. Beyond these reasons, it is not easy or possible to decipher as to what were the factors that influenced the mind of the framers at the time of framing the Constitution when it is juxtaposed to the present time. The inevitable truth is that law is not static and immutable but ever increasingly dynamic and grows with the ongoing passage of time."

222. Justice Kuldip Singh maintained,

> "It is not enough merely to interpret the Constitutional text. It must be interpreted so as to advance the policy and purpose underlying its provisions.

> A purposeful meaning, which may have become necessary by passage of time and process of experience, has to be given. The Courts must face the facts and meet the needs and aspirations of the times. Interpretation of the Constitution is a continual process. The institutions created thereunder, the concepts propounded by the framers and the words, which are beads in the Constitutional-rosary, may keep on changing their hue in the process of trial and error, with the passage of time. The Constitution has not only to be read in the light of contemporary circumstances and values, it has to be read in such a way that the circumstances and values of the present generation are given expression in its provisions."

223. Even Justice A.M. Ahmadi who delivered a dissenting judgment in that decision further made it clear,

> "The concern of the judiciary must be to faithfully interpret the Constitutional provisions according to its true scope and intent because that alone can enhance public confidence in the judicial system."

224. There is an interesting aspect to be noted here which is also relevant in the context. The Constitution of India was published on the 26th day of November 1949 and only a year after of the said publication the famous decision of A.K. Gopalan V. State of Madras AIR (1950) SC 27 was delivered wherein, as I have already discussed, the concept of liberal interpretation of the Constitution was propounded. To my utter surprise I find that even after 44 years of that decision the same concept of liberal interpretation of the Constitution remained unchanged as it could be found in the land mark decision of S.C. Advocate-on-Record V. Government of India AIR(1994) S.C. 268 which I have discussed.

225. In Ministry of Home Affairs V. Fisher reported in 3 All E.R. (1979) 21 their Lordships of the Privy Council observed,

> "This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of law respect must be paid to the language which has been used and to the traditions and usage which have given meaning to that language."

226. From its' inception the American Supreme Court felt that a Constitution must be given a treatment different from statutes and proceeded on liberal interpretation. In Mc. Culloch v. Maryland it observed, "We must never forget that it is a Constitution we are expounding" and went on to say that a Constitution is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. In the words of famous American legal scholar Roscoe Pound-

> "The Constitution is not a glorified police manual. Constitutional provisions lay down great principles to be applied as starting points for legal and political reasoning in the progress of society. A Constitution may lay down hard and fast rules such as, for example, those fixing the exact terms of office and apportioning duties among public functionaries. But the principles established by the Constitution are not to be interpreted and applied strictly according to the literal meaning of words used by the framers as if they laid down rules. Interpretation of Constitutional principles is a matter of reasoned application of rational precepts to conditions of time and place."

227. The American Constitution is treated to be the most rigid and inflexible Constitution.

228. Keeping in the back of mind what I have discussed let me now digress upon the

issue before me.

229. Comprehensive, integrated and holistic approach in propounding the legal principle enunciated in the cases of S.P Gupta and others vs. president of India and others, reported in AIR 1982 SC 149, S.C. Advocates-on-Record V. Union of India AIR 1994 SC 268, Bangladesh and others vs. Md. Idrisur Rahman, Advocate and others 29 BLD AD 79, Al-Jehad Trust Case PLD 1996 SC 324, Ragib Rauf Chowdhury vs. Government of Bangladesh and others 69 DLR 317 and so on are all awe-inspiring well founded concerted decisions having an epitome all its own. All of them preached the primacy of the Chief Justice in the process of appointment of the Judges. Since much elaborations upon all these decisions have already been given by my learned brothers I refrain from repeating those.

230. In Shanti Bhushan vs. Union of India 2009 1 SCC 657 Respondent was appointed as additional Judge with effect from 03.04.2003. However, in between, seven Additional Judges were appointed as permanent Judges on 27.07.2005 but the incumbent respondent was left out and was given extension as Additional Judge. The Supreme Court of India with disapproval of the aforesaid extension observed:

> "If a person is unsuitable to be considered for appointment as a permanent Judge because of circumstances and events which bear adversely on mental and physical capacity, character and integrity or other relevant matter rendering it unwise for appointing him as a permanent Judge, same yardstick has to be followed while considering whether any extension is to be given to him as an Additional Judge."

231. It was also observed:

> "As rightly submitted by learned Counsel for the Union of India unless the circumstances or events arise subsequent to the appointment as an Additional Judge, which bear adversely on the mental and physical capacity, character and integrity or other matters the appointment as a permanent Judge has to be considered in the background of what has been stated in S.P. Gupta's case (supra). Though there is no right of automatic extension or appointment as a permanent Judge, the same has to be decided on the touchstone of fitness and suitability (physical, intellectual and moral). The weightage required to be given cannot be lost sight of. As Justice Pathak J, had succinctly put it there would be reduced emphasis with which the consideration would be exercised though the process involves the consideration of all the concomitant elements and factors which entered into the process of consultation at the time of appointment earlier as an additional Judge. The concept of plurality and the limited scope of judicial review because a number of constitutional functionaries are involved, are certainly important factors. But where the constitutional functionaries have already expressed their opinion regarding the suitability of the person as an Additional Judge, according to us, the parameters as stated in para 13 have to be considered differently from the parameters of para 12. The primacy in the case of the Chief Justice of India was shifted because of the safeguards of plurality. But that is not the only factor. There are certain other factors which would render the exercise suggested by the petitioners impracticable. Having regard to the fact that there is already a full fledged participative consultation in the backdrop of pluralistic view at the time of initial appointment as Additional Judge or Permanent Judge, repetition of the same process does not appear to be the intention."

232. Article 95(1) of the Constitution in clear terms manifested consultation with the

Chief Justice before appointment of a judge under that Article. Effective consultation so to say primacy of the Chief Justice's recommendation in the process of appointment has been a well grained and unquestionable requirement but the fact remains what will be the situation if an appointment of a judge is hit by the positive prohibition under Article 95(2) regardless of the detection of the same at any point of time?

233. Article 95(2) provides:-

> "A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and–
> (a) has, for not less than ten years, been an advocate of the Supreme Court ; or
> (b) ……
> (c) has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court."

234. My brother Obaidul Hassan, J has given a thought provoking analysis of this issue in minute details and hence I am not required to cross swords on that. Harping on the same tune I would fortify that the aforesaid provision 95(2)(a) of ours, unlike Indian Constitution on the point (Article 217(2)(b)), is rigid and dogmatic.

235. Indian Constitution in this respect has given a relaxation incorporating Article 217(2) explanation (aa). In 1978 by 44th amendment act this provision was incorporated. It provides:-

> "in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate."

236. Since no such provisions has been attached in our Constitution in respect of Article 95(2)(a), the same cannot be stretched inducting any analogy enhancing its scope. The case of appellant ABM Altaf Hossain has certainly fall within the mischief of positive prohibition of Article 95(2) of the Constitution as hinted with approval by my brother Obaidul Hassan, J.

237. At the same time I also record that to uphold the primacy of the Chief Justice any legal lacuna or predicament which might have negate the appointment in any manner should have been brought to the notice of the Chief Justice at the earliest. Regrettably, that has not been done in the instant case. Recommendation of Chief Justice is certainly prime and sublime but at the same time if there is any inherent defect which has escaped notice of the Chief Justice because of mistake or otherwise the interpretation of the Constitution of ours to that extent is rigid.

238. Incumbent Appellant ABM Altaf Hossain's case has been assessed and evaluated with all the trappings of interpretation of the Constitution as discussed above and nothing is left unsaid.

239. Before parting I would record that with the lapse of time if the appellant has acquired qualification to be appointed as a Judge of the Supreme Court that may be considered by the authority favorably.

240. With the above observations, the Civil Appeal No. 232 of 2014 is hereby disposed of.

241. Civil petition for leave to appeal No. 602 of 2017 is also disposed of in the light of the observations as stated above. No order in respect of civil petition for leave to appeal No. 2680 of 2014 as it has been abated at the death of the sole petitioner.

242. Md. Abu Zafor Siddique, J: I have gone through the judgments proposed to be delivered by my learned brothers, Obaidul Hassan, J. and Jahangir Hossain, J. Having gone through the same, I find myself in agreement with the decision and findings arrived at by my learned brother, Jahangir Hossain, J. It is required to be mentioned that we have come to an unanimous decision of disposing of this appeal with the individual findings and observations of our own. Accordingly, I would like to write the judgment of my own since the points involve in this appeal are on the constitutional question of special importance with regard to the appointment of the Judges under article 95 of the Constitution on the consultation with the Hon'ble Chief Justice.

243. This civil appeal, by leave, is directed against the judgment and order dated 24.09.2014, passed by the High Court Division in Writ Petition No.7489 of 2014 summarily rejecting the same.

244. Facts, leading to this civil appeal, in short are as follows:

The appellant obtained L.L.B (Hon's) and L.L.M. Degree with First Class from the University of Rajshahi. He also obtained L.L.B (Hon's) from the University of Wolverhampton, U.K., Post Graduate Diploma in Professional and Legal Skills from Inns of Court School of Law, City University, London and after successful completion of Bar Vocational Course from the same University he was called to the Bar as a Barrister by the Hon'ble Society of Lincoln's Inn, London, UK. He also obtained Diploma in Human Rights with distinction from Humanist and Ethical Association of Bangladesh. He was enrolled with the Bangladesh Bar Council as an Advocate on 06.12.1998 and he was permitted to practice in the High Court Division on 18.06.2000 and thereafter, he was enrolled as an Advocate of the Appellate Division of the Supreme Court on 18.05.2011. He was appointed as a Deputy Attorney General for Bangladesh on 03.11.2010 and while serving as a Deputy Attorney General, he was appointed as an Additional Judge of the High Court Division of the Supreme Court of Bangladesh along with five other Additional Judges under article 98 of the Constitution vide Notification No.10. 00. 0000. 128. 011. 010. 2012-816 dated 13.06.2012 and accordingly, he was administered oath as such along with other five Judges on 14.06.2012.

245. It is further stated that as an Additional Judge of the High Court Division, the appellant performed his functions and discharged his duties with utmost sincerity, integrity, honesty and diligence as an oath-abiding Judge. On due consideration and evaluation of the performance rendered by the appellant as an Additional Judge, the Hon'ble Chief Justice recommended the names of all the six Additional Judges including the appellant for appointment as a Judge of the High Court Division of the Supreme Court of Bangladesh under article 95 of the Constitution by the Hon'ble President and such fact of recommendation by the Hon'ble Chief Justice has been widely published in the newspapers. However, it is stated that, to the utter surprise and disappointment, he came to know from the Gazette Notification No.10 .00 .0000. 128. 011. 010. 2012-472 dated 09.06.2014 by which the other five Additional Judges with whom he was appointed under article 98 of the Constitution have been appointed by the Hon'ble President under article 95 of the Constitution as Judges of the High Court Division excluding the name of the appellant.

246. In the circumstances, the appellant had filed the writ petition bringing the allegation of violation of articles 94 and 95 of the Constitution as well as the principle as settled by this Division in the case of **Bangladesh and others Vs. Idrisur Rahman, Advocate and others reported in 29 BLD (AD)79** for not appointing him as a Judge of the High Court Division

under article 95 of the Constitution despite the fact that the Hon'ble Chief Justice of Bangladesh who has legal acumen in this field and being empowered under the Constitution has recommended him along with other five *Judge*s to be appointed as a Judge under article 95 of the Constitution.

247. The High Court Division, upon hearing the parties and on perusal of the writ petition along with all connected papers annexed thereto, rejected the writ petition summarily by the judgment and order dated 24.09.2014.

248. Being aggrieved by and dissatisfied with the judgment and order dated 24.09.2014 passed in Writ Petition No.7489 of 2014 the writ petitioner-appellant herein filed Civil Petition for Leave to Appeal No.2626 of 2014 before this Division and obtained leave by order dated 06.11.2014 which gave rise to the instant civil appeal.

249. The points/grounds involved in this appeal on which leave was granted for determination and adjudication of the same run as follows:

I. *Whether Article 95(1) of the Constitution having expressly provided/stipulated that the Judges of the Supreme Court shall be appointed by the President after consultation with the Chief Justice, the opinion and recommendation resulting from and being a part of such consultation, the opinion/recommendation of the Chief Justice shall have/get primacy over the views and opinions of the Executive in the matter of the appointment of Judges, and the Chief Justice having recommended the writ-petitioner as Judge for confirmation and appointment under Article 95 of the Constitution, the dropping of the name of the petitioner from the Notification dated 06.06.2014 ignoring the opinion/recommendation of the Chief Justice without assigning any cogent reason is without lawful authority and a violation of the Constitution.*

II. *Whether the independence of judiciary as enshrined in our Constitution being a basic structure of our Constitution, which cannot be demolished or curtailed or diminished in any manner, and which basic structure cannot even be amended by the Parliament being beyond its amending power by reason of Article 7B of the Constitution, and there being no provision in the Constitution authorizing the President under Article 48(3) of the Constitution to curtail or diminish the said independence by ignoring the opinion/recommendation of the Chief Justice, non appointment of the writ-petitioner ignoring and bypassing the opinion of the Chief Justice is a violation of the basic structure of the Constitution and as such dropping his name from the Gazette Notification without cogent reason is without lawful authority and unconstitutional.*

III. *Whether the constitutional process being initiated by the executive, whose opinion in the matter of antecedents being already there, and the Chief Justice in the process of consultation having had the benefit of perusing and examining such opinion of the executive, the opinion of the Chief Justice recommending the writ-petitioner for appointment overruling/disregarding such executive opinion, there cannot be any cogent reason for dropping the name of the petitioner from the list of Judge to be appointed under Article 95, and as such, the impugned action is without lawful authority and unconstitutional.*

IV. Whether the case in question is not only a matter of an individual petitioner not having been appointed under Article 95 of the Constitution bypassing the recommendation of the Chief Justice, but it also raises the important constitutional question centering around the constitutional pole and exalted position and office of the Chief Justice as head of the judiciary, and meaning of consultation being effective and meaningful, the disregard without cogent reasons of the opinion/recommendation of the Chief Justice is tantamount to not only a violation of the Constitution but also reducing and diminishing the power, position and role of the Chief Justice under the Constitution.

V. Whether Ten Judges case as reported in 29 BLD(AD)page 79 having contained anomaly and inconsistency touching upon the obiter dicta and ratio decidendi of the case, and there being an observation in the impugned judgment of the High Court Division that the Judges of the Appellate Division was silent on the question of difference of opinion between the Chief Justice and Executive, thereby leaving no way out to resolve the issue by the High Court Division, in this case particularly having regard to the findings of the Appellate Division in Ten Judges case that the opinion of the executive will have dominance in the matter of antecedent, the findings in Ten Judges case ought to be re-examined and revisited for the sake of clear and unambiguous pronouncement from this Division clarifying the said judgment, law and the Constitution."

250. The learned Advocates appearing on behalf of the appellant made submissions based on the grounds as quoted hereinabove on which leave was granted to consider the same.

251. Referring to the decision in the case of **Bangladesh and others Vs. Md. Idrisur Rahman and others reported in 29 BLD (AD) 79** the learned Attorney General along with the learned Additional Attorney General appearing on behalf of the respondents submit that since, the opinion of the executive will have dominance in the matter of antecedents of a candidate (judge) and since, the antecedent of the appellant was not satisfactory, the Hon'ble President rightly did not appoint the appellant as a permanent judge of the High Court Division under article 95 of the Constitution and as such, the High Court Division rightly rejected the writ petition summarily and the same does not call for any interference by this Division.

252. Heard the learned Advocates and the learned Attorney General, along with learned Additional Attorney General and perused the writ petition along with the impugned judgment and papers annexed thereto and also the constitutional provisions and the concerned decisions placed by the parties.

253. Regarding the first point which is for adjudication by us is as to whether the opinion and recommendation of the Chief Justice shall have primacy over the views and opinions of the Executive in the matter of appointment of Judges. In order to appreciate this point, it is apposite to consider the Constitutional provisions relating to consultation such as articles 95(1), 98, 116, 116A and the decisions of Masdar Hossain's case.

254. Article 95(1) of the Constitution before its amendment in 1975 was as under:

"The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice."

255. After its amendment in 1975, article 95(1) runs as follows:

"The Chief Justice and the other Judges shall be appointed by the President."

256. Thus it is clear that the expression "after consultation with the Chief Justice" is no more there in article 95(1) of the Constitution.

257. Again, article 98 of the Constitution before it's amendment in 1975 was as under:-

"*Notwithstanding the provisions of article 94, if the President is satisfied, after consultation with the Chief Justice, that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period;*

Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article."

258. After it's amendment in 1975, article 98 of the Constitution is as under:-

"*Notwithstanding the provisions of article 94, if the President is satisfied that the number of the Judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be Additional Judges of that division for such period not exceeding two years as he may specify, or if he thinks fit, may require a Judge of the High Court Division to sit in the Appellate Division for any temporary period as an Ad hoc Judge and such Judge while so sitting, shall exercise the same jurisdiction, power and functions as a Judge of the Appellate Division;*

Provided that nothing in this article shall prevent a person appointed as an Additional Judge from being appointed as a Judge under article 95 or as an Additional Judge for a further period under this article."

259. However the expression "consultation" is still there in article 116 of the Constitution which provides that the control and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court.

260. The expression 'consultation' has been dealt with and considered in the case of **Secretary, Ministry of Finance Vs. Md. Masdar Hossain reported in 20 BLD (AD) 104** wherein it has been held that, "*under article 116 the views and opinion of the Supreme Court on any matter covered by that article shall get primacy over the views and opinion of the executive*."

261. It is true that 'consultation' was considered in the light of article 116 of the Constitution but, nevertheless the same principle is being applied in the matter of appointment of Judges of the Supreme Court under articles 98 and 95 of the Constitution because without the independence of the Supreme Court there cannot be any independence of the subordinate courts and without consultation and primacy, the separation of judiciary from the executive will be empty words. The principle of consultation with primacy of opinion of the Chief Justice is no longer res-integra and being an integral part of independence of judiciary the same is inherent in the very scheme of the Constitution. There has been unbroken and continuous convention of consultation with the Chief Justice in the matter of appointment of Judges.

262. In the case of **S.P. Gupta and others Vs. President of India and others reported in AIR 1982(SC)149, Supreme Court Advocates-on-Record Association Vs. Union of**

India reported in AIR 1994 page 269 and Special Reference No.1 of 1998 and Al-Jehad Trust Vs. Federation of Pakistan reported in PLD 1996 Vol. 1 page 324 it has been settled that, "*consultation with the Chief Justice is a pre-requisite and the opinion of the Chief Justice shall have primacy."*

263. From the above, it is clear that consultation with the Chief Justice in the matter of appointment of Judges with its primacy is an essential part of the independence of judiciary.

264. In the case of **Bangladesh and others Vs. Md. Idrisur Rahman, Advocates and others reported in 29 BLD(AD)79** it has been held that, *"in the matter of selection of the Judges the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment and in the area of antecedents the opinion of the executive should be dominant.*"

265. In such view of the matter, I am of the opinion that the Chief Justice and the executive should function together to find out the most suitable candidates available for appointment through a transparent process of the Constitution. The duty of all organs of the state is that the public trust and confidence in the judiciary may not go in vain. We have no doubt that every constitutional functionary and authority involved in the process is as much as we are to find out the true meaning and importance of the scheme envisaged by the relevant constitutional obligations avoiding transgression of the limits of the demarcated power.

266. Regarding the point as to whether the independence of judiciary as enshrined in our Constitution is a basic structure of the Constitution and whether the same can be amended, curtailed or diminished in view of article 7B of the Constitution, in this respect the Appellate Division in the Ten Judges case held that, "*independence of judiciary affirmed and declared by the Constitution is a basic structure of the Constitution and cannot be demolished or diminished in any manner."*

267. However, with regard to the constitutional provisions of article 48(3) and 55(2) of the Constitution, this Division in the case of **Bangladesh and others Vs. Md. Idrisur Rahman, Advocates and others reported in 29 BLD (AD) 79** has discussed in details.

268. So far the point as raised in ground No.V of this appeal the decision of the Ten Judges Case is very clear and unambiguous and as such, the same guaranteed no interference by this Division in the present case.

269. However, I would like to conclude with the same remark relying on the findings given by my learned brother Jahangir Hossain, J regarding consideration of the case of the appellant to appoint him as Judge under article 95(1) of the Constitution.

270. It is evident from the record that dropping the name of the appellant from being appointed as a permanent Judge took place on 09.06.2014. Since we do not find any antecedent against the appellant and since his other qualifications find support the case of the appellant namely A.B.M. Altaf Hossain who may be considered to be appointed under article 95(1) of the Constitution as permanent Judge in the High Court Division in the light of the above observations.

271. With the above observations, the Civil Appeal No.232 of 2014 is hereby disposed of.

272. Civil Petition for Leave to Appeal No.602 of 2017 is hereby disposed of in the light of the observation as stated above. No order in respect of Civil Petition for Leave to Appeal No.2680 of 2014 as it has been abated at the death of the sole petitioner.

273. **Jahangir Hossain, J:** I have gone through the judgment of my learned brother, Obaidul Hassan, J. Though I am in respectful agreement with some of the points arrived at by him, yet having regard to the important constitutional points involved in the case, I would like to give my own reasons for those points and would also add some of my opinions on a few other points.

274. The facts of the case have already been narrated in details in the main judgement. Hence, I would not repeat on the same facts. In the instant civil appeal, non-appointment of a Judge of the High Court Division has been challenged and called in question on the ground that the appellant has not been appointed under Article 95 of the constitution of the People's Republic of Bangladesh [hereinafter referred to as the Constitution] despite the consultation and recommendation of the Chief Justice.

275. The High Court Division summarily rejected the writ petition of the appellant on the ground of **Bangladesh and others-Vs-Idrisur Rahman, widely known as ten Judges' case, reported in 29BLD(AD)79** in which the outcome of the event of the recommendation of Chief Justice conflicting with decision of the Executive was not stated. This means the opinion or recommendation of the Chief Justice has primacy in the matter of appointment of such Judges or not. Apart from this, an additional Judge has a right to a writ of mandamus to secure his appointment as a permanent Judge of the High Court Division of the Supreme Court of Bangladesh.

276. According to Article 148 (1) of the constitution, a person elected or appointed to any office in 'Third Schedule' shall before entering upon the office make and subscribe an oath or affirmation [in the article referred to "an oath"] in accordance with that Schedule. The third schedule of the Constitution provides that 'Chief Justice or Judges. An oath [or affirmation] in the following forms shall be administered, in the case of Chief Justice by the President, and in the case of a Judge appointed to a Division by the Chief Justice, which is shown as follows:

> "I, ……, having been appointed Chief Justice of Bangladesh (or Judge of the Appellate/High Court Division of the Supreme Court) do solemnly swear (or affirm) that I will faithfully discharge the duties of my office according to law; That I will bear true faith and allegiance to Bangladesh: That I will preserve, protect and defend the Constitution and the laws of Bangladesh: And that I will do right to all manner of people according to law, without fear or favour, affection or ill-will."

277. Generally in Bangladesh any oath ceremony occurs in the form of our national language so that every citizen of the country could understand the meaning and spirit of the sacred oath, which is quoted below:

> "৬। **প্রধান বিচারপতি বা বিচারক।**-প্রধান বিচারপতির ক্ষেত্রে রাষ্ট্রপতি কর্তৃক এবং সুপ্রীম কোর্টের কোন বিভাগের কোন বিচারকের ক্ষেত্রে প্রধান বিচারপতি কর্তৃক নিম্নলিখিত ফরমে শপথ (বা ঘোষণা)-পাঠ পরিচালিত হইবেঃ
>
> আমি . . .. , প্রধান বিচারপতি (বা ক্ষেত্রমত সুপ্রীম কোর্টের আপীল/হাইকোর্ট বিভাগের বিচারক) নিযুক্ত হইয়া সশ্রদ্ধচিত্তে শপথ (বা দৃঢ়ভাবে ঘোষণা) করিতেছি যে, আমি আইন-অনুযায়ী ও বিশ্বস্ততার সহিত আমার পদের কর্তব্য পালন করিবঃ
>
> আমি বাংলাদেশের প্রতি অকৃত্রিম বিশ্বাস ও আনুগত্য পোষণ করিব;

আমি বাংলাদেশের সংবিধান ও **আইনের রক্ষণ**, সমর্থন ও নিরাপত্তাবিধান করিব;

এবং আমি ভীতি বা অনুগ্রহ, অনুরাগ বা বিরাগের বশবর্তী না হইয়া সকলের প্রতি আইন-অনুযায়ী যথাবিহিত আচরণ করিব।"

.....

278. Similar to the oath of Hon'ble President, Hon'ble Prime Minister and other Ministers, need to preserve, protect and defend the Constitution. In addition, Judges also need to preserve, protect and defend the Constitution and **the laws of Bangladesh** by their oath. So, it is very important to bear in mind that the Judges have to do justice but in accordance with law, nothing less, nothing more. Political regimes might change, the Judges might change but the judgment given by a Judge would remain constant.

279. However, it is needed to be reiterated that in the Article 48(3) and 52(2) of the Constitution has been elaborately discussed in the main judgement of the case wherefrom it reminds to me that in the case of **Raghib Rauf Chowdhury-Vs-Bangladesh, 69 DLR 317** in which it was held that:

> *"46. The eligibility of the Judges has been mentioned in the Article 95(2). In spite of that the petitioner by filing this writ petition wanted to give a guideline how the persons who are in the helm of affairs should act and what should be a criterion for the persons to be recruited in the higher judiciary. Since the opinion of the Chief Justice has been made mandatory for the executive, presumably it can be said that the Chief Justice being the head of the judiciary, one of organs of the State will recruit the proper persons in the higher judiciary having proper legal background, i.e.* ***sufficient knowledge of law, man of dignity and integrity****. The petitioner's submission is that for the sake of independence of judiciary the recruitment process of the Judges of the higher judiciary must be free from all political influences. It is his apprehension that since vide Article 48(3) of the Constitution there is a provision to take advice from the Prime Minister, the President is bound to listen his/her advice, thus there might be political influence in the process of recruitment of the Judges in the higher judiciary. In this regard Mr. Justice Abdul Matin in the case of* ***Bangladesh-Vs-Md. Idrisur Rahman Advocate reported in 29BLD(AD)79*** *has said that "therefore the expression" independence of judiciary" is also no longer res-integra rather has been authoritatively interpreted by this Court when it held that it is a basic pillar of the Constitution and cannot be demolished or curtailed or diminished in any manner accept[sic] and under the provision of the Constitution.* ***We find no existing provision of the Constitution either in Articles 98 and 95 of the Constitution or any other provision which prohibits consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the Constitution. The Prime Minister in view of Article 48(3) and 55(2) cannot advise contrary to the basic feature of the Constitution so as to destroy or demolish the independence of judiciary. Therefore, the advice of the Prime Minister is subject to the other provision of the Constitution that is Article 95, 98, 116 of the Constitution."***
>
> ***[underline of mine is given for emphasis]***

280. The aforesaid view of the case has been approved by the Appellate Division in Civil Petition No.2805 of 2017 by order dated 06.12.2020 dismissing the leave petition. Since it is

approved by the Apex Court, no question of primacy or supremacy of the two organs of the State makes any confrontation with regard to the appointment of Judges of both the Divisions of the Supreme Court of Bangladesh. Since both the organs are highly correlated there is no scope for any conflict. If there is any difference of opinion, it can be mutually solved quite easily without raising any issue in public. Here it is needed to be said that unless the law is enacted by the Parliament for appointment of Judges in the higher judiciary, the process of initiating the appointment of a Judge under Articles 95 and 98 of the Constitution should be done by direct effectuation. In the history of judiciary of Bangladesh from 1972 till date this conflict was raised numerously. No solution has yet been found.

281. From the experience, it is often heard that the Chief Justice gave recommendations for the position of the Judges but subsequently he withdrew those recommendations without any reasons to be recorded. It is also evident that there were instances when the Chief Justice gave recommendations for the appointment of Judges which was duly hounored by the appropriate Appointing Authority, however, subsequently no oath had taken place by the same Chief Justice. There is no logical reason for such occurrences to happen. However, selection by the Chief Justice which means recommendation and final decision by the appropriate Appointing Authority needs to occur directly if there is any adverse antecedent to any candidate. Such matters can be resolved prior to giving any appointment by the appropriate authorities concerned.

282. During hearing of this appeal, we have perused a file placed by the learned Attorney General in a chamber exclusively wherefrom we did not find any adverse antecedent of the appellant. Rather we found that the appropriate Appointing Authority did not give him appointment as permanent Judge together with five other Judges. As per Article 48(3) of the Constitution, there is no scope to raise any question whether any, and if so, what advice has been tendered by the Hon'ble Prime Minister to the Hon'ble President to be enquired into in any court. Here the empowerment of the court is not enforceable to direct the authority concerned to execute any order of this court. Rather the compassion of the appropriate authority may give rise to the appointment of the appellant. According to the aforementioned discussions and in the light of observations made in the case of **Bangladesh and others-Vs-Md. Idrisur Rahman, Advocate and others reported in 29BLD(AD)79**, the writ of mandamus sought by the appellant can be sustained.

283. During hearing, the submission of the respondent as to the appellant's eligibility under Article 95(2)(a) of our Constitution has been brought into question. It is doubtful whether the respondents have any legal scope to question the eligibility of the appellant under Article 95(2)(a) of the Constitution. Inasmuch as there is nothing about this in the respondent's concise statement, however, Order XIX, Rule 3 of the Appellate Division Rules provides that:

> *"3. No party to an appeal shall be entitled to be heard by the court unless he has previously lodged his concise statements."*

284. From the above Rule, it follows by implication that the grounds not taken/pleaded in the concise statement cannot be agitated in the hearing of the appeal. The concise statement on behalf of respondent No.01 clearly shows that no such ground was taken therein. However, since it is raised by the respondent's submission, let us discuss about the qualification/eligibility for appointment of a Judge in the High Court Division of the Supreme Court throughout the Subcontinent.

285. Article 193(2) of the Islamic Republic of Pakistan Constitution stipulates that:

"193. (1) A Judge of a High Court shall be appointed by the President after consultation-

(a) .....

(b) .....

(c) .....

(2) A person shall not be appointed a Judge of a High Court unless he is a citizen of Pakistan, is not less than [forty-five years] of age, and

(a) he has for a period of, or for periods aggregating, not less than ten years been an advocate of a High Court (including a High Court which existed in Pakistan at any time before the commencing day); or

(b) he is, and has for a period of not less than ten years been, a member of a civil service prescribed by law for the purposes of this paragraph, and has, for a period of not less than three years, served as or exercised the functions of a District Judge in Pakistan; or

(c) he has, for a period of not less than ten years, held a judicial office in Pakistan.

[*Explanation.*-In computing the period during which a person has been an advocate of a High Court or held judicial office, there shall be included any period during which he has held judicial office after he became an advocate or, as the case may be, the period during which he has been an advocate after having held judicial office.]

(3) ....."

286. Pakistan is an Islamic country as per their Constitution. Article 193(2) of the Pakistan Constitution discusses that a person should not be appointed as a Judge of the High Court unless he is a citizen of Pakistan, is not less than 45 years of age and he must be an Advocate for a period **aggregating not less than 10 years**. This means the total period of his practice would be counted or he has for a period of not less than 10 years held a judicial office in Pakistan.

287. In the Indian Constitution, Article 217(2) the following is extracted below:

"217. (1) .....

Provided that -

(a) .....

(b) .....

(c) .....

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and -

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least **ten years been an advocate** of a High Court[* * *] or of two or more such Courts in succession;

(c) [* * *]

Explanation.-For the purposes of this clause-

(a)
(aa)
(b)
(3) ....."

288. From the said Article, it is disclosed that the qualification for appointment as a Judge of the High Court should be a citizen of India and at least held a judicial office for a period of 10 years in the territory of India. Or the candidate must have **been an Advocate of a High Court for 10 years** or of two or more such courts in succession. Hence there is no question of aggregation in the Constitution of India.

289. Article 95(2)(a) of our Constitution provides that "*95(2)(a) a person should not be qualified for appointment as a judge unless he is a citizen of Bangladesh and- (a) has, **for not less than 10 years been an Advocate** of the Supreme Court."*

290. It is cardinal principle of interpretation that the words of a statute must not be overruled by the Judges, but reform of the law must be left in the hand of the Parliament. Application of this principle can be used in the interpretation of Constitution since Constitution is the highest law of the country and the words used in the constitution can never be changed or altered.

291. Definition in section 3(2a) of the General Clauses Act, 1897 has to be applied for the reason that Article 152(2) of the Constitution provides-

"(2) The General Clauses Act, 1897 shall apply in relation to-
(a) this Constitution as it applies in relation to an Act of Parliament;"

292. Section 3(2a) of the General Clauses Act, 1897 contemplates-

"(2a) "Advocate" means a person enrolled as such under the Bangladesh Legal Practitioners and Bar Council Order, 1972 (P.O. No.46 of 1972)"

293. Definition of "Advocate"-

Article 2(a) of The Bangladesh Legal Practitioners and Bar Council Order, 1972 [P.O. No.46 of 1972] defines-

"2.(a) "advocate" means an advocate entered in the roll under the provisions of this Order;"

294. "Roll" of the Advocate is defined-

"2.(h) "roll" means the roll of advocates prepared and maintained by the Bar Council;"

295. To construe the word "Advocate" employed in Article 95(2)(a) of the Constitution.

The words in Article 95(2)(a) of the Constitution are- "**been an Advocate**".

296. The word "practicing" has not been mentioned anywhere in this Article. According to accepted principles and rules of interpretation, it cannot be presumed that the word "Advocate" as used in the Constitution meant "Practicing Advocate." To read the word "practicing" before the word "Advocate" in Article 95(2)(a) would mean adding something to

the Constitution that is not already there and would amount to replacing the wisdom of the Constitution's framers, who were elected leaders of our War of Liberation in our nation with our own wisdom. This is completely unacceptable.

297. This argument finds support from the case of **Mahesh Chandra Gupta-Vs-Union of India, (2009) 8 SCC 273**, the Indian Supreme Court shown as follows-

> "38. Whether "actual practise" as against "right to practice" is the "practice" is the prerequisite constitutional requirement of the eligibility criteria under Article 217(2)(b) is the question which we are required to answer in this case.
>
> **50. Before concluding on this point, we may state that the word "standing" connotes the years in which a person is entitled to practise and not the actual years put in by a person in practice. [See Halsbury's Laws of England, 4th Edn. Reissue, Vol.3(1), Paras 351 and 394 of the Chapter under the heading "Barristers"]. Under Section 220(3)(a) of the Government of India Act, 1935, qualifications were prescribed for appointment as a Judge of a High Court. A barrister of at least ten years' standing was qualified to be appointed as a Judge of the High Court. As stated above, the word "standing" connotes the years in which a person is entitled to practise, not the actual years put in by that person in practise.**
>
> 52. The said expression was placed in the Constitution at a time when the practice of advocates was governed by the Indian Bar Councils Act, 1926. Section 2(4)(a) of that Act defined an "advocate" to mean "an advocate entered in the roll of advocates of a High Court under the provisions of this Act. Section 8 provided that:
>
> > "8. Enrolment of advocate.-(1). No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the advocates of the High Court maintained under this Act."
>
> **66. Thus, it becomes clear from the legal history of the 1879 Act, the 1926 Act and the 1961 Act that they all deal with a person's right to practise or entitlement to practise. The 1961 Act only seeks to create a common Bar consisting of one class of members, namely, advocates. Therefore, in our view, the said expression "an advocate of a High Court" as understood, both, pre and post 1961, referred to person(s) right to practise. Therefore, actual practise cannot be read into the qualification provision, namely, Article 217(2)(b). The legal implication of the 1961 Act is that any person whose name is enrolled on the State Bar Council would be regarded as "an advocate of the High Court". The substance of Article 217(2)(b) is that it prescribes an eligibility criteria based on "right to practise" and not actual practice."**

298. Relying on **Mahesh Chandra Gupta-Vs-Union of India, (2009) 8 SCC 273**, the Delhi High Court in DK Sharma-Vs-Union of India, shown as follows-

> "9. The Supreme Court elaborately dealt with the aforesaid contention and has held that "entitlement to practice" is sufficient to meet the requirements of Article 217(2)(b). The Supreme Court has made specific reference to the difference in language of clauses 1 and 2 to Article 217. It has been held that Article 217(1) has a clause relating to "suitability" or "merits", whereas Article 217(2) has a clause relating to "eligibility requirements or qualification" and does not deal with "suitability" or "merits". The provisions of the Advocates Act, 1952, etc, entitle a person to practise in any High Court and for purpose mere enrolment is sufficient."

299. The respondent's reliance in this regard on Al-Jehad Trust-Vs-Federation of Pakistan, PLD 1996 SC 324 is untenable. As Article 193(2)(a) of Pakistan's Constitution, 1973 in employing the word "aggregating" by implication connotes the actual length of practice which is not in our Constitution and Indian Constitution.

300. The appellant's permission to practice in the Supreme Court was not suspended or kept in abeyance during that time, which is sometimes done under the provisions of Articles 3, 2(g) of The Bangladesh Legal Practitioners and Bar Council Order, so to subtract the time spent to be a Barrister from the period from permission to practice in the High Court Division on 18.06.2000 to appointment as an Additional Judge on 13.06.2012 is utterly misguided.

301. Unexpectedly, the respondent claimed that it was unclear whether the Chief Justice had issued any recommendation. This submission is to be rejected outright because there is no such contention in the concise statement, it appears from the leave granting order that the learned Attorney General[late] did not make any submission questioning the recommendation, and there was a specific averment regarding the recommendation in paragraphs 8, 9 and 10 of the writ petition [pp.36-40], and it has already been submitted for the appellant that the same person recommending the appellant presided over the Court while granting leave.

302. Furthermore, the learned Additional Attorney General argued emphatically and frequently that the judges engaged in the matter of the 10 Judges' Case received widespread press coverage for the Chief Justice's recommendations, despite the fact that they were not named as permanent judges. According to the writ petitioner's Annexure-F series (pp. 81–85), it is clear that the Hon'ble Chief Justice offered recommendations about the appellant and five other Additional Judges in this matter as well. Last but not least, the Chief Justice who recommended the appellant sat over the Bench granted leave in this instance. Therefore, it is clear that a suggestion was made. If such were the case, leave could not be given.

303. The outcome of the current appeal will have a significant impact on the rule of law and the independence of the judiciary, which are the two fundamental structural pillars of our Constitution and our constitutional system, respectively. In light of this, the appellant respectfully argued that this appeal merits being allowed to achieve the greater goal of ensuring rule of law and independence of judiciary.

304. In the case of **Bangladesh and others-Vs-Idrisur Rahman, 29 BLD (AD) 79** widely known as ten Judges' Case, where it was held that:-

> *"The process by which Judges are appointed is therefore key to both the reality and the perception of independence. The whole scheme is to shut the doors of interference against executive under lock and key and therefore prudence demands that such key should not be left in possession of the executive."*

305. The appellant obtained first class in the examination of Masters' of Law from the University of Rajshahi and was admitted to the bar on December 6, 1998, was given permission to practice law in the High Court Division on June 18, 2000, and was admitted to the Supreme Court of Bangladesh's Appellate Division on May 18, 2011. It is also clear from the record that on April 20, 2009, the appellant was appointed as Bangladesh's Assistant Attorney General during the current government regime. On 3 November 2010, he was

promoted to the position of Deputy Attorney General for Bangladesh as a result of his improved performance as an Assistant Attorney General. He was raised to the High Court Division as an Additional Judge together with 5 others by a notification dated 13.06.2012, and he took the oath of office on 14.06.2012, while holding the position of Deputy Attorney General. During the Regime of present Government, no question of any eligibility or on the period of practice was raised. According to the documents submitted before the Court that the appellant believes in the spirit of the war of liberation.

306. The above disclosure finds exact support from the case of **Raghib Rauf Chowdhury-Vs-Bangladesh, reported in 69 DLR,317** where it was held in Paras: 54 and 54(a) that:-

> *"In view of the deliberation made herein above and to respond to the public aspiration the existing selection process could be made more effective, improved, transparent and realistic by taking the following matters into account as 'eligibility criteria', if considered appropriate and rational by the Honourable Chief Justice before he moves on to recommend a person or the pool of persons for appointment as Judge or Judges of the High Court Division, having regards to the provisions envisaged in Article 95(2) of our Constitution:*
>
> (a) a person, a citizen of Bangladesh having sincere allegiance to the fundamental principles of the State Policy, i.e., nationalism, socialism, democracy and secularism as mentioned in Article 8 of the Constitution and also the spirit of the war of liberation through which the nation achieved its independence in 1971. A person should not be recommended for appointment if his antecedent does not appear balanced with the above principles and the spirit;"

307. It is evident that non-appointment of the appellant as permanent Judge took place on 09.06.2014. In the meantime, long time he passed with the agony of question of eligibility as a Judge. And his other qualifications find support from the case of **Raghib Rauf Chowdhury-Vs-Bangladesh**. Under such circumstances, the appropriate appointing Authority may reconsider the case of the appellant, A.B.M.Altaf Hossain to be appointed as permanent Judge in the High Court Division in the light of above observations.

308. With the above observations, the Civil Appeal No.232 of 2014 is hereby disposed of.

309. Civil Petition for Leave to Appeal No.602 of 2017 is hereby disposed of on the ground that the petitioner has become under the age of 67 set out in our Constitution.

310. No order in respect of Civil Petition for Leave to Appeal No.2680 of 2014 as it has been abated at the death of the sole petitioner.

COURT'S ORDER

311. We, therefore, sum up as under:

(a) The Chief Justice of Bangladesh in exercise of his functions as consultee shall take aid from the other senior Judges of the Supreme Court at least with two senior most Judges of the Supreme Court before giving his opinion or recommendation in the form of

consultation to the President.

(b) In the light of the observations made in S.P. Gupta, Ten Judges' cases, and the article mentioned in paragraph-17, it is evident that in case of appointment of a Judge of the Supreme Court under Articles 95 and 98 of the Constitution the opinion of the Chief Justice regarding legal acumen and professional suitability of a person is to be considered while the opinion of the Prime Minister regarding the antecedents of a person is also to be considered. If divergent opinions from either side of the two functionaries of the state occur the President is not empowered to appoint that person as Judge. The opinion of any functionary will not get primacy over the others.

(c) If any bad antecedent or disqualification is found against any Additional Judge, who is under consideration of the Chief Justice to be recommended for appointment under the provision of Article 95 of the Constitution, it is obligatory for the executive to bring the matter to the notice of the Chief Justice prior to the consultation process starts.

(d) After recommendation is made by the Chief Justice to the President, even if, at that stage it is revealed that antecedent of any recommended candidate is not conducive to appoint him as a Judge under Article 95 of the Constitution, it shall be obligatory for the executive to send the file of that Additional Judge or the person, back to the Chief Justice for his knowledge, so that the Chief Justice can review his earlier recommendation regarding the such candidate.

(e) If the Chief Justice again (2^{nd} time) recommends the same Judge/person for appointment under Article 95, whose antecedent has been placed before him for reconsideration, this Court expects that, the President of the Republic would show due respect to the latest opinion of the Chief Justice.

312. With the above observations, the Civil Appeal No. 232 of 2014 and Civil Petition for Leave to Appeal No. 602 of 2017 are disposed of.

313. The Writ Petition No. 7489 of 2014 filed by the appellant A.B.M.Altaf Hossain and Writ Petition No. 1948 of 2017 filed by the petitioner Md. Farid Ahmed Shibli were maintainable (by majority view).

314. The concerned authority may consider the case of the appellant A.B.M. Altaf Hossain.

315. No order in respect of Civil Petition for Leave to Appeal No. 2680 of 2014 as it has been abated at the death of the sole petitioner.

19 SCOB [2024] AD 96

APPELLATE DIVISION

Present:
Mr. Justice Hasan Foez Siddique, Chief Justice
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim

CIVIL APPEAL NOS.135-137 OF 2012 AND 443 OF 2016
WITH
CIVIL PETITION FOR LEAVE TO APPEAL NOS.1386, 1936 & 1128 OF 2012, 377 OF 2013 AND 1637 OF 2014.

(From the judgment and orders dated 13.02.2012, 13.05.2012, 14.08.2012 and 20.04.2014 passed by the High Court Division in Writ Petition Nos.8904 of 2011, 157 of 2012, 9263 of 2011 and 14864 of 2012 respectively).

Grameenphone Ltd., represented by its Deputy General Manager Mr. Md. Abdul Hannan.	**:**	**.....Appellant. (In C.A. No.135 of 2012)**
National Board of Revenue (NBR), represented by its Chairman, Revenue Building, Segunbagicha, Dhaka.	**:**	**.....Appellant. (In C.A. No.136 of 2012)**
Bangladesh Telecommunication Regulatory Commission (BTRC), represented by its Chairman, IEB Bhaban, Ramna, Dhaka-1000.	**:**	**.....Appellant. (In C.A. No.137 of 2012)**
Government of Bangladesh, represented by the Secretary, Ministry of Finance, Internal Resources Division, Bangladesh Secretariat, Ramna, Dhaka and others.	**:**	**....Appellants. (In C.A. No.443 of 2016)**
Md. Shafiqul Karim and others.	**:**	**...Petitioners. (In C.P. No.1128 of 2012)**
Orascom Telecom Bangladesh Limited.	**:**	**....Petitioner. (In C.P. No.377 of 2013)**
Banglalink Digital Communications Limited.	**:**	**....Petitioner. (In C.P. No.1637 of 2014)**
Axiata (Bangladesh) Ltd. @ Robi Axiata Ltd.	**:**	**....Petitioner. (In C.P. No.1936 of 2012)**
Telenor Mobile Communications As, represented by Per Erik Hylland, Bangladesh Country Manager.	**:**	**....Petitioner. (In C.P. No.1386 of 2012)**

-Versus-

Bangladesh Telecommunication Regulatory Commission, represented by its Chairman, IEB Bhaban, Ramna, Dhaka-1000 and others.	**:**	**....Respondents. (In C.A. No.135/12, C.P. Nos.1128/12,377/13,1386/201)**
Grameenphone Ltd., represented by its Deputy General Manager Mr. Md. Abdul Hannan and others.	**:**	**....Respondents. (In C.A. Nos.136-137/12)**
Axiata (Bangladesh) Ltd. @ Robi Axiata Ltd. and another.	**:**	**....Respondents. (In C.A. No.443 of 2016, C.P. No.1936 of 2012)**

Government of Bangladesh, represented by the Secretary, Ministry of Finance, Internal Resources Division, Bangladesh Secretariat, Ramna, Dhaka and others. : **....Respondents.** **(In C.P. No.1637/2014,1936/2012)**

For the Appellant. (C.A. No.135 of 2012) : Mr. Mustafizur Rahman Khan, Advocate instructed by Mr. Mvi. Md. Wahidullah, Advocate-on-Record.

For the Appellant. (C.A. No.136 of 2012) : Mr. Sk. Md. Morshed, Additional Attorney General (with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General and Mr. Sayem Mohammad Murad, Assistant Attorney General, Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Mr. Haridas Paul, Advocate-on-Record.

For the Appellant. (C.A. No.137 of 2012) : Mr. Khandaker Reza-E-Raquib, Advocate (with Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For the Appellant. (C.A. No.443 of 2016) : Mr. A. M. Amin Uddin, Attorney General (with Mr. Sk. Md. Morshed, Additional Attorney General, with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Mr. Haridas Paul, Advocate-on-Record.

For the Petitioner. (C.P. No.1128 of 2012) : Mr. A. F. Hassan Ariff, Senior Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For the Petitioners. (C.P. No.377 of 2013 & 1637 of 2014) : Mr. Md. Asaduzzaman, Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For the Petitioner. (C.P. No.1936 of 2012) : Mr. Tanjib-ul Alam, Senior Advocate instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.

For the Petitioner. (C.P. No.1386 of 2012) : Mr. Ramjan Ali Sikder, Advocate instructed by Ms. Sufia Khatun, Advocate-on-Record.

For Respondent No.1. (C.A. No.135 of 2012) : Mr. Khandaker Reza-E-Raquib, Advocate (with Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent No.7. (C.A. No.135 of 2012) : Mr. Sk. Md. Morshed, Additional Attorney General (with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr.

Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent Nos.8-9. (C.A. No.135 of 2012) : Mr. Sk. Md. Morshed, Additional Attorney General, (with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Mr. Haridas Paul, Advocate-on-Record.

For Respondent Nos.2-6. (C.A. No.135 of 2012) : Not represented.

For Respondent No.1. (C.A. No.136 of 2012) : Mr. Mustafizur Rahman Khan, Advocate instructed by Mr. Mvi. Md. Wahidullah, Advocate-on-Record.

For Respondent No.2. (C.A. No.136 of 2012) : Mr. Khandaker Reza-E-Raquib, Advocate (with Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent Nos.10-12. (C.A. No.136 of 2012) : Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For Respondent Nos.3-9. (C.A. No.136 of 2012) : Not represented.

For Respondent No.1. (C.A. No.137 of 2012) : Mr. Mustafizur Rahman Khan, Advocate instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.

For Respondent Nos.7-9. (C.A. No.137 of 2012) : Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For Respondent Nos.2-6. (C.A. No.137 of 2012) : Not represented.

For Respondent No.1. (C.A. No.443 of 2016) : Mr. Tanjib-ul Alam, Senior Advocate instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.

For Respondent No.2. (C.A. No.443 of 2016) : Mr. Khandaker Reza-E-Raquib, Advocate (with Mr. Reja-E-Rabbi Khandoker, Advocate) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent No.1. (C.P. No.1386 of 2012) : Mr. Khandaker Reza-E-Raquib, Advocate (with Mr. Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent Nos.2-7. (C.P. No.1386 of 2012) : Not represented.

For Respondent Nos.1-4. : Mr. A. M. Amin Uddin, Attorney General (with Mr. Sk. Md. Morshed, Additional Attorney General, with

(C.P. No.1936 of 2012) Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent Nos.7-8. (C.P. No.1936 of 2012) : Mr. Khandaker Reza-E-Raquib, Advocate (with Mr. Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent Nos.5-6. (C.P. No.1936 of 2012) : Not represented.

For Respondent Nos.1-2 & 4-9. (C.P. No.1637 of 2014) : Mr. A. M. Amin Uddin, Attorney General (with Mr. Sk. Md. Morshed, Additional Attorney General, with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Mr. Haridas Paul, Advocate-on-Record.

For Respondent No.3. (C.P. No.1637 of 2014) : Mr. Khandaker Reza-E-Raquib, Advocate (with Mr. Reja-E-Rabbi Khandoker, Advocate) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent Nos.1-6. (C.P. No.377 of 2013) : Mr. Khandaker Reza-E-Raquib, Advocate (with Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent Nos.7-9. (C.P. No.377 of 2013) : Mr. A. M. Amin Uddin, Attorney General (with Mr. Sk. Md. Morshed, Additional Attorney General, with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent Nos.1-6. (C.P. No.1128 of 2012) : Mr. Khandaker Reza-E-Raquib, Advocate (with Mr. Reja-E-Rabbi Khandoker, Advocate) instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

For Respondent Nos.7-9. (C.P. No.1128 of 2012) : Mr. Sk. Md. Morshed, Additional Attorney General, (with Mr. Samarandra Nath Biswas, Deputy Attorney General, Ms. Tahmina Polly, Assistant Attorney General, Ms.

Farzana Rahman Shampa, Assistant Attorney General, Mr. Md. Humayun Kabir, Assistant Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Mr. Sayem Mohammad Murad, Assistant Attorney General and Ms. Tamanna Ferdous, Assistant Attorney General) instructed by Ms. Madhumalati Chowdhury Barua, Advocate-on-Record.

For Respondent No.10. : Not represented.
(C.P. No.1128 of 2012)

Date of Hearing. : The 9th November, 2022 & 7th, 13th and 14th December, 2022.

Date of Judgment. : The 10th January, 2023.

Editors' Note:

In these appeals and civil petitions the issues involved for determination, among others, were whether the claim of the BTRC for additional spectrum fee based on Market Competition Factor (MCF) is lawful; whether the Cellular Mobile Phone Operator can withhold the VAT collected at source and then pay the same directly to Government exchequer and VAT paid by the Cellular Mobile Phone Operator is rebatable or not; and whether BTRC requires a compulsory registration under the VAT Act. Contrary to some findings of the High Court Division, the Appellate Division analyzing relevant laws, rules and guidelines held that (1) in accordance with clause-12(viii) of the Cellular Mobile Phone Operator Regulatory and Licensing Guidelines, 2011 BTRC reserves the right to make any change in the charges or levies from time to time and the mobile phone operators are bound to abide by such decision and as such, additional spectrum fee based on Market Competition Factor (MCF) is lawful; (2) the Cellular Mobile Phone Operator cannot withhold the VAT collected at source, the BTRC is to collect VAT from the Cellular Mobile Phone Operators and then deposit it to the Government exchequer and VAT paid by the cellular mobile companies on the spectrum fees and the license fees are not rebatable; and (3) under clause-7 (অন্যান্য সেবা)(ঘ) of the second schedule of the VAT Act, 1991 compulsory VAT registration is not necessary for BTRC.

Key Words:

Sub-Section 3(Ga) of Section 3, 5(4), Sub-Section 4 of Section 6, Section 6 (4KaKa), Section 9(Uma), 15 (4) of the VAT Act, 1991; Rule 18(Ka) and 18(Uma) of the VAT Rules, 1991; Cellular Mobile Phone Operator Regulatory and Licensing Guidelines, 2011; Market Competition Factor (MCF);

Clause-5 of the Assignment Letter dated 30.10.2008 as well as Clause-12(viii) of the Guidelines, 2011:

MCF based on the market shares of the operators is a worldwide system through which the mobile phone operators pay a significant amount of money for the spectrum allocated infavour of them and this system ensures a level playing field amongst the operators. And since the concept of MCF introduced by the Guidelines, 2011, BTRC by the impugned memo did not claim spectrum assignment fees based on MCF retrospectively i.e. from 2008 to 2011. It is pertinent to mention here that Clause-5 of the Assignment Letter dated 30.10.2008 as well as Clause-12(viii) of the Guidelines, 2011 authorize the authority concern i.e. BTRC to reserves the right to make any change in the charges or levies from time to time and the mobile phone operators shall

abide by such decision. Again, upon the facts and circumstances of this case, we found that BTRC did not claim any additional charge for the said spectrum of 7.4 MHz-GSM 1800 frequency band as assigned infavour of Grameenphone in 2008 rather BTRC claiming MCF for the remaining 15 years from 2011 upon a value of Tk.80 crores per MHz which is fixed in the year 2008. Thus, we find substance in the contentions of the appellant BTRC in Civil Appeal No.137 of 2012. As such findings and observations of the High Court Division that *"The impugned memo dated 17.10.2011 (Annexure-'I'), in so far as the application of MCF to the assignment of spectrum of 2008 is concerned, is without lawful authority and accordingly, the petitioner Grameenphone is not required to payment the MCF for the 7.4 spectrum in 1800-MHz assigned to infavour in 2008"* is based on wrong appreciation of the impugned memo and thus liable to be expunged. ...(Para 29 & 30)

It may be mentioned here that spectrum is a scarce natural resource. ...(Para 31)

<u>Article 7 and 18A of the Constitution:</u>
Above mentioned Articles of the Constitution makes it clear that the state is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the Constitutional principles including the doctrine of equality and larger public good. ...(Para 33)

<u>While distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest:</u>
We consider it proper to observe that even though there is no universally accepted definition of natural resources, they are generally understood as elements having intrinsic utility to mankind. They may be renewable or non-renewable. They are thought of as the individual elements of the natural environment that provided economic and social services to human society and are considered valuable in their relatively unmodified, natural form. A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production. Natural resources belong to people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely form their value. The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. ...(Para 40)

As a vital natural resource, the price of spectrum should be sufficient to ensure that it is valued and used wisely. Use of spectrum provides considerable benefits to the economy and benefits from spectrum should be maximized. In this regard we are of the view that in distributing natural resources like spectrum, rational transparent method should have been adopted so that the nation would have been enriched. ...(Para 42)

<u>Sub-Section 4 of Section 6 of VAT Act 1991:</u>
The BTRC is given responsibility to collect VAT from the Cellular Mobile Phone Operators and deposited it to the Government exchequer. As such, there is no scope to

withhold the VAT collected at source by the Grameenphone. ...(Para 45)

Section 9(1)(Uma) of the VAT Act, 1991:

VAT paid by the cellular mobile companies on the spectrum fees and the license fees are not rebatable:

It is clear from Section 9(1)(Uma) of the VAT Act, 1991 that 'spectrum' comes within the definition of infrastructure (অবকাঠামো) and thus VAT paid by the cellular mobile companies on the spectrum fees and the license fees are not rebatable. Said provisions of Section 9 does not require the infrastructure to be tangible as such the argument placed by the learned Advocate for the cellular phone companies that infrastructure cannot intangible is not correct inasmuch as spectrum provided to the cellular mobile phone companies are a range of wave of radio frequencies which is uniquely distinguishable by intangible boundaries that is why spectrum allotted to one cellular phone company cannot be used by others. The cellular phone companies cannot provide service without allocation of spectrum. ...(Para 53)

Clause-7 (অন্যান্য সেবা)(ঘ) of the second schedule of the VAT Act, 1991:

Compulsory VAT registration is not necessary for BTRC:

Government, local authorities, the organization of local authority or organization those who are working for the Government are exempted from payment of VAT. The NBR, postal department, Bangladesh Bank, City Corporation and land revenue authority although engaged in realization of VAT through deduction at source bearing no registration under VAT Act, 1991 and thus the BTRC being Government organization is also exempted from payment of VAT under Clause-7 (অন্যান্য সেবা)(ঘ) of the second schedule of the VAT Act, 1991 and compulsory VAT registration is not necessary for BTRC. ...(Para 56)

JUDGMENT

Borhanuddin, J:

1. Since questions of law involve in all the civil appeals and civil petitions are identical and based on similar facts as such all the appeals and petitions have been taken together for hearing and disposed of by this common judgment.

2. Civil Appeal Nos.135-137 of 2012 by leave are directed against the judgment and order dated 13.02.2012 passed by a Division Bench of the High Court Division in Writ Petition No.8904 of 2011 making the Rule absolute-in-part and Civil Appeal No.443 of 2016 by leave is directed against the judgment and order dated 13.05.2012 passed by another Bench of the High Court Division in Writ Petition No.157 of 2012 discharging the Rule with observation and direction.

3. Facts relevant for disposal of the Civil Appeal Nos.135-137 of 2012 in brief are that the petitioner Grameenphone Limited, a public limited company incorporated under the Companies Act of Bangladesh and carrying it's business as a mobile phone operator, filed Writ Petition No.8904 of 2011 invoking Article 102 of the Constitution challenging decision of the respondent no.1 Bangladesh Telecommunication Regulatory Commission (hereinafter referred as 'BTRC') issued vide Memo No.BTRC/LL/Mobile/License Renewal(382)/2011-687 dated 17.10.2011 by which BTRC claimed spectrum assignment fee based on Market Competition Factor (MCF) so far it relates to already assigned spectrum fee to the petitioner in 2008 and payment of license fee and spectrum fee for new assignment without any

deduction, contending interalia, that on 11.11.1996 the petitioner company was granted a licence by way of an agreement under Section 4 of the Telegraph Act, 1885 by the Government of Bangladesh, represented by the Director (Telecommunication), Ministry of Post and Telecommunication for a period of 15 years i.e. till 2011, for establishing, maintaining and operating of digital cellular mobile radio telephone network all over Bangladesh; Some amendments were brought to the said license agreement on 08.03.1999 and 29.03.2001; As a requirement under the Telegraph Act, 1885 the petitioner company had also obtained a radio station and equipment licence and radio system operating licence, both dated 28.11.1996; BTRC was formed under Bangladesh Telecommunication Regulatory Act, 2001; On 24.10.2004, the writ-respondent no.1 BTRC revalidated the licence of the petitioner company granted on 11.11.1996 with some modifications, amendments and editions; Some more amendments brought into the revalidated operator licence of the petitioner company on 16.04.2006 and 27.04.2006; The petitioner company obtained 5 MHz spectrum in 900 band in the year 1996 which were enhanced phase by phase; The spectrum assigned to the petitioner company till 2008 were due to expire in 2011; On the request of the petitioner company for additional spectrum assignment a meeting was held on 29.09.2008; A Senior Assistant Director of the respondent no.1 vide letter dated 30.09.2008 informed the petitioner company that decisions were taken in the meeting dated 29.09.2008 regarding the terms and conditions of the additional spectrum assignment; Relying the terms and conditions stated in the letter dated 30.09.2008 the petitioner company paid an amount of Tk.148,00,00,000/- (One hundred and forty eight crore) as 25% down payment for 7.4 MHz spectrum in GSM 1800 MHz band to the respondent no.1; Subsequently, respondent no.5 Assistant Director of BTRC vide letter dated 30.10.2008 informed the petitioner company that the BTRC has been pleased to assign the spectrum for a period of 18 years to the petitioner company; In the letter dated 30.10.2008 it is specifically mentioned that assignment has been made for a period of 18 years from the date of assignment subject to the renewal of the license and within 18 years there will not be any additional charge; Thereafter, the BTRC vide memo dated 11.09.2011 has issued the regulatory and licensing Guidelines for renewal of cellular mobile phone operator licence and the said guideline was amended on 22.09.2011; The petitioner company by letter dated 10.10.2011 applied to the BTRC for renewal of the operator licence and equipment licence; The respondent no.1 vide letter dated 17.10.2011 has claimed an amount of Tk.3624.03/- crores from the petitioner company as the spectrum assignment fee and an amount of Tk.10,00,00,000/- has also been claimed as license renewal fee providing 10(ten) day's time for payment without deduction and to submit certain documents; The petitioner company by letter dated 18.10.2011 has pointed out the mistakes conducted by the respondent no.1 BTRC in calculating the spectrum assignment fee with request to recalculate the fees and charges; The BTRC replied the letter on 20.10.2011; The BTRC arbitrarily introduced the concept of Market Competition Factor (MCF) in the guideline dated 11.09.2011 and also claimed the amount stipulated 10(ten) days time for making payment of the license renewal fee and spectrum assignment fee without deduction; The National Board of Revenue (hereinafter stated as 'NBR') by its letters dated 28.02.2011 and 20.10.2011 has affirmed that payment of any money to the Government revenue should be paid after deduction of tax and thus the BTRC has acted arbitrarily and unreasonably by claiming additional spectrum fee for the 7.4 MHz in 1800 band of spectrum (based on MCF) assigned to the petitioner company in 2008 inasmuch as petitioner company has fulfilled all the conditions as stipulated in the assignment letter dated 30.10.2008 and has paid all the requisite fees; The BTRC based upon an audit report has claimed an amount of Tk.3034,11,08,581/- within 23.10.2011 for additional spectrum fee (based on MCF) assigned to the petitioner company in 2008 and such actions of respondent no.1 is without lawful authority and of no legal effect; Hence, the

writ petition.

4. Upon hearing the petitioner, a Division Bench of the High Court Division issued a Rule Nisi upon the respondents to show cause.

5. The BTRC contested the Rule Nisi by filing an affidavit-in-opposition and supplementary affidavit-in-opposition. The petitioner company also submitted several supplementary affidavits.

6. Upon hearing the parties and perusing the relevant papers/documents, a division Bench of the High Court Division made the Rule absolute-in-part vide judgment and order dated 13.02.2012 holding that:

1. *The writ petition is maintainable;*
2. *The Rule is made absolute-in-part;*
3. *The impugned memo dated 17.10.2011 (Annexure-I), in so far as the application of MCF to the assignment of spectrum in 2008 is concerned, is without lawful authority. Accordingly, the petitioner Grameenphone is not required to pay the MCF for the 7.4 spectrum in 1800-MHz assigned in its favour in 2008;*
4. *There is no illegality in the impugned memo in so far as the issue of VAT is concerned. The Grameenphone is required to add the VAT to the demanded money (except the MCF in respect of the spectrum of 2008) and withhold it at source and then pay the same directly to the Government exchequer. However, Grameenphone will get credit for the said paid VAT from the VAT to be paid ultimately by its subscribers in accordance with law;*
5. *In view of above, the Grameenphone should immediately pay, if not paid already, the fees, charges and VAT to the concerned authorities in accordance with law.*

7. Being aggrieved, the petitioner Grameenphone limited filed Civil Petition for Leave to Appeal No.508 of 2012 and writ-respondent no.8 NBR preferred Civil Petition for Leave to Appeal No.772 of 2012, writ-respondent no.1 BTRC preferred Civil Petition for Leave to Appeal No.867 of 2012 invoking Article 103 of the Constitution. Though all the civil petitions were heard together but leave was granted separately vide order dated 16.07.2012.

8. Consequently, above Civil Appeal Nos.135, 136, 137 of 2012 arose.

9. Civil Appeal No.443 of 2016 by leave is directed against the judgment and order dated 13.05.2012 passed by another Division Bench of the High Court Division in Writ Petition No.157 of 2012 discharging the Rule with observations and directions.

10. Facts, in brief, are that the petitioner Axiata (Bangladesh) Ltd, @ Robi Axiata Ltd, a company incorporated under the Laws of Bangladesh, limited by shares and engaged in the business as Cellular Mobile Phone Operator under license is preferred Writ Petition No.157 of 2012, contending interalia, that in course of operation, licence of the petitioner company became due for renewal in 2011; For this purpose, BTRC issued Cellular Mobile Phone Operator Regulatory and licensing Guidelines, 2011 (hereinafter stated as 'the Guidelines, 2011) in September 2011 which was amended by a memo dated 22.09.2011 imposing payment to BTRC for license renewal fee, 5.5% of the audited gross revenue as revenue

sharing, 1% of the audited annual gross revenue to BTRC's Social Obligation Fund and license fee for use of spectrum; The petitioner applied for renewal of cellular mobile phone operator licence and the associated radio communications equipment licence on 10.10.2011, in response to which BTRC issued a *"Notification of Awarding Renewed Cellular Mobile Phone Operator Licence"* dated 17.10.2011 stipulating the petitioner shall pay License Renewal Fee of BDT.10 crores and Spectrum Allocation Fee of BDT.1925.87 crores as per the schedule given therein; The respondent no.2 vide memo dated 20.10.2011 interpret and clarify to the effect that VAT would have to be deducted at source for aforementioned payment received or receivable by BTRC upon a reference to Rule 18(Uma) of the Rules, 1991; The petitioner has paid the required license renewal fee and spectrum allocation fee deducting the VAT amount vide letters dated 31.10.2011 and 02.11.2011, retaining the deducted VAT amount with a handwritten undertaking that the petitioner undertakes *"to pay the rest amount, if any, as determined by BTRC and also in the light of the Honourable Court's decision"* referring two applications filed by two other cellular operators; Meanwhile, vide memo dated 09.11.2011 Senior Assistant Secretary of the Ministry of Post and Telecommunication and the BTRC vide memo dated 10.11.2011 intimated the petitioner company that they can carry on their operation unhindered but the issue of renewal of license will remain suspended; The Large Tax Unit vide memo dated 15.11.2011 has sought to know from the petitioner the particulars of the deductions it has made against VAT in respect to license fee, revenue sharing and spectrum allocation fee or charge payable to BTRC; The petitioner vide letter dated 23.11.2011 informed the LTU that the issue is sub-judice before the High Court Division; The LTU issued a memo dated 13.12.2011 demanding the amount of VAT deducted at source; The petitioner replied to the letter reiterating that the issue is sub-judice; The respondent no.5 Commissioner, LTU issued a demand note vide memo dated 27.12.2011 for payment of Tk.146,85,71,520/- (including penalty/fine) within next two working days or face consequences under Section 56 of the Act, 1991; The Central Intelligence Cell of the NBR vide memo dated 28.12.2011 sought information regarding exact amount of fees given to BTRC and VAT deducted at source therefrom; Then the petitioner invoked writ-jurisdiction under Article 102 of the Constitution.

11. Upon hearing the writ-petitioner, a Division Bench of the High Court Division issued a Rule Nisi calling upon the respondents to show cause.

12. The Rule Nisi was contested by the writ-respondent nos.2 and 7 by filing affidavit-in-opposition, contending interalia, that the petitioner company is liable to deposit the deducted amount of VAT at source pursuant to Section 6(4KaKa) of the Act, 1991 read with Rule 18(Uma) of the Rules, 1991; The provision of Section 6(3)(Ga) provides that the VAT is payable if, any in part or full is made even before rendering the service and there is no provision to retain the deducted amount in the account of the petitioner as such the Rule is liable to be discharged.

13. After hearing the parties a Division Bench of the High Court Division discharged the Rule with following observations and directions vide impugned judgment and order dated 13.05.2012:

> *"Given further this Court's finding and observations both on the general scheme of the Act and the Rules and the Deduction at Source Scheme, the BTRC's contained non-registered status for VAT purposes appears anomalous in the facts and circumstances. This Court being of the view that such situation needs immediate attention to avoid any further confusion in the implementation of the Deduction*

at Source Scheme in particular. It is also noted that the BTRC itself on occasion has contributed to such confusion arising by making ill-advised assertions as to its status within the VAT regime. This Court finds in this respect that circumstances now dictate a compulsory registration of the BTRC by application of Section 15(4) of the Act. Both the NBR and the BTRC are hereby put on notice to ensure such registration by application of Section 15(4) without undue delay. Given the findings in this judgment it is directed that such registration shall be deemed to be effective from the date the BTRC notified the petitioner of award of license and payment of License Renewal Fee and Spectrum Assignment Fees without any deduction i.e. from 17.10.2011."

14. Having aggrieved, the writ-respondent as petitioners moved before this Division invoking under Article 103 of the Constitution by filing Civil Petition for Leave to Appeal No.2420 of 2012.

15. This Division, upon hearing the parties granted leave on the following grounds:

"I. Because, the High Court Division erred in law in finding that the continued non-registered status of the BTRC appeared to be anomalous in the facts and circumstances inasmuch as the said observation is far from reality and based on mere surmise having no legal and material basis as NBR, Postal Department, Bangladesh Bank, City Corporation and Land Revenue Authority although engaged in realizing VAT through deduction at source bear no registration under VAT Act, 1991 and the BTRC being a Government Organization has been given exemption from payment of VAT under Clause-7 (অন্যান্য সেবা)(ঘ) of the second schedule of the VAT Act, 1991.

II. Because, the High Court Division erred in law in making such direction inasmuch as implementation of such direction would create anomalies amongst the Government Organization, that is, NBR, Postal Department, Bangladesh Bank and City Corporation etc. by way of giving birth to some inevitable administrative problems of the VAT authorities."

16. Consequently, Civil Appeal No.443 of 2016 arose.

16. Being aggrieved by and dissatisfied with the judgment and order dated 13.02.2012 passed by the High Court Division in Writ Petition No.8904 of 2011:

a. Writ-petitioner Grameenphone obtained leave to appeal in so far as it relates to the portion regarding VAT i.e. Civil Appeal No.135 of 2012;

b. Writ-respondent no.8 National Board of Revenue (NBR) has obtained leave to appeal in so far as it relates to the portion regarding writ-petitioner Grameenphone being entitled to credit or rebate against the VAT Act i.e. Civil Appeal No.136 of 2012;

c. Writ-respondent no.1 Bangladesh Telecommunication Regulatory Commission (BTRC) has obtained leave relating to declaring illegal the imposition of Market Completion Factor (MCF) on spectrum fee assigned in 2008 i.e. Civil Appeal No.137 of 2012.

18. Mr. Mostafizur Rahman Khan, learned Advocate appearing for the appellant Grameenphone in Civil Appeal No.135 of 2012 and for the respondent no.1 in both Civil Appeal Nos.136-137 of 2012 submits that Sub-Section 3(Ga) of Section 3 of the VAT Act, 1991, provides that VAT will be paid by service provider and Section 5(4) of the VAT Act, 1991, provides that in case of service, VAT will be imposed on the total receivable and in the present case VAT will be charged from and on account of the receivable by the service provider namely BTRC and cannot be imposed as an additional liability on the petitioner as the recipient of service. He further submits that the High Court Division failed to appreciate that Section 6 (4KaKa) of the VAT Act, 1991 read with Rule 18(Ka) and 18(Uma) of the VAT Rules, 1991 do not impose VAT on either the provider or recipient of a service but clarifies and determines a procedure for realization of the VAT which is payable by the provider of certain services against the service rendered by it, i.e. by the recipient of the service deducting the VAT payable at source from the amount that is receivable by the service provider from the recipient of the service and on that view of the matter, the said provisions cannot be read as imposing an obligation on the recipient of the service to calculate the VAT and add it to the amount demanded by the provider of the service and then withhold it at source and pay it to the Government.

19. Mr. Sk. Md. Morshed learned Additional Attorney General, appearing for the appellant NBR in Civil Appeal No.136 of 2012 and for respondent no.7 in Civil Appeal No.135 of 2012 as well as for respondent no.7 in Civil Petition for Leave to Appeal No.1128 of 2012 submits that the Parliament through Finance Act, 2011 has inserted Clause-(Uma) of Sub-Section 3 of Section 3 which clearly states that VAT will be imposed at the rate of 15% on all the imported goods or services rendered in Bangladesh under Section 5 of the VAT Act barring the imported goods mentioned in first schedule and services mentioned in second schedule of the Act and Sub-Section 3(Uma) of Section 3 of the VAT Act provides:

(৩) মূল্য সংযোজন কর প্রদান করিবেন,-

(ক) ----------

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(গ) ----------

(ঘ) ----------

(ঙ) অন্যান্য ক্ষেত্রে, সরবরাহকারী ও সেবাগ্রহণকারী।

20. And the provisions of Rule 18(Uma) provided for deduction of VAT at source at the time of receipt of the fees royalty, charge etc., and Rules 18(Uma) authorize the Government to collect VAT at source at the rate of 15%. He also submits that Section 5 of the VAT Act provides VAT is payable upon the "total value received" from the receiver of goods or service and the same has been affirmed by this Division in Civil Petition for Leave to Appeal No.3720 of 2015 *(Grameenphone Limited vs. Government of Bangladesh and others)* and accordingly the argument placed by the Cellular Phone Companies that VAT is included with the total value, is not tenable in the eye of law. He next submits that exemption has given in Clause-7(Gha) of second schedule for *"Government, Local Authority, any Organization or Institution of the local body who works for the Government"* from paying any VAT but it does not preclude them or BTRC to collect VAT as the service provider. In this regard he submits that NBR, Bangladesh Bank, City Corporation or land revenue authority although are engaged in realizing VAT through deduction at source but does not have VAT registration and just like those organizations BTRC being a Government organization is not required to be registered with the VAT authority and have been exempted from payment of VAT under Clause-7(Gha) of the second schedule of the VAT Act, 1991. He further submits that VAT paid by the cellular mobile phone operator on the spectrum fees

and the license fees are not rebatable as per Section 9(Uma) of the VAT Act because spectrum provided to the cellular companies is a range of wave of radio frequencies which is uniquely distinguishable by intangible boundaries, i.e. while spectrum allotted to one cellular phone company cannot be used by others as such the same come within the purview of infrastructure and thus the argument of the appellant that the infrastructure cannot be intangible does not hold water.

21. Mr. Khandaker Reza-E-Raquib, learned Advocate appearing for the appellant BTRC in Civil Appeal No.137 of 2012 and for respondent no.1 in Civil Appeal No.135 of 2012, respondent no.2 in both Civil Appeal Nos.136 of 2012 and 443 of 2016 as well as for respondent no.1 in Civil Petition for Leave to Appeal No.1386 of 2012, respondent no.7 in Civil Petition for Leave to Appeal No.1936 of 2012, respondent no.3 in Civil Petition for Leave to Appeal No.1637 of 2014 and respondent no.1 in both Civil Petition for Leave to Appeal Nos.1128 of 2012 and 377 of 2013 submits that the High Court Division has failed to appreciate that Market Competition Factor (MCF) introduced by the Guidelines, 2011 has been set by BTRC and approved by the Ministry of Post, Telecommunication and Information Technology to ensure a level playing ground for all Cellular Telephone Operators based on operators market share alongwith other relevant factors and the BTRC did not claim MCF retrospectively by the impugned memo for the period of 2008-2011 rather claimed MCF for the remaining 15 years i.e. from 2011-2026 and as such Grameenphone does not have to pay MCF for the initial 3 years starting from 2008 till the introduction of MCF in 2011 as per Clause-9.01 of the Guidelines, 2011. He further submits that the concept of MCF introduced through Guidelines, 2011 by dint of Section 55(3) of the Bangladesh Telecommunication Regulatory Act, 2001 as amended in 2010, as such it has no impact in changing the terms and conditions of the Cellular Mobile Operator Licence and thus the findings of the High Court Division that MCF incorporated in the guideline dated 11.09.2011 if applied on the spectrum allotted in 2008 would change the terms and conditions of the original licence granted in 1996 is erroneous and in essence the impugned judgment and order is liable to be set-aside.

22. Mr. A. M. Amin Uddin, learned Attorney General appearing for the appellants in Civil Appeal No.443 of 2016 as well as for respondent nos.1/2 in Civil Petition for Leave to Appeal No.1936 of 2012, respondent nos.1/4 in Civil Petition for Leave to Appeal No.1637 of 2014 and respondent no.8 in Civil Petition for Leave to Appeal No.377 of 2013 submits that the High Court Division erred in law in holding that the continued non-registration status of the BTRC appeared to be anomalous in the facts and circumstances inasmuch as the said observation is far from the reality and based on mere surmise having no legal and material basis as NBR, Postal Department, Bangladesh Bank, City Corporation and Land Revenue Authority although engaged in realizing VAT through deduction at source having no registration under VAT Act, 1991 and the BTRC being a Government organization has been given exemption from payment of VAT under Clause-7 (অন্যান্য সেবা)(Ga)(Gha) of the second schedule of the VAT Act, 1991. He also submits that the High Court Division erred in law in making such direction inasmuch as implementation of such direction would create anomalous amongst the Government organization, i.e. NBR, Postal Department, Bangladesh Bank and City Corporation etc. by way of giving birth to some inimitable problems of the VAT Authorities.

23. The writ-petitioner i.e. Axiata (Bangladesh) Ltd. alias Robi Axiata Ltd. of Writ Petition No.157 of 2012 did not file appeal challenging judgment and order passed in the Writ Petition No.157 of 2012.

24. Heard the learned Attorney General, learned Additional Attorney General and learned Advocates appearing for the parties in the respective cases. Perused the impugned judgment and order alongwith papers/ documents contained in the paper books.

25. As it is stated above, the High Court Division passed the impugned judgment and order in Writ Petition No.8904 of 2011 dated 13.02.2012 from which Civil Appeal Nos.135-137 of 2012 arose.

26. In the Writ Petition No.8904 of 2011, the Rule Nisi was issued in the following terms:

> *"Issue a Rule Nisi calling upon the respondents to show cause as to why the decision of the respondent no.1 (BTRC) issued vide Memo No. BTRC/LL/Mobile/License dated 17.10.2011 (Annexure-I)("Impugned memo") under the signature of the respondent no.4 claiming Spectrum Assignment Fee based on the Market Competition Factor (MCF) in so far as it relates to the fee of already assigned spectrum (7.4 MHz-1800 band) to the petitioner in 2008 and payment of license fee and spectrum fee for new assignments without any deduction should not be declared to have been issued without lawful authority and of no legal effect."*

27. From the facts before us it appears that in 2008 the BTRC granted the disputed spectrum of 7.4 band in 1800-MHz vide assignment letter dated 30.10.2008. Prior to this assignment, there were correspondences between the parties, and terms and conditions of the said assignment were determined through such correspondences and negotiations. One of the Assistant Director of spectrum management of the BTRC confirmed the terms and conditions of the said assignment by letter dated 30.09.2008 and the parties having agreed, BRTC issued assignment letter dated 30.10.2008. The relevant terms and conditions mentioned in the said Assignment Letter are quoted below:

"Terms and Conditions:

1. *The assignment will be for 18 years from the date of assignment subject to the renewal of the license. Within 18 years if the license is renewed there will not be any additional charge for this particular assignment for current technology (GSM, GPRS and EDGE);*
2. *The licensees will be allowed to provide services with this spectrum according to the conditions of the cellular mobile license. However, to utilize the frequency for 3G, LTE or equivalent technology based services the licensee will be required to take permission from the Commission. In such cases conditions and terms may be varied as deemed necessary by the Commission;*
3. *The Commission reserves the rights to make any rearrangement in the assignment within the band if required in future and the equipment shall have the provision to readjust according to that rearrangement.*
4. *The operators have to pay the Annual Spectrum Charge for this assignment as per spectrum pricing formula.*
5. *The Commission reserves the right to make any change in the charges or levies from time to time and the Licensee shall abide by the decision of the Commission.*
6. *----------*

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28. The facts as gathered from the affidavit-in-opposition filed by the BTRC that the Grammenphone was assigned with an additional 7.4 MHz spectrum in GSM-1800 MHz Frequency Band vide memo dated 30.10.2008 under the signature of the writ-respondent no.5 for a period of 18 years from the date of assignment subject to the renewal of the license. Accordingly, the Grameenphone paid the requisite amount to the BTRC and obtained the said additional 7.4 MHz Spectrum in the said Frequency Band. Clause-1 of the said assignment letter dated 30.10.2008 states that there will not be any additional charge if the licence is renewed within the said 18 years for this particular assignments for current technology. But Clause-5 of the said assignment letter also states that the BTRC reserves the right to make any change in the charges or levies from time to time and that the licensee shall abide by such decision of the BTRC. On 11.09.2011, BTRC with the approval of the Government has issued the Regulatory and Licensing Guidelines for Renewal of Cellular Mobile Phone Operator License **(Guidelines, 2011)**. Clause-8.01(ii) of the said Guidelines states that the Spectrum Assignment Fees for Cellular Mobile Phone Operator Licence fixed at Tk.150 crore per MHz of GSM 1800 MHz band, GSM 900 MHz band, CDMA 800 MHz band and also EGSM band access frequency. The said clause further states that in determining the Spectrum Assignment Fees, the MCF based on market share of the respective operators shall also be taken into consideration. The concept of MCF is not unique in telecommunication sector. Throughout the world, the operators pay a significant amount of money for 2G spectrum allocation multiplied by factors such as MCF based on the respective market shares of the operators. The goal of introducing such idea of MCF is to set out a path for the current and future availability of spectrum as well as encouraging competition and growth with a level playing field for all operators and maintaining a technology neutral stance. The MCF of 1.48 allotted to the Grameenphone as determined in the said **Guidelines, 2011** has been fixed by the Ministry of Post and Telecommunication reflecting its market share which is based not only upon the spectrums assigned infavour of the Grameenphone prior to the year 2008 but also upon the 7.4 MHz spectrum of 1800 band as assigned in the year of 2008 by BTRC. As per the **Guidelines, 2011** in calculating the Spectrum Assignment fees, the aforesaid assignment fees of Tk.150 crore per MHz frequency shall be multiplied by the MCF as determined for the respective operators and the total amount shall be payable by the respective operators. As per Clause-9.01 of the **Guidelines, 2011** the spectrum assignment fees shall be applicable for all of the access frequencies assigned to the licensees except for the 7.4 MHz Spectrum in GSM 1800 Band assigned in the year of 2008 infavour of the Grameenphone with a value of Tk.80 crore per MHz uplink and downlink for 18 years from the date of assignment subject to the renewal of the license. However, it was also stated in the said Clause-9.01 that the other provisions of the said Guidelines, 2011 shall be applicable of the respective licensees. On 10.10.2011, Grameenphone made two applications for renewal of its Mobile Phone Operator License as

well as the License for Radio Communications Equipment expiring on 10.11.2011. Accordingly, by the impugned memo dated 17.11.2011 the BTRC requested the Grameenphone to make payment of Tk.10,00,00,000.00 crores only as License Renewal Fees as per Clause-7.1.3 of the Guidelines, 2011 alongwith an amount of Tk.3624.03 crores only as Spectrum Assignment Fees calculated in pursuance to Clause-8.01(ii) and 9 of the same. As per the Guidelines, 2011 the Spectrum Assignment Fees as claimed by the impugned memo was calculated in accordance with the Guidelines, 2011 i.e. by multiplying the applicable MCF of 1.48 for the Grameenphone with spectrum fees as determined for per MHz of spectrum. It is also stated that the spectrum fees of Tk.80 crores per MHz for 7.4 MHz-GSM 1800 Frequency Band for 18 years from the date of assignment remains unchanged and by the impugned memo the writ-petitioner i.e. Grameenphone was not even asked to furnish the difference amount of BDT 70 crores (150 crores-80 crores) per MHz for remaining 15 years with regard to the assigned spectrum of 2008 in question. For better appreciation, the impugned memo is reproduced below:

Bangladesh Telecommunication Regulatory Commission
IEB Bhaban, Ramna, Dhaka-1000, Bangladesh.

No.BTRC/LL/Mobile/Lincese Renewal(382)/2011-687 Dated:17.10.2011

Subject: **Notification of awarding Renewed Cellular Mobile Phone Operator License of Grameenphone Limited (GP).**

Ref: (i) GP's application bearing No.GP/CA-LR/2011/01, dated: 10.10.2011 for renewal of Cellular Mobile Phone Operator License.

(ii) GP's application bearing No.GP/CA-LR/2011/02, dated: 10.10.2011 for renewal of Radio Communications Equipment License.

(iii) Regulatory and Licensing Guidelines for Renewal of Cellular Mobile Phone Operator License bearing No:BTRC/LL/Mobile/License Renewal (342)/ 2009-563, dated 11.09.2011 (Guidelines).

With reference to the application mentioned in ref. (i) and (ii), the undersigned is directed to inform you that renewal of the Cellular Mobile Phone Operator License of GP would be considered upon fulfilment of the followings:

(a) Under Clause-7.1.3 of the Guidelines, GP shall pay BDT 10,00,000,00/- (Taka Ten Crore) only as the License Renewal Fee.

(b) Under Clause-8.01 (ii) and Clause-9, of the Guidelines, GP shall pay BDT 3624.03 Crore (Taka Three Thousand Six Hundred Twenty Four point Zero Three Crore) only as the Spectrum Assignment Fee against the spectrum allocated to GP.

Spectrum Fee Calculation:

New assignment in 900 MHz band	Fee for New Assignment per MHz (BDT in Crore)	New Assignment in 1800 MHz band	Fee for New Assignment per MHz (BDT in Crore)	Previous Assignment in 1800 MHz band	Fee for Previous Assignment per MHz (BDT in Crore)	Market Competition Factor (MCF)	Sub Total (BDT in Crore)	Previous Payment Deduction (BDT in Crore)	Payable to BTRC (BDT in Crore)
A	B	C	D	E	F	G	H=[(A×B)+ C×D)+E×F)]× G	I=(E×F)× (15/18)	J=H-I
7.4	150.00	7.2	150.00	7.4	80.00	1.48	4117.36	493.33	3624.03

(c) Payment Schedule, as per provisions of Guidelines [Clause-8.01 (iii)]

Period	October 31, 2011	April 13, 2012	October 10, 2012	April 08, 2013
Percentage of	49%	17%	17%	17%

Payment				
Amount of Payment (BDT in Crore)	1,775.77	616.085	616.085	616.085

(d) Documents to be submitted are listed below:

i. Documents related to Income tax & VAT from year 1997 to 2001 and PSI from 1997 to 2004 (as per provisions of serial 7, appendix 1 of Guidelines).

ii. Information regarding compensation paid for illegal VoIP in the history of non-compliance (as per provisions of serial 14, appendix 1 of Guidelines).

iii. Information relating to year-wise inward and outward fund flow/transaction and year-wise income, expenditure and profit (as per provisional of serial 5, appendix 1 of Guidelines).

You are requested to pay the above mentioned amount without any deduction as per provisions of Guidelines and submit the documents as stated above in Clause-(d) to the commission within 10(ten) days from the date of issuance of this notification.

Thanking you.
Signed/-
(Tareq Hasan Siddiqui)
Deputy Director
Legal and Licensing Divsion
Phone: 9511127

Chief Executive Officer
Grameenphone Limited
GP house
Bashundhara, Baridhara
Dhaka-1229, Bangladesh.

29. Analysing the aforementioned contention of the appellant BTRC in Civil Appeal No.137 of 2012 as well as the impugned memo dated 17.10.2011, we are of the opinion that MCF based on the market shares of the operators is a worldwide system through which the mobile phone operators pay a significant amount of money for the spectrum allocated infavour of them and this system ensures a level playing field amongst the operators. And since the concept of MCF introduced by the Guidelines, 2011, BTRC by the impugned memo did not claim spectrum assignment fees based on MCF retrospectively i.e. from 2008 to 2011. It is pertinent to mention here that Clause-5 of the Assignment Letter dated 30.10.2008 as well as Clause-12(viii) of the Guidelines, 2011 authorize the authority concern i.e. BTRC to reserves the right to make any change in the charges or levies from time to time and the mobile phone operators shall abide by such decision. Again, upon the facts and circumstances of this case, we found that BTRC did not claim any additional charge for the said spectrum of 7.4 MHz-GSM 1800 frequency band as assigned infavour of Grameenphone in 2008 rather BTRC claiming MCF for the remaining 15 years from 2011 upon a value of Tk.80 crores per MHz which is fixed in the year 2008. Thus, we find substance in the contentions of the appellant BTRC in Civil Appeal No.137 of 2012.

30. As such findings and observations of the High Court Division that *"The impugned memo dated 17.10.2011 (Annexure-'I'), in so far as the application of MCF to the assignment of spectrum of 2008 is concerned, is without lawful authority and accordingly, the petitioner Grameenphone is not required to payment the MCF for the 7.4 spectrum in 1800-MHz assigned to infavour in 2008"* is based on wrong appreciation of the impugned memo and thus liable to be expunged.

31. It may be mentioned here that spectrum is a scarce natural resource. Article 18A of our Constitution provides that:

> *"The state shall endeavour to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wild life for the present and future citizens."*
>
> *(emphasis supplied)*

32. Again, Article 7 of the Constitution states that:

> *"7(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution."*

33. Above mentioned Articles of the Constitution makes it clear that the state is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the Constitutional principles including the doctrine of equality and larger public good.

34. It is stated in the Guidelines for the review of spectrum pricing methodologies and the preparation of spectrum fee schedules that the determination of spectrum prices and establishment of spectrum fees are closely linked to economic and market conditions, technical factors such as which technologies and services are being used or deployed, the efficiency and quality of those technologies and services, and how spectrum is assigned to spectrum users. The most important spectrum management objectives associated with spectrum prices and fees is that, the spectrum prices should promote efficient use of spectrum. When spectrum prices are determined through market mechanism, price level at a given time may be influenced by a number of factors such as geography, competition amongst potential users, advances in technology, the present value of cash flows derived from a particular service over time, the general economic climate, and particular conditions and obligations to licensees.

35. It is further stated that the authority concern will need to consider various issues when dealing upon the method, the financial basis, amounts and timing for payment of fees in respect of a particular spectrum brand, type of use or type of user. The issued include:

1. *Fiscal context;*
2. *Relevant principles and objectives for certain types of spectrum fees;*
3. *Funding regulator operations;*
4. *Demand and supply for spectrum;*
5. *Technological change;*
6. *Type and duration of the spectrum authorization and renewal options.*

36. Furthermore, the value of spectrum fees depends upon changing technologies, international and national decisions on spectrum, allocations and harmonization, customer demand, and the commercial availability and cost of radio communications equipment. These factors may greatly affect both demand and supply.

37. It is most likely that a regulator will chose from several methods to establish spectrum prices and fees. Before doing so, the regulator should review legislation, policy, and regulation. The level of competition, sector health and the demand and supply of spectrum are additional important considerations. The availability of reliable data, systems,

adequately experienced and proficient staff will be necessary. Once the regulator has completed this assessment, the final decision rests with what spectrum management and spectrum pricing objectives are to be met.

38. Again, fairness and objectivity requires that fees are based on objectives factors and all licence holders in a given frequency band should be treated on an equitable basis. This would preclude, for example, different treatment users in a given frequency band.

39. The universal system of spectrum pricing module can be formulated from a number of separate elements based on any or all of various criteria such as the amount of spectrum user, number of channels or links used degree of congestion, efficiency of radio equipment, transmitted power/coverage area, geographical location and so forth. The basic principle for this approach is to identify various technical parameters in order to measure the spectrum volume used or define the 'population area' of a radio system as a common basis for establishing spectrum fees. (from the Guidelines methodologies)

40. We consider it proper to observe that even though there is no universally accepted definition of natural resources, they are generally understood as elements having intrinsic utility to mankind. They may be renewable or non-renewable. They are thought of as the individual elements of the natural environment that provided economic and social services to human society and are considered valuable in their relatively unmodified, natural form. A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production. Natural resources belong to people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely form their value. The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest.

41. The Supreme Court of India in the case of *Centre for Public Interest Litigation and Others vs. Union Of India & Ors.*, reported in (2012) 3 SCC 104 observed that:

> *"Since, spectrum is a scarce resources, it needs to be regulate separately. Spectrum should be distributed using such a mechanism that it is allocated optimally to the most efficient user. ----------we hold that the State is the legal owner of the natural resources as trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the Constitutional principles including the doctrine of equality and larger public good."*

42. Thus, as a vital natural resource, the price of spectrum should be sufficient to ensure that it is valued and used wisely. Use of spectrum provides considerable benefits to the economy and benefits from spectrum should be maximized. In this regard we are of the view that in distributing natural resources like spectrum, rational transparent method should have been adopted so that the nation would have been enriched.

43. The appellant of Civil Appeal No.135 of 2012 i.e. Writ Petition No.8904 of 2011 also challenged the impugned memo for the reason that the BTRC demanded the amount without any deduction meaning without deduction of VAT thereform. The High Court Division

arrived at a conclusion that:

> *"There is no illegality in the impugned memo in so far as the issue of VAT is concern. The Grameenphone is required to add the VAT to the demanded money (except the MCF in respect of the spectrum of 2008) and withhold it at source and then pay the same directly to the Government exchequer. However, Grameenphone will get credit for the said VAT from the VAT to be paid ultimately by its subscribers in accordance with law.*
> *In view of above, the Grameenphone should immediately pay, if not paid already, the fees, charges and VAT to the concerned authorities in accordance with law."*

44. So, the question remains whether the Cellular Mobile Phone Operator can withhold the VAT collected at source and then pay the same directly to Government exchequer and VAT paid by the Cellular Mobile Phone Operator is rebatable or not. We find that the VAT as introduced in Bangladesh is an indirect tax to simplify the taxation system. Under the VAT scheme it is provided in Sub-Section 4 of Section 6:

> *"৬ (৪) এই ধারায় যাহা কিছুই থাকুক না কেন, বোর্ড, বিধি দ্বারা নির্ধারিত পদ্ধতিতে, যেকোন পণ্য, পণ্যশ্রেণী বা সেবার ক্ষেত্রে মূল্য সংযোজন কর বা ক্ষেত্রমত, সম্পূরক শুল্ক পরিশোধের সময় ও পদ্ধতি নির্ধারণসহ, অগ্রিম পরিশোধের [বা উৎসে কর্তনে] বিধান করিতে পারিবে।"*

45. Herein, 'Board' means 'the National Board of Revenue'. The BTRC is given responsibility to collect VAT from the Cellular Mobile Phone Operators and deposited it to the Government exchequer. As such, there is no scope to withhold the VAT collected at source by the Grameenphone.

46. Thus, the findings of the High Court Division "*the Grameenphone is required to add the VAT to the demanded money (except the MCF in respect of the spectrum of 2008) and withhold it at source and then pay the same directly to the Government exchequer"* is not based on provisions of the VAT Act and requires to be modified in the following manner:

> *"There is no illegality in the impugned memo in so far as the issue of VAT is concerned. The Ghameenphone is required to add the VAT to the demanded money and pay the same to the BTRC and BTRC shall deposit the same to the Government exchequer forthwith."*

47. The issue whether the VAT paid by the Cellular Mobile Phone Operator is rebatable or not will be determined at the time of the addressing the issue arise in Civil Appeal No.443 of 2016.

48. In Civil Appeal No.443 of 2016 the High Court Division discharged the Rule directing that the LTU-VAT authority shall retain the cash payment of Tk.141,20,88,000/- and treat the same as amount deducted at source by the petitioner as VAT assessed on the licence fee and spectrum allocation charge; The petitioner consequently shall forthwith ensure a replenishment payment of the said amount of Tk.146,90,13,873/- to the BTRC; The NBR/LTU-VAT authority shall be at liberty to demand forthwith any payment due of an account of VAT assessed on the renewal of license fee, revenue sharing, annual spectrum fee

with late charges, if any, from the petitioner. But direction was given for compulsory registration of the BTRC by application of Section 15(4) of the VAT Act.

49. From the above, it appears that both the Bench of the High Court Division in disposing both the Rule issued in Writ Petition No.8904 of 2011 and 157 of 2012 after discussing the relevant provisions of the VAT Act arrived at a conclusion that the cellular mobile phone companies are liable to pay VAT on the renewal of license fee, revenue sharing and spectrum fee.

50. Now the points of law involve in all the appeals are as follows:

1. *Whether VAT if paid is rebatable;*
2. *Whether BTRC requires a compulsory registration under the VAT Act.*

51. Section 9 of the VAT Act provides the provisions for taking rebate by the suppliers of goods or service renderer on the output tax excepting the circumstances narrating in the Section. For better appreciation, the relevant portion of the Section 9 is reproduced below:

> *৯। **কর রেয়াত**।- (১) করযোগ্য পণ্যের সরবরাহকারী, ব্যবসায়ী বা করযোগ্য সেবা প্রদানকারী প্রতি কর মেয়াদে তৎকর্তৃক সরবরাহকৃত পণ্য বা প্রদত্ত সেবার উপর প্রদেয় উৎপাদ করের (output tax) বিপরীতে, নিম্নবর্ণিত ক্ষেত্র ব্যতীত, উপকরণ কর রেয়াত গ্রহণ করিতে পরিবেন, যথা:*
>
> *(ক)----------*
>
> *(খ)----------*
>
> *(গ)----------*
>
> *(ঘ)----------*
>
> *(ঙ) করযোগ্য পণ্য উৎপাদন বা করযোগ্য সেবা প্রদানের সহিত সরাসরি সম্পৃক্ত হইলেও কোনো দালান-কোঠা বা অবকাঠামো বা স্থাপনা নির্মাণ, সুষমীকরণ, আধুনিকীকরণ, [প্রতিস্থাপন, সম্প্রসারণ,] পুনঃসংস্কারকরণ ও মেরামতকরণ, সকল প্রকার আসবাবপত্র, স্টেশনারি দ্রব্যাদি, এয়ারকন্ডিশনার, ফ্যান, আলোক সরঞ্জাম, জেনারেটর ইত্যাদি ক্রয় বা মেরামতকরণ, স্থাপত্য পরিকল্পনা ও নকশা [যানবাহন, ইত্যাদি ভাড়া বা লিজ গ্রহণ,] ইত্যাদির সহিত সংশ্লিষ্ট পণ্য এবং সেবার ওপর পরিশোধিত মূল্য সংযোজন কর;*
>
> *[(চ) করযোগ্য পণ্য উৎপাদন বা সরবরাহ বা করযোগ্য সেবা প্রদানের সহিত সম্পৃক্ত, বিধি দ্বারা নির্ধারিত, বিভিন্ন পণ্য ও সেবা এবং উহাদের ওপর পরিশোধিত মূল্য সংযোজন করের হারের অতিরিক্ত মূল্য সংযোজন কর;]*
>
> *(ছ) ভ্রমণ, আপ্যায়ন, কর্মচারীর কল্যাণ ও উন্নয়নমূলক কাজের ব্যয়ের বিপরীতে পরিশোধিত মূল্য সংযোজন কর।*
>
> *(emphasis supplied)*

52. It is not specified by the writ-petitioners on which raw materials or output tax they are claiming credit/ rebate.

53. It is clear from Section 9(1)(Uma) of the VAT Act, 1991 that 'spectrum' comes within the definition of infrastructure (অবকাঠামো) and thus VAT paid by the cellular mobile companies on the spectrum fees and the license fees are not rebatable. Said provisions of Section 9 does not require the infrastructure to be tangible as such the argument placed by the learned Advocate for the cellular phone companies that infrastructure cannot intangible is

not correct inasmuch as spectrum provided to the cellular mobile phone companies are a range of wave of radio frequencies which is uniquely distinguishable by intangible boundaries that is why spectrum allotted to one cellular phone company cannot be used by others. The cellular phone companies cannot provide service without allocation of spectrum.

54. The High Court Division in Writ Petition No.157 of 2012 directed a compulsory registration of the BTRC by application of Section 15(4) of the VAT Act and directed both the NBR and the BTRC to ensure such registration under the Section. We have perused Section 15(4) of the VAT Act which runs as follows:

> *"১৫। **নিবন্ধন**।- (১) করযোগ্য পণ্যের সরবরাহকারী বা করযোগ্য সেবা প্রদানকারী বা যেকোনো পণ্যের আমদানিকারক বা যেকোনো পণ্য বা সেবার রপ্তানিকারককে বিধি দ্বারা নির্ধারিত পদ্ধতিতে সংশ্লিষ্ট কর্মকর্তার নিকট নিবন্ধিত হইতে হইবে;*
>
> *(২) ----------*
>
> *(৩) ----------*
>
> *(৩ক)----------*
>
> *(৪) যদি নিবন্ধনযোগ্য কোনো ব্যক্তি নিবন্ধনের জন্য আবেদনপত্র পেশ না করেন এবং সংশ্লিষ্ট কর্মকর্তা যথাযথ অনুসন্ধানের পর সন্তুষ্ট হন যে উক্ত ব্যক্তির এই ধারার অধীন নিবন্ধিত হওয়ার বাধ্যবাধকতা রহিয়াছে, তাহা হইলে তিনি উক্ত ব্যক্তিকে [নিবন্ধিত করিয়া তাহাকে অবহিত করিবেন] এবং যেদিন হইতে উক্ত বাধ্যবাধকতার উদ্ভব হইয়াছে সেই দিন হইতেই উক্ত ব্যক্তি নিবন্ধিত বলিয়া গণ্য হইবেন।"*
>
> *(৫) ----------*

55. Second Schedule of the VAT Act described the services exempted from payment of VAT. The relevant portion is quoted hereinunder:

দ্বিতীয় তফসিল

মূল্য সংযোজন কর হইতে অব্যাহতিপ্রাপ্ত সেবাসমূহ

১। ----------

২। ----------

৩। ----------

৪। ----------

৫। ----------

৬। ----------

৭। অন্যান্য সেবা;

(ক) ----------

(খ) ----------

(গ) ----------

(ঘ) সরকার, স্থানীয় কর্তৃপক্ষ, স্থানীয় কর্তৃপক্ষের সংঘ অথবা প্রতিষ্ঠান যাহারা সরকারের জন্য কাজ করে এইরূপ সেবা প্রদানকারী প্রতিষ্ঠান (ওয়াসা, বিদ্যুৎ বিতরণকারী, নির্মাণ সংস্থা, ভূমি উন্নয়ন ও ভবন নির্মাণ, ভূমি বিক্রয়কারী, ব্যাংক ও বীমা প্রতিষ্ঠান ব্যতীত);

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56. From the above it appears that Government, local authorities, the organization of local authority or organization those who are working for the Government are exempted from payment of VAT. The NBR, postal department, Bangladesh Bank, City Corporation

and land revenue authority although engaged in realization of VAT through deduction at source bearing no registration under VAT Act, 1991 and thus the BTRC being Government organization is also exempted from payment of VAT under Clause-7 (অন্যান্য সেবা)(ঘ) of the second schedule of the VAT Act, 1991 and compulsory VAT registration is not necessary for BTRC.

57. For the reasons as stated above the operative portion of the judgement and order dated 13.02.2012 passed in Writ Petition No.8904 of 2011 (from which Civil Appeal Nos.135-137 of 2012 arose) are modified in the following manner:

1. *The writ petition is maintainable;*
2. *There is no illegality in the impugned memo in so far as the issue of VAT is concerned. The Grameenphone is required to add the VAT to the demanded money and pay the same to the BTRC and BTRC shall deposit the same to the Government exchequer forthwith;*
3. *In view of the above, the Grameenphone should immediately pay, if not paid already, the fees, charges and VAT to the concerned authorities in accordance with law.*

And

In view of the discussions made above, observation and direction passed by the High Court Division in Writ Petition No.157 of 2012 dated 13.05.2012 (from which Civil Appeal No.443 of 2016 arose) that:

> *"the BTRC's contained non-registered status for VAT purposes appears anomalous in the facts and circumstances. This Court being of the view that such situation needs immediate attention to avoid any further confusion in the implementation of the Deduction at Source Scheme in particular. It is also noted that the BTRC itself on occasion has contributed to such confusion arising by making ill-advised assertions as to its status within the VAT regime. This Court finds in this respect that circumstances now dictate a compulsory registration of the BTRC by application of Section 15(4) of the Act. Both the NBR and the BTRC are hereby put on notice to ensure such registration by application of Section 15(4) without undue delay. Given the findings in this judgment it is directed that such registration shall be deemed to be effective from the date the BTRC notified the petitioner of award of license and payment of License Renewal Fee and Spectrum Assignment Fees without any deduction i.e. from 17.10.2011."*

-are hereby expunged.

58. With the above modification, observations and findings, Civil Appeal No.135 of 2012 is dismissed, Civil Appeal Nos 136 of 2012 & 443 of 2016 are allowed and Civil Appeal No.137 of 2012 is disposed of and Civil Petition Nos.1386, 1936 of 2012, 1637 of 2014, 377 of 2013 & 1128 of 2012 are disposed of in the light of the judgment and order delivered in Civil Appeal Nos.135-137 of 2012 & 443 of 2016.

59. No order as to costs.

19 SCOB [2024] AD 119

APPELLATE DIVISION

Present:
Mr. Justice Hasan Foez Siddique, CJ
Mr. Justice M. Enayetur Rahim
Mr. Justice Jahangir Hossain

CIVIL APPEAL NOS. 19 AND 20 OF 2015
(From the judgment and order dated the 24th day of January, 2012 passed by the Administrative Appellate Tribunal, Dhaka, in Administrative Appellate Tribunal Appeal Nos.270 of 2009 and 279 of 2009 respectively)

Government of Bangladesh and another : ..... Appellants (In the both cases)

-Versus-

Md. Nazrul Islam Biswas : ..... Respondent (In the both cases)

For the Appellants (In both the cases)	:	Mr. A.M. Amin Uddin, Attorney General, with Ms. Abantee Nurul, Assistant Attorney General, and Mr. Mohammad Saiful Alam, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record
For the Respondent (In both the cases)	:	Mr. Mohammad Abdul Hai, Advocate-on-Record
Date of hearing	:	The 12th , 18th and 19th day of July, 2023
Date of judgment	:	The 1st day of August, 2023

Editors' Note:
In this case the finding of the Administrative Appellate Tribunal that the impugned penalty imposed on the respondent was illegal as because that was imposed by the Director General who was, admittedly, holding current charge and was not the appointing authority, was challenged. Appellate Division analyzing the relevant provisions of law came to the conclusion that when current charge was given for unlimited period it was to be presumed that he had been given all the administrative and financial power of the institution. Consequently, Appellate Division set aside the judgment and order of the Administrative Appellate Tribunal.

Key Words:
Administrative Tribunal; Administrative Appellate Tribunal; Current Charge; Section 4 (3) (b) of the Government Servants (Discipline and Appeal) Rules, 1985

When current charge is given for unlimited period it is to be presumed that he has given all the administrative and financial power of the institution:

The current charge given to a particular officer by an official notification has got some force of law, and when it is given for unlimited period it is to be presumed that he has given all the administrative and financial power of the institution. The current charge given by a gazette notification cannot be termed or treated that the concerned officer will perform only day to day routine work, rather on the strength of such notification he has been vested all the administrative and financial power to be done in accordance with rules of business. Said current charge cannot be equated as a stop gap arrangement. ...(Para 19)

In the instant case the Director General, who passed the impugned order of dismissal, had given current charge by a gazette notification dated 04.12.2003 by the concerned authority of the Government and as such, we are of the view that he had got every authority to exercise the administrative power and it cannot be said that he had acted illegally having no authority and jurisdiction and as such the Tribunal as well as the Administrative Appellate Tribunal committed serious error in passing the impugned judgment and order. ...(Para 20)

JUDGMENT

M. Enayetur Rahim, J:

1. These two appeals, by leave, are directed against the judgement and order dated 24.01.2012 passed by the Administrative Appellate Tribunal in A.A.T Appeal Nos. 270 of 2009 and 279 of 2009 allowing the A.A.T Appeal No. 270 of 2009 and dismissing the A.A.T Appeal No. 279 of 2009.

2. The facts, relevant for disposal of the appeals are that the respondent herein filed A. T. Case No.217 of 2005 before the Administrative Tribunal No.2, Dhaka challenging the order of his compulsory retirement from service. He contended, inter alia, that he was appointed on 27.05.1980 as Library Assistant in the Film Archive of the Ministry of Information and had been working there with utmost sincerity, honesty and to the satisfaction of all concerned. The respondent No.2, Director General (Current Charge) without giving him any opportunity to defend and without any charge sheet or show cause notice, suspended the respondent from service by the order dated 17.09.2002 and long thereafter on 14.09.2003 started a departmental proceeding against him by framing a charge on the allegation that the respondent disobeyed the order of his superior officers and that he attacked his superior officer on 15.09.2002 and wounded him and broke his one teeth and a complaint was lodged against him on that allegation. The respondent submitted his written statement on 20.09.2003 before the authority denying the allegations brought against him but the authority without considering his written statement, constituted an enquiry board on 09.10.2003 comprising three members, two of whom were not at all impartial. The petitioner prayed to withdraw those 2 members from the enquiry board but his prayer was rejected and ultimately on the basis of the enquiry report, submitted by that enquiry board the petitioner was awarded the punishment of compulsory retirement from service under section 4 (3)(b) of the Government Servants (Discipline and Appeal) Rules, 1985 by the Director General (current charge) beyond his power and jurisdiction on 07.07.2004. The petitioner submitted an appeal to the Ministry of Information on 20.07.2004 but the said appeal was rejected and, thereafter, the

present respondent as petitioner filed the above mentioned case before the Administrative Tribunal on 20.03.2005.

3. Present appellants contested that A.T. case by filing written objection denying the material allegations made by the respondent. The case of the appellants is that the respondent had no qualification for holding the post of Library Assistant, in spite of which he had been regularized in the post of Library Assistant on humanitarian ground. But his behavior was not satisfactory, he assaulted the Administrative Officer and as a result he was placed under suspension on the basis of the complaint lodged against him. Prior to the said incident, the petitioner was placed under suspension for 3 (three) times due to the allegations against him. The allegation against the petitioner was proved in the departmental proceeding and he was given all opportunities to defend himself in the departmental proceeding. The petitioner was imposed the penalty of compulsory retirement rightly after observing all requirements of law.

4. The Administrative Tribunal, on hearing both the parties and considering the materials on record allowed that A.T. case in part and set aside the penalty of compulsory retirement, but imposed the penalty of reduction in rank denying arrear pay and other service benefits.

5. Being aggrieved by that judgment and order of the Administrative Tribunal the respondent preferred A. A. Appeal No.270 of 2009 and the appellants preferred A. A. T. Appeal No.279 of 2009.

6. The Administrative Appellate Tribunal heard and disposed both the appeals analogously by the impugned judgment and order found the impugned penalty imposed on the respondent illegal making comment to the effect that the said punishment was imposed by Md. Aminul Islam, Director General (Current Charge) who was, admittedly, holding current charge and was not the appointing authority and that officer on stop gap arrangement in place of the appointing authority is not competent to perform statutory functions and, therefore, the very penalty having been imposed by an incompetent authority is void.

7. Being aggrieved by this judgment and order of the Administrative Appellate Tribunal, the Government of Bangladesh and others have preferred Civil Petitions for Appeal No. 2137 and 2138 of 2012 before this Division and leave was granted on 15.12.2014. Hence, these appeals.

8. Mr. A.M. Amin Uddin, learned Attorney General, appearing for the petitioner submits that the Administrative Appellate Tribunal erred in law in dismissing Appeal No.279 of 2009 and allowing Appeal No.270 of 2009 without any discussions of the respective case of the parties simply finding that the penalty of compulsory retirement was void as it has been passed by an incompetent authority. Learned Attorney General also submits that the Director General in charge having passed the order of compulsory retirement by drawing a departmental proceeding according to Rule 4(3)(b) of the Government Servants (Discipline and Appeal) Rule, 1985 by observing all formalities and procedures according to law and thus, the Administrative Appellate Tribunal erred in law in setting aside the said order and passing the judgment and order.

9. The learned Attorney General finally submits that the Director General in charge having exercising all other functions and duties of the Department being quite competent to pass the order of compulsory retirement as his normal duties, the Administrative Appellate

Tribunal erred in law in passing the impugned judgment dated 24.01.2012 which is liable to be set aside.

10. Per contra, Mr. Mohammad Abdul Hai, learned Advocate-On-Record, appearing on behalf of the respondent made submissions in support of the impugned judgment and order passed by the Administrative Appellate Tribunal.

11. We have considered the submissions of the learned Advocates appearing for the respective parties, perused the judgment of the Appellate Tribunal as well as the Tribunal and connected papers on record.

12. In this particular case, the moot question is whether Director General, who was holding the current charge, had got the authority to pass the order of dismissal.

13. The Administrative Tribunal as well as the Appellate Tribunal have held that the Director General holding current charge had no authority to pass the order of dismissal.

14. The learned Attorney General placed before the Court the Nitimala in regard to the current and additional charge issued by the concerned Ministry, which runs as follows:

"নং-সম (বিধি-১)/এস-১১/৯২-৩০(১৫০) *তারিখ: ৫-২-৯২ইং / ২২-১০-৯৮ বাং*

বিষয়ঃ চলতি দায়িত্ব/অতিরিক্ত দায়িত্ব প্রদান প্রসঙ্গে।

উপরোক্ত বিষয়ে অত্র মন্ত্রণালয় কর্তৃক জারীকৃত সম/আর-১/এস-৩/৯০-৪৩(২০০), তারিখঃ ১-২-৯০ইং/১৯-১০-১৩৯৬ বাং স্মারকের অনুচ্ছেদগুলি নিম্নরূপে প্রতিস্থাপিত হইবেঃ

১। এফ, আর ৪৯ এ একজন সরকারি কর্মকর্তা/কর্মচারীকে অস্থায়ী হিসাবে একই সংগে দুই বা ততোধিক পদের দায়িত্ব প্রদানের ব্যবস্থা আছে, তবে একজন সরকারি কর্মকর্তা/কর্মচারী একই সংগে দুই বা ততোধিক স্থায়ী পদে স্থায়ীভাবে (Substantively) নিযুক্ত হইতে পারেন না।

২। উক্ত বিধি মোতাবেক বিভিন্ন মন্ত্রণালয়/বিভাগ সাধারণতঃ শূন্য পদে যথাক্রমে সমপদধারীকে অতিরিক্ত দায়িত্ব এবং নিম্নপদধারীকে চলতি দায়িত্ব প্রদান করিয়া থাকেন। ইতিপূর্বে রাষ্ট্রপতি নির্দেশ প্রদান করিয়াছিলেন যে, চলতি দায়িত্ব অর্পণের পরিবর্তে পদোন্নতির মাধ্যমে শূন্য পদসমূহ পূরণ করিতে হইবে। উক্ত নির্দেশ অনুযায়ী চলতি/অতিরিক্ত দায়িত্ব প্রদান নিরুৎসাহিত করা হইতেছে। তবে বিভিন্ন কারণে ব্যবস্থাটি সম্পূর্ণ বিলোপ করা সম্ভব হয় নাই। ভবিষ্যতে চলতি/অতিরিক্ত দায়িত্ব প্রদানের প্রবণতা রোধ এবং বিশেষ প্রয়োজনে সুনির্দিষ্ট নীতিমালা অনুসরণ করিয়া ব্যতিক্রমী ক্ষেত্র হিসাবে এরূপ দায়িত্ব প্রদানের ব্যবস্থা চালুকরণের জন্য ২৭-৫-৮৯ইং তারিখের এস,এস, বি'র সিদ্ধান্ত অনুযায়ী এবং অর্থ মন্ত্রণালয়ের সম্মতিক্রমে নিম্নোক্ত নির্দেশসমূহ জারী করা হইলঃ-

(ক) সকল স্থায়ী শূন্যপদ নিয়োগবিধি অনুযায়ী পদোন্নতি/নব নিয়োগের মাধ্যমে স্থায়ীভাবে পূরণ করার ত্বরিৎ ব্যবস্থা গ্রহণ করিতে হইবে।

(খ) নূতন সৃষ্ট পদে চলতি/অতিরিক্ত দায়িত্ব প্রদান করা যাইবে না।

(গ) পদের দায়িত্ব যদি এইরূপ হয় যে, পদপূরণের আনুষ্ঠানিকতা সম্পাদন পর্যন্ত পদটি শূন্য রাখা জনস্বার্থে সমীচীন নহে, তাহা হইলেই কেবলমাত্র নিম্নোক্ত ব্যতিক্রমধর্মী ক্ষেত্রে চলতি দায়িত্ব প্রদান বিবেচনা করা যাইতে পারেঃ-

(১) জ্যেষ্ঠতা নির্ণয়ে জটিলতা;

(২) নিয়োগবিধি প্রণয়নে বিলম্ব;

(৩) পদোন্নতিযোগ্য কর্মকর্তা/কর্মচারীর অভাব;

(৪) নিয়োগবিধি অনুযায়ী নিয়োগ বিলম্ব;

(৫) পদধারীর ছুটি বা প্রশিক্ষণের জন্য দায়িত্ব ত্যাগ। তবে ছুটি, প্রেষণ ও প্রশিক্ষণের জন্য সংরক্ষিত পদ থাকিলে ইহা প্রযোজ্য হইবে না।

(ঘ) অনতিবিলম্বে চলতি দায়িত্ব/অতিরিক্ত দায়িত্বের স্থায়ীত্ব দুই মাসের অধিক হইলে বিষয়টি দুই মাস অতিক্রমের

পূর্বে সংশ্লিষ্ট পদোন্নতি কমিটি/বোর্ডের অনুমোদনের জন্য পেশ করিতে হইবে।

(ঙ) শূন্যপদে সমপদধারী কর্মকর্তা/কর্মচারীদের মধ্য হইতে অতিরিক্ত দায়িত্ব প্রদানকে অগ্রগণ্যতা দেওয়া হইবে।

(চ) সমপদধারীদের মধ্য হইতে অতিরিক্ত দায়িত্ব প্রদান সম্ভব না হইলে অব্যবহিত নিম্নপদধারীদের মধ্য হইতে জ্যেষ্ঠতা ও কর্মদক্ষতার ভিত্তিতে পদোন্নতির যোগ্যতা বিবেচনা করিয়া চলতি দায়িত্ব প্রদান করা যাইতে পারে।

(ছ) অব্যবহিত নিম্নধারীদের মধ্য হইতে কাহাকেও চলতি দায়িত্ব দেওয়া সম্ভব না হইলে নিম্নবর্ণিত শর্তসাপেক্ষে একধাপ নীচের পদধারীকে চলতি দায়িত্ব দেওয়া যাইতে পারেঃ-

(১) সংশ্লিষ্ট পদোন্নতি কমিটির অনুমোদন গ্রহণ করিতে হইবে।

(২) মধ্যবর্তী পদটি শুন্য আছে অথবা অব্যবহিত নিম্নপদধারীদের মধ্যে দায়িত্ব প্রদানের জন্য উপযুক্ত কর্মকর্তা/কর্মচারী নাই এই মর্মে প্রত্যয়ন প্রদান করিতে হইবে।

(৩) যাহাকে দায়িত্ব দেওয়া হইবে তাহার উপরের পদধারী কাহাকেও চলতি দায়িত্বপ্রাপ্ত কর্মকর্তা/কর্মচারীর অধীনস্থ করা যাইবে না।

(জ) যাহাকে চলতি দায়িত্ব দেওয়া হইবে তিনি নিজস্ব পূর্বপদের দায়িত্ব হস্তান্তর করিয়া তাহার চলতি দায়িত্বপ্রাপ্ত পদে যোগদান করিবেন। তাহার পূর্বপদটি সমপদধারীদের মধ্য হইতে কাহাকেও অতিরিক্ত দায়িত্ব প্রদানের মাধ্যমে পূরণ করা হইবে অথবা সাময়িকভাবে পদোন্নতি দ্বারা পূরণ করা যাইবে, তবে শর্ত থাকে যে, চলতি দায়িত্বপ্রাপ্ত কর্মকর্তা/কর্মচারী তাঁহার পূর্বপদে ফেরত আসিলে সাময়িকভাবে পদোন্নতিপ্রাপ্ত কর্মকর্তা/কর্মচারীকে তাহার পূর্বপদে পদাবনতি করিতে হইবে। তবে যে স্থানে পদ খালি হইবে সাধারণভাবে সেই স্থানে/কর্মস্থলের উপযুক্ত কর্মকর্তা/কর্মচারীকে চলতি দায়িত্ব/অতিরিক্ত দায়িত্ব প্রদানের বিষয়ে অগ্রাধিকার দেওয়া হইবে। কোন উপযুক্ত কর্মকর্তা/কর্মচারী পাওয়া না গেলে কেবলমাত্র সেই ক্ষেত্রেই উপরোক্ত ব্যবস্থা গ্রহণ করা যাইবে।

(ঝ) চলতি দায়িত্ব প্রদান, বদলী বা পদোন্নতি বা নিয়োগ নহে, এবং দায়িত্বপ্রাপ্ত কর্মকর্তা/কর্মচারী চলতি দায়িত্বের কারণে এরূপ কোন সুবিধা দাবি করিতে পারিবেন না নিয়োগবিধি অনুসারে শূন্যপদ পূরণ করা হইবে এবং সে ক্ষেত্রে তিনি কোনও অগ্রগণ্যতা বা অধিকার অর্জন করিবেন না।

(ঞ) অতিরিক্ত দায়িত্বপ্রাপ্ত কর্মকর্তা/কর্মচারী তাহার নিজস্ব পদের দায়িত্ব হস্তান্তর করিবেন না। চলতি/অতিরিক্ত দায়িত্বপ্রাপ্ত কর্মকর্তা/কর্মচারী উক্ত দায়িত্বপ্রাপ্ত পদে স্থায়ী পদধারীর মর্যাদা দাবী করিতে পারিবেন না। চলতি/অতিরিক্ত দায়িত্ব পালনকালে কিভাবে পদবী লিখিত হইবে সেই সম্পর্কে সংস্থাপন মন্ত্রণালয়ের ২১-১-৮০ইং তারিখের ইডি/এসএ-১/২৭৫/৭৯-৪৮-(৫০) নং স্মারক অনুসরণ করিতে হইবে।

(ট) চলতি/অতিরিক্ত দায়িত্বের ক্ষেত্রে সরকারি কর্মকর্তা/কর্মচারীর বেতন ভাতাদি অর্থ মন্ত্রণালয় হইতে জারীকৃত ৭-৬-৮২ইং তারিখের স্মারক নং-এমএফ/আর-২/এপি-৫/৮২-১৭৫ দ্বারা নিয়ন্ত্রিত হইবে এবং ভবিষ্যতে জারীকৃতব্য অন্যান্য নির্দেশ পালন করিতে হইবে। (underlines supplied).

(ঠ) উপরোক্ত নির্দেশসমূহ রাজস্ব ও উন্নয়ন বাজেটে অর্ন্তভুক্ত পদসমূহের ক্ষেত্রে প্রযোজ্য হইবে।

৩। ইহাতে অর্থ মন্ত্রণালয়ের সম্মতি রহিয়াছে।

সচিব

সংস্থাপন মন্ত্রণালয়''

15. Eventually said notification was replaced by notification No.05.00.0000.170.11.017. 21-97 dated 18.04.2023. In the said notification, the word 'চলতি দায়িত্ব' has been defined in clause 2 (Kha) which is as follows:

সংজ্ঞাঃ–

"চলতি দায়িত্ব" *অর্থ সাময়িকভাবে কোনো সরকারি কর্মচারীকে তাহার মূল পদের পরবর্তী উচ্চতর কোনো প্রকৃত শূন্যপদে দায়িত্ব প্রদান;*

16. Clause 5 of the said Nitimala is as follows:

"৫। চলতি দায়িত্ব প্রদানের পদ্ধতিঃ- *চলতি দায়িত্ব নিম্নরূপে প্রদত্ত হইবে, যথাঃ-*

(ক) সংশ্লিষ্ট পদের নিয়োগকারী কর্তৃপক্ষ চলতি দায়িত্ব প্রদানের শুরুর তারিখ উল্লেখ করিয়া অফিস আদেশ বা

প্রজ্ঞাপন জারি করিবে;

(খ) চলতি দায়িত্বপ্রাপ্ত কর্মচারী তাহার পূর্ববর্তী পদের দায়িত্ব হস্তান্তর করিয়া চলতি দায়িত্বের পদে যোগদান করিবেন;

এবং

(গ) চলতি দায়িত্ব প্রদানের ক্ষেত্রে পদোন্নতির জন্য প্রণীত জ্যেষ্ঠতা সংক্রান্ত গ্রেডেশন তালিকা যথাযথভাবে অনুসরণ করিতে হইবে এবং এইক্ষেত্রে চাকরি সন্তোষজনক থাকিলে জ্যেষ্ঠ কর্মকর্তাকে বাদ দিয়া কনিষ্ঠ কর্মকর্তাকে চলতি দায়িত্ব প্রদান করা যাইবে না।"

17. Clause 7 of the said Nitimala is as follows:

*"৭। **চলতি দায়িত্ব প্রদানের মেয়াদঃ-** নিয়োগকারী কর্তৃপক্ষ অনুচ্ছেদ ৩ এর বিধান সাপেক্ষে সাময়িকভাবে ০৬ (ছয়) মাসের জন্য চলতি দায়িত্ব প্রদান করিতে পারিবে, তবে ০৬ (ছয়) মাসের অধিক চলতি দায়িত্ব প্রদানের প্রয়োজন হইলে, ০৬ (ছয়) মাস অতিক্রমের পূর্বে আবশ্যিকভাবে সংশ্লিষ্ট পদোন্নতি কমিটি বা বোর্ডের অনুমোদন গ্রহণ করিতে হইবে।"*

18. Clause 8 of the said Nitimala is as follows:

*"৮। **চলতি দায়িত্ব প্রদানের শর্তাদিঃ-** (১) সমপদধারীদের মধ্য হইতে অতিরিক্ত দায়িত্ব প্রদান করা সম্ভব না হইলে কেবল শূন্য পদের ফিডারভুক্ত অব্যবহিত নিম্নপদধারীদের মধ্য হইতে জ্যেষ্ঠতা, কর্মদক্ষতা ও সন্তোষজনক চাকরির ভিত্তিতে পদোন্নতির যোগ্যতা বিবেচনা করিয়া চলতি দায়িত্ব প্রদান করা যাইবে।"*

19. Upon perusal of the above Nitimalas it transpires that the current charge given to a particular officer by an official notification has got some force of law, and when it is given for unlimited period it is to be presumed that he has given all the administrative and financial power of the institution. The current charge given by a gazette notification cannot be termed or treated that the concerned officer will perform only day to day routine work, rather on the strength of such notification he has been vested all the administrative and financial power to be done in accordance with rules of business. Said current charge cannot be equated as a stop gap arrangement.

20. In the instant case the Director General, who passed the impugned order of dismissal, had given current charge by a gazette notification dated 04.12.2003 by the concerned authority of the Government and as such, we are of the view that he had got every authority to exercise the administrative power and it cannot be said that he had acted illegally having no authority and jurisdiction and as such the Tribunal as well as the Administrative Appellate Tribunal committed serious error in passing the impugned judgment and order.

21. Further, it also transpires from the record that the respondent was appointed as a Curator Clerk on 27.05.1980 in the Film Institute and Archive by Mr. A.K.M. Abdur Rouf, who at the relevant time held the post of Curator as current charge i.e. this very appointment of the respondent was made an officer, who at the relevant time was holding the current charge.

22. In view of the above, we are of the view that in this particular case the Director General, Current Charge, had got the authority to pass the order of dismissal.

23. We find substance in these appeals.

24. Accordingly, both the appeals are allowed. The impugned judgment and order passed by the Administrative Appellate Tribunal are set aside.

19 SCOB [2024] AD 125

APPELLATE DIVISION

Present:
Mr. Justice Hasan Foez Siddique, Chief Justice
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Jahangir Hossain

CIVIL PETITION FOR LEAVE TO APPEAL NO. 4506 of 2017
(From the judgment and order dated 24.08.2017 passed by the High Court Division in Writ Petition No.5673 of 2016)

Niko Resources (Bangladesh) Limited	**:**	**..... Petitioner**
-Versus-		
Professor M. Shamsul Alam and others	**:**	**..... Respondents**
For the Petitioner	:	Mr. Mustafizur Rahman Khan, Advocate, instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record
For the Respondent Nos.1, 3 and 4	:	Mr. Tanjib-ul-Alam, Senior Advocate, instructed by Mr. Md. Helal Amin, Advocate-on-Record with Mr. Md. Abdul Hye Bhuiyan, Advocate-on-Record
For the respondent No.2		Mr. A. M. Aminuddin, Attorney General (with leave of the Court)
For the respondent No.5		Not represented
Date of Hearing and judgment	:	The 18th June, 2023

Editors' Note:
In this case the Appellate Division found that the writ respondents No.4 Niko Resources (Bangladesh) Limited and No.5 Niko Resources Limited of Canada had set up a corrupt scheme to illegally obtain gas exploration rights in Bangladesh. Contracts were procured by corruption and therefore those were void ab initio. The Court also found that the rights and assets of the writ respondent No.5 in Block 9 PSC, had also been obtained through corrupt scheme. Consequently, dismissing the petition the Appellate Division held that the High Court Division had rightly declared the Joint Venture Agreement and the Gas Purchase and Sale Agreement to be without lawful authority and of no legal effect and had rightly attached the assets of writ respondent Nos.4 and 5.

Key Words:
Section 161, 162 and 163 of the Penal Code; statutory public authority; Article 152 of the Constitution; Res judicata; Section 23 of the Contract Act; No one can benefit from one's own wrong; Corruption; proceeds of crime; public policy; Article 31, 51, 53 and 54 of the UNCAC;

Section 162 and 163 of the Penal Code:

We note that section 162 of the Penal Code deals with "Taking gratification, in order, by corrupt or illegal means, to influence public servant". Under section 162 of the Penal Code private individuals, such as Mr. Salim Bhuiyan or Mr. Giasuddin Al Mamoon, taking bribes to influence a public servant by corruption or illegal means is a crime. Similarly, section 163 of the Penal Code deals with "Taking gratification, for exercise of personal influence with public servant". Taking or giving gratification to private individuals for their personal influence with public servants is also a crime. Thus, under the laws of Bangladesh there is no requirement that only direct payments to a Government official can constitute corruption. It would be sufficient if the gratification is extracted on a promise of exercise of personal influence with an official, to bring the offence within the mischief of this section 163 of the Penal Code. Proof of actual exercise of personal influence with an official is not necessary. ...(Para 49)

Section 161 of the Penal Code:

The Penal Code of Bangladesh clearly defines what constitutes bribery. Section 161 of the Penal Code deals with "Public servant taking gratification other than legal remuneration in respect of an official act". Under section 161 of the Penal Code any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act amounts to bribery. Giving anything whose value can be estimated in money is bribery. Under section 161 three things are necessary to constitute bribe - (i) the receiver of bribe must be a public servant; (ii) he must receive or solicit an illegal gratification; and (iii) it must be received as a motive or reward for doing an official act which he is empowered to do. There is no need to show, as the respondent No.4 argues that the bribes paid to State Minister AKM Mosharraf Hossain actually influenced his decisions to act in favour of Niko. ...(Para 50)

Section 161 of the Penal Code:

Stratum Management Services Contract is clearly in violation of section 161 since its stated aim was to make payments to Bangladesh Government officials for the procurement of Niko's projects in Bangladesh. There is no need to show additionally, as the respondent No.4 suggests, that these payments of bribes in fact influenced the Government officials who received the bribes. If that was the case, no one would be able to show corruption since one would need to go into the mind of the recipient of the bribe to determine if that person was influenced by the bribe. ...(Para 52)

Just the act of offering a bribe is an offence, regardless of whether the official accepts the offer. ...(Para 52)

The definition of "statutory public authority" under Article 152 of the Constitution:

There is no merit in the contention of Mr. Khan that the JVA and GPSA are commercial contracts entered into by respondent No. 3 (BAPEX) and respondent No. 2 (Petrobangla) as corporate entities and therefore these contracts are not sovereign contracts entered into by the State of Bangladesh which may be subjected to judicial review. We do not agree with these submissions since the JVA and GPSA were clearly executed through the exercise of Executive authority to grant rights over public resources to a private party, respondent No.4. The respondent Nos. 2 and No.3 clearly fall within the definition of "statutory public authority" under Article 152 of the Constitution. ...(Para 54)

Res judicata:

We cannot agree with the submissions that the writ petition is not maintainable due to res judicata effect of the judgment in writ petition No. 6911 of 2005. Res judicata requires uniformity of causes of action and parties. The petition before the Supreme Court of Bangladesh arises from a different cause of action and there is no uniformity of parties. There was no cause of action arising from the corruption and bribery in writ petition No. 6911 of 2005. The parties in the present writ petition are also not the same parties. ...(Para 55)

Section 23 of the Contract Act:

The JVA and GPSA having been procured by corruption would be void under section 23 of the Contract Act as being opposed to "public policy". Bribery and corruption are anathema to the concepts of rule of law and accountability and clearly against the "public policy". Public contracts procured by corruption are obviously against the "public policy" of Bangladesh. ...(Para 63)

No one can benefit from one's own wrong:

We cannot agree that a party which engages in corruption and illegally procures natural resources belonging to the State, through payments of unlawful gratification to public officials or payments to politically powerful persons for their influence over government officials, can benefit from such illegal conduct or that the courts should assist them in enjoying the fruits of their crimes. It is a well-established legal principle that no one can benefit from one's own wrong. In such a situation we see no scope of offering any restitution or benefit to the writ respondent No.4 or No.5 from the JVA and GPSA which are in fact proceeds of crime and are not contracts which can be protected under the laws of Bangladesh. We are of the view that the JVA and GPSA, being procured through corruption, are contrary to the laws of Bangladesh and cannot be protected by any court of law. ...(Para 65)

The institutions of the State should not condone bribery and corruption by powerful vested quarters as doing so would be in violation of the general principles of law, justice, equity, and good conscience. ...(Para 67)

Article 31, 51, 53 and 54 of the UNCAC:

As a legally binding international anti-corruption agreement, UNCAC provides a comprehensive set implemented by state parties to prevent, combat, and prosecute corruption. On ratification, the UNCAC created legal obligations for Bangladesh and those have to be enforced through the Executive branch and/or the Judiciary of Bangladesh. Thus, Bangladesh has a duty under international law, as laid out in Article 31 of the UNCAC, to confiscate the proceeds of crime. Article 51 of the UNCAC makes the return of assets which are proceeds of crime, a fundamental principle of the UNCAC. As such all proceeds of crime acquired by the writ respondents No.4 and No.5, through the use of a corrupt scheme, are to be returned to the state of Bangladesh. Article 53 mandates provisions for the direct recovery of corruption assets, including laws permitting private civil causes of action to recover damages owed to victim states and the recognition of a victim state's claim as a legitimate owner of stolen assets. Article 54 of the UNCAC enunciates mechanisms for recovery of property through international cooperation in confiscation. It requires State Parties to give effect to any confiscation order for corruption proceeds issued in another State Party, and to "consider taking such measures as may be necessary to allow confiscation...without a

criminal conviction." We find support for our decision to confiscate the assets of the respondents No.4 and No.5 in the principles laid down in UNCAC. ...(Para 70)

Public policy reasons for seizing the assets of writ respondents Nos.4 and 5:
We are of the view that there are also a number of public policy reasons for the assets of writ respondents Nos.4 and 5 to be seized, confiscated, and returned to the state of Bangladesh, the ultimate victim of the corruption. The aims of the confiscation are to recover the proceeds of crime, return the assets to the State, deny criminals the use of ill-gotten assets, and deter and disrupt further criminality. ...(Para 74)

Politically influential persons and Government officials who illegally enrich themselves through the abuse of power, and unscrupulous investors who facilitate such corruption, deprive the State of its property and hinder the economic development of the country. The laws of Bangladesh envisage the creation of a fair and just society in which crime does not pay. The Constitution empowers us with the duty to ensure that this vision is achieved by declaring any ultra vires exercise of Government authority of no legal effect and also declaring void any resultant contract procured through illegal acts such as corruption. ...(Para 78)

JUDGMENT

Md. Ashfaqul Islam, J:

1. This Civil Petition for Leave to Appeal has been preferred against the judgment and order dated 24.08.2017 passed by the High Court Division in Writ Petition No.5673 of 2016 making the Rule absolute.

2. The respondent No.1, Professor M. Shamsul Alam herein as petitioner filed the aforesaid writ petition challenging the Joint Venture Agreement dated 16.10.2003 (hereinafter referred to as JVA) between the writ respondent No.3, Bangladesh Petroleum Exploration and Production Company Ltd. (BAPEX) and 4, Niko Resources (Bangladesh) Limited, for the Development and Production of Petroleum from the Marginal/Abandoned Chattak and Feni Gas Fields and Gas Purchase and Sale Agreement dated 27.12.2006 (hereinafter referred to as GPSA) between the writ respondent No.2, Bangladesh Oil, Gas and Mineral Corporation (Petrobangla) as Buyer and a Joint Venture between the writ respondent Nos.3 and 4 (as seller) for the sale of gas from Feni Gas Field being without lawful authority and of no legal effect and thus, void ab initio, as a result of procurement through bribery, fraud, and corruption in violation of the Contract Act, 1872, the Prevention of Corruption Act, 1947 and in derogation of the Constitution of Bangladesh and also Gross negligence of the writ respondent Nos.1, Ministry of Energy, Power and Mineral Resources, 2 and 3 in their failure to seek adequate compensation for the damages caused by the 2005 blowouts at Chattak due to the impugned JVA and not undertaking petroleum operations in a proper and workmanlike manner and in accordance with good oil-field practice as required under the provisions of the Petroleum Act, 1974 and Omissions and actions of the writ respondents in International Centre for Settlement of Investment Dispute (hereinafter referred to as ICSID) Case Nos.ARB/10/11 and ARB/10/18,Niko Resources (Bangladesh) Ltd. V. Bangladesh Petroleum exploration & Production Company Limited (“BAPEX”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”) misleading the ICSID Tribunals in order to act against the public interest of Bangladesh with the mala fide

intention of conferring undue benefits to the writ respondent Nos.4 and 5, Niko Resources Limited.

3. The case, made out in the Writ Petition, in brief, is as follows:

In 1997, the writ respondent No.4 participated in Bangladesh's second bid round for Production Sharing Contracts ("PSC"), including Block 9 PSC, to develop oil and gas resources and was the least qualified, both technically and financially of seven bidders as evidenced by the report dated 28.09.1997 submitted to the writ respondent No.2, by Arthur Anderson, a reputed international consultant. Having failed to qualify for the exploration of gas fields in Bangladesh through a competitive and transparent bidding process, the writ respondent No.4 proposed to carry out a study, partly funded by the Canadian International Development Agency (CIDA) and entered into a Framework of Understanding for Study for the Development and Production of Hydrocarbon from Non Producing Marginal Gas Fields of Chattak, Feni, and Kamta ((hereinafter referred to as "FOU") dated 23.08.1999 with the writ respondent No.3. As part of the study under the FOU, in February 2000, writ respondent Nos.3 and 4 produced a report entitled "Bangladesh Marginal Field Evaluation Chattak, Feni and Kamta, February 2000" which expressly stated that, Chattak East is an "Exploration Structure" and an "Exploration Target". The writ respondent Nos.3 and 4 stated in the Marginal Field Evaluation that, the February 2000 report concluded the requirement of the FOU and a Joint venture Contract may be executed between the writ respondent Nos.3 and 4 as stipulated in the study upon approval of the writ respondent Nos.1 and 2. After the conclusion of the study requirements of FOU, there was not, and could not have been, any binding legal obligations to grant any rights over natural resources, through execution of the JVA, to the writ respondent No.4 without any competitive bid in a non-transparent manner simply, because, the writ respondent No.4 under the terms of the FOU was allowed to conduct a study of marginal/abandoned fields. Neither did the FOU treat Chattak East as a marginal/abandoned field.

4. Two years later on 01.10.2003 (i.e. 15 days before the JVA was executed on 16.10.2003), the respondent No. 4 entered into a Management Services Contract with Stratum Development Limited, a company registered in Jersey, Channel Islands represented by Mr. Qasim Sharif, a person who later became Vice President, South Asia of respondent No.4. Under the terms of the Management Services Contract the parties agreed that respondent No.4 "has executed" a JVA with respondent No.3 and that "Stratum shall invoice Niko Bangladesh for a retainer fee in the sum of US$20,000 per month effective October 1, 2003". According to clause 6 of the Management Service Contract it was agreed that the fee shall cover Stratum's fee in addition to all costs and expenses made or incurred by Stratum related to the provision of the Services such as "payments made to expedite or secure the performance by a foreign (i.e. Bangladeshi)public official of any act of a routine nature that is part of the foreign public official's duties and functions, such as the issuance of permits or licenses" required for the Niko Project.

5. The Respondent No.4 had also executed a Consultancy Agreement dated 27.07.1999 with Stratum Development Limited (represented by Mr. Qasim Sharif). According to Clause 6 of the Consultancy Agreement Stratum agreed to assist in the execution of a joint venture agreement with the respondent No. 3 (BAPEX) for Kamta, Chattak and Feni Gas Fields for which respondent No.4 (Niko Bangladesh) agreed to pay a "CONSULTANCY FEE" equal to "US$0.03 per mcf (three cents per thousand standard cubic feet)" of the Niko Bangladesh's net share of established proven reserves and "a minimum initial consulting fee of US DOLLARS FOUR MILLION" within 15 days of execution of the JVA.

6. The Respondent No.4 (Niko Bangladesh) has admitted to having another consultancy agreement with another company called Nationwide (owned by a Bangladeshi national Mr. Salim Bhuiyan) under which, following the execution of the JVA, respondent No.5 (Niko Canada), through Stratum, paid US$500,000 to Mr. Bhuiyan and admitted that a key part of the services provided by Mr. Bhuiyan was obtaining and arranging meetings with appropriate personnel as BAPEX, Petrobangla and the Ministry of Energy.

7. Mr. Salim Bhuiyan paid another politically influential person, Mr. Giasuddin Al Mamoon, an amount of Tk. 10,800,000 (Taka one crore eight lac) by Standard Chartered Bank Pay Order dated 07.01.2004. Mr. Mamoon is currently in prison following his conviction for money laundering activities in association with his business partner and close friend, Mr. Tarique Rahman, son of former Prime Minister Khaleda Zia. As part of an investigation into Niko's corrupt practices in Bangladesh, Mr. Mamoon admitted to the Royal Canadian Mounted Police ("RCMP") in interviews dated 01.11.2008 and 02.11.2008 of receiving the payments from Mr. Salim Bhuiyan for Mr. Mamoon's role as a sub-agent for Niko. Mr. Salim Bhuiyan made a statement before a Magistrate Court under section 164 of the Code of Criminal Procedure and confirmed paying Tk. 180,00,000 (one crore eighty lac taka) to Mr. Mamoon, Tk. 60,00,000 (sixty lac taka) to State Minister for Energy Mr. AKM Mosharraf Hossain, and retaining the remaining Tk. 60,00,000 (sixty lac) of Niko's fees for himself. This was how the $500,000 consultancy fee (approximately Tk. 300,00,000) paid by respondent No.5 to Nationwide (owned by Mr. Salim Bhuiyan) was distributed. Even though the confessional statement of Mr. Salim Bhuiyan had subsequently retracted the truth of Mr. Salim Bhuiyan's statement is supported by other documentary evidence, bank records, pay orders, and most importantly the own admissions of respondent No.4.

8. In addition to the above, it is also evident from the banking transactions of Messrs. Selim Bhuiyan, Giasuddin Al Mamun and other parties involved in the corruption how money flowed from one account to another surrounding the date of signing of JVA. This is matter of documentary evidence and there is no scope of raising any dispute as to the fact that money had been transferred from the account of Selim Bhuiyan to the account of Giasuddin Al Mamun, as such it is crystal clear that there had been corruption in procuring the JVA.

9. Mr. Selim Bhuiyan has made a confessional statement in Tejgaon P.S. Case No. 20(12)2006 where he admitted to having received money from Niko and paying Mr Giasuddin Al Mammon for the Niko contracts. The payment to Mr. Selim Bhuiyan is not denied by Niko.

10. Mr. Moudud Ahmed, the then Law Minister, had given a legal opinion based on which the contracts were granted to Niko. At the relevant time Mr. Moudud Ahmed provided his legal opinion as Law Minister; his law firm, Moudud Ahmed & Associates, was acting as legal counsel for Niko and provided a legal opinion which was similar to the legal opinion of the Law Minister. Law enforcing authorities have discovered that Niko made payment of US$ 6,065 to Moudud Ahmed on 12 October 2000 and another payment to Moudud Ahmed, while he was Law Minister, of US$8,315 on 15 January 2002.

11. The facts of Niko's corruption are that at all material times, Niko Bangladesh (respondent No.4) was an indirectly wholly owned subsidiary of Niko Resources Limited of Canada (respondent No.5).

12. Niko Bangladesh was funded solely by Niko Canada. Typically, money was transferred from Niko Canada's accounts in Calgary, to Niko Resources Caymans then to the Niko Bangladesh accounts in Barbados and finally to the Niko Bangladesh accounts in Bangladesh. The CEO of Niko Canada sat on the Board of Directors of Niko Bangladesh.

13. Niko Bangladesh entered into a Joint Venture Agreement (hereinafter JVA) with BAPEX for the exploration of the Feni and Chattak gas fields on October 16, 2003. Upon signing of the JVA, Mr. Qasim Sharif became the President of Niko Bangladesh.

14. As a matter of corporate governance, Niko Canada closely monitored the activities of its foreign subsidiaries. The presence of the Niko Canada CEO on the Niko Bangladesh Board ensured Niko Canada's knowledge of its subsidiary's actions.

15. The initial RCMP investigation began in June 2005 after an official from Canada's Department of Foreign Affairs and International Trade (DFAIT) alerted the RCMP to news stories concerning a possible violation of the Corruption of Foreign Public Officials Act by Niko Resources Ltd. The Bangladeshi State Minister for Energy, AKM Mosharraf Hossain, had resigned following reports that he was gifted with a vehicle by the Canadian firm, Niko, and that this gift constituted a bribe. The matter was referred to the RCMP, Calgary Commercial Crime Section, for investigation.

16. RCMP had commenced the investigation and had sent letter of request to Bangladesh for investigation and legal assistance, first on April 10, 2006 and subsequently on several occasions investigation was also joined in by United States Department of Justice through FBI, on the basis of Bangladesh request to USA, as well as Canadian request to USA. Most of the evidence were shared between the parties.

17. On June 24, 2011, Niko Canada pleaded guilty to a violation under Section 3(1)(b) of the Corruption of Foreign Public Officials Act in relation to the above noted investigation. Niko Canada was sentenced, fined, paid victim penalty and was subject to a probation order.

18. Further investigation work was ongoing following the above trial and sentencing in Canada. A further supplemental request was received by Bangladesh dated January 10, 2014 for investigation and legal assistance to RCMP from DOJ, Canada. Bangladesh had provided further assistance in connection with investigation relating to:

- Bribery of judicial officers, etc., contrary to section 119(a) of the Criminal Code of Canada; and
- Secret Commissions, contrary to section 426 of the Criminal Code of Canada; and its equivalent provisions under the laws of Bangladesh.

19. Bangladesh Anti-Corruption Commission has charged eleven individuals in one criminal case (known in Bangladesh as the Niko Corruption case) under Bangladesh Law for the offences committed in Bangladesh. The accused persons in the case are: 1. Former Prime Minister, Mrs. Begum Khaleda Zia; 2. Former Minister for Law Justice and Parliamentary Affairs, Mr. Moudud Ahmed; 3. Former State Minister for Energy Mr. A.K.M. Mosharraf Hossain; 4. Former Secretary in Charge, Mr. Shahidul Islam; 5. Former President of Niko Bangladesh and Managing Director, Stratum Developments Limited, Mr. Quasim Sharif,; Former Principal Secretary, Mr. Kamal Uddin Siddiqui; 7. Former Senior Assistant Secretary, Ministry of Energy, Mr. CM Yusuf; 8. Former Senior General Manager of

BAPEX, Mr. Mir Moynul Haque; 9. Former Company Secretary, BAPEX, Mr. Shafiur Rahman; 10. Managing Director, One Group, Mr. Giasuddin Al- Mamun; and 11. Chairman and Managing Director, International Travel Corporation, Mr. Selim Bhuiyan.

20. This Division, in a verdict on March 23, 2017 cleared the way for continuing of the trial.

21. Bangladesh Anti-Corruption Commission (hereinafter referred to as ACC) has charged two individuals, in another Niko related corruption case, under Bangladesh Laws for the offences of bribery committed in Bangladesh:

22. Former State Minister for Energy. A K M Mosharraf Hossain; and Qasim Sharif, Managing Director, Stratum Developments Limited.

23. The ACC investigation into the alleged bribery of foreign public officials, fraud, and the payment of secret commissions. by representatives of Niko Canada and Niko Bangladesh has thus far included witness interviews, documentary evidence collection and analysis, and the analysis of relevant financial records. The following is a summary of the investigation to date, based on evidence obtained during the course of the investigation.

24. From about 2006 onwards the RCMP started investigating Niko's corrupt practices in Bangladesh. The head of the RCMP investigation Corporal Duggan concluded that Niko, through Mr. Selim Bhuiyan, had agreed to pay to Mr. Giasuddin Al Mamun, friend of the former Prime Minister Khaleda Zia's son Tareq Rahman "$1 million if he helped ensure the success of the JVA." Once the JVA was executed, Mr. Qasim Sharif of Niko arranged for payment totaling Taka three crore (approximately US$514,000) into the Standard Chartered bank account of Mr. Bhuiyan who had "political clout" with the State Minister of Energy, Mr. AKM Mosharraf Hossain. The RCMP believed that this was part payment for procurement of the JVA.

25. In 2011 Niko entered into a plea bargain with the Canadian authorities and pleaded guilty to charges of providing improper benefits to Bangladesh officials to further the business objectives of its subsidiaries in Bangladesh. Niko's plea deal related specifically to giving a vehicle worth more than Canadian $190,000 to the then State Minister for Energy and Mineral Resources. Niko also pleaded guilty to paying $5000 travel and expenses for the former Minister to travel to Calgary, and then on to New York and Chicago.

26. Between January 2 and January 10, 2008 Canadian RCMP officer S/Sgt. Prouse and Sgt. Roussel travelled to Bangladesh and met with Bangladesh Anti-Corruption Commission (ACC) members. Information was exchanged arising out of respective investigations of Niko Canada and Niko Bangladesh.

27. On January 15, 2008 Selim Bhuiyan provided a witness statement to ACC Bangladesh investigators based on which it was concluded by the ACC that Selim Bhuiyan was the middleman facilitating cash payments between Qasim Sharif of Niko Resources Ltd. and Bangladesh government officials. Both Giasuddin Al Mamoon and Qasim Sharif requested Bhuiyan's assistance for Niko Resources. After the Joint Venture Agreement was signed Qasim Sharif representing NIKO paid Bhuiyan 3 crore taka at his Standard Chartered bank in Gulshan. From this money Bhuiyan paid Mamoon 1 crore 8 lac taka (approximately $200,000 US) by pay order, and at different times via cash and cheque, an additional 72 lac

taka. In total Bhuiyan paid 1 crore 80 lac taka (approximately $300,000 US) to Mamoon (approximately 60%) at different times Bhuiyan paid 60 lac taka (approximately $100,000 US) to Energy Minister Hossain (approximately 20%). The balance 60 lac (approximately $100,000 US) Bhuiyan kept for his work (approximately 20%).

28. Under the aforesaid facts and circumstances of the case, to protect the interest of the country as a public spirited citizen and being an activist involving oil and gas sector of the country, the writ petitioner, finding no other alternative efficacious remedy, filed the writ petition before the High Court Division and obtained the Rule.

29. The writ respondent No.4 contested the Rule by filing an affidavit-in-opposition on behalf of the respondent No. 1 against the application for discharging the Rule.

30. In due course, after hearing the parties and considering the connected papers on record, a Division Bench of the High Court Division made the Rule absolute by the impugned judgment and order dated 24.08.2017.

31. Feeling aggrieved, by the impugned judgment and order dated 24.08.2017 passed by the High Court Division in Writ Petition No. 5673 of 2016, the writ respondent No.4 as petitioner herein filed the instant civil Petition for leave to appeal before this Division.

32. Mr. Mustafizur Rahman Khan, the learned Advocate appearing on behalf of the petitioner submits that, the High Court Division erred in law and upon the facts in failing to appreciate that, the ICSID Tribunals having issued in ICSID Case Nos.ARB/10/11 and ARB/10/18 on 19.07.2016, a decision pertaining to the Exclusivity of the Tribunals' Jurisdiction declaring that, the Tribunals had sole and exclusive jurisdiction with respect to all matters validly brought before it, notably, the validity of the JVA and GPSA, including questions relating to the avoidance of these agreements on the grounds of corruption, and Bangladesh being admittedly a signatory of the ICSID Convention, under which the decisions of the ICSID Tribunals having the same binding effect as judgments of this Division, the High Court Division ought to have refrained from proceeding with the Rule.

33. He further submits that, the High Court Division erred in law and upon the facts in failing to appreciate that, the Rule Nisi was barred by the principles of res judicata inasmuch that, in an earlier judgment dated 17.11.2009 passed by the High Court Division in Writ Petition No.6911 of 2005 also filed pro bono publico seeking substantively the same relief, the High Court Division gave a specific finding that, the JVA was not obtained by a flawed process resorting to fraudulent means, and that, on such view of the matter, even on the basis of materials alleged not to have been before the High Court Division when passing the earlier judgment, the Rule Nisi in the subsequent case ought not to have been made absolute, but, rather, the writ petitioner, if aggrieved, ought to have sought review of the earlier judgment.

34. He next submits that, it having been drawn to the attention of the High Court Division that, even before the filing of the writ petition on 09.05.2016, the writ respondent No.3 had filed a Memorial on Damages on 25.03.2016 before the ICSID Tribunal in ICSID Case Nos.ARB/10/11 and ARB/10/18 seeking, inter alia, a declaration that, the petitioner procured the JVA and GPSA through alleged corruption, a dismissal of all the petitioner's claims and compensation for losses in excess of US$ 1 billion, and the respondent Nos.1 and 2 having further filed Money Suit No.224 of 2008 pending in the Court of 1st Joint District

Judge, Dhaka against the petitioner seeking damages of Tk.746.51 crores, which were all pending, the High Court Division ought to have appreciated that, the stated cause of action of the writ petition, being that, the respondent Nos.1 and 3 had failed to take any action in this regard, was patently false and misleading, and, as such, the Rule Nisi was infructuous.

35. He finally submits that, the High Court Division erred in law and upon the facts inasmuch that, the writ petition was premised upon allegations of fraud and corruption which involved highly contentious and disputed questions of fact, which were in fact the subject matter of claims, suits and criminal proceedings still pending, the issues raised by the writ petitioner were not only not justiciable in the summary jurisdiction under Article 102 of the Constitution, but, also any finding with regard to these issues risked prejudicing parties in the said claims, suits and criminal proceedings as well as pre-empting the findings of such proceedings, but, the High Court Division committed serious illegality in making the Rule absolute and, as such, the impugned judgment and order passed by the High Court Division is liable to be set aside.

36. Per contra, on behalf of the respondent Nos. 1, 3 and 4 herein respectively Professor M. Shamsul Alam, Bangladesh Oil, Gas and Mineral Corporation (Petrobangla) and Bangladesh Petroleum Exploration and Production Company Limited (BAPEX), Mr. Tanjib-ul-Alam, the learned Senior Advocate submits that respondent No.4, Niko Resources (Bangladesh) Limited have acted against the public interest of Bangladesh with the malafide intention of conferring benefits to itself. He further submits that, the writ respondent No.5, Niko Resources Limited, Canada which committed the acts of corruption in Bangladesh, has continued to own and retain 60% of the interest in the Block 9 PSC gas field operated by Tullow Bangladesh Limited for which it had been declared to be the least qualified, both financially and technically, of all seven bidders assessed by the Arthur Anderson report dated 28.09.1997. The writ respondent No.5, through Tullow Bangladesh Limited, continued to receive payments despite not having paid the adequate compensation for the 2005 blowouts till these payments were stopped by the Rule and interim order dated 09.05.2016.

37. He next submits that, admittedly the writ respondent Nos.4 and 5 have committed acts of corruption in the procurement of the JVA and GPSA. The procurement of the JVA and GPSA, through bribery and corruption, renders the JVA and GPSA void ab initio under section 23 of the Contract Act. He also submits that, the writ respondents should not be allowed to give effect to the JVA and GPSA procured through corruption since "an opportunity to carry on a business dishonestly is barred under section 23 of the Contract Act inasmuch as the same is opposed to the public policy particularly when the transaction is with the Government" as observed by this Division in the case of Ummu Kawsar Salsabil Vs. Shams Corporation (Pvt) Ltd. and others, reported in 5 BLD (AD)263 (1985).

38. He further submits that, the admitted facts show that, the writ respondent Nos.4 and 5 have violated a number of provisions of the Penal Code including offences related to public servants under sections 161-165, abatement under sections 107-119, criminal conspiracy under section 120, as well as offences under section 5 of the Prevention of Corruption Act, 1974. The US Dollar four million (US$ 4,000,000) Consultancy Agreement between Stratum and the writ respondent No.4 admittedly was aimed to facilitate the payment of gratification to Bangladesh Government officials. Furthermore, under the Nationwide Agreement, Mr. Salim Bhuiyan was admittedly paid US$ five hundred thousand (US$ 500,000) by the writ respondent Nos.4 and 5 as gratification for his exercise of influence over Bangladeshi Government officials. The US$ 4 million Consultancy Agreement, under which US$ 2.93

million was paid on 21.10.2003, i.e. five days after the execution of the JVA dated 16.10.2003, is admitted by NIKO to have been used for making a payment of US$ 500,000 to Mr. Salim Bhuiyan for his influence and ability to obtain meetings with Bangladeshi Government officials. These admissions by the writ respondent Nos.4 of payments to Stratum (owned by Mr. Qasim Sharif) and then to Mr. Salim Bhuiyan are admitted facts which taint the JVA and GPSA with corruption and render them void ab initio. In addition, the Stratum Management Contract clearly violated sections 161-165 of the Penal Code since it expressly stated that, the writ respondent No.4 would pay Stratum for "payments made to expedite or secure the performance" by Bangladesh Public officials for "issuance of permits or licenses required for" the NIKO Project. The writ respondent No.4 admits that, these payments were made and banking records show that, US$ 2.93 million out of the $ 5 million was paid 5 days after the execution of the JVA. Furthermore, the agreement with Nationwide (owned by Mr. Salim Bhuiyan) constitutes violation of section 163 of the Penal Code since Mr. Bhuiyan obtained the payment of US$ 500,000 from NIKO for his exercise of "personal influence" over Bangladeshi Government officials. The writ respondent No.4 blatantly admits to paying US$ 500,000 immediately after the JVA for Mr. Bhuiyan's influence and ability to arrange meetings with Bangladeshi Government officials which enabled the JVA to be procured.

39. He finally submits that, there is no res judicata of the petition with the pending ICSID cases or the previous writ Petition No.6911 of 2005 filed by BELA. This petition arises from a different cause of action and there is no uniformity of parties. The parties in the present writ petition are not the same parties before the pending ICSID arbitration cases, in particular the writ respondent No.5 (which admitted to the acts of corruption) is not a party to the ICSID proceedings and neither is the writ respondent No.1. In addition, there is no res judicata since the ICSID tribunals have not issued any final award or judgment. There is also no res judiciata of the petition with the previous judgment in Writ Petition No.6911 of 2005, since that judgment did not look into the issue of corruption and BELA did not produce any evidence of corruption. BELA tried to show that, the process of granting of the exploration rights in Chattak East, which was not a marginal/abandoned field, to NIKO under the JVA was improper since the process was non-transparent and without any competitive bidding. However, without any evidence of corruption, it was not possible to reach the conclusion that, the JVA was executed in bad faith, through misuse of power, or in an improper manner rendering the JVA illegal and without any legal effect. Hence, the High Court Division rightly made the Rule Nisi absolute with direction and passed the impugned judgment and, therefore, he prays for dismissal of the instant leave petition.

40. Mr. A. M. Aminuddin, the learned Attorney General (with leave of the Court) appearing on behalf of the respondent No.2 made submissions in support of the impugned judgment and order of the High Court Division.

41. We have heard the submissions of the learned Advocate for the petitioner, the learned Senior Advocate for the respondent Nos.1, 3 and 4 and the learned Attorney General for the respondent No.2. We have also perused the impugned judgment and order of the High Court Division and other connected papers on record.

42. The moot question is whether the writ respondent Nos.4 and 5 had set up a corrupt scheme during the period of 2003 to 2006, for obtaining benefits from the Government of Bangladesh and was able to procure the Joint Venture Agreement (JVA) and Sale Agreement for the Sale of Gas from Feni Gas Field (GPSA) through corrupt and fraudulent means.

43. It is admitted that the JVA and GPSA were in fact granted to the respondent No 4, Niko without any competitive bid in a non-transparent manner. Open competition and transparency are means of ensuring the public contracts are given to the best qualified person, at the best price, and not for the personal benefits of vested quarters.

44. It appears that in this situation the entire process of the granting of the JVA and GPSA to the writ respondent No.4 were tainted by clandestine consultancy agreements, illicit payments of exorbitant consultancy fees, and illegal gratifications being paid to Government officials and politically influential persons. In 1997 the respondent No.5 had been assessed to be the least qualified bidder and thus failed to qualify in the competitive bids conducted for granting of gas fields through Production Sharing Contracts, including Block 9 PSC. The respondent No.5 then decided to enter the Bangladesh energy market through the back door by using so-called consultancy agreements by which it agreed to make illegal payments of gratifications to Bangladesh Government officials.

45. It is shocking that the President of writ respondent No. 4, Mr. Qasim Sharif, who also acted as a conduit for payment of gratification to Government officials and politically influential persons in Bangladesh, would be quoted in the Agreed Statement by writ respondent No. 5 as stating that the payments of bribes to the then State Minister for Energy was to obtain and retain business interests and such a payment of bribe was "a commonplace part of doing business in Bangladesh" and a "cost of doing business". Even if bribery is considered commonplace it does not make it legal nor can it be considered a legitimate cost of doing business.

46. It is evident that the scheme of corruption set up by the writ respondent Nos. 4 and No.5 during 2003-2006 was for the payment of hidden consultancy fees amounting to millions of dollars received in Swiss bank accounts of companies incorporated in offshore jurisdictions, for the layering of those clandestine payments through different companies in offshore places such as Barbados and Cayman Islands, and for eventual payments of illegal gratification to politically influential people for their ability to "obtain and arrange" meetings with Bangladeshi Government officials, as was admittedly done by Mr. Salim Bhuiyan, or to "assist in the execution" of the JVA by making payments to Bangladeshi Government officials to "expedite and secure" the performance of official duties of Government officers, as was admittedly done by Mr. Qasim Sharif. Under the laws of Bangladesh this set up of the writ respondents No.4 and No.5 cannot be treated as anything other than a scheme for bribery and corruption. This scheme has been unearthed by the international law enforcing authorities in Canada, United States, and Bangladesh acting in close co-operation for fighting the global menace of corruption.

47. As regards the question of becoming the rule infructuous since the writ Respondent Nos.2 and No.3 has already taken steps against the writ Respondent No.4 and brought claims before the ICSID Tribunal and in a money suit claiming compensation for the blowouts, the High Court Division clearly observed that neither the pending ICSID arbitration cases nor the money suit offers an equally efficacious remedy than that of a writ jurisdiction. Under Article 102 (2) (ii), if no other equally efficacious remedy is provided by law, on the basis of an application of any person aggrieved, it may make an order declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic, has been done or taken without lawful authority and is of no legal effect. The writ respondent No.4 itself argued before the ICSID tribunals that ICSID does not have the power

to carry out judicial review of Bangladesh Government actions as exercised by the High Court Division under Article 102 of our Constitution. Writ Respondent No.4 cannot at the same time argue that the High Court Division should also not exercise its powers of judicial review. The writ respondent No.4 cannot be allowed to blow hot and cold at the same time. The position of the writ respondent No.4 is not maintainable since that would lead to an unacceptable situation where no court or tribunal would have the power to review the ultra vires exercise of government authority tainted by corruption. The judicial review powers of the Bangladesh Supreme Court also cannot be exercised by an ICSID tribunal since ICSID tribunals have no powers to seize the proceeds of crime being enjoyed by the writ respondents No.4 and No.5 in Bangladesh. ICSID tribunals may only issue a pecuniary award but cannot punish corruption or declare invalid unlawful exercise of executive powers. The proper forum for the determination of issues such as unlawful exercise of executive authority tainted by bribery and corruption of Bangladesh Government officials is the Supreme Court of Bangladesh applying law of the land under Article 102 of the Bangladesh Constitution. It is clear that respondent No.5 (Niko Canada), the parent company which actually pleaded guilty to acts of corruption in Bangladesh and which initiated the corruption scheme, is not even party to the pending cases before the ICSID tribunals. The ICSID tribunals have no powers over the assets of writ respondent No.5 in Bangladesh.

48. The next question is whether the allegations brought in the writ petition are disputed questions of facts. In this regard the High Court Division holds that there is no disputed question of fact as such since, in addition to admitting to making payments of bribes to the then State Minister for Energy AKM Mosharraf Hossain for obtaining and retaining business interests in Bangladesh for its subsidiaries, the writ respondent No.4 brazenly admits to making payments of over US$ 4 million to Mr. Qasim Sharif and US$ 500,000 to Mr. Salim Bhuiyan for their services in making "payments to Government officials" and for "arranging meetings with Government officials". Despite the many layers used to hide the payments and the channelling of these payments through numerous offshore bank accounts, the law enforcing agencies in Bangladesh, Canada, and the United States must be commended for their united and effective work in tracing the trail of the corrupt payments from Niko Canada (respondent No.5), through Barbados bank of writ respondent No.4, then through Swiss bank account of Niko's agent and President Mr. Qasim Sharif, to Mr. Salim Bhuiyan, and finally to the eventual recipients in Bangladesh. Having been caught red handed the writ respondent No.4 attempts to classify these corrupt payments as legitimate consultancy fees paid for services such as arranging meetings with Government officials and payments to expedite the performance of official functions. These payments are clearly illegal under the laws of Bangladesh. If these kinds of payments were permitted by law, then there would have been no way of checking corruption. All payments of bribes would have been packaged as payment of consultancy fees.

49. The typical argument of Mr. Khan that even if the allegations are accepted, there is no corruption since the trail of payments stop at Giasuddin Al Mamoon does not hold good. We cannot agree with this submission that there has to be a direct payment to a Bangladesh Government official for there to be corruption. This submission is not supported by the laws of Bangladesh, particularly the Penal Code. We note that section 162 of the Penal Code deals with "Taking gratification, in order, by corrupt or illegal means, to influence public servant". Under section 162 of the Penal Code private individuals, such as Mr. Salim Bhuiyan or Mr. Giasuddin Al Mamoon, taking bribes to influence a public servant by corruption or illegal means is a crime. Similarly, section 163 of the Penal Code deals with "Taking gratification, for exercise of personal influence with public servant". Taking or giving gratification to

private individuals for their personal influence with public servants is also a crime. Thus, under the laws of Bangladesh there is no requirement that only direct payments to a Government official can constitute corruption. It would be sufficient if the gratification is extracted on a promise of exercise of personal influence with an official, to bring the offence within the mischief of this section 163 of the Penal Code. Proof of actual exercise of personal influence with an official is not necessary. The US$ 500,000 payment admittedly made by respondents No.4 and No.5 to Mr. Salim Bhuiyan for his so-called ability to "arrange meetings" with Government officials through his social and political connections would clearly falls under the prohibitions of sections 162 and 163 of the Penal Code. Similarly, if the payment trail reaches Mr. Giasuddin Al Mamoon, then those payments were clearly for his exercise of personal influence and political clout over Bangladeshi Government officials. These facts, though not vital or essential for disposal of this petition, support the totality of the evidence of the corrupt scheme set up by the respondents No.4 and No.5 to acquire their investments in Bangladesh during 2003 to 2006.

50. The Penal Code of Bangladesh clearly defines what constitutes bribery. Section 161 of the Penal Code deals with "Public servant taking gratification other than legal remuneration in respect of an official act". Under section 161 of the Penal Code any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act amounts to bribery. Giving anything whose value can be estimated in money is bribery. Under section 161 three things are necessary to constitute bribe - (i) the receiver of bribe must be a public servant; (ii) he must receive or solicit an illegal gratification; and (iii) it must be received as a motive or reward for doing an official act which he is empowered to do. There is no need to show, as the respondent No.4 argues that the bribes paid to State Minister AKM Mosharraf Hossain actually influenced his decisions to act in favour of Niko.

51. The relevant extract of the case of Anti Corruption Commission vs. Mohammad Shahidul Islam and Ors as cited in 68 DLR AD 242 may profitably be quoted here to reiterate the observations of this division in the context of bribery by one of the legislators (Mr. AKM Mosharraf Hossain as in the instant case) as a public servant holding a public office:

> "*It appears to us the Anti-Corruption Commission Act is applicable in respect of public servant as well as "any other person". The Prevention of Corruption Act, 1947 and Anti Corruption Commission Act and Criminal Law Amendment Act, 1958 are the enactments which are meant for the benefit of the public. The main aim of those Acts are eradiction of the Corruption which is permeating every nook and corner of the country.*
>
> ***Grahm Zellic** in an article "Bribery of Members of Parliament and the Criminal Law" published in Public Law, 1979, has cited the observations of Sir Issac J, which are in the following words :-*
>
> *"When a man becomes a Member of Parliament, he undertakes high public duties. Those duties are inseparable from the position; he cannot retain the honour and divest himself of the duties. The position, independent of the Member, is subsisting, permanent and substantive and will be filled by others after him; this is provided by law; and it is certainly of a more,*

> *rather than less, public character, Erskine May in fact speaks of "Corruption in the Execution of their office as Members. There is nothing to stop a Court, therefore, holding that membership of Parliament constitutes an office....."*
> ***Benjamin Franklin** has said-*
> *"Let honesty be as the breath of thy soul; then shall thou reach the point of happiness, and independence shall be thy shield and buckle, they helmet and crown; then shall thy soul walk upright, nor stoop to the silken wretch because he hath riches, nor pocket an abuse because the hand which officers it wears or ring set with diamonds"*
> ***Thomas Jefferson** said-*
> *"The whole of Government consists in the art of being honest."*
> ***J.A.G. Griffith** in "Parliament" Functions, practice and procedure, has cited **Edmund Burke** while Commenting on the functions of the Members of Parliament. Accordingly to him, "It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication, with his constituents. Their wishes ought to have great weight with him, their opinion, high respect, their business, unremitted attention. It is his duty to sacrifice his repose, his pleasures, his satisfactions to theirs- and above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living.....your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you, if he sacrifices it to yours opinion."*

52. In addition, the Stratum Management Services Contract is clearly in violation of section 161 since its stated aim was to make payments to Bangladesh Government officials for the procurement of Niko's projects in Bangladesh. There is no need to show additionally, as the respondent No.4 suggests, that these payments of bribes in fact influenced the Government officials who received the bribes. If that was the case, no one would be able to show corruption since one would need to go into the mind of the recipient of the bribe to determine if that person was influenced by the bribe. Respondent No.4 and No.5 were parties to and aided and abetted the commission of these crimes in Bangladesh to illegally procure the JVA and GPSA. The respondents No.4 and No.5 have also clearly committed the offences of abetment under the Penal Code by entering into agreements with Stratum and Nationwide for the procurement of the JVA. Just the act of offering a bribe is an offence, regardless of whether the official accepts the offer.

53. In this connection reliance can be placed on the case of Anti-Corruption Commission vs. Mehadi Hassan, 67 DLR (AD) 137, where it has been held that:

> "*The allegations of abetment against respondent No. 1 of all the criminal petitions in manipulating the tender for sale of abandoned properties have been prima facie found to be true in the police report submitted by the investigation officer duly empowered by the Anti-Corruption Commission. Admittedly, respondent No. 1 of all the criminal petitions participated in the tender for sale of the properties in question and he is a*

> *beneficiary of the illegal transaction. Moreover, respondent No. 1 of all the criminal petitions was involved in the alleged illegal transaction for purchasing the case properties either in his own name or in favour of his organization or in the name of his designated person from the principal accused. The aforesaid elements certainly attract the ingredients of abetment in manipulating the tender for sale of the abandoned properties.*

54. There is no merit in the contention of Mr. Khan that the JVA and GPSA are commercial contracts entered into by respondent No. 3 (BAPEX) and respondent No. 2 (Petrobangla) as corporate entities and therefore these contracts are not sovereign contracts entered into by the State of Bangladesh which may be subjected to judicial review. We do not agree with these submissions since the JVA and GPSA were clearly executed through the exercise of Executive authority to grant rights over public resources to a private party, respondent No.4. The respondent Nos. 2 and No.3 clearly fall within the definition of "statutory public authority" under Article 152 of the Constitution.

55. We cannot agree with the submissions that the writ petition is not maintainable due to res judicata effect of the judgment in writ petition No. 6911 of 2005. Res judicata requires uniformity of causes of action and parties. The petition before the Supreme Court of Bangladesh arises from a different cause of action and there is no uniformity of parties. There was no cause of action arising from the corruption and bribery in writ petition No. 6911 of 2005. The parties in the present writ petition are also not the same parties.

56. As the High Court Division comprising of Mr. Justice A.B.M. Khairul Haque and Mr. Justice A.T.M. Fazle Kabir had observed in Bangladesh Italian Marble Works Limited vs. Government of Bangladesh 62 DLR 70:

> *"It is obvious and apparent that the issues in Writ Petition No. 802 of 1994 and the issues in the present Writ Petition are altogether different. The decision of the Court in Writ Petition No. 802 of 1994 was in respect of the Notification dated 24.5.1977. The Court summarily rejected the petition praying for handing over the concerned property in favour of the petitioner- company. But no Rule was issued and no issue could be said to be finally decided in the said writ petition, either in respect of the aforesaid notification or any of the Martial Law Proclamations etc. and its ratification, confirmation and validation by the Constitution (Fifth Amendment) Act, 1979. Under the circumstances, on both these two grounds, the contention that the present petition is barred under the principle of res judicata, has got no substance".*

57. Similarly, the apex court in the case of Dr. Syed Matiur Rob vs. Bangladesh, (reported in 42 DLR (AD) (1990) 129) had decided in a civil case the issue of resjudicata and held that:

> *"The previous judgment is no doubt admissible to show the assertion of the petitioner but it cannot bind respondent no. 4 nor the Government in view of the fact that the new issues that have been raised in these cases had no occasion to be considered in the previous proceedings instituted at the instance of a third party where the present appellant himself*

did not make any assertion as to his status or claim."

58. In the case of Begum Khaleda Zia vs. Anti-Corruption Commission 69 DLR AD 181 it has been held:

> *"The High Court Division has come to a finding that it appeared from the confession of co-accused that bribe was given to the then State Minister for Energy and Mineral Resources, AKM Mosarraf Hossain, Selim Bhuiyan and Giasuddin Al Mamun to ensure that the 'JVA' is to be finalized and singed which clearly comes within the ambit of definition of criminal misconduct given in section 5(1) of the Prevention of Corruption Act, 1947. The High Court Division has held that in the instant case, the issue is determination of criminal liability of the writ-petitioner in respect of the alleged offence under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947, that is, criminal breach of trust by public servant and abetment of the offence that took place in the process of executing the 'JVA'. The High Court Division has noted that abetment under section 109 of the Penal Code is such an offence which can be inferred from the conduct of the accused and attending circumstances of the case.*
>
> *This High Court Division correctly held that the present case is quite distinguishable from the other case which was already quashed by the High Court Division."*

59. Such a view has also been expressed by this Division in the case of M/s. Hyundai Corporation vs. Sumikin Bussan Corporation and others 54 DLR AD 88 in the following manner:

> *".....transparency in the policy/decision making as well as in the functioning of the public bodies is desired, for more than one reasons and particularly in the matter where financial interest of the State is involved transparency of the decision making authority is a recognized matter."*

60. In light of this background, from the undisputed facts and materials presented, it is clear to us that the writ respondent Nos.4 and 5 were engaged in corruption in procuring their investments and exploration rights in Bangladesh during the period 2003 to 2006. There was corruption not just under the laws of Bangladesh Penal Code but even according to World Bank's own definition of corruption. The World Bank's Integrity Vice Presidency defines corruption as follows: "A corrupt practice is the offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party. Example: A supplier agrees to pay "kickbacks" to a senior government official through an agent it hires as a sub consultant to perform "business development and marketing" services but without any deliverables. This agent is connected to a senior government official who is demanding a "commission" from every bidder as the official has influence over the bid evaluation committee and can steer the award of the contract to any bidder willing to pay. This supplier builds in the kickback amount as a percentage of the contract value, and pays for it from the funds it receives from the World Bank Group-financed project. Project financing costs are artificially inflated by these practices, and the supplier recovers costs by providing less expensive and lower quality goods. The transactions are result of corrupt practice outright.

61. In the case of Osimuddin Sarker Vs. State reported in 13 DLR 197/ PLD (Dac) 798, it has been observed:

> *"Section 162-Taking gratification- It is necessary in order to substantiate an offence under section 162 to show that the of being money that was accepted was intended for the purpose paid by way of gratification as a motive or reward for inducing by corrupt or illegal means as public servant but it is not necessary that the gratification must have been intended to be paid to the person who accepted the money. It is sufficient if the person accepting the money knows that the object for which the money is to be used is for the purpose of paying it by way of a gratification as a motive or reward for inducing a public servant."*

62. The World Bank's definition of corruption does not require a direct payment to a Government official, the same way sections 162-163 the Bangladesh Penal Code does not make it a requirement that the payment has to be made to a Government official. In this case, the writ respondents No.4 admits that its parent, respondent No.5, agreed to and did pay Mr. Salim Bhuiyan US$ 500,000 for his social and political connections and his ability to arrange meetings with senior government officials in Bangladesh. Mr. Bhuiyan performed these services without any tangible deliverables, other than getting Government approvals for Niko's projects. The admitted payments made to agents and Government officials in Bangladesh were clearly built into the prices of the contracts entered into by writ respondent No.5 through its subsidiaries. The eventual prices to be paid by Bangladeshi consumers for the gas to be supplied by writ respondent No.5 were thus artificially inflated by these corrupt payments, to take into account the fees paid to Niko's on the ground agents and Bangladeshi government officials.

63. The JVA and GPSA having been procured by corruption would be void under section 23 of the Contract Act as being opposed to "public policy". Bribery and corruption are anathema to the concepts of rule of law and accountability and clearly against the "public policy". Public contracts procured by corruption are obviously against the "public policy" of Bangladesh.

64. Now we would like to appreciate relevant academic perspective of the issue. The following observations by Professor Abdullah Al Faruque, a prominent law academic and a scholar of the Human Rights, Energy and Environmental Law, in his article ***'Relationship between Investment Contract and Human Rights: A Developing Countries' Perspective',*** *in: Sharif Bhuyan, Phillip Sands and Nicolach Scriver (eds.) International Law and Developing Countries, Brill Publisher, Leiden (2013) 120-153* is relevant to this context:

> *"Many investment contracts involve essential public service sectors such as water, oil and gas, electricity, transport, waste disposal and telecommunications, which invariably involve a public interest dimension and directly touch on the enjoyment of human rights.....Lack of transparency breeds corruption. Corruption in revenue management of natural resources agreements may have corrosive effect on realization of human rights and welfare of the host population("Transparency in Extractive Revenues in Developing Countries and Economies in Transition: A Review of Emerging Best Practices," 24(1) Journal of Energy and Natural Resources Law (2006) 66-103).*

> *Corruption increases the costs of investments and disputes arising out of corruption in investment contracts may result in decisions rendering them void or voidable on the ground of violation of international public policy. For instance, in the case of World Duty Free Company Ltd. v. Republic of Kenya, where the tribunal had to decide on the validity of a lease contract, it was held that a private investor had bribed the Kenyan head of state. The arbitrators held that the contract was void because it violated "international public policy (ICSID ARB/00/7, para. 138)."*

65. In this context the learned Counsel of the petitioner Mr. Mustafizur Rahman Khan has submitted since the JVA and GPSA has already been performed and gas has already been supplied to writ respondent No. 2, the only option here is to provide restitution to the writ respondent Nos.4 and 5 for the gas supplied. We cannot agree that a party which engages in corruption and illegally procures natural resources belonging to the State, through payments of unlawful gratification to public officials or payments to politically powerful persons for their influence over government officials, can benefit from such illegal conduct or that the courts should assist them in enjoying the fruits of their crimes. It is a well-established legal principle that no one can benefit from one's own wrong. In such a situation we see no scope of offering any restitution or benefit to the writ respondent No.4 or No.5 from the JVA and GPSA which are in fact proceeds of crime and are not contracts which can be protected under the laws of Bangladesh. We are of the view that the JVA and GPSA, being procured through corruption, are contrary to the laws of Bangladesh and cannot be protected by any court of law.

66. In this context we may again infuse the observations of this Division made in the case of Anti Corruption Commission vs. Mohammad Shahidul Islam and others 68 DLR AD 242:

> *"Corruption by public servants has now reached a monstrous dimension in Bangladesh. Its tentacles have been grappling even the institutions established for the protection of the State. Those must be intercepted and impeded the orderly functions of the public officer, through strong legislative, executive as well as judicial exercises the corrupt public servants could even paralyze the functioning of such institutions and thereby hinder the democratic polity. Hence, the laws should be so interpreted which would serve the object of the Acts. The founding fathers of the Constitution envisioned the legislators as men of character, rectitude and moral uprightness whose sole object was to serve the public with dedication, to be open, truthful and legal. We are reminded here of the memorable words of* ***H.G. Wells****. He was of the view:*
>
> *"The true strength of rulers and empires lies not in armies or emotions, but in the belief of men that they are inflexibly open and truthful and legal. As soon as a Government departs from that standard, it ceases to be anything more than "the gang in possession" and its days are numbered."*
>
> *Proliferation of corrupt public servants could garner momentum to cripple the social order if such men are allowed to continue to manage and operative public institution."*

67. The institutions of the State should not condone bribery and corruption by powerful

vested quarters as doing so would be in violation of the general principles of law, justice, equity, and good conscience in view of the judgments in Ekushey Television Ltd. and another vs. Dr. Chowdhury Mahamood Hasan and others 22 BLD (AD) 163. This Division held:

> *"Many in Bangladesh subscribe to the view point that while doing something Bangladesh should always be concerned about the adverse impact it might have on foreign investors in this country. But law has its own way and is inclined to speak in its own language. When money talks judiciary must not balk. Syndicated bridge-financing for the Ekushey Television by some foreign and local banks and the investment by the U.S.A. finance company is neither a contribution to philanthropy nor an effort to do something for the noble cause of free media. It is a simple case of investment, and like every investment the investment in ETV has its own risk. The third party rights exist and fall with the Ekushey Television, since their interests are merged with that of ETV. The substantive legal principle in this regard is that every person subject to the ordinary law within the jurisdiction. Therefore, all persons within the jurisdiction of Bangladesh are within Bangladesh rule of law. The foreign investors in ETV are no exception to this principle. The submission of Dr. Kamal Hossain is, therefore, bereft of any substance."*

68. Bangladesh is a party to the United Nations Convention against Corruption (hereinafter referred to as UNCAC). UNCAC require their state parties to enable confiscation of instrumentalities, proceeds, and property of corresponding value to proceeds of convention offences. UNCAC calls for national efforts to criminalize conduct and prevent criminals from gaining profit, the most frequent motivation for the crime. An effective deterrent against corruption is the seizure, confiscation and return of the proceeds of corruption. UNCAC contains elaborate mechanism and procedure for seizure, confiscation and return of assets.

69. While writing the foreword of this Convention Former Secretary-General of the UN Kofi A. Annan noted that:

> *"Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development."*

70. As a legally binding international anti-corruption agreement, UNCAC provides a comprehensive set implemented by state parties to prevent, combat, and prosecute

corruption. On ratification, the UNCAC created legal obligations for Bangladesh and those have to be enforced through the Executive branch and/or the Judiciary of Bangladesh. Thus, Bangladesh has a duty under international law, as laid out in Article 31 of the UNCAC, to confiscate the proceeds of crime. Article 51 of the UNCAC makes the return of assets which are proceeds of crime, a fundamental principle of the UNCAC. As such all proceeds of crime acquired by the writ respondents No.4 and No.5, through the use of a corrupt scheme, are to be returned to the state of Bangladesh. Article 53 mandates provisions for the direct recovery of corruption assets, including laws permitting private civil causes of action to recover damages owed to victim states and the recognition of a victim state's claim as a legitimate owner of stolen assets. Article 54 of the UNCAC enunciates mechanisms for recovery of property through international cooperation in confiscation. It requires State Parties to give effect to any confiscation order for corruption proceeds issued in another State Party, and to "consider taking such measures as may be necessary to allow confiscation...without a criminal conviction." We find support for our decision to confiscate the assets of the respondents No.4 and No.5 in the principles laid down in UNCAC.

71. There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth. Such a deprivation, in our opinion, would certainly be consistent with the requirement of the Constitution which prevent the State from arbitrarily depriving a subject of his property. It may be noted that according to the Arthur Anderson Report dated 28.09.1997 Niko was the least qualified of all the companies which were competing to get exploration rights to the Block 9 PSC gas fields. Niko Canada (respondent No.5) nonetheless eventually ended up with the same exploration rights in the form of 60% ownership of Block 9 PSC after it had set up the corrupt scheme during 2003 to 2006. The writ respondent No.5 clearly benefitted from this corrupt scheme. Otherwise, there is no explanation as to how writ respondent No.5, which was found to be the least qualified of seven bidders for the PSC Block 9 in 1997, eventually ended up with obtaining 60% of the exploration rights to the same Block 9. The preponderance of evidence of corruption leads us to the conclusion that but for the corrupt scheme in place the writ respondent No.5 could not have obtained its exploration rights in Bangladesh.

72. We are of the view that writ respondent No.5 should be deprived of its properties in Bangladesh which they have obtained through bribery and corruption. Writ Respondent No.5 has clearly already benefitted from the crimes committed in the form of exploration and production rights under the JVA, GPSA, and the Block 9 PSC. The value of the benefit obtained by writ respondent No.5 include all direct and indirect payments made to the respondent No.5 in relation to the JVA, GPSA, and the Block 9 PSC. Writ Respondent No.5 unlawfully benefitted by obtaining property of the State through the commission of offences under the Penal Code. The direct and indirect assets of the writ respondent No. 5 which are within the jurisdiction of Bangladesh and are, thus, subject to seizure and confiscation.

73. We are mindful that any seizure, confiscation and return of assets leading to the deprivation of property without compensation is to be implemented with great caution. Nonetheless, in this particular situation, our task has been greatly facilitated by the blatant admissions of corruption by both the respondents No.4 and No.5, the evidence of the trail of the corrupt payments uncovered by several international law enforcing agencies working together, and the contracts entered into by Niko which manifestly aim to facilitate corruption of Bangladesh public officials. The consultancy contracts are clear evidence that a corrupt scheme was set up by which regular payments were being made by the respondent No.5 to Bangladesh officials and politically influential people for the business benefits of its subsidiaries in Bangladesh. These manifest and flagrant violations of the laws of Bangladesh

render all the investments of the respondent No.5 in Bangladesh tainted by corruption.

74. We are of the view that there are also a number of public policy reasons for the assets of writ respondents Nos.4 and 5 to be seized, confiscated, and returned to the state of Bangladesh, the ultimate victim of the corruption. The aims of the confiscation are to recover the proceeds of crime, return the assets to the State, deny criminals the use of ill-gotten assets, and deter and disrupt further criminality.

75. The primary purpose of confiscation of the assets of the writ respondents No.4 and 5 is to prevent them from financially benefitting from the fruits of their illicit actions. This deprivation is an important aspect of the penalty imposed on writ respondents No.4 and No.5 for engaging in corrupt practices in Bangladesh. The confiscation of the assets will also deter others from engaging in similar corruption in keeping with the old adage 'crime does not pay'. It is morally wrong to let the corrupt enjoy their ill-gotten wealth. The corrupt cannot be allowed to live handsomely off the profits of their crimes while millions of law-abiding citizens work hard to earn a living.

76. The confiscation of the assets of writ respondents No.4 and No.5 is thus important for gaining confidence of the public in the rule of law. The confiscation and return of the assets to the State will result in some form of restorative justice. The people and the state would be able to obtaining at least some financial benefit or compensation from the scourge of the crime of corruption committed by the respondents No.4 and No.5. Hardship and suffering has been inflicted by the respondents No.4 and No.5 on the citizens such as the victims of the 2005 blowouts. The return of the assets to the State would also help to reimburse the State for the human and financial resources expended in fighting and pursuing the corrupt activities of respondents No.4 and No.5. Confiscation of these assets prevents the assets being used to fund further bribery and corruption. Given the culture of corruption within the companies and the scheme of corruption that was set up by the respondent No.4 and No.5, and in light of the audacity with which they have showed in the payments of bribes as normal business practices, there is no guarantee that similar practices would not be attempted again.

77. Criminals are becoming more and more sophisticated while states such as Bangladesh have to work hard to fight them within the constraints of the limited resources of a developing nation. Corrupt international companies hide behind corporate veils and depend heavily upon the barriers of sovereignty to shield themselves and the evidence of their crimes from detection. Companies such as the respondent No. 4 and No.5 which orchestrate transnational crimes and then disperse and conceal the proceeds of their illicit activities the world over cannot be allowed to continue to act with impunity while committing fraud and corruption. In this particular case, the international community of the law enforcing agencies through mutual legal assistance has managed to uncover the sophisticated corruption scheme of the respondents No.4 and No.5. It has been established that the properties of respondents No.4 and No.5 in Bangladesh were obtained as a result of their general criminal conduct through the setting up of a scheme of corruption. In such a situation, there is a duty upon us to confiscate these assets.

78. Politically influential persons and Government officials who illegally enrich themselves through the abuse of power, and unscrupulous investors who facilitate such corruption, deprive the State of its property and hinder the economic development of the country. The laws of Bangladesh envisage the creation of a fair and just society in which crime does not pay. The Constitution empowers us with the duty to ensure that this vision is achieved by declaring any ultra vires exercise of Government authority of no legal effect and

also declaring void any resultant contract procured through illegal acts such as corruption.

79. The Agreed Statement in paragraph 2 states that the respondent No. 5 provided the bribes to Bangladesh's State Minister of Energy "in order to further the business objectives of Niko Canada and its subsidiaries". The preponderance of evidence of corruption leads us to conclude that the assets of the respondent No.5 and its subsidiaries in Bangladesh, obtained through the corrupt scheme in place from 2003 to 2006, are to be treated as tainted by corruption and proceeds of crime. As such all the assets of the subsidiaries of No.5 including the assets and rights under the JVA, assets and rights under the GPSA, and the assets and shareholding interests in Block-9 PSC are attached and seized. These assets of the respondent No.4 and No.5 are being seized as proceeds of crime as well as to provide compensation to the victims of the 2005 blowouts.

80. In light of the above, it is found that from 2003 till 2006 the writ respondents No.4 and No.5 had set up a corrupt scheme to illegally obtain gas exploration rights in Bangladesh. Based on the undisputed facts, the JVA and GPSA have been procured by corruption and thus render them void ab initio. The rights and assets of the writ respondent No.5 in Block 9 PSC, for which writ respondent No.5 was found to be the least qualified of seven bidders in 1997, have also been obtained through this corrupt scheme and are thus being seized and confiscated as proceeds of crime as well as to provide compensation for the 2005 blowouts. All the rights, assets, and property of the writ respondent No. 4 and 5 in Bangladesh, obtained from the State through the corrupt scheme, shall revert back to the State.

81. In overall review and considering the gravamen of the entire incident which stretched over the years during 2003 to 2006 in particular involving NIKO as the protagonist, can be well perceived in the words of Lord Atkin in the case of Liversidge v Anderson and Another [1942] AC 207; [1941] 3 All ER 338:

> *"In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It be changed, but they speak the same language in war as in peace."*

82. Now, conceptually it is possible to draw a sharp line that none would be spared, how high so ever, when there is corruption in whatever manner and wherever that has been committed.

83. Fortified with the discussion as made above and taking into consideration everything we hold that the High Court Division has rightly declared the Joint Venture Agreement for the Development and Production of Petroleum from the Marginal/Abandoned Chattak and Feni Fields (JVA) dated 16.10.2003 between the writ respondent Nos.3 and 4 to be without lawful authority and of no legal effect and thus, void ab initio and also legally declared the Gas Purchase and Sale Agreement for the sale of gas from Feni Gas Field ("GPSA") dated 27.12.2006 between the writ respondents No.2, as Buyer, and a Joint Venture between the writ respondent Nos.3 and 4, as Seller, to be without lawful authority and of no legal effect and thus, void ab initio and attached the assets of writ respondent Nos.4 and 5, including their shareholding interest in Tullow Bangladesh Limited concerning Block-9.

84. The judgment and order passed by the High Court Division is elaborate, speaking and well composed. Nothing is left unsaid. It is absolutely an excellent pursuit of in-depth scrutiny. We are not inclined to interfere with the same.

85. Accordingly, the civil petition is dismissed without any order as to costs.

19 SCOB [2024] AD 148

APPELLATE DIVISION

Present:
Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Mr. Justice Md. Abu Zafor Siddique

CRIMINAL APPEAL NO.69 OF 2014
(From the judgment and order dated 02.11.2010 passed by the High Court Division in Criminal Appeal No.4582 of 2005 and Jail Appeal No.1302 of 2005 heard along with Death Reference No.162 of 2005)

Shahin	**:**	**. . . Appellant**
Vs.		
The State	**:**	**. . . Respondent**
For the Appellant	:	Mr. Moazzam Hossain, Senior Advocate instructed by Mr. Md. Helal Amin, Advocate–on-Record
For the Respondent	:	Mr. Md. Zahangir Alam, Deputy Attorney General instructed by Ms. Shirin Afroz, Advocate–on-Record
Date of hearing	:	28.03.2023 and 05.04.2023
Date of judgment	:	17.05.2023

Editors' Note:
In this case the trial Court found all the accused including the appellant guilty of the offence charged under sections 302/34 of the Penal Code and sentenced each of them including the appellant to death. The High Court Division, however, modified the sentence of the convict-appellant Shahin altering the death sentence to imprisonment for life. On the other hand, analyzing the evidence on record the Appellate Division found that the prosecution had failed to prove the allegations against the appellant beyond reasonable doubt and as such, allowing the appeal acquitted him.

Key Words:
Section 302/34 of the Penal Code; dying declaration; motive; physical and mental capacity to make dying declaration;

It is clear that the testimony of P.W.2 had not been corroborated by P.Ws.11 and 12. According to the statement of P.W.2 Kazimuddin (P.W.11) and Ziaur Rahman (P.W.12) had reached the place of occurrence before he reached there. He had seen both of them along with others were taking the victim in a *Van* to the Hospital.

Although it has come in the testimony of P.W.2 about the involvement of the accused along with the appellant in commission of the offence but P.W.11 in his deposition had in clear terms mentioned that "ঘটনাস্থলে আমি এসে দেখি বিপ্লব মৃত্যুশয্যায় তখন অঝোরে রক্ত ঝরছিল, আমি তাকে বেহুশের মতো হসপিটালে নিয়ে যাই এর কিছুক্ষণ পরেই মারা যায়" who in cross examination stated that "কিভাবে বিপ্লব মারা গেল তা সঠিক বলতে পারবো না।" and P.W.12 had stated in cross-examination that "বিপ্লবের ভ্যানে পিছনে পিছনে গেছি। সে কি কথা বলেছে তা শুনিনি বা জানিনা।" So, that definitely creates doubt on the physical capability of victim Biplob and as such the High Court Division though rightly came to a concrete finding that the prosecution in view of the facts and circumstances has totally failed to prove that the victim Biplob had the physical and mental capacity to make any statement such as dying declaration after receiving the serious bleeding injuries but it has committed illegality in not allowing the appeal of the convict-appellant which is contradictory to its own findings as stated above.
...(Para 18 & 19)

Only to prove the motive is not sufficient where the subsequent act relating to murder is doubtful relying on which the High Court Division has given the benefit of doubt to the other accused except the present appellant. The only reason that he took the money from the deceased cannot be the sole basis for his conviction in a murder case. According to the prosecution all the F.I.R. named accused had actively participated in the murder of the deceased Biplob and as many as eleven severe bleeding injuries were found on his body. So, only the appellant can't be held liable for committing the murder when the High Court Division has ignored the dying declaration taking into consideration the incapacity of the deceased at that moment and the contradictory statement of the vital PWs as well on the basis of which the trial Court had convicted and awarded death sentence to all of them. ...(Para 21)

The appellant's conduct in absconding was also relied upon by the High Court Division while rejecting his appeal. It has been previously held by this Division that absconding by itself is not an incriminating matter. ...(Para 22)

JUDGMENT

Md. Abu Zafor Siddique J:

1. This criminal appeal, by leave, is directed against the judgment and order dated 02.11.2010 passed by the High Court Division in Criminal Appeal No.4582 of 2005 upholding the judgment and order of conviction dated 27.10.2005 passed against the convict-appellant and modifying the sentence of death passed by the learned Additional Sessions Judge, Manikgonj in Sessions Case No.26 of 2004 arising out of G.R. No.197 of 2003 corresponding to Manikgonj Police Station Case No.4(6)03 dated 04.06.2003 convicting the accused under sections 302/34 of the Penal Code and sentencing the appellant to suffer death and also to pay a fine of Tk.10,000/- modifying the above sentence of death to a sentence of life imprisonment.

2. The prosecution case, in brief, is that deceased Md. Biplob Miah was the younger brother of P.W.1, Chunnu Miah who was the informant. Biplob used to do household works and their neighbours Al-Amin, Shahin and others F.I.R named accused were his friends. About 2 months before the date of occurrence the appellant, Shahin took Tk.1,00,000/- (one lac) from the father of deceased Biplob them in order to send him abroad. After taking the

money Shahin became reluctant to send Biplob abroad. P.W.1 asked Shahin about the progress when he informed that he would go abroad first, then he would take Biplob there. Regarding this issue conflict arose between them and victim Biplob insisted Shahin to return the money. As a result, at one stage Shahin threatened to kill Biplob. On 03.06.2003 at about 4.00 p.m. another co-accused Swapon took Biplob out of his house and at about 7.30 p.m. one Azizul informed P.W.1 that the physical condition of Biplob was very critical as his hands and legs were cut off from his body and he was lying on the paddy field near the bank of the river. After getting the said news, P.W.1 along with (P.W.2) Alamgir, Md. Elim (P.W.5) and many others rushed to the place of occurrence and after reaching there they saw Kader, Kazimuddin (P.W.11), Zia (P.W.12), Mithu and Abul were taking victim Biplob in a *Van* to admit him into the hospital. At that time, the informant, (P.W.1) and (P.W.2), Alamgir asked Biplob as to who assaulted him and in reply to that, Biplob told them that at about 7.00 p.m. Shahin, Al-Amin, Masud, Swapan and Appel about 5/6 persons took him at the south-east side of Hobi Matbor's house in the village-Dergram. Al-Amin inflicted a deadly blow on the upper part of his left arm by a sharp cutting weapon causing serious injury. Shahin and Masud by using sharp-cutting weapons cut down the veins near the ankles of his both legs. Appel and Swapan armed with hammer assaulted on his both legs down the knees breaking the bones. All of them assaulted him indiscriminately. Then, Biplob was taken to Sadar Hospital, Manikgonj where he succumbed to his injuries at about 10.00 p.m. on that day.

3. After receiving the *ejahar*, concerned Officer-in-Charge recorded the criminal case and gave the charge of investigation to S.I. Shamsul Hoque. He took up the charge of investigation of the case and recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure and completed all the other lawful duties in accordance with law. On conclusion of the investigation, the concerned Investigating Officer submitted charge-sheet against the 6 (six) accused including Lebu Miah along with the F.I.R named accused under sections 364/302/34 of the Penal Code.

4. Then after taking cognizance by the learned Magistrate the case record was transmitted to the Court of the learned Sessions Judge, Manikgonj, where it was registered as Sessions Case No.26 of 2004 and was transferred to the learned Additional Sessions Judge for trial. After receiving the case record, the learned Additional Sessions Judge, Manikgonj framed charge against all the accused under sections 302/34 of the Penal Code. In presence of the accused in the dock charge was read over to them and they pleaded not guilty and demanded trial.

5. The prosecution examined 21 witnesses in support of its case while the defence examined none.

6. After closing of the prosecution case, the accused in the dock were examined under section 342 of the Code of Criminal Procedure to which they pleaded not guilty and repeated their innocence. The defence did not however adduce any evidence.

7. The defence case as it could be gathered from the trend of cross-examination of the prosecution witnesses is of total denial, the accused had been falsely implicated in this case out of enmity inasmuch as they were not responsible or connected with the occurrence.

8. The learned Additional Sessions Judge, Manikgonj on the basis of the evidence on record found all the accused including the appellant guilty of the offence charged under sections 302/34 of the Penal Code and by his judgment and order dated 27.10.2005

sentenced each of them including the appellant to death by hanging and also to pay a fine of Tk.10,000/- each.

9. Reference under section 374 of the Code of Criminal Procedure was made to the High Court Division for confirmation of the sentence of death of the condemned-prisoner which was registered as Death Reference No.162 of 2005. The convict-appellant Shahin preferred Criminal Appeal No.4582 of 2005 and Jail Appeal No.1302 of 2005 before the High Court Division which were heard along with the death reference.

10. By the impugned judgment and order dated 02.11.2010 the High Court Division dismissed Criminal Appeal No.4582 of 2005 with modification of the sentence so far as it relates to the convict-appellant Shahin is concerned by altering the death sentence to imprisonment for life. Jail Appeal No.1302 of 2005 was also dismissed with modification of sentence. Hence, **the instant criminal appeal was filed by appellant Shahin before this Division**.

11. Mr. Moazzam Hossain, learned Senior Advocate appearing on behalf of the appellant submitted that the findings and decision of the High Court Division in drawing the inference of guilt on the alleged motive and as well as on abscondence of the appellant is against the well-settled principles of law and as such conviction and sentence of the appellant on such inference is liable to be set aside. He submitted that the High Court Division having held that the prosecution failed to prove that victim Biplob had the physical capacity to make a dying declaration after receiving such serious injury and also having held that the defence had been able to create a reasonable doubt about the veracity of the dying declaration, the conviction of the convict-appellant on the basis of that doubtful dying declaration is unsafe and hence the judgment and order of conviction and sentence passed by the High Court Division may kindly be set aside for securing ends of justice. He also submitted that the High Court Division having held that the alleged dying declaration of the victim was not free from doubt, rule of law and also prudence does not allow to convict a person relying upon a doubtful dying declaration and hence the judgment and order of conviction and sentence passed by High Court Division may kindly be set aside for securing ends of justice. He further submitted that the High Court Division failed to consider that mere acceptance of Tk.1,00,000/- from the victim to send him abroad (even if assumed to be true) does not indicate the involvement of the appellant in the alleged offence and hence the judgment and order of conviction and sentence passed by High Court Division may kindly be set aside. Then, he submitted that all the witnesses supporting the dying declaration are interested and partisan witnesses and moreover, their evidences have got no probative value and as such the impugned judgment and order of conviction and sentence based upon the said doubtful dying declaration is bad in law and liable to be set aside. He added that the High Court Division failed to consider that the injuries caused by the appellant as alleged by the prosecution did not cause death of the victim and the medical officer, PW-6 had admitted in his deposition that "**সাথে সাথে প্রপার ট্রিটমেন্ট পেলে ব্লাড দিতে পারলে হয়তো বাঁচতে পারতো।**' and as such, the order of conviction and sentence may kindly be set aside. He also stated that the High Court Division failed to appreciate that PWs.1 to 5 are not eye witnesses of the occurrence and they are not trustworthy and reliable and their depositions have not been corroborated by any independent witness and as such the impugned judgment and order of conviction and sentence may be set aside for securing ends of justice. He then submitted that the High Court Division having held that there was no circumstantial evidence supporting the alleged dying declaration based on which the co-accused, Lebu Miah, Masud, Swapan, Appel and Al-Amin were thus acquitted but the conviction of the convict-appellant, who stands on the same footing as of the co-accused, on the basis of the same doubtful dying declaration is unsafe and as such, the impugned judgment and order of conviction and sentence may be set aside for securing ends of justice. Finally, he submitted that the High Court Division failed to

appreciate that mere abscondence itself does not constitute the conclusive proof of the guilt of the appellant and therefore, the prosecution has not been able to prove the charges levelled against him beyond all reasonable doubt and as such the impugned judgment and order of conviction and sentence may be set aside for securing ends of justice.

12. Mr. Md. Zahangir Alam, learned Deputy Attorney General appearing on behalf of the respondent made submission in support of the impugned judgment and order of the High Court Division. He submitted that the PWs.1-5 categorically and consistently in their deposition stated that appellant Shahin took Tk.1,00,000/- (one lac) from the father of victim in order to send him abroad, but after that he did not take any step to send Biplob abroad and as a result severe enmity developed between Shahin and Biplob and when Biplob demanded to return back the money then Shahin told him "**বেশী ট্যাকা ট্যাকা করলে তোরে মাইরা ফেলামু**" and the defence extensively cross-examined them but nothing could be extracted to shake their credibility in any manner whatsoever, so the same are invulnerable to the credibility and as such appeal may kindly be dismissed. He also submitted that after killing of Biplob, appellant Shahin went on hiding. These are the strong circumstantial evidence against Shahin leading to the involvement of killing Biplob and as such the appeal may kindly be dismissed.

13. We have considered the submissions of the learned Advocate on behalf of the appellant and the learned Deputy Attorney General for the State, perused the impugned judgement and order of the High Court Division and other connected papers on record.

14. Having gone through the impugned judgment it appears that the High Court Division has rightly held that the trial Court came to a definite conclusion that victim Biplob had the capacity to make the statement treated as dying declaration after receiving as many as 11 serious bleeding injuries.

15. In the case of **Alais Miah vs State reported in 20 BLC (AD) 341** this Division held:
"while considering dying declaration the Court is required to see whether the victim had the physical capability of making such a declaration, whether witnesses who had heard the deceased making such statement heard it correctly. Whether they reproduced names of assailants correctly and whether the maker of the declaration had an opportunity to recognize the assailants."

16. It appears that the trial Court convicted the appellant along with others based on the evidence of P.Ws.1-5, 9 and 15 finding that the victim Biplob made dying declaration before the said P.Ws. implicating all the accused persons and as such finding no reason to disbelieve the said witnesses and the dying declaration made by the victim. The trial Court also found that the evidence of P.W.14 who saw the accused persons running away with blood stained weapons, is a piece of corroborative evidence with the dying declaration. It appears that the defence has challenged the said evidence of P.W.14 and put suggestion that he never went to the shop of Meher and waited there upto 7 p.m and did not see the accused persons running away. The testimony of P.W.14 that he disclosed about the occurrence before Bacchu's shop in presence of so many people was not corroborated by any other witnesses, particularly by Bacchu who was withheld by the prosecution. So the High Court Division rightly held that the trial Court committed error of law in holding that the statement of P.W.14 is corroborative evidence in committing the murder. It further appears from the deposition of P.Ws.1-5 that they categorically stated that at first they were informed by Azizul about the serious condition of deceased Biplob. But surprisingly, the prosecution neither examined the said Azizul nor cited him as a charge sheeted witness even and as such the evidence of P.Ws.1-5 are not corroborative evidence relying upon which the trial Court have awarded the punishment upon the accused including the present appellant. Now, in order to measure the weight of the alleged Dying Declaration, we need to go through the

evidence of P.W.2 who in his deposition stated that hearing the news about the incident from Azizul he along with Md. Elim, Jasim and Chunnu reached to the place of occurrence and saw that Kader, Zia, Kazimuddin and many other people were taking victim Biplob on a 'Van' in seriously injured condition and he asked Biplob 'what had happened'. In reply to that "তখন বিপ্লব বলল যে স্বপন তাকে ডেকে এনেছে। শাহিন, আল-আমিন, মাসুদ, স্বপন, আপেল তাকে বেদম মার ধোর করেছে। তারপর ভ্যান টেনে হসপিটালে আনি। আমি অর্ধেক চালাই। তারপর কাজিমুদ্দিন ভ্যান চালিয়ে হসপিটালে আনে। পরে রাত ১০.০০ টায় মরে যায়।"

17. P.W.2 also stated that Shahin took Tk.1,00,000/- to send Biplob abroad. In his cross-examination he denied the suggestion that Biplob was a terrorist and the previous Chairman of the Union Parisad handed over him to the Deputy Commissioner as the local people made complaint against Biplob to the Deputy Commissioner and Biplob paid a fine because of hijacking a motor-cycle. This witness also denied the suggestion to the effect that: "সত্য নয় যে, অসংখ্য জখমের কারণে বিপ্লবের কথা বলার মত সামর্থ্য ছিল না।" To test the veracity of P.W.2 we may compare it with the evidence of P.Ws.11 and 12. P.W.11 Kajimuddin in his deposition stated to the effect: "ঘটনাস্থলে আমি এসে দেখি বিপ্লব মৃত্যুশয্যায়। তখন অঝোরে রক্ত ঝরছে। আমি ভ্যানেই দেখি। আমি বেহুশের মতো হসপিটালে আনি। এর কিছুক্ষণ পরেই মারা যায়। দারোগার সাথে চুনুর বাড়ীতে কথা হয়েছে।" who in cross-examination had stated that "কিভাবে বিপ্লব মারা গেল তা সঠিক বলতে পারবো না।" PW.12 Md. Ziaur Rahman in his deposition stated to the effect: "রাস্তায় দেখি যে ভ্যান গাড়ির উপরে রক্তাক্ত জখম অবস্থায় বিপ্লবকে দেখি। আমি পিছনে পিছনে মানিকগঞ্জ হসপিটালে আসি। হাসপাতালে যাবার পর বিপ্লব মারা গেছে।" In his cross-examination he stated to the effect: "বিপ্লবের ভ্যানে পিছনে পিছনে গেছি। সে কি কথা বলেছে তা শুনিনি বা জানিনা।"

18. From the above discussion it is clear that the testimony of P.W.2 had not been corroborated by P.Ws.11 and 12. According to the statement of P.W.2 Kazimuddin (P.W.11) and Ziaur Rahman (P.W.12) had reached the place of occurrence before he reached there. He had seen both of them along with others were taking the victim in a *Van* to the Hospital. Although it has come in the testimony of P.W.2 about the involvement of the accused along with the appellant in commission of the offence but P.W.11 in his deposition had in clear terms mentioned that "ঘটনাস্থলে আমি এসে দেখি বিপ্লব মৃত্যুশয্যায় তখন অঝোরে রক্ত ঝরছিল, আমি তাকে বেহুশের মতো হসপিটালে নিয়ে যাই এর কিছুক্ষণ পরেই মারা যায়" who in cross examination stated that "কিভাবে বিপ্লব মারা গেল তা সঠিক বলতে পারবো না।" and P.W.12 had stated in cross-examination that "বিপ্লবের ভ্যানে পিছনে পিছনে গেছি। সে কি কথা বলেছে তা শুনিনি বা জানিনা।"

19. So, that definitely creates doubt on the physical capability of victim Biplob and as such the High Court Division though rightly came to a concrete finding that the prosecution in view of the facts and circumstances has totally failed to prove that the victim Biplob had the physical and mental capacity to make any statement such as dying declaration after receiving the serious bleeding injuries, but it has committed illegality in not allowing the appeal of the convict-appellant which is contradictory to it's own findings as stated above.

20. Moreover, the High court Division has also found that at the time of examining the appellant under section 342 of the Code of Criminal Procedure the learned trial Judge brought in his notice the most incriminating piece of evidence to the effect: "বিপ্লবকে বিদেশে পাঠানোর নাম করিয়া ১ লক্ষ টাকা আসামী শাহীন আত্মসাৎ করে। সেই টাকা ফেরত চাহিলে আসামী শাহিন বিপ্লবকে খুনের হুমকি দেয়। এই বিষয়টি সমর্থন করিয়া সাক্ষ্য দিয়াছে পিডব্লিউ-১ হইতে পিডব্লিউ-৪ নং সাক্ষী।"

21. In reply to that appellant Shahin did not say anything nor denied the said allegation. According to the High Court Division thus the prosecution has been able to prove the motive of murder so far appellant Shahin is concerned and has established the chain of events against him. But unfortunately we cannot agree with this finding of the High Court Division as this was the most incriminating piece of evidence against him because only to prove the motive is not sufficient where the subsequent act relating to murder is doubtful relying on

which the High Court Division has given the benefit of doubt to the other accused except the present appellant. The only reason that he took the money from the deceased cannot be the sole basis for his conviction in a murder case. According to the prosecution all the F.I.R. named accused had actively participated in the murder of the deceased Biplob and as many as eleven severe bleeding injuries were found on his body. So, only the appellant can't be held liable for committing the murder when the High Court Division has ignored the dying declaration taking into consideration the incapacity of the deceased at that moment and the contradictory statement of the vital PWs as well on the basis of which the trial Court had convicted and awarded death sentence to all of them.

22. The appellant's conduct in absconding was also relied upon by the High Court Division while rejecting his appeal. It has been previously held by this Division that absconding by itself is not an incriminating matter.

23. This was the view taken by Dua, J. in the case of **Matru V. State of U.P. reported in AIR (1971) SC 1050,** where it was held,

> "Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime; such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case."

24. The same principle was applied by this Division in the case of **State vs. Lalu Miah and another reported in 39 DLR (AD) 117,** where it was held,

> "Absconsion by itself is not an incriminating matter, for, even an innocent person, if implicated in the ejahar for a serious crime, sometimes absconds to avoid harassment during investigation by the police."

25. Although a contrary view was taken by this Division due to a different situation arose in the case of **Yasin Rahman @ Titu vs State reported in 19 BLC (AD) 08** which was referred by the learned D.A.G on behalf of the State; It was held in that case by a majority view that,

> "Abscondence by itself is not always an incriminating matter, for, even an innocent person sometimes absconds to avoid harassment by police. But in this present case the abscondence of this accused-appellant Yasin Rahman @ Titu, son of a very rich industrialist-immediate after the murder of Jibran Tayyabi and his remaining absconding for a long period of about 13 years do not support at all that he absconded and remained absconding for such a long period to avoid harassment by police."

26. But in the present case the appellant remained absconded for almost two years during the trial till he was arrested by the police. So, the case referred by learned D.A.G. Md. Zahangir Alam does not fit here with the case of the appellant but in this regard he is in the same footing with the other co-accused Appel, Lebu and Alamin. So, if any negative inference is to be drawn from remaining absconded then it should be equal for all otherwise it would be discriminatory.

27. However, according to the prosecution, regarding the active participation of the appellant in committing the murder of the deceased, he is in the same footing with the other accused. So, it will be a matter of outright injustice to the appellant if the same benefit of doubt is not granted to him. On a careful consideration of the evidence on record we are inclined to give benefit of doubt to the present appellant.

28. In the result the appeal is allowed. The sentence of the convict-appellant is acquitted of the charge levelled against him and his conviction and sentence is set aside.

19 SCOB [2024] AD 155

APPELLATE DIVISION

Present:
Mr. Justice Hasan Foez Siddique, Chief Justice
Mr. Justice M. Enayetur Rahim
Mr. Justice Jahangir Hossain

CIVIL APPEAL NO.64 OF 2008
(From the judgment and order dated the 2nd and 3rd days of August, 2005 passed by the High Court Division in Writ Petition No.3185 of 2004)

Government of Bangladesh and others : . . . Appellants

Vs.

Golam Mustafa : . . . Respondent

For the Appellants : Mr. Mohammad Mehedi Hasan Chowdhury, Additional Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record

For the Respondent : Mrs. Sufia Khatun, Advocate-on-Record

Date of Hearing : 25.01.2023

Date of Judgment : The 31st day of January, 2023

Editors' Note:
In this case Hakkani Publishers moved the High Court Division claiming that the Ministry of Information issued work order to supply 2317 sets of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] but later did not pay the bill. However, it transpires that no work order was given to the publisher. The Appellate Division found that different correspondences took place between and among different ministries about the purchase of 2317 sets of the Dalilpatra without due process of tender. It then held that inter-ministry correspondences regarding buying of additional sets of Dalilpatra without tender do not tantamount to any binding agreement between the instant appellants and the respondent and as such, the appellants are under no obligation to buy any book from the respondent. The Court also held that legitimate expectation cannot be based on departmental note as it was seen that the letters communicated among the ministries, were internal correspondences.

Key Words:
Legitimate expectation; work order; Article 102 of the Constitution; Dalilpatra

On perusal of the record, it transpires that the different correspondences took place in the affairs of the inter-ministries about the purchase of 2317 sets of the Dalilpatra without due process of tender. Correspondences of inter-ministries regarding additional sets of the Dalilpatra without tender do not tantamount to any binding agreement

between the instant appellants and the respondent and as such, the appellants are under no obligation to buy any book from the respondent. ...(Para 12)

In order to establish legitimate expectation, there must be a commitment which can be characterized as a promise. The root of the principle of legitimate expectation is constitutional principle of rule of law which requires regularity, predictability and certainty in Government's dealing with the public. ...(Para 15)

Legitimate expectation cannot be based on departmental note as it is seen that the letters communicated amongst the inter ministries, were internal correspondences. It is further claimed that the respondent came to know about the desire of ministry concerned to purchase additional sets of the Dalilpatra, but it was absolutely confidential inter-ministerial communication. A contract can be made to the extent that the terms and conditions between the parties are to be agreed in accordance with law. ...(Para19)

Article 102 of the Constitution:

Mere correspondence in the office of ministries concerned, does not fulfil any requirement to make a statutory contract or contract entered into by the Government in the capacity as sovereign, the relief sought by way of writ jurisdiction in the present case is not sustainable. The High Court Division cannot exercise its power conferred under Article 102 of the Constitution where the desire of buying and selling books without tender between the appellants and the present respondent is of inter-ministerial correspondences in nature. Apart from this, without tender and legal approval from the concerned authority, the proposal for buying additional 2317 sets of Dalilpatra would be an act of criminal offence that was realized later by the offices of ministries concerned and subsequently, it had to cancel for avoiding illegality in purchasing additional books in question. Such act of illegal attempt cannot be justified invoking Article 102 of the Constitution in the form of judicial review. ... (Para 21)

JUDGMENT

Jahangir Hossain, J:

1. This civil appeal, by leave, is directed against the judgment and order dated the 2nd and 3rd days of August, 2005 passed by the High Court Division in Writ Petition No.3185 of 2004 making the Rule absolute.

2. The facts, relevant for disposal of this civil appeal, in short, are that on 01.05.2003, a Notice DFP No.10980 dated 30.04.2003 was published in the Daily Newspapers inviting publishers interested in re-printing and marketing of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] published by the Ministry of Information [writ-respondent No.2] to submit their applications in their own pads mentioning their royalty to writ-respondent No.3 by 10:30 am on 09.05.2003. In the said notice, it was referred that a number of readers were interested in buying the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] and in order to meet this urgent demand, it was necessary to publish a limited number of sets of the said volumes. In compliance of the notice DFP No.10980, the writ-petitioner submitted an application for re-printing and marketing the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes]. Writ-respondent No.3 by its letter No.Tama/Press-1/2F-2/97-Bibidh-1/347 dated 14.05.2003 informed the writ-petitioner that it had been given permission for the re-printing of 3000 sets of the বাংলাদেশের

স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] on the basis of payment of 8.5% royalty. Subsequently, a contract dated 10.08.2003 was made between the writ-petitioner and writ-respondent No.2 setting out the terms and conditions, on the basis of which the writ-petitioner was permitted to re-print 3000 sets of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] on payment of royalty of 8.5%. According to clause-4 of the contract dated 10.08.2003, a specimen set of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] was obtained by the writ-petitioner on 02.10.2003 from writ-respondent No.4. By a letter No.Tama/Press-1/2F-2/97/Bibidh-1/969 dated 30.10.2003 issued by writ-respondent No.3 and as per clauses 7, 8 and 9 of the contract dated 10.08.2003, the specimen provided by the writ-petitioner was granted final permission regarding the cover layout printer's line and design. On 12.04.2004, the Information Minister, Tariqul Islam, formally unveiled the cover of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] re-printed by the writ-petitioner.

3. Writ-respondent No.3 by a letter dated 20.01.2004 requested writ-respondent No.4 to include the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] in the list of books required for each of 2317 educational institutions additionally under the project of writ-respondent No.1. On 08.05.2004, writ-respondent No.4 requested the Education Minister to include the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] in 2317 educational institutions of writ-respondent No.6. On 09.05.2004, writ-respondent No.6 issued a letter to writ-respondent No.1 requesting for administrative permission and financial approval of taka 3,47,55,000 [taka three crore forty seven lakh and fifty five thousand only] for the procurement without tender of 2317 sets of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] at a price of taka 15,000[taka fifteen thousand] per set. Writ-respondent No.6 also informed writ-respondent No.1 that the Education Minister had given verbal instructions for the said procurement. By a letter bearing Memo No.Sha-6/Nimabupra-2/99/206 dated 02.05.2004 issued by writ-respondent No.5 and addressed to writ-respondent No.6, permission was granted for the purchase of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] for each of 2317 institutions under the project of writ-respondent No.6. Writ-respondent No.4 issued letter No.PIO/01/2002-2004/3060 dated 24.05.2004 to writ-respondent No.6 stating that the writ-petitioner was the publisher on behalf of the Ministry of Information and 2317 sets were ready for delivery. Writ-respondent No.6 was instructed to contact the writ-petitioner directly for the purchase of the sets. In accordance with the direction of writ-respondent No.1, writ-respondent No.6 issued letter No.Nimabu/ 49/2001/451 dated 27.05.2004 to writ-respondent No.4 with work order for the procurement of 2317 sets of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] at a total price of taka 3,47,55,000. This letter was forwarded to the writ-petitioner for the purpose of taking necessary arrangement. Subsequently, writ-respondent Nos.1 and 5 purportedly issued two letters bearing Memo Nos.Sha:6/Namabiupra-2/99/2004/267 and Nimabiu/49/ 2001/478 both dated 07.06.2004 stating that the work order dated 27.05.2004 for the supply of 2317 copies of books was being cancelled. The writ-respondents neither gave any notice to the writ-petitioner nor gave any reason for such cancellation of the work order. Feeling aggrieved by the decision taken by the writ-respondents, the writ-petitioner filed Writ Petition No.3185 of 2004 before the High Court Division and obtained the Rule *Nisi*.

4. Writ-respondent No.1, Ministry of Education and writ-respondent No.2, Ministry of Information, by filing two separate affidavits-in-opposition contested the Rule. The writ-petitioner filed two supplementary affidavits sworn on 03.05.2005 and 17.07.2005 respectively. The learned Judges of the High Court Division upon hearing both the sides made the Rule absolute with direction to take delivery of the said sets of books from the writ-petitioner, in compliance with the work order dated 27.05.2004 within a period of 60(sixty) days from the date of receipt of the judgment and order.

5. Being aggrieved by and dissatisfied with the impugned judgment and order of the High Court Division, the present appellants preferred this civil appeal arisen out of Civil Petition for Leave to Appeal No.1657 of 2006 before this Division.

6. Mr. Mohammad Mehedi Hasan Chowdhury, learned Additional Attorney General, appearing for the appellants, submits that the High Court Division after having heard made the Rule absolute with a direction to honour the work order, within the period of 2(two) months from date, without considering the law, facts and circumstances of the case. He further asserts that appellant No.6 never issued any work order to the respondent for publication of books and as such, the claim of the respondent against appellant No.6 is not sustainable in law. The respondent printed those books, if any, at his own risk and responsibility for which the appellants are not liable. It is further submitted that Annexures-P and P1 to the writ petition are correspondences between appellant No.6 and the Ministry of Information which have nothing to do with the present respondent. He finally vindicates that in Annexure-M to the writ petition, direction has been given to issue work order in favour of appellant No.2, not in favour of the present respondent and as such, the impugned judgment and order of the High Court Division is bad in law.

7. Per Contra, Mrs. Sufia Khatun, learned Advocate-on-Record, appearing on behalf of the respondent, contends that in response to a public notice dated 01.05.2003, the offer of Hakkani Publishers to re-print 3000 copies of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] was accepted by the Ministry of Information, writ-respondent No.2, which was already in the earlier list of books to be supplied to the selected schools under the Selected Secondary School [Government and Non-Government] Development Project and as such, on the request of writ-respondent No.4 and as directed by the Minster for Education, the Project Director of the Project, writ-respondent No.6 obtained administrative and financial approval to procure 2317 sets of the Dalilpatra from the Ministry of Information. She further contends that the whole dispute is to be understood from the background of these undisputed facts. It is further contended that after a prolonged negotiation between the Ministry of Education and the Ministry of Information, passing for nearly 5[five] months, writ-respondent No.6 placed its work order dated 27.05.2004 with writ-respondent No.4 for supplying 2317 sets of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes], although, earlier said writ-respondent No.4 requested writ-respondent No.6 to place its delivery order directly with the Hakkani Publishers with a copy of the writ-petitioner for information and necessary action in that respect to supply 2317 sets within 30 [thirty] days.

8. These correspondences between the two Ministries of the Government had always held the Hakkani Publishers as the printer and supplier of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] to the Ministry of Education and although they placed the formal work order with writ-respondent No.4 knowing that the work order would be executed by the Hakkani Publishers for and on behalf of writ-respondent No.4 and the Ministry of Information, as such, on receipt of the work order on 27.05.2004 in continuation of the earlier instructions contained in the letter of writ-respondent No.4 dated 26.05.2004, the writ-petitioner, proprietor of the Hakkani Publishers immediately took all out efforts to meet the dead line to supply 2317 sets of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] within 10.06.2004 and as a matter of fact, was actually ready with the consignment by 07.06.2004. It is further contended that since the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] was already in the list of books to be supplied to a large number of selected schools, the writ-petitioner was encouraged to submit the tender for printing the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes]

with such an expectation; secondly, it was actually included in the renewed list on the request of the Ministry of Information, raising its expectation that he would be able to supply the books to the Project since he had the contract with the Ministry of Information, the sole publisher of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] to print the same; thirdly, his expectation got legitimacy when writ-respondent No.6 issued the work order to supply 2317 sets of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes], giving the price, time and other specific particulars spelt out the condition that the work order would be cancelled on the failure to supply the books by 10.06.2004 and as such, prior to that date, cancellation of the sanction to purchase books and the work order itself on 07.06.2004, were arbitrary, unfair and prejudicial to the legitimate expectation of the writ-petitioner raised from the conducts and representations of the two responsible Ministries of the Government as transpired from the various correspondences, consequently, the cancellation by the letters dated 07.06.2004, were illegal and without any lawful authority, rather the writ-respondents were obliged to accept the delivery of the books and also to make payments in accordance with the stipulation made in the work order dated 27.05.2004, issued by writ-respondent No.6 and endorsed by writ-respondent No.4.

9. Heard the contentions of the learned Additional Attorney General and the Advocate-on-Record for both the parties and perused the materials along with other connected papers on record.

10. It appears from the relevant documents on record that writ-respondent No.2, the Ministry of Information, on 01.05.2003, published a Notice DFP No.10980 dated 30.04.2003 in the Daily Newspapers inviting the publishers interested in re-printing and marketing of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] [hereinafter referred to as the Dalilpatra] to meet the urgent demand of a number of interested readers who were eager to buy the Dalilpatra. Subsequently, a contract was signed between writ-respondent No.2 and the writ-petitioner on 10.08.2003 following the due process of tender. Writ-respondent No.4 having met the Education Minister, Dr. Osman Faroq, requested him to include the Dalilpatra in a project, namely, Selected Secondary Schools [Government and Non-Government] Development Project under the Education Ministry for the students and interested local readers [Annexure-H to the writ petition]. On 09.05.2004, writ-respondent No.6, the Project Director, by a letter requested writ-respondent No.1, the Secretary, Ministry of Education, for Administrative as well as Financial approval for procuring 2317 sets of the Dalilpatra from writ-respondent No.2, the Ministry of Information, without tender for the selected schools at the cost of taka [(2317x1500)=3,47,55,000.00] [Annexure-I to the writ petition]. On 20.05.2004, writ-respondent No.5, the Senior Assistant Secretary, Ministry of Education, by a letter informed the Project Director, writ-respondent No.6 that the Education Ministry, writ-respondent No.1, gave the administrative as well as financial permission for purchasing 2317 sets of the Dalilpatra from the Information Ministry without tender [Annexure-J to the writ petition]. Thereafter, the Project Director by a letter dated 22.05.2004 informed the Principal Information Officer, writ-respondent No.4 that the Government gave nod to purchase 2317 sets of the Dalilpatra without tender published by the Information Ministry and requested as to whether the price of the Dalilpatra would be reduced[Annexure-K to the writ petition]. Thereafter, the Principal Information Officer, writ-respondent No.4, by a letter dated 24.05.2004 requested the Project Director, writ-respondent No.6, to place the work order to the Hakkani Publishers directly and then made them aware [Annexure-L to the writ petition]. Thereafter, the Senior Assistant Secretary, writ-respondent No.5, by a letter dated 26.05.2004 having been directed requested the Project Director, writ-respondent No.6, to place the work order to the sole publisher, Ministry of Information not to the Hakkani Publishers [Annexure-

M to the writ petition]. Then, the Project Director, writ-respondent No.6, by a letter dated 27.05.2004, having been directed placed the work order to the Principal Information Officer, Information Directorate, Ministry of Information for purchasing 2317 sets of the Dalilpatra [Annexure-N to the writ petition]. Thereafter, the Project Director, writ-respondent No.6, by a letter dated 07.06.2004 informed the Principal Information Officer, writ-respondent No.4 that the work order dated 27.05.2004 had been cancelled on being directed [Annexure-P to the writ petition].

11. It reveals from the record that the present respondent was involved in the correspondences of only two documents, which are Notice DFP No.10980 dated 30.04.2003 published in the Daily Newspapers inviting the publishers interested in re-printing and marketing of the Dalilpatra, and the contract signed on 10.08.2003 between them [the writ-petitioner and writ-respondent No.2] following the due process of tender. There has been no dispute between them over the purchase of 3000 sets of the Dalilpatra.

12. On perusal of the record, it transpires that the different correspondences took place in the affairs of the inter-ministries about the purchase of 2317 sets of the Dalilpatra without due process of tender. Correspondences of inter-ministries regarding additional sets of the Dalilpatra without tender do not tantamount to any binding agreement between the instant appellants and the respondent and as such, the appellants are under no obligation to buy any book from the respondent. The present appellants never issued any work order to the respondent as alleged in the writ petition [annexure-N to the writ petition]. Writ-respondent No.6 wrote to the Principal Information Officer, Information Directorate, directing to supply 2317 sets of books to the Secondary Education Directorate as its own cost and responsibility. It further appears that the correspondence between writ-respondent No.4 and writ-respondent No.6 to the effect that writ-respondent No.4 issued a letter to make correspondence with the present respondent regarding payment of price of books. To resolve these anomalies, writ-respondent No.6 wrote to writ-respondent No.1 asking for a clarification as to whether writ-respondent No.6 should maintain contact with the present respondent as per direction given in annexure-L to the writ petition to which writ-respondent No.1 instructed to contact writ-respondent No.4 directly, but not with the present respondent [annexure-M to the writ petition]. There was no official correspondence between writ-respondent Nos.1, 5, 6 and the present respondent. So, the present respondent has no cause of action against writ-respondent Nos.1, 5 and 6. The present respondent is not a party to work order rather it has been issued exclusively to writ-respondent No.4, but by claiming the same forwarded to him, arose a disputed question of fact which is not amenable in writ jurisdiction. The disputed question of fact cannot be invoked in the writ jurisdiction. In the case of Shamsun Nahar and others-Vs-Md. Wahidur Rahman and others reported in 51 DLR (AD) 232 it was held that under Article 102 of the Constitution a writ bench should not decide any disputed question of fact in favour of the petitioner which requires evidence to be taken for settlement. Exactly, similar view was echoed in the case of Nuruddin(Md)-Vs- Titas Gas Transmission and Distribution Company Limited and others reported in 3 BLC (AD) 231. Admittedly, annexure-A to the writ petition has been published in order to meet the demand of the interested readers making the book available in the market by the publisher interested in marketing of the same. Annexure-C is a contract/agreement executed by and between the writ-petitioner and writ-respondent No.2, Ministry of Information, entitling the writ-petitioner to reprint 3000 sets of 15 volumes of the Dalilpatra. No question was raised by the inter-ministerial correspondences regarding the 3000 sets of Dalilpatra because it was done following due process of tender. It is apparent that long before issuance of work order [annexure-N to the writ petition], the additional sets of Dalilpatra in question had been printed as alleged for selling in the open market by paying royalty, which indicates that the writ-petitioner was more advanced than that of the buyers

who were not authorised to purchase any books without due process of law. The inter-ministerial correspondences never created any right in favour of the present respondent nor could hold the appellants responsible. In annexure-M to the writ petition, direction was given to issue work order in favour of writ-respondent No.2 not in favour of the present respondent. The work order had never been issued to the present respondent. The appellants made no promise to buy the books in question before or after printing of those and no amount had been paid in advance and no direct or indirect assurance had been made.

13. While the inter-ministerial correspondences were going on, they found that it was a lot of money to be spent in purchasing the Dalilpatra for the selected schools [Government and Non-Government] without tender might be a scam. Though, at the first instance, the Education Minister gave oral permission for purchasing 2317 sets of the Dalilpatra at a cost of taka[(2317x1500)=3,47,55,000.00], subsequently, there was no written document made in this regard. The cancellation of the work order occurred between the inter-ministries not with the Hakkani Publishers.

14. The last claim of the writ-petitioner is that concerned Ministries through official correspondences both in writing and oral gave him utmost hope to supply the books in question which creates a legitimate expectation to be executed by the writ-respondents.

15. The phrase "legitimate expectation" first emerged in its modern public law context in the judgment of Lord Denning in *Smith vs Secretary of State for Home Affairs [1969] 2 ch.149, 170* and it has gained an ever more prominent presence in the reported cases. Despite this increasing visibility, however, many of its features remain undefined. In order to establish legitimate expectation, there must be a commitment which can be characterized as a promise. The root of the principle of legitimate expectation is constitutional principle of rule of law which requires regularity, predictability and certainty in Government's dealing with the public.

16. In the case of the *Council of Civil Service Union vs Minister for the Civil Service 1985 AC 374*, the House of Lords observed that,

> "Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of regular practice which the claimant can reasonably expect to continue."

17. Late Mr. Mahmudul Islam, learned Senior Advocate of this Court, in his book "Constitutional Law of Bangladesh", Third Edition, having considered a large number of reported cases of English, Indian and our jurisdictions deduced the principles emerged from those cases as under:

"(i) The statement or practice giving rise to the legitimate expectation must be sufficiently clear and unambiguous, and expressed or carried out in such a way as to show that it was intended to be binding. A statement will not be binding if it is tentative, or if there is uncertainty as to what was said. Where it was said that a recommendation from X was 'almost invariably' accepted there was no legitimate expectation that it would be accepted. Legitimate expectation cannot be based on departmental note to which concurrence of the relevant authority has not been obtained.

(ii) Legitimate expectation cannot be pressed in aid when the policy or practice on which the expectation is based is *ultra vires*.

(iii) Substantive protection of legitimate expectation will generally require that the promise is made to a small group and a general announcement of policy to a large group is unlikely to be presented substantively.

(iv) An expectation to be legitimate must founded upon a promise or practice by

the public authority that is said to be bound to fulfil the expectation and a Minster cannot find an expectation that an independent officer will act in a particular way or an election promise made by a shadow Minister does not bind the responsible Minister after the change of the government.

(v) A person basing his claim on the doctrine of legitimate expectation has to satisfy that he relied on the representation of the authority and the denial of that expectation would work to his detriment. The Court can interfere only if the decision taken by the authority is found to be arbitrary, unreasonable or in gross abuse of power or in violation of the principles of natural justice and not taken in public interest.

(vi) The statement or practice must be shown to be applicable and relevant to the case in hand. Thus where an offer of an interview had been made in 1986, but action was taken in 1988 without an interview, there was no legitimate expectation of an interview in 1988 as the circumstances then were quite different.

(vii) Legitimate expectations are enforced in order to achieve fairness. Thus where it was argued that a previous practice of giving an oral hearing gave rise to a legitimate expectation of a hearing, the court said that the question was whether the official in question had acted unfairly and in the circumstances the decision on the papers was held fair. Even if a case of legitimate expectation is made out, the decision or action of the authority will not be interfered with unless it is shown to have resulted in failure of justice. There cannot be any legitimate expectation ignoring a mandatory provision of law requiring permission to be obtained.

(viii) Clear words in the statute or in the policy statement override legitimate expectation.

(ix) If the statement said to be binding was given in response to information from the citizen, it will not be binding if that information is less than frank, and if it is not indicated that a binding statement is being sought.

(x) He who seeks to enforce must be a person to whom (or a member of the class to which) the statement was made or the practice applied.

(xi) Even though a case is made out, a legitimate expectation shall not be enforced if there is overriding public interest which requires otherwise.

(xii) A claim based on legitimate expectation cannot be sustained when there is non-compliance with a mandatory provision of law."

18. The above elaborated principles be guiding principles in deciding the cases on legitimate expectation. It should not exercise abruptly by the Court without appropriate guidelines as expounded above.

19. The case in our hand is a case of Government versus a publisher named the Hakkani Publishers. The publisher being a writ-petitioner moved the High Court Division to meet his demand invoking writ jurisdiction. It is claimed that the Ministry of Information issued work order to supply 2317 sets of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes], in addition. But the learned Additional Attorney General pressed that it was only the correspondence between writ-respondent No.6 and the Ministry of Information and the Ministry of Education. The Hakkani Publishers is a private enterprise which publishes books to sell under the Ministry of Information. It is an admitted fact that the Ministry of Information and the Hakkani Publishers made a contract to re-print and market 3000 sets of the বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র [15 Volumes] to the interested readers following the due process of tender. But for additional 2317 sets of the same, the enterprise cannot invoke the writ jurisdiction showing the legitimate expectation that there was a lawful promise. Legitimate expectation cannot be

based on departmental note as it is seen that the letters communicated amongst the inter ministries, were internal correspondences. It is further claimed that the respondent came to know about the desire of ministry concerned to purchase additional sets of the Dalilpatra, but it was absolutely confidential inter-ministerial communication. A contract can be made to the extent that the terms and conditions between the parties are to be agreed in accordance with law.

20. In the case of Superintendent Engineer, RHD & Ors.-Vs- Md.Enus and Brothers (Pvt.) Ltd. & Ors, reported in 31BLD(AD)1[2011], this Division held that writ jurisdiction can be invoked in case of breach of contract when;

(a) The contract is entered into by the Government in the capacity as sovereign;
(b) Where contractual obligation sought to be enforced in writ jurisdiction arises out of statutory duty or sovereign obligation or public function of a public authority;
(c) Where contract is entered into in exercise of an enacting power conferred by a statute that by itself does not render the contract a statutory contract, but 'if entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory;
(d) Where a statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions and the contract so entered by the statutory power then merely because one of the parties to the contract is statutory or public body such contract is not a statutory contract;
(e) When contract is entered into by a public authority invested with the statutory power, in case of breach thereof relief in writ jurisdiction may be sought as against such on the plea that the contract was entered into by the public authority invested with a statutory power;
(f) Where the contract has been entered into in exercise of statutory power by a statutory authority in terms of the statutory provisions and then breach thereof gives right to the aggrieved party to invoke writ jurisdiction because the relief sought is against breach of statutory obligation.

21. Mere correspondence in the office of ministries concerned, does not fulfil any requirement to make a statutory contract or contract entered into by the Government in the capacity as sovereign, the relief sought by way of writ jurisdiction in the present case is not sustainable. The High Court Division cannot exercise its power conferred under Article 102 of the Constitution where the desire of buying and selling books without tender between the appellants and the present respondent is of inter-ministerial correspondences in nature. Apart from this, without tender and legal approval from the concerned authority, the proposal for buying additional 2317 sets of Dalilpatra would be an act of criminal offence that was realized later by the offices of ministries concerned and subsequently, it had to cancel for avoiding illegality in purchasing additional books in question. Such act of illegal attempt cannot be justified invoking Article 102 of the Constitution in the form of judicial review.

22. On consideration of the matters discussed above, we are of the view that the High Court Division made a serious error of law making the Rule absolute. So, we are constrained to hold that the writ petition was not at all maintainable under Article 102 of the Constitution.

23. Therefore, the civil appeal is allowed without any order as costs. Accordingly, the judgment and order of the High Court Division is set aside.

19 SCOB [2024] HCD 1

HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Criminal Appeal No. 7323 of 2022
with
Jail Appeal No. 154 of 2021

Md. Zoni ...Appellant-petitioners

-Versus-

The State ...Respondent

Mr. Md. Nasimul Hasan, Advocate
.....For the appellant.

Mr. M.D. Rezaul Karim, D.A.G with
Mr. Md. Mizanur Rahman, A.A.G
… For the Respondent.

Heard on: 19.03.2024
Judgment on: 21.04.2024

Present:
Mr. Justice Md. Shahinur Islam
And
Mr. Justice Sardar Md. Rashed Jahangir

Editors' Note:
In this case the convict-appellant was sentenced to suffer imprisonment for life by the trial court under section 302 of the Penal Code. High Court Division, however, finding that the victim sustained single injury and died 18 days later, the weapon (Batal) was not carried by the appellant in advance, there was no premeditation and the convict lost self-control being emotional before committing the crime held that the convict-appellant had no intention to commit the murder. His act falls under the offence of 'culpable homicide not amounting to murder'. Consequently, appellant's sentence was altered by the High Court Division from life imprisonment to rigorous imprisonment for 10 (ten) years.

Key Words:
Murder; Culpable homicide; Confessional statement; Section 302 and section 304 Part II of the Penal Code; premeditation

All murders are culpable homicides but all culpable homicides are not murder:
It is now settled that all murders are culpable homicides but all culpable homicides are not murder. Culpable homicide is a genus and murders its specie. That is to say all murders are culpable homicide, but all culpable homicides are not murder.
...(Para 57)

In the absence of any motive, conspiracy, pre-plan or pre-meditation on part of accused it can be deduced that the appellant had no 'intention to commit murder':
It is to be noted that to find an accused guilty of offence of murder punishable under section 302 Penal Code it must be proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause

death. But in the case in hand, we do not find the injury sustained by the victim was sufficient to cause his death. Injured victim however died in hospital 18 days after he sustained injury. The post Mortem doctor admits in cross-examination that no appropriate treatment was provided to injured victim when he had been in hospital. It appears from the evidence on record that prosecution failed to prove any motive, pre-meditation, pre-plan or any conspiracy on the part of accused appellant to kill victim Alimullah. In the absence of any motive, conspiracy, pre-plan or pre-meditation on part of accused-appellant Joni while inflicting injury resulting the death of the victim 18 days after the occurrence, we find that the accused-appellant Joni had no 'intention to commit murder' but he committed the offence of 'culpable homicide not amounting to murder'. ...(Para 65 &66)

In the case in hand, it depicts that the injury caused by the accused-appellant was not the immediate cause of victim's death. Rather, the post mortem report speaks that the victim died due to spinal cord injury resulting from the injury inflicted by 'Batal' blow on his back. In the backdrop of attending facts and circumstances unveiled, it can be justifiably concluded that if the appellant really had any 'intention to cause death' of the victim, he could have inflicted repeated 'Batal' blows on vital part of the body of the victim. But the accused did not do it. Such sudden culpable conduct of the accused leads to the conclusion that he had no intention to cause victim's death by inflicting such single 'Batal' blow. ...(Para 68)

<u>Section 302 of the Penal Code:</u>
It is to be noted that to find an accused guilty of offence of murder punishable under section 302 Penal Code it must be proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death. ...(Para 70)

In our opinion, having regard to the totality of circumstances, viz., the single injury the victim sustained, that the victim died 18 days later, that the weapon (Batal) was not carried by the accused-appellant in advance, that there was no premeditation, that the accused could not control himself on seeing Eva whom he wanted to get married moving with one Shamim, one prudent person can only say that the accused-appellant must be attributed the knowledge that he was likely to cause an injury which was likely to cause death, but not with intention to cause death of the victim. ...(Para 74)

JUDGMENT

Md. Shahinur Islam, J:

1. The instant jail appeal being number **154 of 2021 and Criminal Appeal being number 7323 of 2022** have arisen out of the judgment and order dated 22.11.2020 passed by the Additional Sessions Judge, 4th Court Dhaka convicting and sentencing the convict-appellant under section 302, Penal Code and sentencing him there under to suffer rigorous imprisonment for life and also to pay a fine of Taka 20,000/-, in default to suffer imprisonment of further six (6) months.

2. At the midst of the hearing it has been found that the jail-appellant preferred a regular appeal too being Criminal Appeal No. 7323 of 2022.

3. In view of above, jail appeal and the criminal appeal have been heard together in order to dispose of the same by single judgment. Hearing eventually concluded on 19.03.2024 and then the matter was kept in CAV i.e. for delivery and pronouncement of judgment. Afterward, today i.e. 21.04.2024 has been fixed for delivery of judgment.

Factual Matrix

4. Prosecution case, in brief, as unfurled in trial is that the accused-appellant Md. Joni used to like Eva, the daughter of the informant Md. Abdullah's brother (victim Alimullah). The accused intended to get married with Eva. Knowing it victim Alimullah (guardian of Eva) , the elder brother of the informant had talk over it with parents of accused Md. Joni and conveyed the decision that he was not agreed to get his daughter Eva married with the accused. Due to such negation rivalry cropped up between the accused Md. Joni and Alimullah. In consequence of such rivalry created, on 25.03.2017 at about 12:05 P.M. accused Md. Joni inflicted 'Batal' blow on right side of back of the victim finding him alone at the place in front of Kaji Badal's house at 49/A Baddanagar water tank, Moneswar lane. On hearing screaming, brother of victim Alimullah and locals came forward when the accused managed to escape. Injured victim was then taken to hospital and victim's brother lodged the First Information Report with Hajaribag police station on 11.04.2017 stating the event happened to set the law on motion. The victim who was taken to hospital eventually died on 12.04.2017 due to injury he sustained.

Investigation and submitting Police report

5. Md. Jewel Rana, Sub-Inspector (P.W.08) working at Hajaribag police station at the relevant time was assigned with the task of investigation. During investigation he visited the place of occurrence, prepared sketch-map thereof with index, examined the witnesses and recorded their statement under section 161 Cr.P.C.

6. In course of investigation accused-appellant Md. Joni, being repented for the culpable act he committed surrendered and then he was sent to prison showing him arrested in connection with this case on 30.04.2017. The accused made confessional statement under section 164 Cr.P.C before the Magistrate, First Class. On conclusion of investigation the IO submitted police report under section 173 Cr.P.C recommending prosecution of the accused Md. Joni for the offence punishable under section 302 of the Penal Code.

7. On receipt of the case record the case was numbered as Metro Sessions Case no. 15141/2018 and cognizance of offence under section 302 of the Penal Code was taken and the case was sent to Additional Metropolitan Session Court, 4th court, Dhaka for trial and disposal.

Commencement of Trial

8. The trial court framed charge against the accused under section 302 , Penal Code and the same was read over and explained to him when he pleaded not guilty and claimed to be tried according to law.

9. In course of trial, prosecution in order to prove the charge adduced and examined in all 11 witnesses and this phase of trial concluded on 20.02.2020. On closure of examination of prosecution witnesses the accused was examined on 25.02.2020 under section 342 of the Code of Criminal Procedure when he repeated innocence and declined to adduce evidence.

10. Defence case as can be extracted from the trend of cross-examination of prosecution witnesses and what the accused stated during examination under section 342 Cr.P.C is that he was not involved with the event leading to killing the victim Alimullah and on the day he had not been at the place of occurrence at the relevant time when the alleged event happened and that the victim Alimullah died due to accident.

Evidence of Prosecution Witnesses

11. At the outset it is indubitably imperative to focus on what the witnesses testified in court for ascertaining the event arraigned and complicity and participation of the accused-appellant therewith. Thus, first let us eye on core essence of what the witnesses narrated in court.

12. **P.W.01Abdullah**, the brother of victim Alimullah is the informant. He stated some pre-event facts and facts chained to the event arraigned. He stated that accused Md. Joni desired to get his brother's daughter Eva married. His brother Alimullah placed marriage proposal to the mother of the accused when Joni's mother disagreed it and then his brother refused Joni's desire.

13. P.W.01 in respect of the event arraigned stated that his brother (Alimullah) was on move outside, on the day the event happened and finding him alone near the shoe factory in front of their home accused Joni inflicted 'Rafi' blow on right part of the back of his brother Alimullah. On being informed of it, he rushed to the crime site and he along with his brother's son Sumon took away the victim to Dhaka Medical College to have medical treatment. The event happened on 25.03.2017 and his brother died on 12.04.2017 when he was under treatment in Dhaka Medical College Hospital. He lodged first information report after his injured brother got admitted in Medical College Hospital.

14. On cross-examination P.W.01 stated that he had been at home when the event happened. He heard the event from people when he rushed to the crime scene on hearing screaming and he found his brother lying there in injured condition. He lodged the FIR on 11.04.2017.

15. **P.W.02 Sumon** is the son of the deceased victim Alimullah. In respect of the alleged act related to the event arraigned P.W.02 is a hearsay witness. However, he stated some pertinent facts chained to the event happened. He stated that on 25.03.2017 at about 12:00 noon his father had been in front of Hajaribag water tank when accused Joni inflicted 'Batal' (shoe making/repairing device) blow on right part of his father's back causing deep injury . On getting information he (P.W.02) rushed to the place of occurrence and took his father to Dhaka Medical College Hospital where he received treatment.

16. P.W.02 also stated that Joni proposed to get Eva married, but Alimullah refused the proposal and with this Joni being aggrieved killed his father. Accused Joni surrendered coming to police station and confessed his guilt. His father (victim) died on 12.04.2017 when he was undergoing medical treatment.

17. On cross-examination P.W.02 stated that he came to the crime scene from his shop at Kamrangir Char when his father was taken to Medical and then he too moved to Medical. His uncle (victim) died 16/17 days after the event happened.

18. **P.W.03 Md. Arif Islam** is the grand-son of deceased victim Alimullah. He stated that on 25.03.2017 at about 12:00/12:15 noon he was on move toward his work place when he saw the people encircling his grand-father and he found him lying there in injured condition due to injury he sustained on right part of his back. Their (P.W.04) home was about 10-15 feet far from the crime scene. He saw accused Joni inflicting blow on his grand-father's back and then he rushed to the spot but already accused Joni escaped there from. He then took his grand-father to Dhaka Medical. His grand-father died on 12.04.2017 in Dhaka Medical College Hospital. Police conducted inquest and he put his signature to inquest report.

19. On cross-examination P.W.03 stated in reply to defence question put to him that the accused Joni was alone when he inflicted blow to his grand-father Alimullah. However, defence does not seem to have been able to controvert what the P.W.04 stated in relation to the event arraigned.

20. **P.W.04 Asadullah Saron** is a hearsay witness. He stated that on 25.03.2017 at about 11:00 A.M. he was on move toward his business place when he heard that accused Joni inflicted 'Batal' blow on the back of Alimullah and he then moved to the place of occurrence and saw him (victim) being taken to Dhaka Medical College Hospital. He (P.W.04) also heard that the victim died there on 12.04.2017. On getting information he rushed to hospital. P.W.04 proved his signature that he put in the inquest report. The dead body of Alimullah was buried at Azimpur graveyard, P.W.04 stated.

21. On cross-examination P.W.04 stated that injured Alimullah was taking to hospital by rickshaw by his younger brother Abdullah and grand-son.

22. **P.W.05 Billal Hossain** stated some crucial facts related to the event arraigned. He stated that on 25.03.2017 at about 12:00 noon when he was returning back from his work place he saw accused Joni running away having a blood stained 'Rafi'(Batal: a device used in shoe factory) in hand. He then saw neighbor Alimullah lying in injured condition and then his relatives took him away to Medical (Medical College Hospital) by rickshaw.

23. Defence does not seem to have made any effort to controvert what the P.W.05 stated in examination-in-chief in relation to facts chained to the event happened. It remained unimpeached that at the relevant time the injured victim was lying at the crime scene when the accused was fleeing away there from having a blood stained 'Rafi' in hand.

24. P.W.05 also stated that on 12.04.2017 he got information about death of victim and then he moved to hospital. He saw injury on the back of the victim. P.W.05 proved his signature he put in the inquest report.

25. On cross-examination P.W.05 stated in reply to defence question that he saw the accused Joni running away taking a blood stained 'Rafi' (Batal) in hand. He (P.W.05) did not see the event and he just heard it to happen.

26. Post mortem holding doctor **P.W.06 A.K.M Shafiuzzaman** stated that he conducted post mortem of the victim who died on 12.04.2017. He stated in the post mortem report that– **"In my opinion the death was due to shock as a result of spinal cord injury which was ante mortem and homicidal in nature caused by hard and blunt weapon for hard and blunt application."** P.W.06 proved the Post Mortem report as **Exhibit-3.**

27. On cross-examination P.W.06 stated that the victim had been in hospital since 25.3.2017 to 12.04.2017 and that he knew that the victim died due to lack of appropriate medical treatment.

28. It depicts from the version of P.W.06 made in cross-examination that the victim could have been survived if appropriate medical treatment was provided to him when he had been in hospital.

29**. P.W.07 Mahim Al**i is a mere formal witness. He simply stated on 12.04.2017 he took the dead body of the deceased for holding post mortem and handed over alamats of deceased to Police station.

30. **P.W.08 Md. Jewel**, **police Inspector (now)** is the Investigation Officer. He stated that on 11.04.2017 he had been working in Hajaribag police station. Being assigned with the task, of investigation he visited the place of occurrence when he came to know that accused Md. Joni inflicted 'Rafi' blow on right part of back of victim Alimullah, the elder brother of informant, out of rivalry and then the victim was taken to Dhaka Medical College Hospital where the victim died on 12.04.2017.

31. P.W.08 also stated that he prepared inquest report of the deceased. He arrested the accused Md. Joni on 30.04.2017 and produced him before the Metropolitan Magistrate for recording his confessional statement under section 164 of the Cr.P.C. After recording his confessional statement he was sent to prison on 30.04.2017. On conclusion of investigation he submitted charge sheet.

32. On cross-examination P.W.08 stated that he obtained statement of witnesses under section 161 Cr.P.C before the victim died and also after he died. He recorded statement of informant Abdullah on 12.04.2017.

33. **P.W.09 Delwar Hossain** is the confessional statement recording Magistrate. He stated that by providing three hours time to the accused Md. Joni he recorded his confessional statement **(Exhibit-7).** In cross-examination P.W.09 denied defence suggestion that he did not tell the accused Joni that the confessional statement would go against him.

34. **P.W.10 Sohag is the son of victim Alimullah**. In addition to the event arraigned he stated one pre-event fact. He stated that his father Alimullah died on 12.04.2017 when he was under medical treatment. Accused Joni used to like his younger sister and proposed to get her married. But his father did not respond to such proposal as Joni was not a good person. With this Joni became heated. Joni used to work in a shoe factory in front of water tank opposite to their home. On 25.03.2017 accused Joni attacked his father and inflicted Rafi blow to him. Then his father was taken to Dhaka medical College. He (P.W.09) signed the inquest report prepared by police.

35. On cross-examination P.W. 10 stated that at the time of the event happened he had been staying at home. He heard the event from people. He and his elder brother Sumon brought his father to hospital by rickshaw. His father (victim) died on 12.04.2017 when he had been staying in hospital to undergo medical treatment.P.W.10 also stated that accused Joni surrendered after lodgment of the case. His (P.W.10) father too disclosed the name of Joni (as the perpetrator).

36. **P.W.11 Ramjan Joni is the grand-son of the victim**. He stated that on 25.03.2017 he had been at home and on hearing outcry he came out to the place of occurrence. Accused Joni inflicted Rafi blow on the back of his grand-father Alimullah out of previous rivalry. On arriving at the place of occurrence he saw injured Alimullah lying on road. On being asked Alimullah disclosed the name of accused Joni as the perpetrator. Then they brought Alimullah to Medical College Hospital by rickshaw. Alimullah died on 12.04.2017 in Medical College Hospital. He put his signature on the inquest report prepared by police

37. On cross-examination P.W.11 stated that their home was about 30-35 yards far from the place of occurrence. On hearing outcry he rushed to the crime site. They brought the victim to hospital by rickshaw.

Decision of the trial Court

38. The convict-appellant has been found guilty of offence of 'murder' and has been sentenced to suffer imprisonment for life under section 302 of the Penal Code, by the trial court being aggrieved by which the convict-appellant has come up with the appeal, in addition to Jail Appeal.

Finding with Reasoning on Evaluation of Evidence

39. **Mr. Md. Nasimul Hasan,** the learned Advocate for the convict-appellant submits that the appellant was innocent; that prosecution could not prove his complicity with the alleged culpable act and that the prosecution case suffers from reasonable doubt as the alleged confessional statement of the accused was not voluntary and true and thus it cannot be acted upon in finding him guilty of the alleged offence. It is the further contention of the learned Advocate appearing for the convict-appellant that the ingredients of section 300 of the Penal Code are not attracted in the present case against the convict-appellant. Rather, it is under Exception 4 of section 300 of the Penal Code, if the alleged culpable act of accused is found to have been proved.

40. It has been contended too by the learned Advocate for the appellant that if it is accepted to be true that the accused committed the alleged culpable act constituting the offence of 'culpable homicide' it was not a pre-mediated attack on the deceased. Incident took place suddenly and not with intention to cause death. Thus, the accused could not be held guilty of offence punishable under section 302 of the Penal Code. At best he can be found guilty for the offence of 'culpable homicide not amounting to murder'. The injury inflicted did not cause instant death of the victim. The victim was alive for 18 days at the hospital even after sustaining the injury. It thus shows that the injury inflicted by single 'Batal' blow was not likely to cause death of victim in ordinary course, although it ultimately resulted in death, 18 days after the event happened.

41. **Mr. M.D. Rezaul Karim,** learned Deputy Attorney General, with **Mr. Md. Mizanur Rahman,** learned Assistant Attorney General in course of hearing contended that the accused-appellant made the confessional statement voluntarily and its contents were true as well. The accused-appellant by making such voluntary confessional statement admitted his guilt and stated that he himself on the date, time and at the place inflicted 'Rafi' blow on the

back of the victim and then he fled away. The relatives of victim are the key witnesses who testified the facts chained to the event arraigned and two witnesses saw the accused fleeing from the crime scene taking blood stained 'Rafi' in hand. It could not be tainted that the victim eventually died due to injury he sustained. The accused knew that the injury he caused to victim was likely to cause his death.

42. It has been submitted too by the learned DAG that confessional statement of the accused together with testimony of crucial facts deserves to be acted upon in arriving at decision in finding the accused-appellant guilty of the offence of murder committed. The Court below did not commit any error in convicting the appellant for the offence of 'murder'. The trial court lawfully and based on evidence presented convicted and sentenced the accused-appellant for committing the offence of murder punishable under section 302 of the Penal Code.

43. Having heard the learned counsel appearing for the convict-appellant and the learned DAG and having gone through the materials on record, the only question that falls for our consideration is whether the conviction of the appellant herein for the offence punishable under Section 302 of the Penal Code is sustainable or whether it should be further altered to Section 304 Part II of the Penal Code.

44. On having due appraisal of evidence presented, post mortem report and confessional statement made by the accused-appellant we require to arrive at decision that the victim Alimullah sustained spinal cord injury resulting from 'Batal' blow inflicted to his back and the accused Md. Joni committed such culpable act either intending to cause victim's death or intending not to cause victim's death.

45. On cumulative evaluation of facts and circumstances unveiled in testimony of witnesses it remained uncontroverted that on 25.03.2017 at the relevant time victim Alimullah was attacked at the place of occurrence, nearer to the shoe factory where the accused Joni used to work. It depicts that the relatives, on hearing outcry instantly after the event happened rushed to the crime site, in front of the water tank and found the injured victim lying there having infliction of 'Rafi' blow on his back and then instantly he was taken to Dhaka Medical College Hospital. The victim died there 18 days after the event happened.

46. Testimony of the relatives of victim demonstrates that the victim disclosed how and by whom he sustained injury. Such disclosure by the victim was natural and can be acted upon safely together with other circumstances. The relatives of the victim in testifying in court stated that the victim disclosed the name of accused Joni as the perpetrator. Defence could not impeach it in any manner, by cross-examining them.

47. It depicts patently from uncontroverted testimony of **P.W.10 Sohag,** the son of victim Alimullah that accused Joni surrendered after lodgment of the case. His (P.W.10) father (victim) too disclosed the name of Joni (as the perpetrator).

48. It appears that the accused Joni, on his surrender was shown arrested and then was brought before the Magistrate for recording his confessional statement. **P.W.09 Delwar Hossain** is the confessional statement recording Magistrate. He stated that by providing three hours time to the accused Joni he recorded his confessional statement **(Exhibit-7).** Defence does not claim that it was obtained under coercion, torture or threat.

49. Now, we require seeing whether the confessional statement made by the accused was voluntary and true and whether it was inculpatory. What the accused confessed and stated in confessional statement? It appears that the accused Joni stated in his confessional statement that –

> " আলীমুল্লাহর শালীর মেয়ের সাথে আমার সম্পর্ক হয়। আমি বিয়ের প্রস্তাব দেই। আলীমুল্লাহ এতে বাধা দেন। ইভা পরে অন্য এক লোকের সাথে ভেগে যায়। ইভাকে ভাগিয়ে নিয়ে যায় শামীম। .....এদিকে কারখানার লোকজন বলে তোর সাথে বিয়ে দিবেনা, তাই মেয়েকে তারা অন্য জায়গায় লুকিয়ে রেখেছে।.....হঠাৎ একদিন ইভাকে শামীমের সাথে আসতে দেখে আমার মাথা খারাপ হয়ে যায়। এরপর কারখানায় যাই। কারখানায় গিয়ে একটা রাফি বা বাটাল নিয়ে আলীমুল্লাহ এর পিঠে জোরে আঘাত করি। এরপর আমি পালিয়ে যাই।

50. It appears from the testimony of **P.W.09 Delwar Hossain,** the confessional statement recording Magistrate that sufficient time was provided to the accused to settle on whether he intended to make confessional statement. Thus and since such confessional statement was made after the accused surrendered it may be indubitably concluded that such confessional statement was voluntary in nature.

51. It appears too that the Magistrate being satisfied upon questioning the accused and by providing him sufficient time to decide and then recorded his confessional statement under section 164 of the Code. The accused did not raise any objection that he was tortured by the police or anybody else. Thus, the confessional statement of the accused-appellant was recorded by observing all legal formalities as envisaged under sections 164 and 364 of the Code, we deduce.

52. By making such confessional statement the accused Joni inculpated him with the attack arraigned. He admitted that he used to like Eva whom he desired to get married. But his desire was negated and on the day of the event, on seeing Eva moving together with one Shamim he could not control him and then finding Alimullah in from of the shoe factory he inflicted 'Batal' blow on the back of the victim.

53. Sworn testimonies of prosecution witnesses, the relatives of the victim and post-mortem report seem to be consistent with the contents of the confessional statement of the accused made under section 164 Cr.P.C which makes the confessional statement true.

54. In view of evidence as evaluated above together with confessional statement of the accused we arrive at decision that the prosecution has been able to prove beyond reasonable doubt that the accused Joni, on the date and at the relevant time seeing the victim Alimullah walking through the road, in front of the shoe factory inflicted 'Batal' blow on his back and managed to flee. It also stands proved that due to injury the victim sustained caused his death, 18 days after the event happened.

55. Regarding cause of death, the doctor opined that, **"In my opinion, death was due to head injury caused by the above mentioned injuries which were ante-mortem and homicidal in nature.** So, it stands proved that the victim sustained spinal cord injury due to 'Batal' blow inflicted on his back which eventually resulted in his death, 18 days after the event happened.

56. The accused Joni is justifiably found to have committed an unlawful culpable act constituting the offence of 'culpable homicide'. However, now it is indispensible to resolve, considering the facts and circumstances divulged, as to whether the 'culpable homicide' as found to have been proved amounted to 'murder' or 'not amounted to murder'.

57. It is now settled that all murders are culpable homicides but all culpable homicides are not murder. Culpable homicide is a genus and murders its specie. That is to say all murders are culpable homicide, but all culpable homicides are not murder. Keeping it in mind now the question comes to fore as to whether the act of accused-appellant constituted the offence of culpable homicide amounting to murder or not amounting to murder. In the case in hand, based on facts and circumstances unveiled in trial it is to be therefore deduced whether the culpable homicide committed amounted to murder or not amounted to murder.

58. What facts have been divulged in the case in hand? Admittedly, the convict-appellant used to love Eva the daughter of victim Alimullah's sister-in-law and desired to get her married. But Alimullah declined the desire the accused expressed. It made the accused dejected. In such circumstance on the day of the event happened the accused saw Eva moving along with a person Shamim whom she got married. Few times later the accused finding Alimullah at the place of occurrence inflicted single 'Batal' blow on his back, being heavily depressed and then he managed to escape.

59. The case pertinently rests on circumstantial evidence and confessional statement of the accused. Due and close marshalling all these together is required to arrive at the conclusion that the accused Joni is responsible for the death of the deceased victim Alimullah.

60. Confessional statement of the accused together with the narrative made by the witnesses demonstrates patently that on seeing Eva moving along with one Shamim the accused lost his self-control and then finding Alimullah moving alone through the place of occurrence he inflicted 'Batal' blow on his back and then he managed to flee. It thus stands proved that the accused-appellant Joni was the perpetrator who on the day and at the relevant time committed such unlawful act by inflicting 'Batal' blow on the back of the victim finding him moving through the front of the shoe factory.

61. Why the accused committed such unlawful attack directing the victim? The evidence on record leads to an unerring conclusion that being imbued by grave depression the accused presumably could not control himself when he saw Eva (whom he desired to get married) moving along with other person and then suddenly and out of passion he lost his self control and then taking the 'Batal' inflicted blow on the back of Alimullah, whom the accused found moving through the place of occurrence at the relevant time. Such unlawful culpable act of the accused does not seem to be premeditated and was not intended to cause death of the victim Alimullah.

62. What happened next? The injured victim Alimullah was then taken to hospital where he was undergoing medical treatment for 18 days and eventually he succumbed to injury he sustained. It appears that the accused few days later made him surrendered. Presumably, being heavily saddened and repented the accused did it. Afterward, he made confessional statement under section 164 Cr.P.C and thereby he admitted that he himself inflicted the 'Batal' blow on the back of Alimullah and he also expressed his depression that he had to face due to negation of his desire to marry Eva.

63. Ocular narrative in respect of facts chained to the event happened made by the P.W.05 and other witnesses, the relatives of the victim gets corroboration even from the confessional statement of the accused Joni. Thus, the confessional statement made by the accused was self inculpatory in nature and as observed already it is voluntary and true. We can thus safely act even solely upon the confessional statement in arriving at decision.

64. The facts emerged do not lead to conclude that the accused with intent to cause death of the victim inflicted 'Batal' blow to him. The culpable act of the accused was not cool-headed and premeditated. In the circumstances of the case in hand the accused may be deemed to have acted with the knowledge that his unlawful culpable act may cause such bodily injury which was likely to cause death and thus there seems to be no reason why, in the circumstances unveiled, the appellant cannot be held liable under Section 304, part II, Penal Code. In this regard we recall the decision rendered in the case of **Alauddin (Md) and others vs. State reported in 7 BLC 54** which is as below:

> "Considering the background and attending circumstances of the case, it appears that it was not a cool headed and premeditated murder, rather the fact of the case as disclosed that the incident that took place out of sheer passion and that has been taken into such circumstances to commit the alleged , offence or murder when intention to kill is lacking and is not culpable homicide amounting to murder and hence the alleged offence of murder does not fall within the provision of section 302 of the Penal Code, rather the alleged offence comes under the provision of section 304 Part II of the Penal Code."

65. It is to be noted that to find an accused guilty of offence of murder punishable under section 302 Penal Code it must be proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death. But in the case in hand, we do not find the injury sustained by the victim was sufficient to cause his death. Injured victim however died in hospital 18 days after he sustained injury. The post Mortem doctor admits in cross-examination that no appropriate treatment was provided to injured victim when he had been in hospital.

66. It appears from the evidence on record that prosecution failed to prove any motive, pre-meditation, pre-plan or any conspiracy on the part of accused appellant to kill victim Alimullah. In the absence of any motive, conspiracy, pre-plan or pre-meditation on part of accused-appellant Joni while inflicting injury resulting the death of the victim 18 days after the occurrence, we find that the accused-appellant Joni had no 'intention to commit murder' but he committed the offence of 'culpable homicide not amounting to murder'.

67. It depicts patently from the culpable act perpetrated by the accused that if really he intended to kill or cause death of victim, repeated blows could be inflicted on the person of the victim. But it was not done. Just by inflicting a sole 'Batal' blow on the back of victim the accused managed to escape from the site.

68. In the case in hand, it depicts that the injury caused by the accused-appellant was not the immediate cause of victim's death. Rather, the post mortem report speaks that the victim

died due to spinal cord injury resulting from the injury inflicted by 'Batal' blow on his back. In the backdrop of attending facts and circumstances unveiled, it can be justifiably concluded that if the appellant really had any 'intention to cause death' of the victim, he could have inflicted repeated 'Batal' blows on vital part of the body of the victim. But the accused did not do it. Such sudden culpable conduct of the accused leads to the conclusion that he had no intention to cause victim's death by inflicting such single 'Batal' blow.

69. An act by an individual can be done intentionally, knowingly, recklessly, or negligently, which helps to ascertain the culpability of such an act. In the case in hand, no doubt offence has been committed by the accused- appellant Joni, but it is for the court of law to decide, on intrinsic appraisal of evidence adduced and circumstances divulged whether the allegation comes under section 302 of the Penal Code or section 304 Part II of the Penal Code.

70. It is to be noted that to find an accused guilty of offence of murder punishable under section 302 Penal Code it must be proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature was sufficient to cause death. But in the case in hand, we do not find the injury sustained by the victim was sufficient to cause his instant death. Injured victim died in hospital 18 days after he sustained such injury. The post Mortem doctor admits in cross-examination that no appropriate treatment was provided to injured victim when he had been in hospital to undergo treatment.

71. In the case of **the State Vs Tayeb Ali and others [40 DLR (AD) 6]** the difference between 'murder' and 'culpable homicide' has been articulated by the Appellate Division of Supreme Court of Bangladesh as below:

> ".....All murders are culpable homicide but all culpable homicides are not murder. Excepting the General Exceptions attached to the definition of murder an act committed either with certain guilty intention or with certain guilty knowledge constitutes culpable homicide amounting to murder. If the criminal act is done with the intention of causing death then it is murder clear and simple. In all other cases of culpable homicide, it is the degree of probability of death from certain injuries which determines whether the injuries constitute murder or culpable homicide not amounting to murder. If death is likely to result from the injuries it is culpable homicide not amounting to murder; and if death is the most likely result, then it is murder....."

72. In the case in hand, we are constrained to infer indisputably based on facts and circumstances emerged in evidence together with the legal proposition enunciated in the case cited above that refusal to accused's desire to marry Eva prompted the accused to commit such culpable act which did not transgress the limit of rudeness and it happened out of sudden passion and depression.

73. Besides, victim was not struck on any vital part of his body, although he succumbed to injury he sustained on his back. It may be deduced that key purpose of such attack upon

the victim was to protest the refusal to recognize accused's passion and desire of getting Eva married. It was thus a case of 'culpable homicide not amounting to murder'.

74. In our opinion, having regard to the totality of circumstances, viz., the single injury the victim sustained, that the victim died 18 days later, that the weapon (Batal) was not carried by the accused-appellant in advance, that there was no premeditation, that the accused could not control himself on seeing Eva whom he wanted to get married moving with one Shamim, one prudent person can only say that the accused-appellant must be attributed the knowledge that he was likely to cause an injury which was likely to cause death, but not with intention to cause death of the victim.

75. Therefore, it is profusely clear that the event arraigned happened not pursuant to any pre- arranged plan. The appellant thus at least could be imputed with knowledge that he was likely to cause an injury which was likely to cause death and not with the intention to causing death of the victim. Taking the facts and circumstances unveiled into consideration it becomes thus difficult to affirm the conviction of the accused-appellant under section 302 of the Penal Code.

76. On appraisal of the entire evidence including the post mortem report, we are of the unerring view that the conviction of the appellant cannot be sustained under section 302 of the Penal Code, but the appropriate section under which the appellant ought to be convicted is section 304 Part II of the Penal Code.

77. Under the above circumstances, in our opinion, the accused-appellant is thus found guilty of an offence punishable under Section 304, Part II of the Penal Code and not under section 302 of the Penal Code. Therefore, we are of unanimous view that it would be just to alter the conviction of the appellant from section 302 of the Penal Code to section 304 Part II of the Penal Code.

78. Thus, the Criminal Appeal and Jail Appeal which have been heard together are **allowed in part with the modification of the sentence of the convict-appellant**. We, therefore, alter the conviction of the convict-appellant Joni from Section 302 to Section 304 Part–II of the Penal Code and reduce the sentence to **rigorous imprisonment for 10 (ten) years.**

79. The appellant will get the benefit of section 35A of the Code of Criminal Procedure, 1898 in calculating the sentence awarded as above.

80. Let copy of this judgment be transmitted to the concerned Trial court and also to the prison authority for information and due compliance.

81. Send down the trial court record at once together with a copy of this judgment.

19 SCOB [2024] HCD 14

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 9003 of 2019

Md. Mesbaul Alam and others
Vs.
The Government of People's Republic of Bangladesh represented by the Secretary, Ministry of Local Government, Co-operative Division and others

Mr. Md. Ashrafuzzaman, Advocate
...for the petitioners
Mr. Noor Us Sadik Chowdhury, D.A.G
with Mr. Md. Awlad Hossain, A.A.G
with Mr. Rashedul Islam, A.A.G
... for the respondents No. 1.
Mr. Molla Kismot Habib, Advocate
... for the respondents No. 3.
Heard on: 06.06.2022, 07.06.2022, 08.06.2022 and judgment on: 09.06.2022

Madam Justice Kashefa Hussain
And
Madam Justice Fatema Najib

Editors' Note:
Question arose in this petition whether writ is maintainable against Milk Vita. The High Court Division found that Milk Vita is a public body and not a private entity and as such Writ is maintainable. The court also found that the petitioners are not "worker" so their case does not lie before the Labor Court. Finally, Court found that impugned memos were not issued lawfully so it declared them issued without lawful authority and directed the concerned authority to proceed against the petitioners under clause 8.06 of the চাকুরী বিধি ও নিয়োগ নীতিমালা ২০০৮ (সংশোধিত-২০০৯) and dispose of the matter in accordance with law.

Key Words:
Sections 2(65), 4Ka of Bangladesh Labour Law, 2006; section 2(c) of Services (Reorganisation & Conditions) Act-1975; dismissal; termination; termination simpliciter; Section 14, 16 of the সমবায় সমিটি আইন ও সমবায় সমিতি বিধিমালা; Sections 14 and 21 of the Co-operative Society Act- 2001; Section 1(4)(ka) of the বাংলাদেশ শ্রম আইন-২০০৬

Our considered view upon examining all the materials on records before us which includes the documents derived from the government website which include the list of government owned company, it clearly shows the inclusion of the respondent's organization inter alia other factors. We are of the considered finding that Milk Vita is a public body and not a private entity. ...(Para 23)

Section 14 and 21 of the Co-operative Society Act- 2001:
Our considered view upon perusal of the সমবায় সমিতি Ain is that although Section 14 contemplates that all সমবায় সমিতি shall be a body corporate having independent entity, however Section 21 clearly contemplate that the class of সমবায় সমিতি may be distinguished.

...(Para 27)

The class of সমবায় সমিতি envisaged under Section 21 therefore contemplate that the government shall appoint their first class officers on deputation in those organizations. It is clear that Section 14 of the Co-operative Society Act-2001 does not contemplate that all সমবায় সমিতিs shall be private bodies if the governments interest is involved in such সমিতি. Therefore by no stretch of imagination can it be assumed that Milk Vita Limited which is a limited company owned by the government can fall into the category of a 'private body'. We are of the considered opinion that the instant সমবায় সমিতি is a public body owned by the Government and does not fall within the category of a private entity. ...(Para 29)

Section 1(4)(ka) of the বাংলাদেশ শ্রম আইন-২০০৬:

We have next drawn our attention to Section 1(4)(ka) of the বাংলাদেশ শ্রম আইন-২০০৬. Section 1(4)(ক) contemplates organizations which shall fall within the exception of Section 1(4)(ক) and shall not fall within the meaning of বাংলাদেশ শ্রম আইন-২০০৬. We have particularly drawn attention to Section 1(4)(ক) and which is reproduced hereunder: "সরকার বা সরকারের অধীনস্থ কোন অফিস" which means Government office or institutions owned by the government. Since we are of the considered finding and opinion that the বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড is a public body and is owned by the government therefore it is needless to state that the organizations owned by the government falls within the exception of Section 1(4)(ক). Consequently the provisions of বাংলাদেশ শ্রম আইন-২০০৬ shall not be applicable in the petitioners case. Such being the position, we are also of the considered view that the petitioners' are not workers rather they are permanent employees under a particular selection grade. ...(Para 35)

The employees must be afforded due process before seizing him of his employment. In not affording due process is a direct infringement into the employee's fundamental rights guaranteed under the constitution. ...(Para 42)

JUDGMENT

Kashefa Hussain, J:

1. Supplementary affidavit do form part of the main petition.

2. Supplementary Rule nisi was issued calling upon the respondents to show cause as to why the impugned notification purported to have been issued vides memo No. No. মিই/প্রশা-৩২/১২/২০১৬/২৩৯ (ANNEXURE-E), মিই/প্রশা-৩২/১২/২০১৬/২৪৬ (ANNEXURE-E1), মিই/প্রশা-৩২/১২/২০১৬/২৪৫ (ANNEXURE-E2), মিই/প্রশা-৩২/১২/২০১৬/২৪১ (ANNEXURE-E3), মিই/প্রশা-৩২/১২/২০১৬/২৪০ (ANNEXURE-E4) and মিই/প্রশা-৩২/১২/২০১৬/২৪৪ (ANNEXURE-E5), dated 23.02.2016 under the signature of the respondent No. 05 dismissing the petitioners from the service should not be declared to be without lawful authority and is of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

3. The petitioner No. 1 is Md. Mesbaul Alam son of Md. Mokbul Hossain and Most. Rokeya Begum of Village – Chak Rada Kanai, pPolice Station- Fulbaria, District: Mymensingh, petitioner No. 2 is Md. Arifur Rahman son of late Abul Hossain Sardar and late Kahinur Begum of E/32, Road No. 7, Arambag Housing, Post Office – Mirpu, Pallabi, Dhaka, petitioner No. 3 is Md. Mujibor Rahman (Aslam) son of Md. Ataur Rahman and Most. Rozina Begum, Holding No. 991, Road No. 5, Section-7, Post Office-Mirpur, Pallabi,

Dhaka, petitioner No. 4 is Md. Mohasin Gazi son of Abdul Jabbar and Begum Alea Holding No. 1067, Road-5, 7/5, Post Office- Mirpur, Pallabi, Dhaka, petitioner No. 5 is S.M Moshiur Rahman son of Golam Mowla Sharif and Fizroza Begum of Village- Baro Kasba, Ward No. 3 (part), post office- Tarki Bondor, Police Station – Gouranadi, Barisal and petitioner No.6 is Md. Rashed Khan son of Abdur Rashid and Nur Jahan Begum Holding No. 1216, Road No. 11, Post Office – Mirpur, Pallabi, Dhaka are the citizens of Bangladesh. The respondent No. 1 is the Secretary, Ministry of Local Government, Co-operative Division, Bangladesh Secretariat, Dhaka, respondent No. 2 is the Chairman, Bangladesh Dugdo Utpadonkari Samabay Union Ltd. Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208, the respondent No. 3 is the managing Director, Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208, the respondent No. 4 is the Additional Managing Director, Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208, the respondent No. 5 is the Additional Managing Director (Administration and Finance and Accounce), Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208, the respondent No. 6 is the Deputy Managing Director, Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208 and the respondent No. 7 is the Personal Officer of Chairman, Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208. .

4. The petitioners' case inter alia is that the petitioners were appointed on the basis of Daily Hajira on 30.11.2010 by the Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208. That the petitioners after appointment were performing their duty painstakingly and sincerely in the Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208. That after joining in their respective posts the petitoners have been performing their duties sincerely, honestly and diligently with full satisfaction and the authority nobody raised any objection against the performance of the petitioners. That by Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208 being Memo No. মিই/প্রশা-২৫৭/২০১৫/২২৩৭ dated 05.11.2015 the petitioners including many workers were made permanent. That thereafter the petitioners on 02/01/2016 on the basis of Office order being Memo No. মিই/প্রশা-২৫৭/২০১৫/২২৩৭ dated 05.11.2015 joined as permanent employees as Production Super / Utpadon Tattabadayok (Employee Grade-2) and Grade – 4 in Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208. That the petitioners after joining in the said post have been performing their functions and duty painstakingly and sincerely in Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208. That between two groups of employees there was a clash and following said incident one Officer Md. Masiur Rahman Khan of Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140, Tejgaon Industrial Area, Dhaka-1208 as informant lodged FIR being Tejgaon Industrial Area Police Station Case No. 18(2)16 corresponding to G.R. No. 87 of 2016 under sections 143/323/325 of the Penal Code. That the said case after enquiry/ investigation submitted charge sheet and charged was framed and tried by the Chief Metropolitan Magistrate-02, Dhaka and the court of CMM, Dhaka discharged the petitioners and acquainted the petitioner by order dated 13.02.2017 and others on 23.04.2019. That unfortunately on 23.02.2016 the Additional Managing Director, Bangladesh Dugdo Utpadonkari Samabay Union Ltd, Head Office- Dugdo Bhaban, 139-140,

Tejgaon Industrial Area, Dhaka-1208 issued office order দপ্তর আদেশ (Daftor Adesh) for dismissal of the petitioners. That the petitioners filed representation on 27.04.2017 and lastly on 19.05.2019 for their further appointment but in vain. That the petitioners served a demand justice notice upon the respondents through their learned Advocate for their appointment/ reinstatement in their jobs but the respondents till today has not taken steps. Hence the writ petition.

5. Learned Advocate Mr. Md. Ashrafuzzaman appeared on behalf of the petitioners while learned D.A.G Mr. Noor Us Sadik Chowdhury with Mr. Md. Awlad Hossain, A.A.G along with Mr. Rashedul Islam, A.A.G appeared for the respondents No. 1 and learned Advocate Mr. Molla Kismot Habib appeared for the respondent No.3.

6. Learned Advocate for the petitioners submits that the respondents under the signature of the respondent No. 5 most unlawfully dismissed the employees from their service and such dismissal Order (Annexure-E) dated 23.02.2016 is without lawful authority. He points out to the materials on record before us and submits that the petitioners were initially on 30.11.2010 appointed as temporary employees on daily basis subject to some conditions which are marked as Annexure-A series. He continues that subsequently by way of Annexure B series and C series all the petitioners were made permanent employees by way of Annexure B by office order dated 05.11.2015 under the signature of the respondent No. 3. He next points out that Annexure C series show that the 6(six) petitioners are all employees within the definition of the বিধিমালা and definition of the Co-operative Society Ain, 2001 and which is manifest from Annexure C series. He points out to Annexure C series and draws our attention to the fact that 4(four) of the petitioners were appointed as permanent employees in grade-2 and other two petitioners were appointed as permanent employees in grade-4.

7. There was a query from this bench arising out of the contention of the learned Advocate for the respondent No. 3 that the petitioners do not fall within the status of employees rather they are workers subject to the Bangladesh Labour Laws. The learned Advocate for the petitioners controverts the contention of the learned Advocate for the respondent No. 3 by drawing attention to Annexure C series and points out that Annexure- C series clearly manifest that the petitioners are not workers within the meaning of the labour laws of Bangladesh rather they are employees classified under specific grades for purpose of employment by the বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড. Upon further query from this bench he contended that বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড and Milk Vita is not a private body rather it is a public body and is owned by the Government of Bangladesh. In support he places before this court some materials from the Government website and draws our attention to the said materials. He agitates that these materials manifest that বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড and Milk Vita limited is not a private company rather it is owned by the Government. He also draws attention to a list of Government owned companies from the website and draws our attention to the fact that the Milk Vita also falls in the category.

8. On the issue of maintainability of writ petition, he agitates that since Milk Vita is a Government owned company and the petitioners were all dismissed from service under the signature of the respondent No. 5, Additional Managing Director(Administration and Finance and Accounce) who is the Deputy Secretary of the Government and is holding post is Additional Managing Director. He submits that the respondent No. 5 is not holding the position of Additional Managing Director in his private capacity. He continues that the Respondent No. 5 only holds as designated by the Government to supervise the company's

inter alia function since it is a government owned company. He submits that therefore it is clear that the বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড and Milk Vita is not a private company nor is it a body corporate in any manner and writ is maintainable.

9. He submits that by the Government owned organization and the respondent No. 3 particularly under whose signature the order was passed are also representing the government as a person or authority performing functions in connection with the affairs of the republic within the meaning of Article 102 of the Constitution. In this context he agitates that therefore the order of dismissal by the respondent No. 3 may be challenged under Article 102 and writ is maintainable under Article 102 of the Constitution.

10. He next takes us to some factual aspects asserting that the petitioners as is evident from Annexure 'C' even were made permanent employees of the বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড, Milk Vita and have been classified in accordance with their gradation list in grade-2 and grade-4 respectively. He contends that however the respondent No. 5 arbitrarily dismissed the petitioners from their service without issuing any show cause notice upon them which evidently entails due process was not afforded to them. He submits that the respondents were removed by office order No. 3 on 23.02.2016. He next points out to Annexure D series and shows the date the criminal case was filed by some other members of the সমিতি against the petitioners that is on 23.02.2016. He shows us that the petitioners were dismissed on the same date on 23.02.2016. He next draws us to Annexure D1 and shows that however ultimately the Court of Chief Metropolitan Magistrate, Court No. 2, Dhaka acquitted them from the case by its order dated 23.04.2019. He argues that even for argument's sake it is presumed that even if the respondents raised the question of criminal case pending against the petitioners and which may have led them to their dismissal, nevertheless it is evident from annexure-D1 that all the petitioners were acquitted from the case after being proved innocent (নির্দোষ). He continues that however even if a criminal case was pending against the petitioners even in that case the respondents were bound to issue show cause notice upon the petitioners before dismissing them. To substantiate his argument he draws attention to clause 8.02 (Kha) of the চাকুরী বিধি ও নিয়োগ নীতিমালা ২০০৮ (সংশোধিত-২০০৯). He draws us to Clause 8.02 Kha(2) and points out that the dismissal from service of the petitioners falls within the provision under 'খ' Kha that is গুরুদন্ড. He next draws our attention to clause 8.06 of the চাকুরী বিধি ও নিয়োগ নীতিমালা ২০০৮ (সংশোধিত-২০০৯) and shows that clause 8.06 has categorically laid out the procedure in the event of dismissal of service of any employees of the বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড. He points out that clause 8.06 contemplates before dismissing from service imposing গুরুতর দন্ড by framing charge sheet followed by other procedures which is categorically laid out in clause-8.06 (Ka and Kha). He submits that it is admitted that the petitioners were not afforded due process under the mandates of the চাকুরী বিধি ও নিয়োগ নীতিমালা ২০০৮ (সংশোধিত-২০০৯) of the বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড. He agitates that the respondent No. 3 representing the government and Milk Vita being a public body was bound to afford due process to the petitioners by way of the চাকুরী বিধি ও নিয়োগ নীতিমালা ২০০৮ (সংশোধিত-২০০৯ and also under the principles of natural justice. He agitates that by not affording due process to the petitioners the respondents infringed upon the fundamental rights of the petitioners which right is guaranteed under Article 27, 31 and also Article 40 of the Constitution.

11. On the issue of respondent No. 3's contention that it is an appealable order and falls within clause 8.12 of the চাকুরী বিধি ও নিয়োগ নীতিমালা ২০০৮ (সংশোধিত-২০০৯), he controverts upon assertion that writ is maintainable in the instant writ petition since due process was not

afforded to the petitioners while dismissing them from their service and further is violative of the principles of natural justice. Regarding the respondents' contention that the petitioners are rather workers and not employees within the meaning of the বাংলাদেশ শ্রম আইন 2006, the petitioner controverts such contention of the learned Advocate for the respondents. He takes us to Section 4 of the আইন wherefrom he points out to 4(ক) and submits that section 4(ক) contemplate that শ্রম আইন of 2006 will not be applicable for any institution owned by the government. He submits that Section 4(ক) which contemplates that সরকার বা সরকারের অধীনস্থ কোন অফিস that is government or any institution under the Government or owned by the government shall fall within the exception of 14 Ka and therefore the employees therein shall evidently also fall within that exception for all purposes related to their employment. He submits that section 4(ক) makes its clear that employees of a government or government owned organization are not workers within the definition of worker under the Bangladesh Labour Law, 2006.

12. He takes us to Section 2(65) of the Bangladesh Labour Law, 2006 and contends that in any case the instant petitioners' nature of employment also do not fall within the category of labour. He argues that Section 2(65) of আইন of 2006 contemplates that প্রশাসনিক বা ব্যবস্থাপনামূলক কাজে দায়িত্বপ্রাপ্ত কোন ব্যক্তি do not fall within the category of workers under any event. He agitates that it is clear from Annexure C series that the employees being হিসাব রক্ষক and বিপনন তত্বাবধায়ক the nature of their employment do not fall with the category of workers. He however reiterates that given that Milk Vita is a government owned company which otherwise falls within the exception of section 4 Ka of the Labour Laws of Bangladesh that none of the provisions of the আইন of 2006 is applicable in the petitioner's case.

13. Reinforcing his argument on the respondent No. 2 representing the বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড not falling within the category of a public body within the meaning of Services (Reorganisation & Conditions) Act-1975, he particularly draws attention to section 2(c) of the Services (Reorganisation & Conditions) Act-1975. He agitates that sub-section 2(c) of Act of 1985 clearly contemplates that anybody, authority, corporation or institution constituted or established by or under any law and includes any other body, authority or institution owned, controlled, managed or set up by the Government. Relying upon 2(C) he contends that it is clear enough from the materials placed before this bench that the respondents' organization was established by the government. He assails that therefore it is clear that the respondents clearly being an institution owned, controlled, managed and set up by the government evidently falls within the definition of a public body. He assails that therefore writ being maintainable against all public bodies the instant writ petition is also maintainable. He concludes his submissions upon assertion that the Rule bears merits ought to be made absolute for ends of justice.

14. On the other hand learned Advocate for the respondent No. 3 vehemently opposes the Rule. At the onset of his arguments he contends that the present writ is not maintainable. Upon elaborating, he argues that the বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড is a private body and not a public body and not owned by the Government. He argues that the government is not a share holder of Milk Vita nor is it owned by the Government. He contends that the government's interest in the institution is limited and is in only so far as its equity and অনুদান is concerned. Upon a query from this bench regarding the order of dismissal being under the signature of respondent No. 5 who is the Additional Managing Director (Deputy Secretary of the Government), he argues that some officers are deputed to the institution in which the government have some interest and the functions of those persons is

only to supervise the dealings of the company so far as the interest of the government is concerned. He however next argues that neither the respondent No. 5 nor the respondent No. 3 while they are serving in their post of Managing Director and Additional Managing Director so long as they are holding these posts they are holding the same in their private capacity and are not representing the public authority nor government. He submits that therefore the respondent No. 2 being a private body writ is not maintainable in the instant case.

15. He next argues that the petitioners if at all aggrieved could have availed the forum of appeal afforded under clause 8.12 of the চাকুরী বিধি ও নিয়োগ নীতিমালা ২০০৮ (সংশোধিত-২০০৯) to seek redress against order of dismissal. He reiterates that writ is particularly not maintainable in the instant case since the respondent No. 2 is the Chairman of বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড which is not a public body or institution.

16. He next contends that the petitioners wrongly argued that the petitioners were dismissed from their service. He submits that in the petitioners case the petitioners were not dismissed from service rather they were terminated from their service. He submits that there is a fundamental distinction before dismissal and termination. He draws attention to annexure E-E5 which are the 6(six) orders issued by the respondent No. 5 Additional Managing Director (Deputy Secretary of the Government). He draws attention to the language and heading of the office order dated 23.02.2016. He assails that in the petitioners case the service of all six petitioners were terminated and not dismissed. He particularly draws attention to the subject matter of the office order dated 23.02.2016 চাকুরী অবসান. He submits that it is clearly written that they were all terminated চাকুরী অবসান করা হইলে. He submits that under the principle of law and following a decision of our Appellate Division that in case of termination simpliciter no due process has to be given and principle of natural justice does not lie. In support of his case he cited a decision in the case of Biman Bangladesh Vs. Moniruzzaman reported in 17 BLC (AD)(2012) 56 and points out that in this decision our Appellate Division made it clear that- *"termination simpliciter without giving any stigma or making any accusation is not a punishment and in passing such order no reason is required to be assigned."* He submits that since no reason was given in termination of the petitioners therefore it was a termination simpliciter and the principles of natural are not applicable and the চাকুরী বিধি ও নিয়োগ নীতিমালা ২০০৮ (সংশোধিত-২০০৯) clause 8.06 is also not applicable in this case.

17. He next argues that since the said respondent organization is a private body and has its own নীতিমালা therefore writ is not maintainable. He asserts that the petitioners ought to have sought redress under Clause 8.12 of the নীতিমালা which provide for the forum of appeal against any order passed by the respondents. He argues that the petitioners clearly did not resort before the appropriate forum which is contemplated under clause 8.12 of the নীতিমালা therefore they did not seek redress before the proper forum, however writ being not maintainable the writ petition is not sustainable.

18. He next argues on the nature of class of employment of the petitioners. He contends that the petitioners are not 'employees' rather they fall within the category of 'worker' within the meaning of the Bangladesh Labour Law, 2006. In this context, he asserts that the petitioners to seek redress ought to have resorted to the labour court against the order of dismissal and certainly not writ forum. To substantiate his submissions he draws attention to paragraph No. 4, and 7 of the writ petition and submits that in paragraph Nos. 4 and 7 of the writ petitions the petitioners have admitted that they are workers and therefore the petitioners

case shall fall within the scheme of the relevant laws. He particularly draws attention to Paragraph No.4 of the writ petition and pursuades that it is the petitioners' admission that they were appointed on the basis of Daily Hajira on 30.11.2010 by the Bangladesh Dugdo Utpadonkari Samabay Union Ltd.

19. Upon a query from this bench the learned Advocate for the respondent No. 3 claims that however the petitioners are employed in managerial and administrative capacity but nevertheless as workers. He draws attention to Section 14 of the সমবায় সমিটি আইন ও সমবায় সমিতি বিধিমালা and submits that from Section 14 of the সমবায় সমিটি আইন ও সমবায় সমিতি বিধিমালা it clearly shows that সমবায় সমিটি আইন ও সমবায় সমিতি বিধিমালা is a body corporate and a separate and independent entity not dependant on the Government. He submits that Section 14 makes its clear that the সমবায় সমিটি আইন ও সমবায় সমিতি বিধিমালা is a body corporate and it inter alia can sue and be sued and can own on its liability as an independent body corporate.

20. He next draws attention to Section 16 of the সমবায় সমিটি আইন ও সমবায় সমিতি বিধিমালা and points out that Section 16 of the Ain contemplate that any decision taken by the management of the co-operative society shall be final. He submits that although the petitioners were formally terminated from their service under the signature of the respondent No. 5 but however the respondent No. 5 is only working under the decision of the management committee and in accordance with section 16 of the বিধিমালা the order is final. On the issue of finality of decisions, orders etc of the co-operative society, he draws attention to a decision in the case of Nasim Ahmed Vs. Bangladesh and others reported in 32 DLD(HCD)2012 page 172 wherein he draws attention to the principle laid that an action taken by the executive committee of a co-operative society, which was neither performing the functions in connection with the affairs of the Republic nor of a local authority, is not amenable to writ jurisdiction. He reiterates that 32BLD(HCD)2012 case and this writ petition falls within similar category since the instant co-operative society is also a private entity and therefore writ is not maintainable. He concludes his submissions upon assertion that the Rule bears no merit ought to be discharged for ends of justice.

21. Learned Deputy Attorney General for the respondent No. 1 controverts the submissions of the learned Advocate for the respondent No. 3 regarding the nature and legal status of the respondent No. 2 who is the Chairman, Bangladesh Dugdo Utpadonkari Samabay Union Ltd. The learned D.A.G upon a query from this bench submits that the Bangladesh Dugdo Utpadonkari Samabay Union Ltd. Milk Vita is a public body and owned by the Government and certainly not a private entity. To substantiate his submissions regarding the nature of the entity he shows some materials from the government website and takes us to the history of Milk Vita which is a co-operative union Ltd. He draws us to the materials derived from the government website and also to other materials placed by the petitioners. He points out that the materials clearly show that the Bangladesh Dugdo Utpadonkari Samabay Union Ltd. is a government owned organization and the owners of the body is not the any private person but owned by the government. Upon a query from this bench he submits that regarding the nature and legal status the respondent No. 3 and the respondent No. 5's position as Additional Managing Director and Managing Director of Milk Vita he pursuades that by no stretch of imagination can it be contemplated that a government officer under the laws of the land can hold any position in private capacity till retirement nor in any other dual capacity.

22. We have heard the Advocates for both sides, also heard the learned Deputy Attorney General, perused the writ petition and the materials on records including the decisions cited

by the learned Advocates. The learned Advocate for the respondent No. 3 revolved around the issue of non maintainability of the writ petition. Therefore we are inclined to address the issue of maintainability first. On the issue of maintainability of the writ petition the respondent No. 3's contention is that Milk Vita is not a public body rather it is a private body. We have perused the documents before us derived from the materials that have been available from the government website. We have gone into the history of the organization. The history of the organization is that Milk Vita was established and initiated by the government and certainly not by any private person. The government is clearly the owner of the company and the objective of Milk Vita contemplates that it was established mainly for purpose of social welfare by way of producing milk products by the organization for sale to the public. Upon a query from this bench the learned Advocate for the respondents as to who the share holders of the Bangladesh Dugdo Utpadonkari Samabay Union Ltd. of Milk Vita are, the learned Advocate for the respondent No. 3 claims that "প্রান্তিক চাষী " are the share holders of the institution and not the government. The learned Advocate for the respondents' substantive claim appears to be that share holders are the (cultivators) প্রান্তিক চাষী of Milk Vita Limited and not the Government. Upon a query from this bench he however could not make out any substantive submission as to what is the basis of the share holding of প্রান্তিক চাষী (cultivators) in the company.

23. Our considered view upon examining all the materials on records before us which includes the documents derived from the government website which include the list of government owned company, it clearly shows the inclusion of the respondent's organization inter alia other factors. We are of the considered finding that Milk Vita is a public body and not a private entity.

24. The learned Advocate for the respondents contended that Milk Vita limited is a 'body corporate' within the meaning of Section 14 of the Co-operative Society Act- 2001. He further contended that it is a private independent entity and carries all rights and liabilities attached to an independent entity. To address this issue we have examined other provisions of 2001 (সমবায় সমিতি আইন এবং বিধিমালা). Since it is a principle of law that to comprehend and properly appreciate the scheme of any law it must be read in whole and not in part with such principle in mind we have examined Sections 14 and 21 of the Co-operative Society Act-2001. Sections 14 and 21 of the Co-operative Society Act-2001are reproduced hereunder:

> "ধারা-১৪। প্রত্যেক সমবায় সমিতি একটি সংবিধিবদ্ধ সংস্থা।-(১) এই আইনের অধীনে নিবন্ধিত প্রত্যেক সমরায় সমিতি হইবে স্বতন্ত্র আইনগত সত্তাবিশিষ্ট একটি সংবিধিবদ্ধ সংস্থা (Body Corporate) যাহার স্থায়ী ধারাবাহিকতা থাকিবে, উহার উদ্দেশ্য পূরণকল্পে যেকোন ধরনের সম্পদ অর্জন, ধারণ, হস্তান্তর করার এবং চুক্তি করার অধিকার থাকিবে; সমিতির একটি সাধারণ সীলমোহর থাকিবে এবং সমিতি উহার নিজ নামে মামলা দায়ের করিতে পারিবে এবং উক্ত নামে উহার বিরুদ্ধেও মামলা দায়ের করা যাইবে।
>
> (২) নিবন্ধিত সমবায় সমিতির সাধারণ সীলমোহর কাহার তত্ত্বাবধানে থাকিবে, কোন কোন দলিলে ও কোন কর্তৃপক্ষের উপস্থিতিতে সীলমোহর দ্বারা সীল দিতে হইবে তাহা উপ-আইন দ্বারা নির্ধারিত হইবে।"

and

> "ধারা-২১। সমবায় সমিতির কার্যাবলী পরিচালনার জন্য সরকারি কর্মকর্তা এবং কর্মচারী প্রেষণে নিয়োগ। -(১) যে সকল সমিতিতে সরকারের শেয়ার, ঋণ বা উক্ত সমিতির গৃহীত ঋণের ব্যাপারে সরকারের গ্যারান্টি রহিয়াছে সে সকল সমিতিতে সরকার, নির্ধারিত শর্ত সাপেক্ষে, কোন প্রথম শ্রেনীর সরকারি কর্মকর্তাকে উহার নির্বাহের জন্য প্রেষণে নিয়োগ করিতে পারিবে।
>
> (২) কোন সমবায় সমিতির আবেদনক্রমে নিবন্ধক, তদকর্তৃক নির্ধারিত শর্ত সাপেক্ষে, অধিদপ্তরের কোন কর্মকর্তা বা কর্মচারীকে সমিতির কার্যাবলী নির্বাহের জন্য প্রেষণে নিয়োগ করিতে পারিবেন।"

25. It is true that Section 14 of the Co-operative Society Act-2001 contemplates that all সমবায় সমিতি shall be independent body corporate with its inter alia own rights and liability.

26. However upon perusal of Section 21 it clearly shows that the provision of Section 21 contemplates the existence of some সমবায় সমিতি wherein the government of Bangladesh may be a share holder or a guarantor having share, loans or may be involved as guarantors regarding some loans by the government. In those cases section 21 provides that the government may subject to pre conditions appoint a first class government officer on deputation to look after the affairs of the organization.

27. Our considered view upon perusal of the সমবায় সমিতি Ain is that although Section 14 contemplates that all সমবায় সমিতি shall be a body corporate having independent entity, however Section 21 clearly contemplate that the class of সমবায় সমিতি may be distinguished.

28. Although section 14 is a general provision but however section 21 clearly contemplate a different class of সমবায় সমিতি (Co-operative society). Section 14 provide a broad general legal status of সমবায় সমিতি (Co-operative society). On the other hand section 21 specifically presuppose the existence of a different class of সমবায় সমিতি . Such different class is expressly distinguishable under section 21 of the আইন। Section 21 envisages those entities wherein the government may have interest and in pursuance of which they may depute their representative from the government basically to monitor/ supervise the running / functions of the entity.

29. The class of সমবায় সমিতি envisaged under Section 21 therefore contemplate that the government shall appoint their first class officers on deputation in those organizations. It is clear that Section 14 of the Co-operative Society Act-2001 does not contemplate that all সমবায় সমিতিs shall be private bodies if the governments interest is involved in such সমিতি. Therefore by no stretch of imagination can it be assumed that Milk Vita Limited which is a limited company owned by the government can fall into the category of a 'private body'. We are of the considered opinion that the instant সমবায় সমিতি is a public body owned by the Government and does not fall within the category of a private entity.

30. We have perused section 2(c) of the Services (Reorganisation and Conditions) Act-1975. The said section 2(c) provides the definition of a public body which is reproduced hereunder:

> "(c) "Public body" means anybody, authority, corporation or institution constituted or established by or under any law and includes any other body, authority or institution owned, controlled, managed or set up by the Government."

31. Form our findings and also upon perusal of Section 2(c) of the Services (Reorganisation and Conditions) Act-1975 it is clear that the respondents are a public body since it is owned, controlled and set up by the government.

32. Now our next contention is the class of employees the petitioners belong to. The learned Advocate for the respondents repeatedly contended that the petitioners falls within the category of 'workers'. The learned Advocate for the respondents pursuades that the petitioners in paragraph Nos. 4 and 7 of the writ petition 'admitted' that they are workers.

33. Our considered view is that whatever the language in the petition is not important rather the intention from the nature of the employment is to be considered. Pursuant to sifting through the materials and relevant laws, we have examined the office order dated 05.11.2022

marked as annexure-B which is the order of respondent No.6 making the petitioners permanent. Although the petitioners were appointed on temporary basis but it is admitted (Annexure B) that they were made permanent under the signature of the respondent No. 6. The office order clearly shows that they have not been termed as 'worker' but as employees and the petitioners' employees grades are 2 and 4 respectively.

34. For our purpose we have also addressed Annexure C which describes the nature of the employment of the petitioners. The petitioners belong to Grade 4 and 2 respectively in post of হিসাব রক্ষক and বিপনন তত্বাবধায়ক. Therefore it is clear that they are not 'workers' within the meaning of the labour law, rather they are employees and have been accorded Grades belonging to Grade 2 and Grade 4 respectively.

35. We have next drawn our attention to Section 1(4)(ka) of the বাংলাদেশ শ্রম আইন-২০০৬. Section 1(4)(ক) contemplates organizations which shall fall within the exception of Section 1(4)(ক) and shall not fall within the meaning of বাংলাদেশ শ্রম আইন-২০০৬. We have particularly drawn attention to Section 1(4)(ক) and which is reproduced hereunder: "সরকার বা সরকারের অধীনস্থ কোন অফিস" which means Government office or institutions owned by the government. Since we are of the considered finding and opinion that the বাংলাদেশ দুগ্ধ উৎপাদনকারী সমবায় ইউনিয়ন লিমিটেড is a public body and is owned by the government therefore it is needless to state that the organizations owned by the government falls within the exception of Section 1(4)(ক). Consequently the provisions of বাংলাদেশ শ্রম আইন-২০০৬ shall not be applicable in the petitioners case. Such being the position, we are also of the considered view that the petitioners' are not workers rather they are permanent employees under a particular selection grade.

36. Next we are inclined to address the issue of the nature of the relief from duties of the petitioners. The learned Advocates for the Respondents pursuaded that the petitioners' were "terminated" from their service which is apparent from the office order dated 23.02.2016 which is annexure E. The learned Advocate for the respondents also argued that therefore the petitioner's case does not fall within the definition of dismissal or removal. In pressing their argument, they relied on a decision in the case of Biman Bangladesh Vs. Moniruzzaman reported in 17 BLC(AD)(2012)56 wherein our Apex court held:

> *"The principle of natural justice has got no manner of application in case of termination simpliciter, An order of termination simpliciter is a valid order and cannot be interfered within in judicial review provided that the intended action is not taken with a view to victimize the employer/worker for trade union activities."*

37. The learned Advocate for the respondent No. 3 also tried to pursuade that in the 17 BLD (AD) 2012 case also Bangladesh Biman Corporation is a corporation owned by the government.

38. Keeping these in mind however we have perused the terms of the চাকুরী বিধি ও নিয়োগ নতিমালা ২০০৮ (সংশোধিত-২০০৯) of Milk Vita. We have perused clause No. 9.02 of the চাকুরী বিধি ও নিয়োগ নতিমালা ২০০৮ (সংশোধিত-২০০৯) which contemplates a situation of termination of employees and which clause 9.02 is reproduced hereunder:

> "৯.০২ বাধ্যতামূলক অবসরদান/ চাকুরীর অবসান ঘটান (Termination of Employment) :
>
> (১) এ বিধিমালার অন্যত্র বর্নিত কোন বিধান মোতাবেক না হলে কর্তৃপক্ষ কর্তৃক স্থায়ী কর্মচারীদের চাকুরীর মেয়াদ ২৫ বৎসর পূর্ন হলে বাধ্যতামূলক অবসরদান/অবসান ঘটাতে

পারবে। সে ক্ষেত্রে সংশ্লিষ্ট কর্মচারীকে অবশ্যই ১২০ (একশত বিশ) দিনের লিখিত নোটিশ দিতে হবে। তবে শর্ত থাকে যে, একজন কর্মচারীর চাকুরী এরুপ বাধ্যতামূলক অবসরদান/অবসান ঘটাবার ক্ষেত্রে এ ধরনের নোটিশের পরিবর্তে ১২০(একশত বিশ) দিনের বেতন প্রদান করা যাবে।

আরো শর্ত থাকে যে, একজন কর্মচারীর চাকুরী এরুপে বাধ্যতামূলক অবসরদান/অবসান ঘটাবার ক্ষেত্রে তাকে চাকুরীকালের সমাপ্ত প্রত্যেক বৎসর অথবা যে কোন অংশ বিশেষের জন্য (কমপক্ষে ১২০ দিন) মিল্ক ইউনিয়ন কর্তৃক ০২ (দুই) মাসের মূলবেতন হারে আনুতোষিক (গ্র্যাচ্যুইটি) এবং অর্জিত ছুটির নগদায়নকৃত অর্থ প্রদান করতে হবে।

(২) অসদাচরন, অদক্ষতা অথবা অন্য কোন কারনে চাকুরী হতে বরখাস্ত বা অপসারিত হলে আনুতোষিক (গ্র্যাচ্যুইটি) প্রাপ্য হবেন না, তবে প্রতিষ্ঠানের আর্থিক কোন ক্ষতি সাধিত না হলে অথবা আর্থিক ক্ষতি হলে, উক্ত আর্থিক ক্ষতি সমন্বয় সাপেক্ষে চাকুরীকালের সমাপ্ত প্রত্যেক বৎসর অথবা যে কোন অংশ বিশেষের জন্য(কমপক্ষে ১২০ দিন) মিল্ক ইউনিয়ন কর্তৃক ০২ (দুই) মাসের মূলবেতন হারে আনুতোষিক (গ্র্যাচ্যুইটি) এবং অর্জিত ছুটির নগদায়নকৃত অর্থ প্রদান করতে হবে।

39. In our case we find that even if the petitioner's employment were "terminated" it appears from Annexure E that however no notice was served upon them nor was any মূল বেতন basic salary given to them only. Upon perusal of Clause 9.02 it appears that in whatever terms the office order dated 23.02.2016(Annexure E) may have been issued, but for practical purposes it is not 'termination' within the meaning of the বিধিমালা since the respondents neither gave them notice under clause 9.02 nor did they give them pay of 120 days in lieu of. We are of the considered view that clause No. 9.02 of the চাকুরী বিধি ও নিয়োগ নতিমালা ২০০৮ (সংশোধিত-২০০৯) which provides for termination, however in the instant case since they were neither given any notice nor were they given their salary their being relieved of their services does not fall with termination. Therefore the appellate Division decision in the case of Biman Bangladesh Vs. Moniruzzaman reported in 17 BLC(AD)(2012)56 is not applicable in the instant case. We are of the considered view that since it is not substantively a termination, consequently the petitioners being relieved from duty may fall within the other categories. In accordance with the petitioner's nature of service, being relieved of their service may fall within the other categories in the চাকুরী বিধি ও নিয়োগ নতিমালা ২০০৮ (সংশোধিত-২০০৯) of Milk Vita Ltd. Particularly Clause 8.02(1)(Kha) is reproduced hereunder:

৮.০২(১)(খ) গুরুদন্ড:

১. চাকুরী হতে অপসারণ (removal from service)

২. চাকুরী হতে বরখাস্ত (Dismissal from service)

৩. চাকুরী হতে অপসারনের ক্ষেত্রে নহে বরং চাকুরী হতে বরখাস্ত হওয়ার পর কোন কর্মচারী ভবিষ্যতে মিল্ক ইউনিয়নে চাকুরী প্রাপ্তির অযোগ্য বলে গন্য হবেন।

৪. বাধ্যতামূলক অবসরদান (Compulsory retirement)

40. We are inclined to opine that the petitioner's dismissal from their service falls with clause 8.02 of the নীতিমালা। Therefore we are also of the considered view that 'গুরুদন্ড' was imposed upon the petitioners.

41. We have also perused the other related clauses particular clause 8.06 which sets out an enquiry procedure imposition of গুরুদন্ড (Serious punishment) if found guilty. Clause 8.06(ক) contemplate a charge sheet and further states that the accused employee will be

informed "কর্মচারীকে অবহিত করবে ". Clause 8.06 presupposes a written statement লিখিত বিবৃতি, and also ব্যক্তিগত শুনানী (personal hearing).

42. Upon overall perusal clause of 8.06 it clearly reflects the Rule of affording due process of defence to the employee prior to imposing গুরুদন্ড of the নীতিমালা। Nevertheless, even if the নীতিমালা was silent on the issue of due process, even then the principle of natural justice would be applicable and the employees must be afforded due process before seizing him of his employment. In not affording due process is a direct infringement into the employee's fundamental rights guaranteed under the constitution.

43. Moreover, the Respondent organization being a public body not affording the petitioner due process is in direct violation of the petitioners fundamental rights and therefore writ is maintainable in the instant case.

44. The learned Advocate for the respondent No. 3 contended that the petitioners ought to have resorted to the appellate forum contemplated under clause 8.12 of the the চাকুরী বিধি ও নিয়োগ নতিমালা ২০০৮ (সংশোধিত-২০০৯) and further contended that writ is not maintainable since there is other efficacious remedy.

45. Here we must pause to observe that some of the submissions of the learned Advocate for the respondent No. 3 are inconsistent. On one hand learned Advocate for the respondent No. 3 contends that the petitioners could have availed the appellate forum under clause 8.12 while in the same breath he contended that the petitioners do not fall within the category of employees rather they fall within the category of 'worker' within the meaning of labour law and ought to have resorted to the labour court to seek redress.

46. Be that as it may however we are of the considered opinion that the petitioner's fundamental rights have been violated and the respondents represents a public body, the petitioners ought to have been afforded due process which is their constitutional right and also has right under clause 8.06 of the চাকুরী বিধি ও নিয়োগ নতিমালা ২০০৮ (সংশোধিত-২০০৯) . Such being our opinion, we are inclined to dispose of the matter.

47. In the result, the Rule is disposed of with directions and observations made above.

48. The impugned notification purported to have been issued vides memo No. No. মিই/প্রশা-৩২/১২/২০১৬/২৩৯ (ANNEXURE-E), মিই/প্রশা-৩২/১২/২০১৬/২৪৬ (ANNEXURE-E1), মিই/প্রশা-৩২/১২/২০১৬/২৪৫ (ANNEXURE-E2), মিই/প্রশা-৩২/১২/২০১৬/২৪১ (ANNEXURE-E3), মিই/প্রশা-৩২/১২/২০১৬/২৪০ (ANNEXURE-E4) and মিই/প্রশা-৩২/১২/২০১৬/২৪৪ (ANNEXURE-E5), dated 23.02.2016 under the signature of the respondent No. 05 dismissing the petitioners from the service is declared to be without lawful authority and is of no legal effect. The respondents are hereby directed to proceed against the petitioners under clause 8.06 of the the চাকুরী বিধি ও নিয়োগ নতিমালা ২০০৮ (সংশোধিত-২০০৯) and dispose of the matter in accordance with law.

49. Communicate this judgment at once.

19 SCOB [2024] HCD 27

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)
WRIT PETITION NO. 4177 of 2020

Tanvir Quader and another
Vs.
Bangladesh and others

Mr. Anik R. Haque, with
Mr. Junayed Ahmed Chowdhury, Advocates ..... for the Petitioners
Mr. Mustafizur Rahman Khan, Advocate
….. For the respondent No.5
Mr. Omar Sadat, Advocate
….. For the respondent No.6

Mr. Samarendra Nath Biswas, D.A.G. with
Mr. Md. Abul Kalam Khan Daud, A.A.G. with
Ms. Rehana Sultana, A.A.G. with
Mr. Ali Akbar Khan, A.A.G. and
Ms. Nurunnahar Akter, A.A.G
.... For the Respondents-government

Heard on: 24.02.2021 and 25.02.2021
Judgment on: 28.02.2021

Present:
Mrs. Justice Farah Mahbub
And
Mr. Justice S.M. Maniruzzaman

Editors' Note:
The petitioners as being the parents of the students who were studying at the respective private schools filed this writ petition challenging the charging of unreasonable high tuition fees on the students who were attending on-line classes of the respective private schools during Covid-19 pandemic. The High Court Division, however, found that writ petition was not maintainable against the private schools who are neither "statutory body" nor "local authority". Consequently, it discharged the 1st part of Rule. But it directed the respective registering authorities to take immediate steps under the provisions of বিদেশি কারিকুলাম এ পরিচালিত বেসরকারি বিদ্যালয় নিবন্ধন বিধিমালা, ২০১৭ and বেসরকারি প্রাথমিক (বাংলা ও ইংরেজী মাধ্যম) বিদ্যালয় নিবন্ধন বিধিমালা, ২০১১ to constitute respective Managing Committees who can look into the issue of the quantum and collection of tuition fees from students.

Key Words:
Article 102(5) read with Article 152 of the Constitution; Sections 3(39) and 3(28) of the General Clauses Act, 1847; Registration of Private Schools Ordinance, 1962;

A writ against private schools is maintainable only when those are either *"statutory body"* or a *"local authority"* respectively. ...(Para 50)

Article 102(5) read with Article 152 of the Constitution and Sections 3(39) and 3(28) of the General Clauses Act, 1847 and Registration of Private Schools Ordinance, 1962:
The respondent Nos. 5 and 6 are neither a *'statutory body'* nor a *'local authority'* within the meaning of '*person'* as defined in Article 102(5) read with Article 152 of the Constitution and Sections 3(39) and 3(28) of the General Clauses Act, 1847 but are merely governed by the Ordinance of 1962 as well as the Rules so have been framed

thereunder for proper maintenance, administration and supervision of the respective educational institution. ...(Para 52)

Writ of *mandamus* can be issued only when there exists a legal right and a corresponding legal duty on the part of the executive. ...(Para 54)

Registration of Private Schools Ordinance, 1962:

In the instant case, the petitioners have miserably failed to show that charging same tuition fees as charged in pre Covid-19 period from the students of private schools including respondent Nos. 5 and 6 for the on line classes during Covid-19 pandemic is violative of the provisions of the Ordinance No. XX of 1962 and the Rules so have been framed thereunder. Consequently, the line of argument which has been resorted to by the petitioners for maintainability of the 1st part of the Rule, falls through. ...(Para 57)

Once the issue is decided in favour of a class of persons its benefit is equally applicable to similarly placed persons to do substantial justice. ...(Para 61)

***Registration of Private Schools Ordinance, 1962*, "বিদেশি কারিকুলাম এ পরিচালিত বেসরকারি বিদ্যালয় নিবন্ধন বিধিমালা, ২০১৭" and "বেসরকারি প্রাথমিক (বাংলা ও ইংরেজী মাধ্যম) বিদ্যালয় নিবন্ধন বিধিমালা, ২০১১:**

Vide *Registration of Private Schools Ordinance, 1962*, "বিদেশি কারিকুলাম এ পরিচালিত বেসরকারি বিদ্যালয় নিবন্ধন বিধিমালা, ২০১৭" and "বেসরকারি প্রাথমিক (বাংলা ও ইংরেজী মাধ্যম) বিদ্যালয় নিবন্ধন বিধিমালা, ২০১১", the respective functions of the private schools are being governed as well as managed and that said statute and the Rules have been framed thereunder do not contain any provision whatsoever fixing parameter of charging tuition/ school fees. ...(Para 63)

JUDGMENT

Farah Mahbub, J:

1. The petitioners as being the parents of the students who are studying at the respective private schools i.e. the respondent Nos.5 and 6, have filed the instant writ petition challenging the impugned action of the private schools including the said respondents as to charging unreasonable high tuition fees on the students who are attending on-line classes of the respective private schools during Covid-19 pandemic, whereupon instant Rule Nisi has been issued in the following manner:

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to why an order should not be passed declaring that the charge of the same tuition fee as charged in pre-Covid-19 period from students of private schools including the respondents No.5 and 6 for online classes during the Covid-19 pandemic is being done without any lawful authority and is of no legal effect, and also as to why the respondents should not be directed to formulate a scheme with respect to the quantum and collection of tuition fees from students of private schools during the subsistence of the Covid-19 pandemic based on the provisions of the Registration of Private Schools Ordinance, 1962, Non-Government School Registration Rules, 2017 and the United Nations Convention on the Rights of the Child, 1989 without prejudice to the rights of the parents and children."*

2. At the time of issuance of the Rule, the respondent Nos.2 to 6 were directed to formulate a scheme with respect to the quantum and collection of tuition fees from the

students of private schools(English Medium) during the subsistence of Covid-19 pandemic and to submit the same to the Government within a prescribed period.

3. Challenging the ad-interim order of direction the respondent No.5 moved the Appellate Division by filing Civil Petition for Leave to Appeal No.1509 of 2020. Upon hearing the parties the learned Judge-in-Chamber of the Appellate Division stayed operation of the interim direction. Ultimately, pursuant to the order dated 01.12.2020 passed by the Appellate Division this Bench has taken up the matter for hearing and disposal of the same.

4. In support of the Rule Nisi the categorical contention of the petitioners are that *Registration of Private Schools Ordinance,1962* (in short, the Ordinance,1962) was promulgated for the purpose of providing a framework for registration of private schools. The main objective behind such registration of private schools, as embodied in the preamble of the Ordinance, is to "*supervise and regulate the working of private schools in Bangladesh*". In this pursuit of supervision and regulation of private schools, the Government in exercise of power as provided under Section 8 of the Ordinance,1962 framed the following Rules, namely:-

(a) " বিদেশি কারিকুলাম এ পরিচালিত বেসরকারি বিদ্যালয় নিবন্ধন বিধিমালা, ২০১৭" (in short, Rules, 2017); and

(b) "বেসরকারি প্রাথমিক (বাংলা ও ইংরেজি মাধ্যম) বিদ্যালয় নিবন্ধন বিধিমালা, ২০১১" (in short, Rules, 2011).

5. In order to ensure transparency and accountability (স্বচ্ছতা ও জবাবদিহিতা) of private schools, Rule 7 of the Rules of 2017 and Rule 9 of the Rules of 2011 stipulate creation of Managing Committees in every private school of the country comprising of, amongst others, teachers, parents of the students and promoters/ founders of those categories of school. One of the responsibilities of the said Managing Committees, however, is to determine the amount of tuition fee, admission fee, session charge and other fees of the respective students (as contained in Rule 9(gha) of the Rules, 2017 and Rule 12 (gha) of the Rules, 2011respectively).

6. In this regard, the emphatic contention of the petitioners is that despite giving 17 (seventeen) points direction by this Hon'ble Court in ***Barrister Fatima S Chowdhury –Vs-Government of Bangladesh and others*** reported in ***23 BLC 620*** including constitution of Managing Committee under the Rules of 2017, no such Managing Committees have been constituted by the respondent Nos. 5 and 6 till date in compliance thereof. Consequently, for lack of Managing Committees in private schools with guardian representative the management of the private schools are exercising unbridled and uncensored power while determining the amount of tuition fees chargeable on the students. The further contention of the petitioners in this regard is that during the Covid-19 pandemic charging students the same amount of tuition fees as the private schools did before commencement of the said pandemic cannot be mandated as lawful, for, Section 2(g) of the Ordinance,1962 while defining a "*private school*" clearly stated that the respective educational institution is to impart "*organized instruction*".

7. In this connection it has been averred that the International Standard Classification of Education' 2011 ("ISCED 2011") issued under the United Nations Educational, Scientific and Cultural Organization (UNESCO), defines "*organized instructions*" in the context of "*education and learning"* at paragraphs 11-16 and 100 in the following words:

"11. In ISCED, an education programme is defined as a coherent set or sequence of educational activities or communication designed and organized to achieve pre-determined learning objectives or accomplish a specific set of educational tasks over a sustained period. Objectives encompass improving knowledge, skills and competencies within any personal, civic, social and/or employment-related context. Learning objectives are typically linked to the purpose of preparing for more advanced studies and/or for an occupation, trade, or class of occupations or trades but may be related to personal development or leisure. A common characteristic of an education programme is that, upon fulfillment of learning objectives or educational tasks, successful completion is certified.

The key concepts in the above formulation are to be understood as follows:

12. EDUCATIONAL ACTIVITIES: deliberate activities involving some form of communication intended to bring about learning .

13. COMMUNICATION: a relationship between two or more persons or an inanimate medium and persons, involving the transfer of information (messages, ideas, knowledge, strategies, etc.). Communication may be verbal or non-verbal, direct/face-to-face or indirect/remote, and may involve a wide variety of channels and media.

14. LEARNING: individual acquisition or modification of information, knowledge, understanding, attitudes, values, skills, competencies or behaviours through experience, practice, study or instruction.

15. ORGANIZED: planned in a pattern or sequence with explicit or implicit aims. It involves a providing agency person(s) or body that facilitates a learning environment, and a method of instruction through which communication is organized. Instruction typically involves a teacher or trainer who is engaged in communicating and guiding knowledge and skills with a view to bringing about learning. The medium of instruction can also be indirect, e.g. through radio, television, computer software, film, recordings, Internet or other communication technologies.

16. *SUSTAINED: the learning experience has the elements of duration and continuity.*

.....

100. Programmes at ISCED Level O' or early childhood education, are typically designed with a holistic approach to support children's early cognitive, physical, social and emotional development and introduce young children to organized instruction outside of the family context. ISCED These programme aim to develop socio-emotional skills necessary for participation in school and society."

8. In the light of the above, as contended by the petitioners, when the Ordinance, 1962 requires private school to impart *"organised instruction"*, it, infact, refers to the overall nurturing and development of children into both able-mind and socially aware citizens of Bangladesh. Moreover, the concept of education imparted by private schools is not merely limited to the materials prescribed in a textbook, but also involves installing important social and political values in children that will help create a more equitable society.

9. Furthermore, Rule 15(3) of the Rules of 2017 provides specific guidance as to what should be entailed in the education curriculum of private schools which involve physical demonstrations such as, indoor and outdoor sports activities, cultural activities in celebration of the history and culture of Bangladesh, book fairs, tree planting and cleanliness/hygiene related activities. In addition, Rule 15(4) of the Rules of 2017 and Rule 21(4) of the Rules of 2011 also stipulate that private schools must take necessary steps to ensure rights of children

in accordance with the United Nations Convention on the Rights of the Child, 1989 ("the UN Child Convention").

10. However, fact remains that in the wake of Covid-19 pandemic private schools have shifted to providing virtual education to students through online platforms such as, Zoom, Google Meet etc. As a consequence, they developed online class schedules which cover a much less period of time and significantly fewer classes than usual (Annexures- B and B-1 respectively). Also, such virtual classes clearly do not include use of any indoor or outdoor space or field by the students for sports activities or any interaction with fellow students and/or between teachers and students. Thus, it is apparent that the respondent Nos.5 and 6 including other private schools have failed to comply the respective Rules so have been framed under the Ordinance, 1962.

11. In addition to above, vide an undated letter the respondent No. 5 had informed the parents of the respective students, by giving reference to the decision of the representative body called "Dhaka International Schools Association" ("DISA"), which has no legal entity in the eye of law, that no flat rate tuition fees would be waived by the school for all the students and that waiver of tuition fees would be considered on a case to case basis (Annexure C). Said letter of the respondent No. 5 clearly shows their inflexible attitude towards refusal to reduction or adjustment of school tuition fees based on changing times of Covid-19 pandemic.

12. Due to the said stand, left the petitioners with no other option but to file the instant writ petition whereupon instant Rule Nisi has been issued by this Court.

13. Respondent No. 5 entered appearance by filing affidavit-in-opposition stating, *inter-alia*, that the said respondent is fully dedicated to the growth and development of each of its students. The respondent school aims to provide broad, holistic, challenging and sound education in order to enable the children to reach their full academic potential. Textbooks and schemes of work are chosen to accommodate and stimulate children of all abilities. The curriculum is carefully structured, regularly reviewed and updated. Moreover, the respondent No.5 aims to provide opportunities, training and resources for students to research and become independent learners. The school monitors students' progress through regular assessments and also provides extra-curricular activities to produce well rounded students. In addition to provide lab facilities to the students, the respondent No.5 also instill moral and ethical values to inspire students to become good human beings above all else.

14. Further, it has been averred that the quality of education imparted by the respondent No.5 school will be borne of the performance of its students in the examinations conducted by the international Boards, and also by the stature of the institutions of secondary and tertiary education to which its students are admitted, which included some of the most renowned universities and colleges of the world, apart from the leading institutions of Bangladesh.

15. It has also been stated that the respondent No.5 has a rich history of celebrating historical and cultural days in compliance with that of Bangladesh. The said respondent was the first school to make Bangladesh studies mandatory; in fact, the school chased Cambridge Assessment International Education to introduce it as a subject in 1995 and worked on developing the syllabus and the textbooks which were written by the teachers of the said respondent. Day long events are organized in school where students and teachers engage in discussions and activities annually such as, Pohela Falgun and Pitha Utshop on 13th February, International Mother Language Day on 21st February, Bangabandhu's birthday and Children day on 17th March, Independence Day on 26th March, Pohela Boishak on 14th April, National

Mourning Day on 15th August and Victory Day on 16th December. Such events have not been organized in the school premises during the Covid-19 pandemic to avoid public gatherings; however, the school has arranged for celebration of such events virtually. In addition to the above, the respondent No.5 also arranges daily assemblies which are still being held virtually where it is mandatory for the National Anthem to be sung. The virtual class hours have been kept the same as the class times maintained by the respondent No.5 prior to Covid-19 pandemic, therefore, the class schedules are still the same.

16. Although physical education/activities have not been conducted during this Covid-19 pandemic, the respondent No.5 has ensured its engagement with students across all classes for counseling sessions by expert counselors. The school also arranged for Mind-Body-Soul(MBS) platform whereby this respondent counsels its students: (i) to battle their mental health issues which students and families have been facing at unprecedented levels during the Covid-19 pandemic, (ii) to guide students on physical health and consumption of healthy nutritional food; and (iii) to educate the importance of spiritual wellbeing which is achieved through physical exercises, yoga classes, etc. The respondent No.5 also allows student interaction by fun activities and arranges virtual concerts. Therefore, the respondent No.5 has to plain, arrange and design new ways of imparting such education by virtual means which never existed in the curriculum of the school.

17. It has been stated that prior to admission of the child to the respondent No.5 school, it issues a prospectus/brochure to the guardian of the child, including the fee structure, which the guardian accepts and only then the child is admitted . However, annual increase of school fees to the extent of 10% is allowed under the proviso as contained in Rule 19(1) of the Rules of 2017. Moreover, when the child of the petitioner No.1 was admitted to the respondent No.5 school in Playgroup for the session commencing from August 2019, the monthly tuition fee for Playgroup was Tk.23,000/- and Nursery was Tk.23.000/-. When the child of the petitioner No.1 was promoted to Nursery, his tuition fee was the same in the session starting in August' 2020. Hence, there is no scope for the petitioner No.1 to allege that there has been any violation of law.

18. Further, it has been stated that following the advent of the current Covid-19 pandemic, the respondent No.5 school has not increased its tuition fees, has not charged any penalty for late payment of tuition fees and has not expelled any student on account of non-payment or late payment of tuition fees.

19. Moreover, the respondent No.5 is a private school which does not receive any manner of subsidy from the Government or any public authority. The said school has not been established by a charitable or educational society or trust or religious organization. Hence, charging and realization of fees, in accordance with law, is crucial to the continued existence of the school, meeting its different expenses and returning a reasonable profit for those who have invested to set it up.

20. During the ongoing Covid-19 pandemic, the costs of the respondent No.5 have not seen any reduction, even though physical classes are not continuing. The respondent No.5 is to continue payment of rents for the premises and salaries of staffs and teachers, maintain existing infrastructure and also has had to incur additional expenditure for arranging online virtual classes. The hours of classes have not been reduced. Rather, due to online classes, additional resources have had to be procured and employed. Moreover, the respondent No.5 has continued to provide and incorporate regular routine during this COVID-19 pandemic as much as possible.

21. Also, it has been stated that the respondent No.5 continues to meet the International Standard Classification of Education' 2011 ("ISCED 2011") issued under the United Nations Educational, Scientific and Cultural Organization (UNESCO) to the extent possible during the Covid-19 pandemic. Since neither the Ordiance,1962 nor the Rules so have been framed thereunder including the ISCED-2011 provide for guidelines to be followed during a pandemic situation therefore, in the absence of such guidelines, the petitioners are wrongly placing allegations of non-compliance of the provisions of law and the guidelines under the ISCED-2011.

22. In this connection it has been contended that Covid-19 pandemic was beyond the contemplation of the Legislature at the time of promulgation of the Ordinance,1962 and the Rules, 2017. As such, allegation of violation of the Ordinance, 1962 and the Rules of 2017 for failing to arrange physical activities during such dire situation, does not arise at all.

23. Mr. Anik R. Haque, the learned Advocate appearing with Mr. Junayed Ahmed Chowdhury, the learned Advocate for the petitioners submits that online classes, as provided by private schools on a virtual platform, may be considered as a single part of the education or learning activities the students receive from the respective schools. However, these online classes are not the only component of education or learning activities that fall within the expression "*organised instruction*" to the students as mandated by the Ordinance,1962. Moreover, it has been contended that online classes also do not comply with the provisions of the Rules of 2017 nor the UN Child Convention,1989. Accordingly, he submits that since private schools including the respondent Nos.5 and 6 are not imparting the full extent of the *" organised instruction"* as envisaged by the UNESCO's International Standard Classification of Education' 2011 and as required under the Ordinance,1962 read with the Rules of 2017 as well as the UN Child Convention,1989 the private schools including the respondent Nos. 5 and 6 are not entitled to demand full tuition fees from the students during the Covid-19 pandemic, i.e. the exact amount that they used to charge before the Covid-19 pandemic.

24. He also submits that the nationwide closure of physical classes in schools has prevented private schools from complying with the educational standards set by the Government. As such, lack of significant educational resources given to the students on a virtual forum must be reflected in the tuition fees charged on such students. Hence, the private schools should impose significantly less tuition fees on students in exchange for the virtual education being imparted on them.

25. He further submits that Rule 19(1) of the Rules of 2017 provides that the Managing Committee of a private school will determine, amongst others, the school fees in consideration of the quality of education and infrastructural facilities being provided by such school. Consequently, the absence of Managing Committees in private schools is enabling the management of such schools to keep charging the same tuition fees during the Covid-19 pandemic even though they are not providing the same quality of education or infrastructural facilities as required under the said provision of law.

26. So far seeking direction to formulate scheme with respect to the quantum of tuition fees collected from the students during this Covid-19 pandemic period Mr. Anik goes to argue that the private schools including the respondent Nos. 5 and 6 must consult with their regulatory authority and the Government to formulate a scheme or plan regarding the exact amount of tuition fees that a particular private school can charge for providing online classes during the Covid-19 pandemic in consideration of the quality of education and infrastructural facilities based on *Registration of Private Schools Ordinance*, *1962,* "বেসরকারি বিদ্যালয় নিবন্ধন বিধিমালা, ২০১৭" and the United Nations Convention on the Rights of the Child, 1989 without

prejudice to the rights of the parents and children, by way of detailed representations and submit the same to Government for consideration.

27. He lastly submits that this writ petition albeit has been filed by the petitioners in their capacity as parents of the students of the respondent Nos.5 and 6, but they have categorically satisfied the threshold requirement of *locus standi* for maintaining this public interest litigation, as espoused by the Appellate Division in the case of ***Dr. Mohiuddin Farooque – vs- Bangladesh*** reported in ***49 DLR (AD) 1 para 48.*** Hence, he submits that this writ cannot be knocked down on the ground of maintainability. In other words, he submits, this Rule is maintainable.

28. Conversely, Mr. Mustafizur Rahman Khan the learned Advocate appearing for the respondent No.5 submits that the respondent No. 5 which imparts education from Play Group to O' Level, falls within the purview of the Rules, 2017 as it is a "*private school*" within the definition of Rule 2(7) of the said Rules read with Section 2(g) of the Ordinance, 1962.

29. However, he goes to submit that Rule 7 of the Rules of 2017 provides for a Managing Committee of 11 members comprising, amongst others, 2 representatives, including at least 1 female, elected from amongst the guardians of the students studying in the school. Insofar as the election process is concerned, Rule 7(4) of the Rules, 2017 stipulates that the procedure for electing representatives shall be prescribed by general or special order of the registration authority. In this regard, he submits that the registration authority for the respondent No.5 is the respondent No.2 in terms of Rule 2(5) of the Rules, 2017 read with Section 2(h) of the Ordinance, 1962. But, to the knowledge of the respondent No.5, the respondent No.2 has not issued any general or special order in terms of Rule 7(4) of the Rules, 2017 prescribing the procedure of electing representatives in different categories of the Managing Committee, nor has the Government framed any Rules in this behalf under Section 8 of the Ordinance, 1962. As such, he submits that in the absence of such special or general order or Rules, the respondent No.5, of its own volition, has established two Managing Committees, one for the respondent No.5's primary section, which comprises of 3 founder members, 3 parent representatives, 1 teacher representative, 1 retired meritorious educationist (government employee) and the Head of School herself; and the other for the respondent No.5's secondary section, which comprises of 3 founder members, 2 teacher representatives, 3 parent representatives and the Head of the School herself. Thus, he submits, the members of these Managing Committees are not elected, rather are selected informally through consultations and are finalized by the owners of the school.

30. The present Managing Committee of the respondent No.5, he submits, has given input in deciding on the amount of tuition fees to be imposed during the Covid-19 pandemic. Pursuant to the decision of the Managing Committee, special accommodations have been provided by the respondent No.5 for its students, in particular; (i) the fees charged by the respondent No.5 for the academic year beginning from 18.08.2020 have not been increased, though in normal circumstances they increase annually; (ii) no late fee penalties have been imposed; (iii) the respondent No.5 has ensured that no student has to leave the school for inability to pay the required fees; and (iv) students are allowed deferred payment without letting delay in payment affect the attendance of the students in their online classes. The said respondent has communicated the concerned bank receiving the tuition fees to avoid charging penalties for late payment by email dated 11.05.2020. He also submits that despite the fact that costs of running the school has not been reduced during the Covid-19 pandemic, the respondent No.5 has continued paying the rental amount for the premises occupied by the school and the salaries to its employees and staff members.

31. He further goes to submit that the respondent No.5 continues to meet the International Standard Classification of Education, 2011, ("ISCED, 2011") issued under the United Nations Educational, Scientific and Cultural Organization (UNESCO) to the extent possible during the Covid-19 pandemic. However, fact remains that ISCED-2011 does not provide for guidelines to follow during a pandemic situation; hence, in the absence of such a guideline, placing allegations by the petitioners of non-compliance of the guideline under the ISCED-2011, is not tenable in the eye of law.

32. He again submits that the respondent No.5 has continued to maintain regular routine during this Covid-19 pandemic to the extent possible. However, he submits, although physical education/activities have not been conducted during this Covid-19 pandemic, but the respondent No.5 has ensured its engagement with students across all classes for counseling sessions by expert counselors to battle their mental health issues which students and families have been facing at unprecedented levels during the Covid-19 pandemic, also to guide students on physical health and consumption of healthy nutritional food; and to educate the importance of spiritual wellbeing which is achieved through physical exercises, yoga classes, etc. Thus, he submits that the respondent No.5 has to arrange and design new ways of imparting such education by virtual means which never existed in the curriculum of the school.

33. He also submits that there is no express provision of law regulating the level of fees to be charged during the times of pandemic; as such, it cannot be alleged that the respondent No.5 has violated any provisions of the Ordinance,1962 and the Rules so have been framed thereunder.

34. The learned Advocate concludes his argument by submitting that this writ is not maintainable for having had preferred by the petitioners against private schools. Hence, it is liable to be discharged.

35. Mr. Omar Sadat, the learned Advocate appearing on behalf of the respondent No.6 by filing affidavit-in-opposition adopts the submissions so have been advanced on behalf of the respondent No.5.

36. Instant writ petition is centering around the issue of charging same tuition fees during Covid-19 pandemic as being charged in pre-Covid period from the students of the private schools of the country including respondent Nos.5 and 6 for attending on line classes during this period.

37. Since the grievances of the petitioners squarely lie against the respondent Nos. 5 and 6, who are admittedly private schools including all other private schools of Bangladesh as such, the issue which requires to be resolved first is whether this writ is maintainable against private school(s).

38. Article 102(1)(a)(i)and(ii) of the Constitution of the People's Republic of Bangladesh (in short, the Constitution) is invoked by the person aggrieved against any person or authority, including any person performing any function in connection with the affairs of the Republic for the enforcement of his fundamental rights as guaranteed under Part III of the Constitution. Article 102(1) of the Constitution is referred below for ready reference.

> *"102(1) The High Court Division on the application of any person aggrieved may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be*

appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution".

39. Vide Article 102(2)(a)(i) and (ii) writ of *certiorari, mandamus and prohibition* is maintainable against a *"person"* performing any functions "*in connection with the affairs of the Republic"* or of a *"local authority"*.

40. Article 102(2)(a)(i) and (ii) of the Constitution is quoted as under:

"The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-

(a) on the application of any person aggrieved, make an order-

(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

(ii) declaring that any act done or proceeding taken by a person performing function in connection with the affairs of the Republic or of a local authority, has been done or taken without lawful authority and is of no legal effect; or

.....''

41. However, vide Article 102(5) the word *"person''*, as used in Article 102, includes a "*statutory public authority''* and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any discipline force and the tribunal to which Article 117 is applied.

42. Article 102(5) is accordingly quoted below for a cursory glance:

102(5) In this article, unless the context otherwise requires, "persons'' includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which article 117 applies.

43. Thus, it appears that the definition of the word "*person*" is both inclusionary and exclusionary and it includes all statutory public authorities as defined in Article 152.

44. The definition of "*statutory public authority*", as embodied in Article 152 of the Constitution is referred below:

"statutory public authority" means any authority, corporation or body the activities or the principal activities of which are authorised by any Act, ordinance, order or instrument having the force of law in Bangladesh;

45. In addition, the word "*person*" also includes *"local authority"* and that in view of Article 152(2) the definition of *"person"* and *"local authority",* as provided in Sections 3(39) and 3(38) respectively of the General Clauses Act, 1897(in short, Act of 1897) is applicable in view of the *ratio* as decided in ***B.S.I.C – Vs- Mahbub Hossain (1977) 29 DLR (SC) 41.***

46. Sections 3(39) and 3(28) of the Act of 1847 are accordingly, quoted as under:

"3(39) "person" shall include any company or association or body of individuals, whether incorporated or not:

3(28) Local Authority- "Local authority" shall mean and include a Paura Shava, Zilla Board, Union Panchayet, Board of Trustees of a port or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund, or any corporation or other body or authority constituted or established by the Government under any law:]"

47. The respondent Nos. 5 and 6 including other private schools of the country as being private schools can claim to be a "*local authority*" if it is established by the Government under the law, as has been observed by the Appellate Division in the case of ***Mofizul Huq – Vs- Mofizur Rahman and others*** reported in ***48 DLR (AD) 121.***

48. In ***Mofizul Huq–Vs-Mofizur Rahman and others(supra)*** the Appellate Division while deciding the issue as to whether a non-government secondary school is a "*statutory body*" or a "*local authority*" has categorically observed, *inter-alia*:

"To be a statutory body it must, first of all, owe its existence to a statute. In other words, it must be created by or under a statute. There is nothing in the Ordinance of 1961 nor any other law has been brought to our notice showing that a secondary school or, to be more particular, the Sammilani Girls' High School in this case, is or has been created by or under any law. A distinction must be made between a body or institution which is created by or under a statute and a body or institution which is not so created but is governed by certain statutory provisions for the proper maintenance and administration of the said body or institution. A secondary school is undoubtedly governed by the provisions of the Ordinance in question and the various other regulations made thereunder but does not necessarily follow that the school is a creature of the said Ordinance or any other law.

It was held that the District School Board so far as that case was concerned, had no independent existence and every employee under the Board was in fact holding office under the Government. Evidently this decision is not at all relevant for determining what a 'local authority' is meant under the General Clauses Act.

It is, however, true that the school like any other non-government secondary school is regulated and managed in accordance with provision of the Ordinance of 1961 and the various regulations made thereunder. The Government have control over these schools in a very large measure. Nevertheless it is clear from what has been discussed above that thereby a recognized non-government secondary school does neither become a statutory body nor a 'local authority' within the meaning of the General Clauses Act....."

49. Said observation and findings of the Appellate Division have further been reiterated in ***Noor-E-Alom Jahangir (Md) English Teacher, Rifles Public School and College–Vs-Government of Bangladesh represented by the Secondary, Ministry of Education and others***, reported in ***60 DLR (AD) 12*** by observing, *inter-alia* :

".....if the institution is simply governed by an Ordinance it does not necessarily follow that the said institution is a creature of the said Ordinance and that Rifles Public School and College, being regulated and managed in accordance with the provision of the Board of Intermediate and Secondary Education, Dhaka (Managing Committee of the Recongnised Non-government Secondary School) Regulations, 1977

and other provisions and regulations, is not a statutory body or local authority and the impugned order has not been passed by any statutory body or local authority and further, admittedly the Principal of the above Rifles Public School and College is also not in the service of the Republic and accordingly, the writ petition is not maintainable. "

50. In the light of the above observations of the Appellate Division a writ against private schools is maintainable only when those are either *"statutory body"* or a *"local authority"* respectively.

51. In order to supervise and regulate the working of private schools in Bangladesh inclusive registration of such schools the "*Registration of Private Schools Ordinance, 1962* (Ordinance No. XX of 1962) was promulgated. However, in exercise of power as provided under Section 8 of the Ordinance, 1962 "বেসরকারী প্রাথমিক (বাংলা ও ইংরেজী মাধ্যম) বিদ্যালয় নিবন্ধন বিধিমালা, ২০১১" was framed in order to give effect to the provisions of the said Ordinance.

52. In view of the observations and findings of the Appellate division as well the position of facts of the instant case it is now evident that the respondent Nos. 5 and 6 are neither a *'statutory body'* nor a *'local authority'* within the meaning of '*person'* as defined in Article 102(5) read with Article 152 of the Constitution and Sections 3(39) and 3(28) of the General Clauses Act,1847 but are merely governed by the Ordinance of 1962 as well as the Rules so have been framed thereunder for proper maintenance, administration and supervision of the respective educational institution.

53. At this juncture, the contention of the petitioners are that the definition of the word "*person*" as provided in Article 102(5) of the Constitution is not exhaustive and that instead of depending on the "t*ype*" of person it is more reliant on the nature of the activities performed by such person, which covers "*public duty"*. Accordingly, it has been contended that since respondent Nos. 5 and 6 are undertaking *"public functions"* i.e. providing education to the children this writ is maintainable against *"private school"*. In support reliance has been made on the *ratio* of the case of ***Ramesh Ahluwalia -Vs- State of Punjab and others,*** in connection with ***Civil Appeal No.6634 of 2012*** where the Supreme Court of India while holding that writ is maintainable against unaided "*private school*" in view of the words "*any person or authority*" used in Article 226 of the Indian Constitution held as follows-

"The term authority' used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied."

54. Writ of *mandamus* can be issued only when there exists a legal right and a corresponding legal duty on the part of the executive. However, in the Indian jurisdiction, the Supreme Court of India has mandated issuance of writ of *mandamus* even against a private authority where such authority fails to discharge a public function casts upon it by statute.

55. Also, in ***Satimbha Sharma –Vs- St. Paul's Senior Secondary School (2011) 13 SCC -760 (para 25)*** it has been observed, *inter-alia*, that where a statutory provision casts a duty on a private unaided school to the same salary and allowance to its teachers as are being paid to the teachers of government aided schools, then a writ of *mandamus* to the school could be issued to enforce such statutory duty; but not where there is no such statutory provision.

56. The contention of the present petitioners is squarely based on Indian jurisdiction where the Supreme Court of India has categorically relied on the statutory provisions which enumerate respective public functions as are being performed by private unaided school(s).

57. In the instant case, the petitioners have miserably failed to show that charging same tuition fees as charged in pre Covid-19 period from the students of private schools including respondent Nos. 5 and 6 for the on line classes during Covid-19 pandemic is violative of the provisions of the Ordinance No. XX of 1962 and the Rules so have been framed thereunder. Consequently, the line of argument which has been resorted to by the petitioners for maintainability of the 1st part of the Rule, falls through.

58. In other words, this writ fails as being not maintainable so far challenging the impugned actions of the respondent Nos. 5 and 6, the respective private schools including other private schools of the country.

59. It is further apparent that the petitioners have filed this writ petition on their behalf as well as on behalf of the other guardians in general posing themselves as the persons interested to espouse the cause of the guardians, whose children are studying in the respective private schools of the country.

60. In this connection their contention is that the result of this Rule Nisi will be equally applicable to all the parents and the children and the schools that are similarly placed. Hence, the relief which has been sought for should also be extended to those class of persons who did not approach this Court. As such, there is no justification for each and every parent and their children to file separate writ petition and pray for the same relief. In support, the learned Advocate has referred the case of ***A.F.M. Mustafizur Rahman, Director General Bangladesh Railway Rail Bhaban and others –Vs- Manoharan Mazumder and others*** reported in ***9 MLR (AD) 251.***

61. We are also in agreement with the findings of the Appellate Division that once the issue is decided in favour of a class of persons its benefit is equally applicable to similarly placed persons to do substantial justice.

62. In the instant case, the petitioners have raised the issue of charging same tuition fees as charged in pre-Covid-19 period from the students of respondent Nos. 5 and 6. In view of the assertions of the respondent Nos. 5 and 6 it becomes apparent that each private school has their own respective framework towards fixation of tuition fees considering online class facilities, parents orientation and financial assistance program. In other words, the process of charging tuition fees by the respective private schools involves question of facts.

63. Moreover, vide *Registration of Private Schools Ordinance, 1962*, "বিদেশি কারিকুলাম এ পরিচালিত বেসরকারি বিদ্যালয় নিবন্ধন বিধিমালা, ২০১৭" and "বেসরকারি প্রাথমিক (বাংলা ও ইংরেজী মাধ্যম) বিদ্যালয় নিবন্ধন বিধিমালা, ২০১১", the respective functions of the private schools are being governed as well as managed and that said statute and the Rules have been framed thereunder do not contain any provision whatsoever fixing parameter of charging tuition/ school fees.

64. In the given context, it cannot be said that all the other private schools of the country are at par with that of the respondent Nos. 5 and 6 on the issue in question. Hence, espousing the cause of the guardians in general, whose children are studying in the respective private

schools of the country along with the petitioners, whose children are studying at respondent Nos. 5 and 6, is not maintainable.

65. So far second part of the Rule Nisi is concerned the petitioners have sought for a direction to formulate scheme with respect to the quantum and collection of tuition fees from the students of private schools during the subsistence of Covid-19 pandemic based on the Ordinance, 1962, Rules, 2017 and the United Nations Convention on the Rights of the Child, 1989.

66. Vide Rule 9 of the Rules, 2011 and Rule 7 of the Rules, 2017 there shall be a Managing Committee for every non-government primary school and that said committee shall be composed of the representatives of different categories including the guardians of the respective class of students. However, vide Rule 12 of the Rules, 2011 and Rule 9 of the Rules, 2017 one of the functions of the said Managing Committee is to fix tuition fees of its students.

67. Rule 12 of the Rules, 2011is quoted below for ready reference:

> " ১২। ব্যবস্থাপনা কমিটির কার্যাবলী। - ব্যবস্থাপনা কমিটির দায়িত্ব ও কার্যাবলী হইবে নিম্নরূপ, যথাঃ-
> .....
> (ঘ) ছাত্রছাত্রীদের টিউশন ফি নির্ধারণ....."

68. Rule 9 of the Rules, 2017 is referred below:

> "৯। ম্যানেজিং কমিটির দায়িত্ব ও কার্যাবলী। - ম্যানেজিং কমিটির দায়িত্ব ও কার্যাবলী হইবে নিম্নরুপ, যথাঃ-
> .....
> (ঘ) এই বিধির বিধানাবলী সাপেক্ষে, ছাত্র-ছাত্রীদের টিউশন ফি, ভর্তি ফি, সেশন চার্জ ও অন্যান্য ফি নির্ধারণ;....."

69. In this regard, the categorical contention of the respondent Nos. 5 and 6 is that since respondent No.2, who is the registering authority, as defined in Section 2(h) of the Ordinance 1962, has not issued any general or special order in terms of Rule 7(4) of the Rules, 2017 prescribing the procedure of electing representatives in different categories of the Managing Committee, nor the Government has framed Rules in this behalf under Section 8 of the Ordinance, 1962 consequently, no Managing Committee could have been constituted in strict compliance of Rules of 2017. Said contention of the respondent Nos.5 and 6 has not been controverted by the respondent government.

70. Under the stated circumstances, the respondent Nos. 2, 3 and 4, the respective registering authorities are hereby directed to take immediate steps in terms of Rule 7(4) of the Rules of 2017 within a period of 8(eight) weeks from the date of receipt of the copy of this judgment and order with a view to constitute respective Managing Committee under the Rules of 2017 and 2011, who in their turn can look into the issue in question in view of Rules 9 and 19 of the Rules of 2017.

71. In the result, 1st part of the Rule is discharged as being not maintainable.

72. However, 2nd part of the Rule is disposed of with the observations and direction so have been given herein above.

73. There is no order as to costs.

74. Communicate the judgment and order to the respondents concerned at once.

19 SCOB [2024] HCD 41

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 1434 of 1988

Swairachar O Sampradaiyikata Protirodh Committee and others

Vs.

The Government of Bangladesh and others

Mr. Subrata Chowdhury, Senior Advocate with Mr. J.H. Afric, Advocates
….for the petitioners

Mr. Mahbubey Alam, Attorney General with
Mr. Murad Reza, Additional Attorney General
…..for the respondent no.2

Heard on : 29.02.2016
Judgment on : 28.03.2016

Present:
Ms. Justice Naima Haider
&
Mr. Justice Quazi Reza-ul-Hoque
&
Mr. Justice Md. Ashraful Kamal

Editors' Note:
In this writ petition the constitutional amendments by which the creation of permanent Benches of the High Court Division and insertion of article 2A in the constitution, declaring Islam as the state religion, was challenged. The High Court Division mainly discussed the issue of state religion as the legality of creation of permanent Benches has already been decided by the Appellate Division in the case of Anwar Hossain Chowdhury and others Vs. Bangladesh [41 DLR (AD) 165]. The Court, by majority, held that though Islam had been declared as the state religion, the amendment, by creating positive obligation upon the state, had also ensured that other religion would not be discriminated. However, Mr. Justice Md. Ashraful Kamal indicated that no hearing on merit of the Rule took place and the Rule was discharged only on the point of *locus standi* of the petitioner organization and others. In the result, the larger Bench discharged the rule.

Key Words:
State Religion; Articles 2A, 12, 41 and 100 of the Constitution; Section 2 of the Constitution (Eight Amendment) Act 1988; religious establishment; political questions; secularism;

Our Constitution does not provide for any repugnancy clauses within the meaning set out in the aforesaid paragraph. Our Constitution, as on date, does not provide for any provision for enforcement of Islam as a superior religion.
...(Para 25, Per Naima Haider, J)

Article 2A of the Constitution:
Article 2A declares Islam as state religion. But then it imposes an obligation upon the State to ensure *"equal status and equal right in practice"* of all other religion. Thus Article 2A through the use of the word "equal" places Islam at par with all other religion. Moreover, with regard to other religion, the Constitution places a positive

obligation upon the State to ensure equal standing, if there is inequality. The wordings of Article 2A of the Constitution, in our view, do not lead to any discrimination between the holders of state religion and other holders of other religious beliefs.

...(Para 27, Per Naima Haider, J)

Purely political questions are outside the scope of judicial review:

"Purely political questions" are outside the scope of judicial review but when political questions have constitutional implications, such questions are most certainly reviewable; the review would be on the issue of constitutional implication and not on politics. In cases of amendment to Constitution, it would not suffice to say "there was politics behind the amendment"; the test would be whether the amendment, based on political consideration (if at all), is compatible with the Constitution.

...(Para 32, Per Naima Haider, J)

Article 41 of the Constitution:

The impugned constitutional amendment in our view, does not offend Article 41 of the Constitution. To the contrary, it supplements Article 41 because it places an obligation upon the State to *ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religion*. ...(Para 35, Per Naima Haider, J)

Article 12 of the Constitution:

In political terms, secularism is a movement towards the separation of religion and Government, often termed the separation of Church and State. Article 12 of the Constitution is unlike the French Constitution. It deals with "Secularism and freedom of religion"; this means that our Constitution while aiming to ensure secularism acknowledges and respects freedom of religion. Secularism is to be ensured but not at the cost of religion. How "secularism" will be ensured is set out in Articles 12(a)-12(d) of the Constitution. Article 12 of the Constitution provides that secularism shall be realized by elimination of *"granting by the State of political status in favour of any religion"*. Article 12, in our view contemplates impermissibility of "state religion with establishment" as "state religion with establishment" in many cases places the state religion in superior position. Article 12 as drafted, in our view, would impose an obligation upon the State to ensure religious authorities of any particular religion cannot dominate over the State since the basic structure of our Constitution would mandates *Supremacy of State.* ...(Para 38, Per Naima Haider, J)

Article 2A of the Constitution:

Article 2A of the Constitution, impugned herein, in our view, neither offends the basic principles of the Constitution, as contained in the preamble nor offends any other provision of the Constitution. The conferment of status of *"State Religion"* on its own does not tantamount to an action on the part of State to grant political status in favour of Islam. Article 2A must be read as a whole and once read, it becomes obvious that the insertion of the concept of Islam being the state religion does not, on its own, affect the constitutional rights of others having different religious beliefs. It does not affect the basic structure of the Constitution and also does not render the Constitution redundant. The impugned amendment also does not offend the concept of secularism, as provided for in the Constitution. ...(Para 39, Per Naima Haider, J)

দরখাস্তকারী সংগঠনের অত্র মোকদ্দমা অত্র আদালতের সামনে উপস্থাপনের নিমিত্তে প্রয়োজনীয় আইনগত যোগ্যতা না থাকা হেতু অত্র রুলটি খারিজ যোগ্য। অতএব, আদেশ হয় যে, অত্র রুলটি বিনা খরচায় খারিজ করা হলো।

...(Para 70 & 71, বিচারপতি মোঃ আশরাফুল কামাল)

JUDGMENT

Naima Haider, J;

1. Given the issue involved in the instant writ petition, a Larger Bench was constituted to hear and dispose of the instant writ petition. This writ petition invites us to deal with the constitutionality of the amendments made to the Constitution through Section 2 of the Constitution (Eighth Amendment) Act 1988 [incorporating Article 2A to the Constitution] and Section 7 of the Constitution (Eighth Amendment) Act 1988 making amendment to Article 100 of the Constitution by way of substitution through a new Article. Rule Nisi was issued in the following terms:

2. Let a Rule Nisi was issued calling upon the respondents to show cause as to why the insertion of Article 2A in the Constitution of Bangladesh by section 2 of the Constitution Eighth Amendment Act, 1988, Act no. XXX of 1988 should not be declared to have been made unconstitutional, ultra vires the Constitution and without lawful authority and of no legal effect and/or why such other or further order or orders, as this Court may deem fit and proper.

3. The issues before this Division are whether (i) constitutional amendment through which High Court Division of the Supreme Court was decentralized and (ii) constitutional amendment through which "Islam" was made the State Religion could be construed to be constitutional and valid.

4. The learned Counsel for the petitioners takes us through the provisions of the Constitution and vehemently argues that the impugned amendments affect basic structure of our Constitution and therefore, there is no scope but to declare the said impugned amendments as unconstitutional. The learned Counsel emphasize that under no circumstances, the basic structure of the Constitution can be amended. He also argues that the impugned amendments have the effect of nullifying different constitutional provisions; in this regard, he points out that any amendment to the Constitution which results in contradiction with the Constitution as a whole or any part thereof is liable to be struck down as being unconstitutional.

5. In this writ petition, two constitutional provisions are under challenge. The first is Article 100 of the Constitution, as amended through Section 5 of the Constitution (Eight Amendment) Act 1988 and the second is Article 2A as inserted though Section 2 of the Constitution (Eight Amendment) Act 1988.

6. The first issue relates to constitutionality of amended Article 100 of the Constitution through Section 5 of the Constitution (Eight Amendment) Act 1988. Through this amendment, among others, Permanent Benches of this Division was created. The said amendment to Article 100 of the Constitution was challenged and the Hon'ble Appellate Division in the celebrated case of ***Anwar Hossain Chowdhury and others V Bangladesh*** *[41 DLR (AD) 165]* resolved the issue. His Lordship, Justice Bodrul Haider Chowdhury (as his Lordship then was) pronounced the leading Judgment on behalf of the majority and held that Article 100 as amended was unconstitutional. His Lordship in summing up held:

> ***"297 (To sum up):***
>
> *(1) The amended Article 100 is ultra vires because it has destroyed the essential limb of the judiciary, namely, of the Supreme Court of Bangladesh by setting up rival*

courts to the High Court Division in the name of Permanent Benches conferring full jurisdiction, powers and functions of the High Court Division;

(2) Amended Article 100 is illegal because there is no provision of transfer of cases from one Permanent Bench to another Bench which is an essential requisite for dispensation of justice (see AIR 1979 SC 478);

(3) The absence of such provision of Transfer shows that territorial, exclusive courts, independent of each other, have been created dismantling the High Court Division which in the Constitution is contemplated as an integral part of the Supreme Court;

(4) Transfer of judges by a deeming provision is violative of Article 147;

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

7. The first issue before us, being the constitutionality of amended Article 100 has already been settled by the Hon'ble Appellate Division.
Though Judgment of Hon'ble Appellate Division is binding on us, we have perused the said Judgment and agree fully with the majority view. We also find no reason to add our own view to the extensive Judgment passed.

8. Having said so, we wish to point out that in the celebrated Anwar Hossain's case, their Lordships pointed out the limitations on constitutional amendments. Broadly speaking, amendment to the Constitution cannot alter its basic structure. Amendments resulting in contradiction would also be impermissible. Any amendment cannot be beyond the amending power given to the Parliament under Article 142 of the Constitution. It also appears from the Judgment that any amendment must be read "as a whole" in light of the Constitution to assess constitutionality. Furthermore, we find it worth noting from the Judgment passed by Shahabuddin Ahmed J (as his Lordship then was) whereby his Lordship relying upon the Judgment of the Indian Supreme Court in the case of ***Kesavananda V State of Kerala*** *[AIR 1973 SC 1461]* concluded that amendment(s) abrogating fundamental rights or altering the basic features of the Constitution are not permissible.

9. Their Lordship's views in Anwar Hossain's case are relevant for disposal of the second issue before us. We are called upon to address whether Article 2A of the Constitution, introducing Islam as "state religion" is ultra vires to the Constitution.

10. The concept of "state religion" does create conceptual difficulties in the minds of ordinary persons. How can a State have a religion? That is the most common question. In order to deal with compatibility of state religion, we need to address the following, being whether the concept of state religion is an alien concept, what does state religion imply, how state religion is introduced in the constitution and lastly whether our Constitution, permits Article 2A to stand, as is.

11. Broadly speaking, *"State Religion"* is a religion officially endorsed by a sovereign State. Such endorsement is not uncommon. For instance, Bhutan, Cambodia, Myanmar and Sri Lanka constitutionally recognize Buddhism as state religion. Article 9 of Chapter II of the Constitution of Sri Lanka provides: *"The Republic of Sri Lanka declares Buddhism as the state religion and accordingly it shall be the duty of the Head of State and the Head of*

Government to protect and foster the Buddha Sasana". In some countries such as Thailand and Laos, Buddhism is not constitutionally recognized as state religion but Buddhism holds special status. Thus for instance, Article 67 of the Constitution of Thailand provides that the State should support and protect Buddhism.

12. Likewise, Christianity is constitutionally recognized as state religion in various countries, including Costa Rica, Malta, Monaco, Argentina, Italy, Panama, Peru, Bulgaria, Spain, Finland, Georgia.

13. Islam is also constitutionally recognized as state religion in different countries, which include Bahrain, Comoros, Egypt, Iran, Pakistan, Jordan, Kuwait, Malaysia, Libya, Maldives, Palestine, Saudi Arabia, Somalia, Yemen, etc.

14. From the above, what is clear is that the concept of state religion is not something uncommon as different jurisdictions have constitutionally recognized certain religion as state religion.

15. While constitutions contemplate state religion, there are constitutions which expressly provide that the State shall be secular. Thus for instance, the Constitution of the Fifth French Republic provides that France is an indivisible, secular, democratic and Social Republic. Generally when constitutional provision provides for secularism, the concerned State recognizes and protects the rights of religious freedom in personal life but maintains a defensive attitude against public religiosity. A consequence of this for instance is that French secularism permits the prohibition of displays of religious affiliation in public places, banning of wearing of religious insignia in public schools etc.

16. France is a strong secular country. There is also "weak secularism". The Constitution of the United States of America contemplates weak secularism. In case of "weak secularism" State maintains *"neutrality"* in matters of religion and does not take account of religious values and beliefs; furthermore, religion of any kind may is not permitted to be publicly funded or supported by any public authority but at the same time, public authorities are not permitted to prohibit, limit, promote or support any religious belief or practice and cannot discriminate against, or favour, any religion.

17. Regardless of how religion is perceived in any particular constitution, in our view, religious freedom and freedom from religious coercion are universally recognized principles. We are of the view that there can be no free State if freedom of religious beliefs and practice including the freedom of religious minorities and of dissenters are not guaranteed.

18. When a particular constitution recognizes a state religion, it becomes important to understand the nature of recognition i.e. whether the recognition is *"recognition without establishment"* or *"recognition with establishment"*. At the same time, the language used in the constitution in recognizing state religion becomes relevant. We feel it necessary to understand how, in certain jurisdictions, Islam was recognized as state religion. The chart below would provide certain clarification:

Country	**Manner of recognition**
Yemen	Article 2 of the Constitution of Yemen provides: *" Islam is the religion of the state, and Arabic is its official language"*
Kingdom of Saudi Arabia	Article 1 provides: *"The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam"*
Qatar	Article 1 of the Constitution of Qatar provides: *"Qatar is an independent sovereign Arab State. Its religion is Islam and Shari'a law*

	shall be the main source of its legislation"
Oman	Article 2 of the Constitution of Oman provides: *" The religion of the State is Islam and Islamic Sharia is the basis for legislation"*
Pakistan	Article 2 of the Constitution of Pakistan provides: *" Islam shall be the State religion of Pakistan"*
Malaysia	Article 11 of the Constitution of Malaysia provides: *" Islam is the religion of the Federation but other religions may be practised in peace and harmony in any part of the Federation"*
Kuwait	Article 2 of the Constitution of Kuwait provides: *" The religion of State is Islam and Islamic Law shall be the main source of legislation"*

19. In Tunisia, Islam is not constitutionally endorsed as state religion but Islam has been given special privilege. Regardless of the absence of express endorsement, under Article 88, the President of Tunisia must be a Muslim by faith.

20. It appears to us that the manner of recognition/endorsement differs from jurisdiction to jurisdiction. For instance in Yemen, Islam is recognized as state religion but in Oman, Islam is not only the state religion but also the basis for legislation. Constitution of Malaysia on the other hand declares Islam as the state religion but at the same time, guarantees free practice of religious values by people of other religion.

21. Yemen's recognition of Islam as state religion is a recognition without establishment. Recognition with establishment will occur when the State maintains a formal connection with any specific religion which is "established" in the sense of being supported, funded by the State. Thus establishment is possible in different ways with different degree of intensity; particular religion can be adopted as official state religion, religious laws can become source of laws, religion can be source of inspiration etc.

22. A strong form of religious establishment may include reservation of senior positions for members of the established religion; for instance, heads of State must be a member of that religion. A *"religious establishment"* can generally be understood to be present in a system where the religious hierarchy has superiority over the civil power, meaning that the religious authorities are dominant over the State and the State is subject to the controlling power of a religious body. Iranian Constitution could be construed as a religious based establishment since the Constitution confer religious authorities guardianship role in the affairs of the state.

23. Islam as state religion is sometime associated with the State having Islamic identity. Countries such as Afghanistan, Iran, Pakistan, term themselves as "Islamic Republic" and by doing so, the respective States claim Islamic identity. Other Islamic countries recognize Islam as the official religion only but do not claim an Islamic identity for the State. The difference is important because in the latter case, the constitutional scheme can easily permit exercise of fundamental right of religion by non Muslims.

24. At present, 25 countries claim Islamic credentials. Of these 25 countries, 23 countries constitutionally declare Islam to be the state religion. Constitution of 18 countries provides that Islam ***will be source of law and constitution of 6 countries provide for "repugnancy clauses" stipulating that no laws can be passed that contradicts Islam***. In Iran the Constitution provides that the Judges should refrain from executing any laws that violate Islam. *(underlined by us).*

25. Our Constitution does not provide for any repugnancy clauses within the meaning set out in the aforesaid paragraph. Our Constitution, as on date, does not provide for any provision for enforcement of Islam as a superior religion. The only issue now is whether

impugned amendment recognizing Islam as state religion is incompatible with our Constitution.

26. Through the impugned amendment inserted Article 2A was inserted in the Constitution which provides for *"The state religion"*. Article 2 A reads as follows:

> *"The state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religion"*

27. To begin with, Article 2A declares Islam as state religion. But then it imposes an obligation upon the State to ensure *"equal status and equal right in practice"* of all other religion. Thus Article 2A through the use of the word "equal" places Islam at par with all other religion. Moreover, with regard to other religion, the Constitution places a positive obligation upon the State to ensure equal standing, if there is inequality. The wordings of Article 2A of the Constitution, in our view, do not lead to any discrimination between the holders of state religion and other holders of other religious beliefs.

28. The United Nations acknowledges the notion of state religion but under international mandate, there is an obligation upon the State to ensure that the notion does not result in discrimination of members of other religion. In this regard we wish to refer to the note of UN General Assembly, Human Rights Council (2011), the relevant part of which is set out below:

> *"..While the notion of State religion is not per se prohibited under international human rights law, States have to ensure that this does not lead to a de jure or de facto discrimination of members of other religion or beliefs..."*

29. Though the Application for Issuance of Supplementary Rule, the petitioners, by annexing certain articles have tried to point out that the impugned amendment is motivated by political considerations and in constitutional amendments cannot be based on political considerations.

30. It is a settled principle that where the issue before the High Court Division involves resolution of political question, the High Court Division will not intervene under Article 102 of the Constitution since questions of political wisdom cannot be subject of judicial review. However, we are mindful of the decision of the Indian Supreme Court in ***State of Rajasthan V Union of India*** *AIR [1977 SC 1361]* where their Lordship made a distinction between purely political questions and questions having political complexion. Their Lordships held:

> *"... It is true that if a question brought before the Court is purely a political question, not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of Constitutional determination... It will, therefore, be seen that merely because a question has a political colour, the Court cannot fold its hands in despair and declare 'Judicial hands off'. So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so... "*

31. The recent decision of the Supreme Court of United Kingdom in R (Miller) V Prime Minister [2020 AC 373] is relevant in the present context. In this case the Supreme Court unanimously held that, executive decisions cannot without any justification prevent the Parliament in carrying out its constitutional role. The advice of the Prime Minister to the Queen, which is an executive act based on political consideration, resulting in the prorogation was outside the powers of the Prime Minister and therefore, illegal; consequentially, the prorogation itself was unlawful. Lady Haled CJ of the Supreme Court of United Kingdom

acknowledged that political questions are beyond the scope of review but having said so, observed as follows:

> *"... although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of the politicians, or arises from a matter of political controversy has never been sufficient reason for the courts to refuse to consider it. Most of the constitutional issues have been concerned with politics in the sense that important decisions made by the executives have a political hue to them and courts have exercised supervisory jurisdiction... Whether the law recognizes the existence of prerogative power and what its legal limits are, are by definition questions of law which are for the courts to determine. There is no prerogative which the law of the land does not allow: the limits of prerogative power are set by law and are determined by courts... Unlimited power of prorogation is incompatible with the principle of Parliamentary sovereignty. It is a concomitant of that principle that the power cannot be unlimited. The effect of prorogation would be to prevent the operation of ministerial accountability to Parliament during that period. The fact that the minister is politically accountable to the Parliament does not mean that he is therefore immune from legal accountability to courts... A decision to prorogue Parliament (or to advice the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as legislature and as the body responsible for the supervision of the executive. In such a situation the court will intervene if the effect is sufficiently serious to justify such an exceptional course..."*

32. From the aforesaid celebrated judgments, it appears to us that "purely political questions" are outside the scope of judicial review but when political questions have constitutional implications, such questions are most certainly reviewable; the review would be on the issue of constitutional implication and not on politics. In cases of amendment to Constitution, it would not suffice to say "there was politics behind the amendment"; the test would be whether the amendment, based on political consideration (if at all), is compatible with the Constitution.

33. The Judiciary is not concerned with politics; the Judiciary is "antithesis" to politics. The Judiciary must acknowledge that enactment(s) or amendments may be affected by political considerations; Judiciary must acknowledge that they may not like the enactment or amendment to statute or constitution. This matters little. The function of the Judiciary is to ensure supremacy of the Constitution as contemplated under Article 7 and under no circumstance, should allow the Parliament to pass any law or make any constitutional amendment(s) that is unconstitutional. Thus, whether the impugned amendment was infact tainted with any political consideration is immaterial so far we are concerned. Our concern is limited to review of the constitutionality of the impugned amendment.

34. Part III of our Constitution deals with fundamental rights and Article 41 of the Constitution provides for *"Freedom of religion"*. Under Article 41 of the Constitution, subject to law, public order and morality, every citizen has the right to profess, practice or propagate any religion and every religious community or denomination has the right to establish, maintain and manage its religious institutions. Furthermore, under Article 41(2) of the Constitution *"No person attending any educational institution shall be required to receive religious instruction, or take part in or to attend any religious ceremony or worship, if that instruction, ceremony or worship relates to a religion other than his own"*.

35. The impugned constitutional amendment in our view, does not offend Article 41 of the Constitution. To the contrary, it supplements Article 41 because it places an obligation

upon the State to *ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religion*.

36. The fundamental principles of the Constitution are set out in the preamble. The relevant part of the preamble of our Constitution reads as follows:

> *"...Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution..."*

37. To accommodate the concept of secularism, as contemplated in the preamble to our Constitution, Article 12 had been amended by the Fifteenth Amendment to read as follows:

> *"**Secularism and freedom of religion**:- The principles of secularism shall be realised by the elimination of-*
> *(a) communalism in all its forms*
> *(b) the granting by the State of political status in favour of any religion;*
> *(c) the abuse of religion for political purpose;*
> *(d) any discrimination against or persecution of, persons practicing a particular religion*

38. In political terms, secularism is a movement towards the separation of religion and Government, often termed the separation of Church and State. Article 12 of the Constitution is unlike the French Constitution. It deals with "Secularism and freedom of religion"; this means that our Constitution while aiming to ensure secularism acknowledges and respects freedom of religion. Secularism is to be ensured but not at the cost of religion. How "secularism" will be ensured is set out in Articles 12(a)-12(d) of the Constitution. Article 12 of the Constitution provides that secularism shall be realized by elimination of *"granting by the State of political status in favour of any religion"*. Article 12, in our view contemplates impermissibility of "state religion with establishment" as "state religion with establishment" in many cases places the state religion in superior position. Article 12 as drafted, in our view, would impose an obligation upon the State to ensure religious authorities of any particular religion cannot dominate over the State since the basic structure of our Constitution would mandates *Supremacy of State*.

39. Article 2A of the Constitution, impugned herein, in our view, neither offends the basic principles of the Constitution, as contained in the preamble nor offends any other provision of the Constitution. The conferment of status of *"State Religion"* on its own does not tantamount to an action on the part of State to grant political status in favour of Islam. Article 2A must be read as a whole and once read, it becomes obvious that the insertion of the concept of Islam being the state religion does not, on its own, affect the constitutional rights of others having different religious beliefs. It does not affect the basic structure of the Constitution and also does not render the Constitution redundant. The impugned amendment also does not offend the concept of secularism, as provided for in the Constitution.

40. Therefore, it is our considered view that the impugned amendment through Article 2A recognizing Islam as state religion is not ultra vires to the Constitution.

41. As an attempt to simplify the issue, we have discussed the arguments advanced in our Judgment. We have refrained from setting out specific submissions made by the Counsels for the petitioners and respondents because the constitutionality issue should be dealt with "as a whole".

42. In light of the aforesaid, we are inclined to discharge the Rule.

43. Communicate the Judgment and Order at once.

বিচারপতি মোঃ আশরাফুল কামাল ঃ

44. মাননীয় জ্যৈষ্ঠ বিচারক বিচারপতি নাইমা হায়দার এঁর রায়টি পড়লাম। রায়ের সিদ্ধান্ত তথা রুলটি খারিজের সিদ্ধান্তের সাথে আমি একমত।

45. তবে জ্যৈষ্ঠ বিচারক বিচারপতি নাইমা হায়দার রুলটি যে বিচার বিশ্লেষণে খারিজ করেছেন সেটি প্রকৃত ঘটনার সাথে সামঞ্জস্যপূর্ণ নয় বিধায় আমি প্রকৃত ঘটনা বর্ণনাপূর্বক আমার পৃথক রায় ও আদেশ প্রদান করছি।

46. অত্র রুলটি ইস্যু করা হয়েছিল সংবিধানের (অষ্টম সংশোধনী) আইন, ১৯৮৮ এর ধারা ২ বলে সংবিধানের অনুচ্ছেদ ২ এর পর অনুচ্ছেদ *"২ক। প্রজাতন্ত্রের রাষ্ট্র ধর্ম ইসলাম, তবে হিন্দু, বৌদ্ধ ও খ্রিষ্টানসহ অন্যান্য ধর্ম পালনে রাষ্ট্র সমমর্যাদা ও সমঅধিকার নিশ্চিত করিবেন।"* সংযোজন সংশ্লিষ্টতায়। যেহেতু অত্র রুলটি সংবিধানের (অষ্টম সংশোধনী) আইন এর একটি ধারা সংশ্লিষ্টতায় সেহেতু সংবিধানের (পঞ্চম সংশোধনী) আইন বাতিল করণের, সংবিধানের (সপ্তম সংশোধনী) আইন বাতিল করণের এবং সংবিধানের (অষ্টম সংশোধনী) আইন এর ধারা ৭ এবং ৯ ধারা বাতিল করতঃ সংবিধানের অনুচ্ছেদ ১০০ ও ১০৭ পুনঃবহালের রায়ের আদেশের অংশ গুরুত্বপূর্ণ বিধায় প্রথমে উক্ত রায়ত্রয়ের আদেশের অংশ দেখা জরুরী।

47. বাংলাদেশের বিচার বিভাগের ইতিহাসে এযাবৎকালের সর্বশ্রেষ্ঠ রায় হলো সংবিধানের (পঞ্চম সংশোধনী) নামে খ্যাত বাংলাদেশ ইটালিয়ান মার্বেল ওয়ার্কস লিমিটেড বনাম বাংলাদেশ ও অন্যান্য (বিএলটি বিশেষ সংখ্যা ২০০৬) মোকদ্দমার রায়। এটি শুধু বাংলাদেশেরই শ্রেষ্ঠ রায় নয় এটি পৃথিবীরও অন্যতম একটি শ্রেষ্ঠ রায় বটে। সংবিধান সমুন্নত রাখতে এমন সাহসী রায় পৃথিবীতে বিরল। উক্ত মোকদ্দমার রায়ে মাননীয় বিচারপতি এ,বি,এম, খায়রুল হক এবং মাননীয় বিচারপতি এ,টি,এম, ফজলে কবির সংবিধানের (পঞ্চম সংশোধনী) আইনটি মূল সংবিধানের পরিপন্থী বিধায় সম্পূর্ণরূপে বাতিল করেছিলেন। নিম্নে রায়ের আদেশের অংশ অবিকল অনুলিখন হলোঃ

> *"PART XXXVI*
> *Summary*
> *To summarise, we hold :*
> *1. Bangladesh is a Sovereign Democratic Republic, governed by the Government of laws and not of men.*
> *2. The Constitution of Bangladesh being the embodiment of the will of the Sovereign People of the Republic of Bangladesh, is the supreme law and all other laws, actions and proceedings, must conform to it and any law or action or proceeding, in whatever form and manner, if made in violation of the Constitution, is void and non est.*
> *3. The Legislature, the Executive and the Judiciary are the three pillars of the Republic, created by the Constitution, as such, are bound by its provisions. The Legislature makes the law, the Executive runs the government in accordance with law and the Judiciary ensures the enforcement of the provisions of the Constitution.*
> *4. All Functionaries of the Republic and all services of the Republic, namely, Civil Service, Defence Services and all other services owe its existence to the Constitution and must obey its edicts.*
> *5. State of emergency can only be declared by the President of the Republic on the advice of the Prime Minister, in case of imminent danger to the security or economic life of the Republic.*
> *6. The Constitution stipulates a democratic Republic, run by the elected representatives of the people of Bangladesh but any attempt by any person or group of persons, how high so ever, to usurp an elected government, shall render themselves liable for high treason.*
> *7. A proclamation can only be issued to declare an existing law under the Constitution, but not for promulgating a new law or offence or for any other purpose.*

8. There is no such law in Bangladesh as Martial Law and no such authority as Martial Law Authority, as such, if any person declares Martial Law, he will be liable for high treason against the Republic. Obedience to superior orders is itself no defence.

9. The taking over of the powers of the Government of the People's Republic of Bangladesh with effect from the morning of 15th August, 1975, by Khandaker Mushtaque Ahmed, an usurper, placing Bangladesh under Martial Law and his assumption of the office of the President of Bangladesh, were in clear violation of the Constitution, as such, illegal, without lawful authority and without jurisdiction.

10. The nomination of Mr. Justice Abusadat Mohammad Sayem, as the President of Bangladesh, on November, 6, 1975, and his taking over of the Office of President of Bangladesh and his assumption of the powers of the Chief Martial Law Administrator and his appointment of the Deputy Chief Martial Law Administrators by the Proclamation issued on November 8, 1975, were all in violation of the Constitution.

11. The handing over of the Office of Martial Law Administrator to Major General Ziaur Rahman B.U., PSC., by the aforesaid Justice Abusadat Mohammad Sayem, by the Third Proclamation issued on November 29, 1976, enabling the said Major General Ziaur Rahman, to exercise all the powers of the Chief Martial Law Administrator, was beyond the ambit of the Constitution.

12. The nomination of Major General Ziaur Rahman, B.U., to become the President of Bangladesh by Justice Abusadat Mohammad Sayem, the assumption of office of the President of Bangladesh by Major General Ziaur Rahman, B.U., were without lawful authority and without jurisdiction.

13. The Referendum Order, 1977 (Martial Law Order No. 1 of 1977), published in Bangladesh Gazette On 1st May, 1977, is unknown to the Constitution, being made only to ascertain the confidence of the people of Bangladesh in one person, namely, Major General Ziaur Rahman, B.U.

14. All Proclamations, Martial Law Regulations and Martial Law Orders made during the period from August 15, 1975 to April 9, 1979, were illegal, void and non est because:

i) Those were made by persons without lawful authority, as such, without jurisdiction,

ii) The Constitution was made subordinate and subservient to those Proclamations, Martial Law Regulations and Martial Law Orders,

iii) Those provisions disgraced the Constitution which is the embodiment of the will of the people of Bangladesh, as such, disgraced the people of Bangladesh also,

iv) From August 15, 1975 to April 7, 1979, Bangladesh was ruled not by the representatives of the people but by the usurpers and dictators, as such, during the said period the people and their country, the Republic of Bangladesh, lost its sovereign republic character and was under the subjugation of the dictators,

v) From November 1975 to March, 1979, Bangladesh was without any Parliament and was ruled by the dictators, as such, lost its democratic character for the said period.

vi) The Proclamations etc., destroyed the basic character of the Constitution, such as, change of the secular character, negation of Bangalee nationalism,

negation of Rule of law, ouster of the jurisdiction of Court, denial of those constitute seditious offence.

15. Paragraph 3A was illegal. firstly because it sought to validate the Proclamations, MLRs and MLOs which were illegal, and secondln. Paragraph 3A. made by the Proclamation Orders, as such, itself was void.

16. The Parliament may enact any law but subject to the Constitution. The Constitution (Fifth Amendment) Act, 1979 is ultra vires, because:

Firstly, Section 2 of the Constitution (Fifth Amendment) Act, 1979, enacted Paragraph 18, for its insertion in the Fourth Schedule to the Constitution, in order to ratify, confirm and validate the Proclamations, MLRs and MLOs etc. during the period from August 15, 1975 to April 9, 1979. Since those Proclamations, MLRs, MLOs etc., were illegal and void, there were nothing for the Parliament to ratify, confirm and validate.

Secondly, the Proclamations etc., being illegal and constituting offence, its ratification, confirmation and validation, by the Parliament were against common right and reason.

Thirdly, the Constitution was made subordinate and subservient to the Proclamations etc.

Fourthly, those Proclamations etc. destroyed its basic features.

Fifthly, ratification, confirmation and validation do not come within the ambit of 'amendment' in Article 142 of the Constitution.

Sixthly, lack of long title which is a mandatory condition for amendment, made the amendment void.

Seventhly, the Fifth Amendment was made for a collateral purpose which constituted a fraud upon the People of Bangladesh and its Constitution.

17. The Fourth Schedule as envisaged under Article 150 is meant for transitional and temporary provisions, since Paragraph 3A and 18, were neither transitional nor temporary, the insertion of those paragraphs in the Fourth Schedule are beyond the ambit of Article 150 of the Constitution.

18. The turmoil or crisis in the country is no excuse for any violation of the Constitution or its deviation on any pretext. Such turmoil or crisis must be faced and quelled within the ambit of the Constitution and the laws made thereunder, by the concerned authorities, established under the law for such purpose.

19. Violation of the Constitution is a grave legal wrong and remains so for all time to come. It cannot be legitimized and shall remain illegitimate forever, however, on the necessity of the State only, such legal wrongs can be condoned in certain circumstances, invoking the maxims, Id quod Alias Non Est Licitum, Necessitas Licitum Facit, salus populi est suprema lex and salus republicae est suprema lex.

20. As such, all acts and things done and actions and proceedings taken during the period from August 15, 1975 to April 9, 1979, are condoned as past and closed transactions, but such condonations are made not because those are legal but only in the interest of the Republic in order to avoid chaos and confusion in the society, although distantly apprehended, however, those remain illegitimate and void forever.

21. Condonations of provisions were made, among others, in respect of provisions, deleting the various provisions of the Fourth Amendment but no condonation of the provisions was allowed in respect of omission of any provision enshrined in the original Constitution. The Preamble, Article 6, 8, 9,

10, 12, 25, 38 and 142 remain as it was in the original Constitution. No condonation is allowed in respect of change of any of these provisions of the Constitution. Besides, Article 95, as amended by the Second Proclamation Order No. IV of 1976, is declared valid and retained.

We further declare:

i) The Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979) is declared illegal and void ab initio, subject to condonations of the provisions and actions taken thereon as mentioned above.

ii) The "ratification and confirmation" of The Abandoned Properties (Supplementary Provisions) Regulation, 1977 (Martial Law Regulation No. VII of 1977) and Proclamations (Amendment) Order, 1977 (Proclamation Order No. 1 of 1977) with regard to insertion of Paragraph 3A to Fourth Schedule of the Constitution by Paragraph 18 of the Fourth Schedule of the Constitution added by the Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979), is declared to have been made without lawful authority and is of no legal effect.

We further direct the respondents to handover the physical possession of the premises, known as Moon Cinema Hall at 11, Wiseghat, Dhaka, in favour of the Petitioners, within 60 (Sixty) days from the date of receipt of the copy of this Judgment and Order.

In the result, the Rule is made absolute but without any order as to costs.

Before parting with the case, I would like to express my deep gratitude to the learned Advocates appearing in this case for their unfailing assistance to us. I have enriched my knowledge by their profound learning and experience. I would like to put it on record my deep appreciation for all of them."

48. বাংলাদেশের দ্বিতীয় সর্বশ্রেষ্ঠ রায়টি হলো সংবিধানের (সপ্তম সংশোধনী) মোকদ্দমা নামে খ্যাত সিদ্দিক আহমেদ বনাম বাংলাদেশ [1 Counsel (Spl) (2013)] মোকদ্দমাটি। উক্ত মোকদ্দমার বিচারপতি এ,এইচ,এম, শামসুদ্দিন চৌধুরী এবং বিচারপতি শেখ মোঃ জাকির হোসেন সংবিধানের (সপ্তম সংশোধনী) আইনটি মূল সংবিধানের পরিপন্থী বিধায় সম্পূর্ণরূপে বাতিল করেছিলেন। নিম্নে রায়ের আদেশের অংশ অবিকল অনুলিখন হলোঃ

"The Ultimate Summing Up

309. Our judgment may be summed up in following terms;

1) Martial Law is totally alien a concept to our Constitution and hence, what Dicey commented about it, is squarely applicable to us as well.

2) A fortiori, usurpation of power by General Mohammad Ershad, flexing his arms, was void ab-initio, as was the authoritarian rule by Mushtaque – Zia duo, before Ershad, and shall remain so through eternity. All martial law instruments were void ab-inito. As a corollary, action purportedly shedding validity through the Constitution (Seven Amendment) Act 1986, constituted a stale, moribund attempt, having no effect through the vision of law, to grant credibility to the frenzied concept, and the same must be cremated without delay.

3) The killing of the Father of the Nation, which was followed by successive military rules, with a few years of intermission, was not an spontaneous act-it resulted from a well intrigued plot, harboured over a long period of time

which was aimed not only to kill the Father of the Nation and his family, but also to wipe out the principles on which the Liberation War was fought.

4) During the autocratic rule of Khandaker Mushtaque and General Ziaur Rahman, every efforts were undertaken to erase the memory of the Liberation War against Pakistan.

5) Two military regimes, the first being with effect from 15th August, 1975, and the second one being between 24th March 1982, and 10th November 1986, put the country miles backward. Both the martial laws devastated the democratic fabric, as well as the patriotic aspiration of the country. During Ziaur Rahman's martial law, the slogan of the Liberation War, "Joy Bangla" was hacked to death. Many other Bengali words such as Bangladesh Betar, Bangladesh Biman were also erased from our vocabulary. Suhrawarddi Uddyan, which stands as a relic of Bangabandhu's 7th March Declaration as well as that of Pakistani troops' surrender, was converted into a childrens' park. Top Pakistani collaborator Shah Azizur Rahman was given the second highest political post of the Republic, while other reprehensible collaborators like Col. Mustafiz (I O in Agartala conspiracy case), A S M Suleiman, Abdul Alim etc were installed in Zia's cabinet. Many collaborators, who fled the country towards the end of the Liberation War, were allowed, not only to return to Bangladesh, but were also greeted with safe haven, were deployed in important national positions. Self-confessed killers of Bangabandu were given immunity from indictment through a notorious piece of purported legislation. They were also honoured with prestigious and tempting diplomatic assignments abroad. The original Constitution of the Republic of 1972 was mercilessly ravaged by General Ziaur Rahman who erased from it, one of the basic features, Secularism and allowed communal politics, proscribed by Bangabandhu, to stage a come back.

6) During General Ershad's Martial Law also democracy suffered devastating havoc. The Constitution was kept in abeyance. Doors of communal politics, wide opened by General Zia, were remained so during his period. Substitution of Bengali Nationalism by communally oriented concept of Bangladeshi Nationalism was also allowed longevity during Ershad's Martial Law period.

7) By the judgment in the Fifth Amendment Case all the misdeeds perpetrated by Mushtaque-Zia duo have been eradicated and the Constitution has been restored to its original position as it was framed in 1972.

8) It is about time that the relics left behind by Martial Law perpetrators be completely swept away for good.

9) Steps should be taken by the government to remove the impeding factors, the Appellate Division cited, in order to restore original Article 6, i. e, Bangalee Nationalism.

10) Those who advised Ershad, including his law minister and Attorney General during his Martial Law period to keep the Constitution suspended, should also be tried.

Rule made absolute in part

310. For the reasons assigned above, the Rule is made absolute in part. The Constitution (Seventh Amendment) Act, 1986 is hereby declared to be thoroughly illegal, without lawful authority, void ab-initio and the same is, hence invalidated forthwith this judgment, subject however, to the condonation catalogued above, where they would apply.

311. Paragraph 19 of Fourth Schedule to the Constitution, is hereby declared extinct wherefor the same must be effaced from the Constitution without delay.

312. The Respondents are further directed, having regard to the Appellate Division's modifying Order in the Fifth Amendment case, to take steps to clear the impediments, cited by the Appellate Division, with a view to eventual restoration of original Article 6.

313. The Respondents No. 1 is directed to reflect this judgment by re-printing the Constitution.

314. No Order, however, is made to interfere with the petitioner's conviction or the sentence for the reasons stated above and hence he must surrender to his bail.

315. The learned Counsel for the petitioner applied for a certificate under Article 103(2)(a) of the Constitution and, as the case raises a substantial question of law as to the interpretation of the Constitution, we have no hesitation to issue the certificate asked for, which is hereby issued.

There is however, no order as to cost."

49. ১৯৮৮ সালে সংবিধানের (অষ্টম সংশোধনী) আইনটি নিম্নে অবিকল অনুলিখন হলোঃ

The Constitution (Eighth Amendment) Act, 1988
(Act No. 30 of 1988)

[9th June, 1988]

An Act further to amend certain provisions of the Constitution of the People's Republic of Bangladesh

WHEREAS it is expedient further to amend certain provisions of the Constitution of the People's Republic of Bangladesh for the purposes hereinafter appearing;

It is hereby enacted as follows.-

***1. Short title.-** This Act may be called the Constitution (Eighth Amendment) Act, 1988.*

***2. Amendment of article 2A of the Constitution.-** In the Constitution of the People's Republic of Bangladesh, hereinafter referred to as the Constitution, after article 2 the following new article 2A shall be inserted, namely:-*

"2A. The State Religion.- The state religion of the Republic is Islam, but other religions may be practised in peace and harmony in the Republic."

***3. Amendment of article 3 of the Constitution.-** In the Constitution, in article 3 for the word "Bengali" the word "Bangla" shall be substituted.*

***4. Amendment of article 5 of the Constitution.-** In the Constitution, in article 5, in clause (1), for the word "Dacca" the word "Dhaka" shall be substituted.*

***5. Amendment of article 30 of the Constitution.-** In the Constitution of the People's Republic of Bangladesh, hereinafter referred to as the Constitution, for article 30 the following article 30 shall be substituted, namely:*

*"**30. Prohibition of foreign titles, etc-** No citizen shall, without the prior approval of the President, accept any title, honour, award or decoration from any foreign state.*

***6. Amendment of article 68 of the Constitution. -** In the Constitution, in article 68 and its sub-title for the word "salaries" the word "remuneration" shall be substituted.*

***7. Amendment of article 100 of the Constitution.-** In the Constitution of the People's Republic of Bangladesh, hereinafter referred to as the Constitution, for the article 100, the following article 100 shall be substituted, namely:-*

***"100. Seat of Supreme Court.-** (1) Subject to this article, the permanent seat of the Supreme Court shall be in the capital.*

(2) The High Court Division and the Judges thereof shall sit at the permanent seat of the Supreme Court and at the seats of its permanent Benches.

(3) The High Court Division shall have a permanent Bench each at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet, and each permanent Bench shall have such Benches as the Chief Justice may determine from time to time.

(4) A permanent Bench shall consist of such number of judges of the High Court Division as the Chief Justice may deem it necessary to nominate to that Bench from time to time and on such nomination the judges shall be deemed to have been transferred to that Bench.

(5) The President shall, in consultation with the Chief Justice, assign the area in relation to which each permanent Bench shall have Jurisdictions, powers and functions conferred or that may be conferred on the High Court Division by this Constitution or any other law; and the area not so assigned shall be the area in relation to which the High Court Division sitting at the permanent seat of the Supreme Court shall have such jurisdictions, powers and functions.
(6) The Chief Justice shall make rules to provide for all incidental, supplemental or consequential matters relating to the permanent Benches."

***8. Amendment of article 103 of the Constitution.-** In the Constitution, in article 103, in clause (2b), for the word "transportation" the word "imprisonment" shall be substituted.*

***9. Amendment of article 107 of the Constitution.-** In the Constitution, in article 107, in clause (3), for the words "Supreme Court" the words, commas and brackts "or any Bench of a permanent Bench of the High Court Division referred to in clause (3) of article 100" shall be substituted.*

50. সংবিধানের (অষ্টম সংশোধনী) মোকদ্দমা নামে খ্যাত আনোয়ার হোসেন বনাম বাংলাদেশ মোকদ্দমায় মাননীয় বিচারপতি বদরুল হায়দার চোধুরী, মাননীয় বিচারপতি শাহাবুদ্দিন আহমেদ, মাননীয় বিচারপতি এম, এইচ, রহমান এবং মাননীয় বিচারপতি এ,টি,এম, আফজাল সমন্বয়ে গঠিত তৎকালীন মাননীয় আপীল বিভাগ সংখ্যাগরিষ্ঠ মতামতের ভিত্তিতে উপরিল্লিখিত *The Constitution(Eighth Amendment) Act, 1988* এর কেবল মাত্র দুটি ধারা ৭ এবং ৯ বাতিল করে সংবিধানের

অনুচ্ছেদ ১০০ এবং ১০৭ পূর্বরূপ পুনঃস্থাপন করেন। [৪১ ডিএলআর (এডি)(১৯৮৯) পাতা-১৬৫]। রায়ের আদেশে বলা হয়েছে যে,

"Order of the Court

1. By majority judgment and appeals are allowed; The impugned orders of the High Court Division are set aside.

2. The impugned amendment of Article 100 along with consequential amendment of Article 107 of the Constitution is held to be ultra vires and hereby declared invalid.

3. This invalidation however will not affect the previous operation of the amended Articles and judgments, decrees, orders, etc. rendered or to be rendered and transactions past and closed.

4. In view of this invalidation, old Article 100 of the Constitution stands restored along with the Sessions of the High Court Division.

5. Civil Petition No. 3 of 1989 is disposed of in terms of this Order.

6. There will be no order as to costs."

51. অর্থাৎ মাননীয় বিচারপতি বদরুল হায়দার চৌধুরীর নেতৃত্বে তৎকালীন আপীল বিভাগ সংখ্যা গরিষ্ঠতার ভিত্তিতে উপরিল্লিখিত *The Constitution(Eighth Amendment) Act, 1988* এর কেবল মাত্র দুটি ধারা ৭ এবং ৯ বাতিল করে সংবিধানের অনুচ্ছেদ ১০০ এবং ১০৭ পূর্বরূপ পুনঃস্থাপন করলেও উক্ত আইনের অন্যান্য ধারা বিশেষ করে সংবিধানের অনুচ্ছেদ ২ক। সংশ্লিষ্টতায় ধারা ২ সম্পর্কে কোনরূপ মতামত প্রদান না করে মৌনতা অবলম্বন করেন। সংবিধানের (অষ্টম সংশোধনী) মোকদ্দমা নামে খ্যাত আনোয়ার হোসেন বনাম বাংলাদেশ মোকদ্দমাটিতে সংবিধানের (অষ্টম সংশোধনী) আইনটি সম্পূর্ণরূপে বাতিল করা হয় নাই। সংবিধানের (পঞ্চম সংশোধনী) এবং সংবিধানের (সপ্তম সংশোধনী) মোকদ্দমার রায়ে সংবিধানের (পঞ্চম সংশোধনী) আইন এবং সংবিধানের (সপ্তম সংশোধনী) আইন সম্পূর্ণ বাতিল করা হয়েছিল। কিন্তু আনোয়ার হোসেন বনাম বাংলাদেশ মোকদ্দমাটি সংবিধানের (অষ্টম সংশোধনী) আইন সম্পূর্ণ বাতিলের রায় নয়। আনোয়ার হোসেন বনাম বাংলাদেশ মোকদ্দমার রায়কে সংবিধানের অনুচ্ছেদ ১০০ এবং ১০৭ পুনঃবহালের রায় বলা যায়।

52. সংবিধান দিবস, ২০০০ উপলক্ষ্যে বাংলাদেশ সুপ্রীম কোর্টের সিনিয়র এ্যাডভোকেট বাংলাদেশের অন্যতম শ্রেষ্ঠ এ্যাডভোকেট সৈয়দ ইশতিয়াক আহমেদ এর প্রদত্ত বক্তব্যটি বাংলাদেশ সুপ্রীম কোর্ট বার এসোসিয়েশন এর ২০০২-২০০৩ সালের কার্যকরী কমিটি কর্তৃক প্রকাশিত "The Law Magazine"–এ ছাপা হয়েছিল। উক্ত বক্তব্যের অংশ বিশেষ নিম্নে অবিকল অনুলিখন হলোঃ

"সংবিধান গণতান্ত্রিক শাসন ব্যবস্থার একটি দলিল। গণতন্ত্র ধর্ম বা অধর্মের ব্যাপার নয়। এ এমনই এক মতবাদ যা স্বাভাবিক কারণেই ধর্মনিরপেক্ষ। কোন ধর্মীয় মতবাদের ভিত্তিতে সংবিধান রচিত হলে তা গণতন্ত্র, মৌলিক অধিকার, আইনের শাসন, রাজনৈতিক বিজ্ঞান ও দার্শনিক নীতির ভিত্তিতে প্রতিষ্ঠিত হবে না। আমাদের দেশের মানুষ, যারা সহজ সরল ও ধর্মপ্রাণ অথচ দরিদ্র এবং দুঃখী, তাদের ধর্মীয় অনুভূতির সুযোগ নিয়ে শাসকেরা যুগে যুগে তাদের উদ্দেশ্য হাসিল করবার প্রয়াস পেয়েছে। আমাদের প্রথম সামরিক শাসনামলে চালু ছিল। প্রথম সামরিক শাসনামলের এই সংশোধনগুলোর মূল বৈশিষ্ট্য হল প্রথমতঃ প্রস্ড়াবনায় দয়াময় পরম দয়ালু আল- াহর নাম সংযোজিত করা। শুধু তাই যদি হতো তাহলে হয়তো বলার কিছু ছিল না। কিন্তু এর মূল উদ্দেশ্য ছিল প্রস্ড়াবনার দ্বিতীয় অনুচ্ছেদের পরিবর্তে অন্য অনুচ্ছেন প্রতিষ্ঠা করা, যা এখনো বলবৎ আছে। মূল সংবিধানের প্রস্ড়াবনার দ্বিতীয় অনুচ্ছেদটিতে ছিল আমাদের মুক্তিযুদ্ধের সেই মহান আদর্শের অঙ্গীকার, যে আদর্শের জন্য আমাদের বীর জনগণ জাতীয় মুক্তি সংগ্রামে অ্ড়নিয়োগ ও বীর শহীদদিগকে প্রাণ উৎসর্গ করতে উদ্বুদ্ধ করেছিল। যা ছিল জাতীয়তাবাদ, সমাজতন্ত্র, গণতন্ত্র এবং ধর্ম নিরপেক্ষতা। এগুলো ঘোষিত হয়েছিলো সংবিধানের মূল নীতি হিসাবে। সামরিক শাসনামলে প্রধান এবং মৌলিক মূল নীতি অর্থাৎ ধর্ম নিরপেক্ষতা প্রতিস্থাপিত করা হয়, 'সর্ব শক্তিমান আল– াহর উপর পূর্ণ আস্থা এবং বিশ্বাস" এই শব্দসমূহ দ্বারা। মুক্তি সংগ্রামকেও আখ্যায়িত করা হল স্বাধীনতার জন্য যুদ্ধ হিসাবে। তারপর এই শাসনের দীর্ঘকাল অকারণে সামরিক ফরমান দ্বারা খেয়াল খুশি মত সংবিধান সংশোধন করা হয়। কে বলবে এগুলো দরকার ছিল মানুষের মঙ্গলের জন্য, দেশের স্বার্থে অথবা সাংবিধানিক কোন সংকট উত্তরণের জন্য। শাসকগোষ্ঠীর নিজস্ব স্থায়ীত্বের স্বার্থে এগুলোর প্রয়োজন ছিল বলেই করা। সামরিক শাসনের শেষে তথাকথিত গণতন্ত্র প্রতিষ্ঠার প্রাক্কালে সংবিধানকে পুনর"্জীবিত করবার জন্য পঞ্চম সংশোধনী আনা হয়। এই ধরণের সংশোধনীর তথাকথিত সাংবিধানিক পদক্ষেপ পৃথিবীর ইতিহাসে বাংলাদেশেই প্রথম।

তারপর ৬ষ্ঠ সংশোধনী আনা হল সম্পূর্ণ ব্যক্তিগত ও দলীয় স্বার্থে। বিচারপতি আব্দুস সাত্তার তথা বি এন পি-র শাসনের স্বার্থে। উপ-রাষ্ট্রপতি হিসাবে বিচারপতি সাত্তারের নির্বাচনে অংশ নেয়ার পক্ষে সাংবিধানিক বাধা ছিল। এই সংশোধনীর মাধ্যমে সেই বাধা দূর করা হয়। ফলে পরবর্তীতে বিচারপতি সাত্তার রাষ্ট্রপতি হিসাবে নির্বাচিত হলেন। পঞ্চম সংশোধনীর মতই সপ্তম সংশোধনীর মূল উদ্দেশ্য ছিল সামরিক শাসন বৈধ করা এবং সামরিক শাসন প্রতিষ্ঠাকারীকে রাষ্ট্রদ্রোহিতার অভিযোগ থেকে রক্ষা করা। এই সংশোধনীতে দেশ অথবা জনগোষ্ঠীর স্বার্থ কোথায়?

সামরিক স্বৈরশাসন সজ্ঞাগত ভাবেই ধর্ম, নীতি ও আদর্শের তোয়াক্কা করে না অথচ তাবা অষ্টম সংশোধনীর মাধ্যমে ইসলামকে রাষ্ট্র ধর্ম হিসাবে ঘোষণা করল। দেশে কোন ধর্মীয় সংকট ছিল না। ছিলো না কোন সাংবিধানিক সংকট। তাছাড়া এ বিষয়ে জনগণের পক্ষ থেকে কোন দাবীও উত্থাপিত হয়নি। আশির দশকের স্বৈরশাসকরা রাষ্ট্র ধর্ম ঘোষণা করা ব্যতিরেকে যা কিছু করেছেন তার সবই অধর্ম, অন্যায়, নীতিহীনতা, প্রতারণা, লুটতরাজ এবং বল- াহীন দুর্নীতি। সন্ত্রাস এবং কুশাসন এ সব কিছু মিলেই এমন এক পরিস্থিতির সৃষ্টি হয় যা থেকে পরিত্রাণ পাওয়ার জন্যে এদেশের সব শ্রেণী ও পেশার মানুষ দীর্ঘ নয় বছর ধরে এই স্বৈরশাসনের অবসানের জন্য সংগ্রাম, ত্যাগ ও আত্মোৎসর্গ করেছে। মানুষের কাঁধে কাঁধ মিলিয়ে এ দেশের সমগ্র আইনজীবি সমাজ এই সংগ্রামের পুরভাগে দাঁড়িয়ে আন্দোলন করেছিলেন, ত্যাগ স্বীকার করেছিলেন।''

53. সংবিধানে অনুচ্ছেদ ২ক। 'প্রজাতন্ত্রের রাষ্ট্রধর্ম হবে ইসলাম, তবে অন্যান্য ধর্মও প্রজাতন্ত্রে শান্তিতে পালন করা যাইবে।' এর বৈধতা চ্যালেঞ্জ করে ১৯৮৮ সালে 'স্বৈরাচার ও সাম্প্রদায়িকতা প্রতিরোধ কমিটি'-র পক্ষে স্বৈরাচার ও সাম্প্রদায়িকতা প্রতিরোধ কমিটির প্রেসিডিয়াম সদস্য বিচারপতি কামাল উদ্দিন হোসেনসহ অপর ১৫ (পনের) জন সদস্য দরখাস্তকারী হয়ে গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের অনুচ্ছেদ ১০২ মোতাবেক এক দরখাস্ত বিগত ইংরেজী ১৪ই আগষ্ট, ১৯৮৮ সালে অত্র বিভাগের কমিশনার অব এফিডেভিটের সম্মুখে হলফনামা সম্পাদন করে দরখাস্তটি নিবন্ধিত করেন।

54. ১৪ই আগষ্ট, ১৯৮৮ সালে উক্ত হলফনামা সম্পাদন করার পর দরখাস্তকারীগণ দীর্ঘ ২৩ (তেইশ) বৎসর যাবৎ তাদের রীট পিটিশনটি (রীট পিটিশন নং-১৪৩৪/১৯৮৮) অত্র বিভাগের কোন বেঞ্চে মোশন (Motion) শুনানীর জন্য উপস্থাপন করেন নাই।

55. দরখাস্তকারীগণ উপরিল্লিখিত রীট পিটিশনটি দীর্ঘ ২৩ (তেইশ) বৎসর কোন আদালতে মোশন (Motion) শুনানীর জন্য উপস্থাপন না করে বিগত ইংরেজী ০৮.০৬.২০১১ তারিখে একটি অতিরিক্ত দরখাস্তের হলফনামা সম্পাদন করেন।

56. অতঃপর, দীর্ঘ ২৩ (তেইশ) বৎসর পর, বিগত ইংরেজী ০৮.০৬.২০১১ তারিখে দরখাস্তকারীগণের বিজ্ঞ এ্যাডভোকেট জনাব সুব্রত চৌধুরী অত্র রীট পিটিশন নং ১৪৩৪/১৯৮৮ দরখাস্তটি মোশন (Motion) শুনানীর জন্য বিচারপতি এ, এইচ, এম, শামসুদ্দিন চৌধুরী এবং বিচারপতি গোবিন্দ চন্দ্র ঠাকুর সমন্বয়ে গঠিত অত্র বিভাগের একটি দ্বৈত বেঞ্চে উপস্থাপন করেন। হাইকোর্ট বিভাগের উপরিল্লিখিত বেঞ্চ দরখাস্তকারীগণের রীট পিটিশনটি শুনানীঅন্তে ঐদিনই তথা বিগত ইংরেজী ০৮.০৬.২০১১ তারিখে প্রতিপক্ষগণের উপর কারণ দর্শানো পূর্বক অত্র প্রথম রুলটি ইস্যু করেছিলেন। যা অবিকল নিম্নরূপঃ-

''Let the supplementary affidavit form part of the main petition.
Let a Rule Nisi be issued calling upon the respondents to show cause as to why the insertion of Article 2A in the Constitution of Bangladesh by section 2 of the Constitution (Eighth Amendment) Act, 1988, (Act No. XXX of 1988) should not be declared to have been made unconstitutional, ultra vires the constitution and without lawful authority and of no legal effect and/or why such other or further order or orders, as this Court may deem fit and proper, should not be passed.
The following learned Advocates be requested to assist us as amicus curie.

1. *Mr. T.H. Khan*
2. *Dr. Kamal Hossain*
3. *Mr. Rafiqul Hoque*
4. *Mr. M. Amirul Islam*

5. Dr. M. Zahir
6. Mr. Mahmudul Islam
7. Mr. A.F. Hasan Arif
8. Mr. Rokonuddin Mahmud
9. Mr. Aktar Imam
10. Mr. Fida M. Kamal
11. Mr. Ajmalul Hossain QC
12. Mr. Abdul Matin Khasru
13. Mr. Yousuf Hossain Humayun and
14. Mr. A.F.M. Mesbahuddin.
***The matter shall be taken up for hearing on 16.06.2011**.*
The Office is directed to put in the requisites for service of notices upon the respondents in usual course and through registered post.

Sd/-illegible"

57. অতঃপর বিগত ইংরেজী ১৬.০৬.২০১১ তারিখে অত্র রুলটি আংশিক শুনানী হয়ে বিগত ইংরেজী ১৪.০৭.২০১১ তারিখ পর্যন্ত শুনানী মুলতবী রাখা হয়।

58. অতঃপর বিগত ইংরেজী ২৫.০৮.২০১১ তারিখে বিচারপতি এ,এইচ,এম শামসুদ্দিন চৌধুরী এবং বিচারপতি গোবিন্দ চন্দ্র ঠাকুর সমন্বয়ে গঠিত অত্র বিভাগের দ্বৈত বেঞ্চ অত্র রুলটি তদবীর অভাবে খারিজ করেন।

59. অতঃপর বিগত ইংরেজী ০১.১২.২০১১ তারিখে বিচারপতি এ, এইচ, এম, শামসুদ্দিন চৌধুরী এবং বিচারপতি জাহাঙ্গীর হোসেনের সমন্বয়ে গঠিত অত্র বিভাগের দ্বৈত বেঞ্চ বিগত ইংরেজী ২৫.০৮.২০১১ তারিখের স্বাক্ষর বিহীন আদেশ প্রত্যাহার করে অত্র রুলটি পুনরুজ্জীবিত করেন এবং অতিরিক্ত (supplementary) রুল ইস্যু করেন যা নিম্নরূপঃ-

"The unsign order is hereby recalled. The matter shall come up in the list for hearing on 05.12.2011.
Let a Supplementary Rule Nisi be issued calling upon the respondents to show cause as to why the insertion of substituted Article 2A in the Constitution of Bangladesh by Section 4 of the Constitution (15th Amendment) Act, 2011 described in paragraph No.2 of this application, should not be declared to have been made unconstitutional, ultravires to the Constitution and without any lawful authority and is of no legal effect and/or why such other or further order or orders as to this court may deem fit and proper, shout not be passed.
The Rule is made returnable within 10(ten) days from date.
The petitioners are directed to put in the requisites for service of notices upon the respondents in usual course and though registered post.

Sd/-illegible"

60. অতঃপর বিগত ইংরেজী ২৭.০৮.২০১৫ তারিখে বিচারপতি জুবায়ের রহমান চৌধুরী এবং বিচারপতি মাহমুদুল হক আদেশ প্রদান করেন যে,

" Since the instant writ petition is appearing as Item No. 32 before a senior Bench (Court No.9 Annex), which has been sent there by the Hon'ble Chief Justice, let this matter go out from the cause list of this Court.

Sd/-illegible"

61. অতঃপর বিগত ইংরেজী ৩১.০৮.২০১৫ তারিখে বিচারপতি জিনাত আরা এবং বিচারপতি এ, কে, এম, সাহিদুল হক আদেশ প্রদান করেন যে,

"On the prayer of the learned Advocate on behalf of the petitioner, the matter is adjourned to 07.09.2015.

Sd/-illegible"

62. উপরিল্লিখিত বিগত ইংরেজী ৩১.০৮.২০১৫ তারিখের আদেশ মোতাবেক অত্র মোকদ্দমাটি শুনানীর জন্য মাননীয় বিচারপতি জিনাত আরা এবং মাননীয় বিচারপতি এ, কে, এম, সাহিদুল হক এর আদালতে বিগত ইংরেজী ০৭.০৯.২০১৫ তারিখে দিন ধার্য থাকলেও উক্ত আদালত উক্ত তারিখে মোকদ্দমাটি কার্যতালিকায় আনেন নাই। এমনকি শুনানীর জন্য পরবর্তীতে কোনো তারিখও উক্ত আদালত কর্তৃক নির্ধারন করা হয় নাই।

63. অপরদিকে, বিগত ইংরেজী ০৭.০৯.২০১৫ তারিখে অত্র আদালতের বিজ্ঞ এ্যাডভোকেট সমরেন্দ্র নাথ গোস্বামী নিজে দরখাস্তকারী হয়ে অত্র মোকদ্দমাটির বিষয়বস্তু সংশ্লিষ্টতায় তথা সংবিধানের "অনুচ্ছেদ ২ক" সংবিধান পরিপন্থী ঘোষণা চেয়ে মাননীয় বিচারপতি মোঃ এমদাদুল হক এবং মাননীয় বিচারপতি মুহাম্মদ খুরশীদ আলম সরকার এর দ্বৈত বেঞ্চে রীট পিটিশন নং ৮০৫৬/২০১৫ উপস্থাপন করলে উক্ত বেঞ্চ শুনানী অন্তে ঐদিনই প্রদত্ত রায় ও আদেশে রীট পিটিশনটি সরাসরি প্রত্যাখ্যান করেন।

64. গুরুত্বপূর্ণ বিধায় মাননীয় বিচারপতি মোঃ এমদাদুল হক এবং মাননীয় বিচারপতি মুহাম্মদ খুরশীদ আলম সরকার কর্তৃক রীট পিটিশন নং ৮০৫৬/২০১৫ শুনানী অন্তে বিগত ইংরেজী ০৭.০৯.২০১৫ তারিখে প্রদত্ত রায় ও আদেশ নিম্নে অবিকল অনুলিখন হলোঃ

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

Writ Petition No. 8056 of 2015.

In the matter of:
An application under Article 102(1) and (2)(a)(ii) read with article 26 of the Constitution of the People's Republic of Bangladesh.

And

In the matter of:
Samarendra Nath Goswami, Advocate.

.....Petitioner.

-Versus-

Government of Bangladesh, represented by the Secretary. Ministry of Law Justice and parliamentary Affairs, Bangladesh Secretariat, Dhaka.

.....Respondent.

Mr. Samarendra Nath Goswami, Advocate.(In person)

....For the petitioner.

Mr. Murad Reza, Addl. Attorney General with
Mr. Md. Khushedul Aiam, D.A.G.

....For the State.

Present:
Mr. Justice Md. Emdadul Huq
And
Mr. Justice Muhammad Khurshid Alam Sarkar
Order on: 07-09-2015.

Advocate Mr. Samarendra Nath Goswami has, in his personal capacity, filed this Writ Petition and has prayed for issuance of a Rule Nisi with regard to the vires of article 2ka of the Constitution as inserted by the Constitution (15 Amendment) Act. 2011.

The petitioner has stated that he is an enrolled Advocate of this Court and that he has filed this petition "in his capacity as public spirited citizen to protect and uphold the Constitution and law by way of public interest litigation. This pro bono Writ Petition is brought by the petitioner to preserve the integrity of the rule of law and for enforcing public duty having grave public importance the petitioner file this writ petition as an expression of social commitment and obligation to advance public aims in the interest of public at large to defend public collective right and prevent public wrongs. The petitioner files this writ petition for ventilation of collective and common grievance injurious to public welfare.....

At the hearing of this Writ Petition as a Motion, Mr. Goswami appears in person, and submits that the new article 2ka is violative of the ideal of secularism (ধর্মনিরপেক্ষতা) which has been declared in the Preamble as one of the four basic ideals of this Country and further enunciated in articles 8 and 12 of the Constitution.

Mr. Goswami next submits that this new article 2ka has been inserted in the Constitution by the Constitution (Fifteenth Amendment) Act, '201 I declaring Islam as the রাস্ট্র ধর্ম, but there should have been a referendum under article 142, as it stood before amendment of that article by the Constitution (Fifteenth Amendment), Act, 2011.

Mr. Goswami, lastly submits that this new article creates discrimination between the followers of Islam and the followers of other religion and thus violates article 27 which guarantees equality of all citizens and therefore a Rule Nisi should be issued.

At the hearing of this Writ Petition as a Motion, Mr. Murad Reza, the learned Additional Attorney General, appears and submits that the contents of article 2ka has been inserted in the Constitution by substituting the old article 2ka and in making such amendment all the requirements of article 142 of the Constitution have been followed and therefore it is not a provision of a simple Act of Parliament.

Mr. Reza, the learned Additional Attorney General, next submits that Part-1 of the Constitution contains specific declarations about the various aspects of the identity of the Republic including a declaration in Article 2ka that the State Religion is Islam with a specific direction that the State shall ensure equal status and equal rights in the practice of all other religions.

Mr. Reza next submits that the declaration made in article 2ka is nothing but a narration of the ideal of "secularism" as declared in the Preamble and articles 8 and 12 of the Constitution.

Mr. Reza, lastly submits that this article 2ka is not a provision conferring any fundamental rights that are guaranteed in Part III and that it can not construed as violative of any fundamental right and therefore no rule should be issued.

We have considered the statements made in the Writ Petition and the submission made by Mr. Goswami, the petitioner appearing in person, and

also the submission made by the learned Additional Attorney General and the relevant provisions of the Constitution and the Preamble thereof.

The issue raised in this case with regard to constitutionality of the declaration of Islam as the State Religion in article 2ka of the Constitution need to be examined in the context of the constitutional development of this Country, particularly in the light of the ideal of secularism as embodied in the preamble and articles 8 and 12 of the Constitution.

Secularism: In the Preamble (প্রস্তাবনা) of the Constitution, the Constituent Assembly, among others, made a declaration about the high the ideals that inspired the people of this Country to engage in the national liberation struggle leading to the liberation and adoption of the Constitution. One of the four ideals as enshrined in the original 2nd paragraph of the Preamble is ধর্মনিরপেক্ষতা (secularism) and it runs as follows:

> "আমরা অঙ্গীকার করিতেছি যে, যে সকল মহান আদর্শ আমাদের বীর জনগনকে জাতীয় মুক্তি সংগ্রামে আত্মনিয়োগ ও বীর শহীদদিগকে প্রানোৎসর্গ করিতে উদ্বুদ্ধ করিয়াছিল- জাতীয়তাবাদ, সমাজতন্ত্র, গনতন্ত্র ও ধর্মনিরপেক্ষতার সেই সকল আদর্শ এই সংবিধানের মূলনীতি হইবে।"

The ideal of "secularism" is a political theory that originated in Europe in the back ground of the debate on separation of the Church from the State. The theory spread out to non-European countries. However the manner of depicting this political philosophy and the implication thereof in reality are different in various countries of the world. There is no universally acceptable definition of secularism, nor there is any universally accepted form of practice of this ideal.

In this country, secularism has been declared as one of the four basic ideals of the State in the Preamble and further enunciated in articles 8 and 12 of Part II of the Constitution. But the ideal of "secularism" was never practiced in this country in the sense that all religious practices are to be completely separated from the activities of the State. This reality is manifest from various executive actions including declaration of public holidays on the occasion of various religious festivals of the followers mainstream religions like Islam, Hinduism, Christianity, Buddhism etc., patronization of pilgrimage like haj etc.

In the legal arena, article 149 of the Constitution has approved tile continuation of all "existing laws" that were enacted in the pre- liberation days. These laws include some important laws based on religions tenets e.g. The Muslim Personal Law (Shariat) Application Act, 1937 with regard to inheritance, gift, will, marriage, divorce, etc of Muslims. The principles and practices based on the religion have been followed by the Hindu Community of the country with regard to inheritance, marriage etc these principle and practices have been judicially recognized and enforced by courts. Such principles and practices have been approved by the constitution as "existing laws". The Constitutional scheme becomes clear when we consider the definition of "law" in article 152 as follows:

> *"Law" means any Act, Ordinance rule, regulation bye-law notification of other instrument, and any custom or usage. having the force of law in Bangladesh.*

After adoption of the Constitution in 1972 not only the pre- liberation statutes and "customs or usage having the force of law" were continued, but also new laws patronizing religious matters were enacted e.g. (1) Islamic Foundation Act, 1975. (2) Hindu Religious Welfare Trust Ordinance, 1983. (3) Christian Relicious welfare trust Ordinance, 1983. 4) Buddhist Religious welfare Trust Ordinance, 1983. 5) Zakat Fund Ordinance, 1982, etc.

So in this Country religion was never completely separated from State activities as propagated by the theorists of the ideal of secularism. Various provisions of the Penal Code (sections 295-298) even make certain actions punishable offence in respect of religious belief, place of worship etc.

However there were some changes in depicting the ideal of Secularism in the Constitution. During the Martial Law Period, the 2 para of the original Preamble was substituted by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. 12 of 1978) as follows:

> "আমরা অঙ্গীকার করিতেছি যে, যে সকল মহান আদর্শ আমাদের বীর জনগনকে জাতীয় স্বাধীনতার জন্য যুদ্ধে আত্মনিয়োগ ও বীর শহীদদিগকে প্রানোৎসর্গ করিতে উদ্বুদ্ধ করিয়াছিল সর্বশক্তিমান আল্লাহের উপর পূর্ণ আস্থা ও বিশ্বাস, জাতীয়তাবাদ, গনতন্ত্র এবং সমাজতন্ত্র অর্থাৎ অর্থনৈতিক ও সামাজিক সুবিচারের সেই সকল আদর্শ এই সংবিধানের মূলনীতি হইবে।"

By the same Proclamation Order No. 12 of 1978 the original article 8(1) was substituted in the light of the change made in the Preamble and article 12 was repealed. These changes were even ratified by the Constitution (Fifth Amendment) Act, 1979.

The above noted changes in the Preamble and in articles 8 and 12 continued till the decision of the High Court Division in the Case of Bangladesh Italian Marble Works Limited vs. the Government of Bangladesh and others in which the High Court Division summarized its findings in Para 14 with regard to the illegality of the Constitution (Fifth Amendment) Act, 1979 (vide the Special Issue, Bangladesh Legal Decision (2010) In that judgment the High Court Division declared as follows:

> *"14. all Proclamations, martial Law Regulations and Martial Law Orders made during the period from August 15, 1975 to April 9, 1979, were illegal, void and non est because".*
>
> *(i)*
>
> *(ii)-(vi) .....*

We further declare:

> i) The Constitution (Fifth Amendment) Act, 1979 (Act 1 of 1979) is declared illegal and void ab initio, subject to condonations of the provisions and actions taken thereon as mentioned above".

The above noted finding of the High Court Division was approved by the Appellate Division in the appeal being the case Of Munsif Ahsan Kabir and other vs. Bangladesh Italian Marble works. Dhaka and other (vide-Special Issue 2010 BLD (Special).

The above noted judicial decision has been reflected in the Constitution (Fifteenth Amendment) Act, 2011, by which the original 2nd para of the Pre-amble has been restored and the relevant article of the Constitution containing the ideals of secularism, namely article 8 was restored and the original article 12 was substituted. These two articles are quotea below:

" জাতীয়তাবাদ, সমাজতন্ত্র, গণতন্ত্র ও ধর্মনিরপেক্ষতার-এই নীতিসমূহ এবং তৎসহ এই নীতিসমূহ হইতে উদ্ভুত এই ভাগে বর্নিত অন্য সকল নীতি রাষ্ট্র পরিচালনার মূলনীতি বলিয়া পরিগনিত হইবে।"

"১২। ধর্ম নিরপেক্ষতা নীতি বাস্তাবায়নের জন্য-

(ক) সর্ব প্রকার সাম্প্রদায়িকতা,

(খ) রাষ্ট্র কর্তৃক কোন ধর্মকে রাজনৈতিক মর্যাদা দান,

(গ) রাজনৈতিক উদ্দেশ্যে ধর্মীয় অপব্যবহার,

(ঘ) কোন বিশেষ ধর্ম পালনকারী ব্যক্তির প্রতি বৈষম্য বা তাহার উপর নিপীড়ন, বিলোপ করা হইবে।"

The Parliament of this country has the constitutional and lawful authority to identify the extent of "secularism" and narrate the same keeping in view of the realities of this country and it has lawfully done so.

State Religion: The concept of State Religion was not there in the original Constitution. However the Parliament of this Country, by the Constitution (8th Amendment) Act, 1988 inserted article 2ka containing a declaration about State Religion as follows:

> "প্রজাতন্ত্রের রাষ্ট্রধর্ম ইসলাম, তবে অন্যান্য ধর্মও প্রজাতন্ত্রে শান্তিতে পালন করা যাইবে।"

Later on, the Parliament by the Constitution (Fifteenth Amendment) Act, 2011 substituted article 2ka, and modified the concept of State Religion as follows.

> "২ক। প্রজাতন্ত্রের রাষ্ট্রধর্ম ইসলাম, তবে হিন্দু, বৌদ্ধ, খৃষ্টানসহ অন্যান্য ধর্ম পালনে রাষ্ট্র সমমর্যাদা ও সমঅধিকার নিশ্চিত করিবেন।"

It is evident that article 2ka declares Islam as the রাষ্ট্রধর্ম and at the same time declares that it is the duty of the State to ensure "equal status" and "equal rights" (সমঅধিকার) to the followers of all other religions. We do not consider that the declaration made in article 2ka is derogatory from the ideal of secularism as declared by the Constituent Assembly and lastly restored by our Parliament in the Preamble, Nor is it derogatory from any provision of the Constitution including article 8 or 12 or 27. The Parliament has the constitutional and lawful authority to identify the ideal of secularism in the light of the realities of this Country and to make the declaration in article 2ka as quoted above. Parliament has lawfully done so by the Constitution (Fifteenth Amendment), Act, 2011.

In view of the above we are not inclined to issue Rule. The Writ Petition is summarily rejected.

Md. Emdadul Huq
M. K. A. Sarkar.

65. অপরদিকে, অত্র মোকদ্দমাটি একটি বৃহত্তর বেঞ্চ গঠনের মাধ্যমে নিষ্পত্তির নিমিত্তে দরখাস্তকারী পক্ষের বিজ্ঞ এ্যাডভোকেট সুব্রত চৌধুরী বিগত ইংরেজী ০৬.০৯.২০১৫ তারিখে হলফনামা সহকারে দরখাস্ত দাখিল করেন। উক্ত দরখাস্তের প্রেক্ষিতে বিগত ইংরেজী ০৩.১১.২০১৫ তারিখের আদেশে বাংলাদেশের তৎকালীন মাননীয় প্রধান বিচারপতি আদেশ প্রদান করেন যে,

> *"Let this matter be heard and disposed of by the Larger Bench Constituting of Naima Haider, Quazi Rezaul Haque and Mohammad Ashraful Kamal, J.J)*
>
> *Sd/-illegible"*

66. রীট পিটিশন নং-৮০৫৬/২০১৫-এ বিগত ইংরেজী ০৭.০৯.২০১৫ তারিখে প্রদত্ত রায় ও আদেশে অত্র মোকদ্দমার বিষয় সংশ্লিষ্টতায় অত্র বিভাগ থেকে নিষ্পত্তি হওয়ায় এটি কার্যত আপীল বিভাগের এখতিয়ারাধীন বিষয় হয় এবং অত্র রুলটিও কার্যত অকার্যকর হয়ে পড়ে।

67. অতঃপর বিগত ইংরেজী ২৯.০২.২০১৬ তারিখে অত্র বৃহত্তর বেঞ্চ বসেন এবং সংক্ষিপ্ত আদেশে পরবর্তী শুনানীর তারিখ বিগত ইংরেজী ২৮.০৩.২০১৬ তারিখ নির্ধারন করেন। বিগত ইংরেজী ২৯.০২.২০১৬ তারিখের আদেশ নিম্নে অবিকল অনুলিখন হলোঃ

<u>29.02.2016</u>
M. H. Afric, Advocate

-------- Fro the petitioner

The order dated 08.06.2011 with regard to the assisting the court as amicus curie is hereby recalled for the time being and this matter may come up in the list on 28.03.2016 for hearing.

68. *মাননীয় জ্যৈষ্ঠ বিচারপতি নাইমা হায়দার তার রায়ের দ্বিতীয় পাতার তৃতীয় প্যারায় লিখেছেন যে, "The learned Counsel for the petitioners takes us through the provisions of the Constitution and vehemently argues that the impugned amendments affect basic structure or our Constitution and therefore, there is no scope but to declare the said impugned amendments as unconstitutional. The learned Counsel emphasize that under no circumstances, the basic structure of the Constitution can be amended. He also argues that the impugned amendments have the effect of nullifying different constitutional provisions; in this regard, he points out that any amendment to the Constitution which results in contradiction with the Constitution as a whole or any part thereof is liable to be struck down as being unconstitutional."*

69. প্রকৃত পক্ষে অদ্য অত্র বৃহত্তর বেঞ্চ কর্তৃক অত্র রুলটির শুনানী মাত্র ১০/১২ মিনিট স্থায়ী হয়। শুনানীর শুরুতেই রাষ্ট্রপক্ষের অতিরিক্ত অ্যাটর্নি জেনারেল মুরাদ রেজা আদালতকে উদ্দেশ্য করে বলেন, **"এটা অনেক আগের মামলা। এতে দু'টি রুল হয়েছে। ১৯৮৮ সালের রীট এবং পরে দু'টি সম্পূরক আবেদনের রুল।"** উত্তরে জ্যৈষ্ঠ বিচারক বিচারপতি নাইমা হায়দার বলেন যে, **"আগে আবেদনকারীর আইনজীবীকে শুনবো।"** এরপর সুপ্রিম কোর্টের সিনিয়র আইনজীবী বিচারপতি টিএইচ খান, এবিএম নুরুল ইসলামসহ কয়েকজন আইনজীবী রাষ্ট্রধর্ম হিসেবে ইসলাম ধর্ম বহাল রাখার পক্ষে পক্ষভুক্ত হওয়ার আবেদন নিয়ে দাঁড়ালে জ্যৈষ্ঠ বিচারপতি নাইমা হায়দার তাদের বলেন, **"আপনারা এখন বসেন। এখনো শুনানি শুরু হয়নি।"** অতঃপর জ্যৈষ্ঠ বিচারক বিচারপতি নাইমা হায়দার দরখাস্তকারীর বিজ্ঞ এ্যাডভোকেট সুব্রত চৌধুরীকে বলেন, **"আপনাকে আমরা দেখে আসতে বলেছিলাম 'স্বৈরাচার ও সাম্প্রদায়িকতা প্রতিরোধ কমিটির' পক্ষে এ রীটটি দায়েরের লোকাস স্ট্যান্ডি (রীট করার এখতিয়ার) ছিল কি?"** অর্থাৎ স্বৈরাচার ও সাম্প্রদায়িকতা প্রতিরোধ কমিটি কোন নিবন্ধিত সংগঠন কিনা? কিংবা আইনানুগ ব্যক্তি তথা কৃত্রিম ব্যক্তি তথা আইনগত ব্যক্তি স্বত্বা রয়েছে বলে স্বীকৃত তথা আইনানুগ অধিকার ও কর্তব্য ভোগ করতে এবং আইনানুগ অধিকার কর্তব্যের অধীন হতে পারে এমন একটি সংস্থা কিনা? সর্বোপরি উক্ত কমিটি তথা দরখাস্তকারীগণ অত্র মামলা করার আইনত অধিকারী কিনা তথা মামলা করার অথবা আইনের বৈধতা সম্পর্কে প্রশ্ন উত্থাপনের অধিকারী কিনা? এছাড়াও, স্বৈরাচার ও সাম্প্রদায়িকতা প্রতিরোধ কমিটি নামে কোন কমিটির বর্তমানে কোন অস্থিত্ব আছে কিনা? জবাবে সুব্রত চৌধুরী বলেন, **"সংগঠন ছাড়াও রীটটি আলাদা আলাদাভাবে প্রত্যেক আবেদনকারী করেছেন।"** তখন জ্যৈষ্ঠ বিচারক বিচারপতি নাইমা হায়দার বলেন, **"আমরা দেখছি, ওই সংগঠনটির পক্ষে রীট আবেদন করা হয়েছে।"** তখন সুব্রত চৌধুরী বলেন, **"শুনানীর সময় আমরা বিস্তারিত বলবো। সন্তোষজনক জবাব দেবো। আমাদের শুনানী করার সুযোগ দিন।"** তখন জ্যৈষ্ঠ বিচারক মাননীয় বিচারপতি নাইমা হায়দার আমাদের সকলের পক্ষে বলেন যে, **"দরখাস্তকারী সংগঠনের মামলা করার এখতিয়ার নাই। রুলটি খারিজ"।**

70. দরখাস্তকারী সংগঠনের অত্র মোকদ্দমা অত্র আদালতের সামনে উপস্থাপনের নিমিত্তে প্রয়োজনীয় আইনগত যোগ্যতা না থাকা হেতু অত্র রুলটি খারিজ যোগ্য।

71. অতএব, আদেশ হয় যে, অত্র রুলটি বিনা খরচায় খারিজ করা হলো।

19 SCOB [2024] HCD 66

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 609 of 2019

Mr. Md. Taherul Islam (Tawhid)
... Petitioner
Vs.
The Speaker, Bangladesh Jatiya Sangsad and others
…Respondents

Mr. A.M. Mahbub Uddin with Mr. Saqeb Mahbub, Advocates.
. ..For the petitioner.

Mr. Mahbubey Alam, Attorney General with Mr. Murad Reza, Additional Attorney General with Mr. Motahar Hossain Saju, D.A.G. with Mr. Mokleshur Rahman, D.A.G with Mr. Bishawjit Debnath, D.A.G Ms. Shuchira Hossain, Assistant Attorney General with Ms. Ms. Samira Tarannum Rabeya, Assistant Attorney General.
….. For the Government.

The 18th February, 2019

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Razik-Al-Jalil

Editors' Note:

In this case petitioner challenged the holding of office by taking oath by the Members of Parliament who were elected for the 11th National Parliament before expiration of the term of the previous Parliament. The petitioner alleged that by taking oath before dissolution of the 10th National Parliament the MPs had violated the Article 123(3) read with Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh and there existed 600 MPs at that time. The High Court Division analyzing different provisions of the Constitution, summarily rejected the writ petition on the ground that Article 148(3) of the Constitution was incorporated to maintain continuity of running the government for the best interest of democracy. The "deeming clause" that exists under Article 148(3) is to facilitate the continuity of the government. The Court also held that though, upon taking oath, the MPs in reality had not assumed office of Members of Parliament, yet they had assumed office by way of legal fiction created by the Constitution. Therefore, taking oath by the MPs before dissolution of previous parliament was not illegal. This view of the High Court Division was affirmed by the Appellate Division (*see* 19 SCOB [2024] AD 10).

Key Words:

Article 123(3), Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh; Deeming Clause; Parliamentary Election; Member of Parliament; Legal Fiction

Article 56(3), 57 and 58 of the Constitution of the Peoples' Republic of Bangladesh: The government cannot have any break in its continuity:

When an election to national parliament takes place and returned candidates are declared, the framers of the Constitution have incorporated this provision, namely sub-article (3) of Article 56, for appointment of a member of parliament as Prime Minister, so that no break takes place in the continuity of the government. This provision has been incorporated so that even if the parliament does not sit in its first meeting, there cannot be any vacuum in the running of the governance and for such continuity of the government, the President shall appoint the majority leader of the new parliament as Prime Minister, who then shall from his or her cabinet according to her desire in accordance with the relevant provisions of the Constitution. Therefore, it appears that though there may be a break between one parliament and another parliament, the continuity of the government cannot have any break, and even if the Prime Minister becomes disqualified to continue as Prime Minister, he or she will still continue under Article 57 unless and until the next Prime Minister takes upon the office. The tenure of the Minister is also the same as provided by Article 58, in that he/she will also continue to hold office until his or her successor enters upon such office. Therefore, it appears from this chapter of the Constitution, dealing with the executive branch of the State, that the government cannot have any break in its continuity and the framers of the Constitution have nicely balanced different Articles of the Constitution to provide such continuity of the government. ...(Para 19)

Article 123 (3) and 148(3) of the Constitution of the Peoples' Republic of Bangladesh: MPs take oath to discharge their duties upon which they do not enter immediately, rather they are about to enter:

The framers of the Constitution in one place of the Constitution has provided that the MPs shall not assume office before expiration of the tenure of the last parliament, in another place it has provided that an MP shall be deemed to have assumed such office once he takes oath even before the first meeting of parliament or even before dissolution of the last parliament. As stated above, there is a latent purpose in the Constitution for incorporating this deeming provision which is the continuity of the government or the executives. This purpose become more clear when we see the prescribed form of oath to be taken by the MPs as incorporated in the 3rd Schedule to the Constitution. Unlike other oaths therein, the MPs take oath to discharge their duties upon which they do not enter immediately, rather they are about to enter. ...(Para 21)

Article 123 (3) and 148(3) of the Constitution of the Peoples' Republic of Bangladesh: MPs who took oath even before the first meeting of the parliament shall not in fact or in reality assume such office of members of parliament before expiration of the tenure of the last parliament:

This 'deeming clause' has been incorporated in sub article (3) of Article 148 just to facilitate such working and continuity of the government. Though, upon taking oath, the MPs in reality have not assumed office of members of parliament, yet they have assumed office by way of legal fiction created by the Constitution and that legal fiction must be interpreted by this Court limiting the same to be used for the said purpose only. It is apparent from the examination of the relevant provisions of the Constitution as

mentioned above that our legislature has deliberately created this legal fiction so that the next executive government can be formed and appointed by the President. This intention of the legislature has been made clear by proviso to sub article (3) of Article 123 wherein it has been provided that such MPs shall not assume office as members of parliament except after the expiration of the term of the previous parliament. This means that, the MPs who took oath even before the first meeting of the parliament shall not in fact or in reality assume such office of members of parliament before expiration of the tenure of the last parliament. ...(Para 22)

JUDGMENT

Sheikh Hassan Arif, J:

1. The petitioner, who is an advocate of the Supreme Court of Bangladesh, has filed this application under Article 102 (2)(a)(ii) and (b)(ii) of the Constitution of the People's Republic of Bangladesh in the form of writ of quo-warranto seeking a Rule upon the Speaker of Parliament, Election Commission and all Members of Parliament, who have recently been elected as such in the National Parliamentary Election held on 30.12.2018, mainly on the ground that the said members of parliament have taken oath and assumed their office as member of parliament (MP) in violation of the provisions under Article 123 (3) read with Articles 148(3) and 72 (3) of the Constitution.

2. It is contended by the petitioner that being an advocate of this Court, he is a vigilant citizen of this country and is highly interested in the establishment of rule of law in the country, and compliance of mandatory provisions of the Constitution by the public functionaries particularly those who have taken solemn oath to preserve, protect and defend the Constitution. According to him, on 05.01.2014, the 10th National Parliamentary Election was held and the members of parliament (MPs) elected therein took oath on 09.01.2014 after the publication of official gazette as regards their result and, accordingly, the cabinet then, was formed on 12.01.2014. That thereafter, on 29.01.2014, the first meeting of the 10th national parliament was held and, according to Article 72(3) of the Constitution, the tenure of the said 10th national parliament expired on 28.01.2019 i.e. after completion of five years term from the date of its 1st meeting. That the official web-site of Bangladesh Jatiya Sangsad also declares that the 1st meeting of the 10th parliament was held on 29.01.2014. That the election for the 11th National Parliament was held on 30.12.2018, under the supervision of the Election Commission wherein election was held in 299 constituencies of Bangladesh. That in view of the provisions under Article 19 (3) of the Representation of Peoples Order 1972, the Election Commission declared the official result of the returned candidates in the said election on 01.01.2019 vide gazette notification. Though, according to the petitioner, there was no time limit mentioned in the Constitution under Article 39 (4) to publish such a gazette, the oath of the newly elected MPs was administered at 11A.M. on 03.01.2019 in a ceremonial way and thereafter, on the same day, the Hon'ble President appointed Sheikh Hasina MP as the Prime Minister of Bangladesh to form cabinet under her leadership and, accordingly, a gazette notification was published on the same day, i.e. on 03.01.2019, followed by a gazette dated 07.01.2019 appointing her as the Prime Minister of Bangladesh. That on the same day, a further gazette was published pursuant to Article 56(ii) of the Constitution and Rule 3 (iv) of the Rules of Business, 1996 announcing the names of the Ministers, State Ministers and Deputy Ministers. Accordingly, they took oath as Ministers, State Ministers and Deputy Ministers on 07.01.2019. It is contended that on the same day, 47

individuals including 7, who were not members of 10th National Parliament, took oath as ministers and the said seven members are Mr. AK Abdul Monem, Mr. S.M. Rezaul Karim, Mr. Mostafa Jabbar, Mr. Md. Murad Hasan, Mrs. Habibun Nahar, Mr. A K M Enamul Huq Shamim and Mr. Mohilbul Hassan Chowdhury. That the first cabinet of the new government held its meeting on 21.01.2019, even though the first meeting of the 11th parliament was held on 30.01.2019.

3. According to the petitioner, since Article 148 (3) of the Constitution mandates that the persons who are required to take oath before entering an office, shall be deemed to have entered office immediately after such an oath, the said MPs entered the office of MP on the day when they took oath as members of parliament. Therefore, according to him, on the day they took oath, there were about six hundred members of parliament, which is clearly in contradiction to the provisions of the Constitution. It is also contended that by virtue of taking oath, even before the first meeting of the 11th parliament, in particular, when the tenure of the earlier parliament did not expire, said MPs grossly violated the Constitutional provision and as such they cannot remain in office as members of parliament. It is also contended that since the cabinet was formed even before the first meeting of the 11th parliament, the MPs who took oath as ministers also committed gross illegality in violation of the Constitution. Accordingly, it is contended by the petitioner that, a Rule should be issued by this Court in the form of qua-warranto calling upon the said MPs, as to under what capacity are they holding such office of the members of parliament in particular, when they entered office when the previous MPs were also existing in the said office as members of parliament.

4. Since the petitioner in this writ petition has raised a serious constitutional issue, we have had no option but to hear the learned Attorney General before deciding whether we should issue Rule Nisi in this matter. Accordingly, Mr. Mahbubey Alam, learned Attorney General, has made submissions before this Court by referring to various articles of the Constitution. At the out-set, he submits that the petitioner is just a busy-body and he has no genuine interest in filing this writ petition and that he had moved a writ petition earlier, being Writ Petition No. 426 of 2019, raising almost the same issues, even though the said writ petition was moved seeking a Rule of certiorari. However, according to him, since the petitioner could not satisfy a different Bench of this Court, the said petition was rejected as being not pressed.

5. Learned Attorney General submits that it has not been shown or stated in the petition that the said MPs were elected illegally or their election was unlawful or even that they are disqualified for any reason to become members of parliament. Therefore, according to him, in so far as this writ petition is concerned, it has only challenged the oath taking by the said MPs for which the said MPs have got nothing to do as the said ceremony of oath taking is the matter of parliament secretariat. By referring to the special nature of 'oath' being taken by members of parliament, as incorporated in the 3rd Schedule to the Constitution, learned Attorney General submits that the form of oath of members of parliament is quite unique and not similar to the other oaths mentioned in the said third schedule. He submits that the members of parliament do not assume office in reality whenever they take oath, rather the Constitution has created a legal fiction as regards assumption of office by the members of parliament upon taking oath only for the purpose of forming a government or cabinet so that there is no break in the running of the government and governance of the country. According to him, the framers of the Constitution have deliberately incorporated the words 'যে কর্তব্যভার গ্রহন করিতে যাইতেছি' ('the duties upon which I am about to enter') in the oath of MPs.

Distinguishing these very words, as used in the form of oath, from the words used in other oaths under the 3rd schedule, learned Attorney General submits that this very oath clearly indicates that upon taking oath the MPs do not become MPs in reality, rather they fictionally assume office of members of parliament for certain purposes. According to him, it is the mandate of Article 56 of the Constitution that an MP will not assume office in reality until he sits in the parliament and only when the first meeting of the parliament takes place, the MPs elected may assume office in reality. In support of above submissions, Mr. Murad Reza, learned Additional Attorney General, has cited various decisions of our superior Courts, namely case of the **National Board of Revenue vs Abu Saeed Khan, 18 BLC (AD)-116, Abdur Rab Mia vs District Registrar, 4 BLC(AD)-8, Dartic Das Gupta vs. Election Commission, VIII ADC-578 and Dr. Kamal Hussain and others vs Muhammad Sirajul Islam, 21 DLR(SC)-23.**

6. In the course of the hearing, Mr. A.M. Mahbub Uddin, learned advocate appearing for the petitioner, by reiterating the statements in the writ petition, has referred to Article 72(3), Proviso to sub-Article (3) of Article 123 and sub-Article (3) of Article 148 of the Constitution and has repeatedly made prayers for issuance of a Rule Nisi at least for examination of the issues raised by the petitioner.

7. Before deciding on the prayer made by the learned advocate to issue Rule, we thought it was advisable to examine whether the issues raised by the petitioner do in fact deserve any consideration or examination by this Court, in particular when about 300 newly elected MPs would be required to show cause before this Court regarding their capacity of holding office after issuance of such Rule. Therefore, we have decided to give a second thought after examining all relevant provisions of the Constitution before issuance of Rule in this matter.

8. Since learned advocates for the petitioner have repeatedly relied on sub-Article (3) of Article 72, proviso to sub-Article (3) of Article 123 and sub-Article (3) of Article 148, the said provisions of the Constitution are reproduced herein-below for ready reference:

"72. (1)……..

(2)……..

(3) Unless sooner dissolved by the President, Parliament shall stand dissolved on the expiration of the period of five years from the date of its first meeting."

"123. (1)……..

(2)……..

(3) A general election of the members of Parliament shall be held-

(a) in the case of a dissolution by reason of the expiration of its term, within the period of ninety days preceding such dissolution; and

(b) in the case of a dissolution otherwise than by reason of such expiration, within ninety days after such dissolution.

Provided that the persons elected at a general election under sub-clause (a) shall not assume office as members of Parliament except after the expiration of the term referred to therein."

"148. (1)……..

(2)……..

(3) Where under this Constitution a person is required to make an oath before he enters upon an office he shall be deemed to have entered upon the office immediately after he makes the oath."

(Underlines supplied)

9. It appears from sub-Article (3) of Article 72, as quoted above, that unless dissolved before expiration of the tenure, the tenure of the parliament will continue up to the expiration of five years from the date of its first meeting. Admittedly, the first meeting of the 10th Parliament took place on 29.01.2014 and, accordingly, the tenure of the said parliament was supposed to be expired on 28.01.2019. It further appears that, according to the proviso to sub-Article (3) of Article 123, there is a prohibition on the Members of Parliament that they shall not assume office as members of parliament except after expiration of the term of the earlier parliament. Now, the provisions under sub-Article (3) of Article 148 provides that where any person under the Constitution is required to make oath before he enters upon an office, he shall be deemed to have entered upon such office immediately after he takes the oath. Therefore, as suggested by the learned advocates for the petitioner, there is an apparent clash between these provisions in particular in the attending facts and circumstances of this case.

10. Admittedly, the newly elected MPs in the 11th parliamentary election took oath on 03.01.2019 and thereafter the cabinet was formed, even though the tenure of the 10th parliament expired after those incidents, i.e. on 28.01.2019. Therefore, according to the learned advocate, if upon taking oath the MPs elected are deemed to have assumed office of Member of Parliament, they have entered such office even before expiration of the tenure of the 10th Parliament, which is clear violation of the proviso to Article 123(3).

11. To address these suggested clashes between the oath taking and the specific provisions of the Constitution, we need to examine the relevant provisions of the Constitution at length, in particular, to understand the 'deeming clause' as incorporated in sub-Article (3) of Article 148. It has been decided repeatedly by superior Courts of this sub-continent that a 'deeming clause' incorporated in the statute or the Constitution is incorporated by the legislatures to provide a legal fiction in order to provide existence of something for a particular purpose which in fact does not exist in reality. Our late lamented constitutional lawyer Mr. Mahmudul Islam in his well published and circulated book, **"Interpretation of Statutes and Documents, (Mullick Brothers, P-87)",** has stated as follows:

> *"The legislature sometimes creates legal fiction by using words which are called 'deeming clause'. A legal fiction is one which is not an actual reality, but the legislature mandates and the courts accept it to be a reality, though in reality it does not exist. The effect of such deeming clause is that a position which otherwise would not obtain is deemed to obtain under the circumstances."*

12. This paragraph in the said book of Mahmudul Islam has been relied upon by both the parties in the course of arguments. However, none of the parties has referred to the concluding parts thereof wherein he has categorically stated that a 'deeming clause' is incorporated in a particular statute or Constitution for a particular purpose only and such deeming clause cannot be interpreted beyond such purpose. In this regard, he has observed:

> *"The Court has to determine the limits within which and the purposes for which the legislature has created the fiction; the court is to find out the limit of the legal fiction and not to extend the frontier of the legal fiction."*

13. In another part of the same chapter, he has observed:

> *"However, in construing the deeming clause, it should not be extended beyond the purpose for which it is created or beyond the language of the section by which it is created; it cannot be extended by importing another fiction".*

14. The limited purpose of such deeming clauses has also been pointed out in some other renowned textbooks. As for example, the textbook authored by Justice J.P. Singh, **Principles of Statutory Interpretation, 11th Edition (2008), Wada and Nagpur**. By referring to various judgments of the Indian Supreme Court, the author has observed at page -371 as follows:

> *"But although full effect must be given to the legal fiction as already noticed, it should not be extended beyond the purpose for which it is created."*

15. By quoting the observation of Chief Justice S.R. Das of Indian Supreme Court (while he was performing the functions as acting chief justice) in Bengal Immunity Company Limited vs. State of Bihar, author observed:

> *"Legal fictions are created only for some definite purpose and a legal fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field."*

16. Again, in **Radha Kissen Chamaria vs Durga Prashad Chamaria, AIR 1940 PC-167 page-170**, wherein a deeming clause under Section 19(3) of the Bengal Public Demands Recovery Act, 1913, was under consideration of the Privy Council, which provided that a certificate holder shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof, the Privy Council pointed out that the legal fiction created thereby was for a limited purpose of enabling the certificate holder to execute the decree and to satisfy his own claim out of the proceeds of such execution, but he was not in a position of an assignee of the decree so as to acquire all the rights of the original decree holder in the decree.

17. Therefore, it appears from the above examples of cases as well as comments made by the reputed authors on the said cases that a 'deeming clause', as incorporated in any statute or Constitution, has to be interpreted depending on the context for which the same was incorporated in particular as against the purpose for such incorporation and the purpose for use of such deeming clause.

18. To find out the purpose of the 'deeming clause' as incorporated in sub-article (3) of Article 148 of the Constitution of Bangladesh, we need to examine the relevant provisions of the entire Constitution. Part-V of our Constitution has incorporated the provisions relating to the establishment and running of the parliament, i.e. legislature of Bangladesh. According to Article 65, there shall be a parliament for Bangladesh to be known as the House of Nation (জাতীয় সংসদ) whereupon the legislative functions of the State shall be vested. Article 66 has provided the qualifications and disqualifications for the members to be elected to the said house as members of parliament. Article 72 is more relevant for the purpose of this writ petition, in particular sub-articles (2) and (3) of the same. According to sub-article (2) of Article 72, the parliament shall be summoned to meet within 30(thirty) days after the declaration of the results of polling at any general election of members of parliament. Therefore, according to the Constitution, once gazette notification is published by the Election Commission declaring the names of the returned candidates, the parliament has to resume its meeting within thirty days from the date of such publication. Sub-article (3) of Article 72 provides that unless dissolved soon by the President, the parliament shall stand dissolved on the expiry of the five years period from the date of its first meeting. Article 74(1) provides that in the first meeting of the Parliament, it shall elect its Speaker and Deputy Speaker. Though there are many other relevant important provisions under the said chapter,

which are applicable to parliaments and its members, we do not need to discuss them for the purpose of this writ petition.

19. However, it is relevant to examine the provisions regarding formation of the government which are dealt with under Chapter-II of Part-IV of the Constitution. According to Article 55 therein, there shall be a cabinet for Bangladesh having the Prime Minister at its helm, and all executive power of the republic shall be exercised by, or, on the authority of the Prime Minister. Article 56, at the same time, has incorporated provisions as to how the Ministers, State Ministers and Deputy Ministers are appointed as to be determined by the Prime Minister. In this regard, Article 56 (3) is very much relevant for this writ petition. According to this sub-article, it is the President who appoints Prime Minster who shall be a Member of Parliament who, according to the President, commands the support of the majority of the members of Parliament. Therefore, in the present scenario, when the election to the 11th parliament was held and the returned candidates were declared, it was incumbent upon the Hon'ble President of Bangladesh to appoint a Prime Minister first, who shall be a Member of Parliament being returned in the said election, as elected candidate, and who should appear to the President as commanding the support of the majority members who were elected in the said election. Therefore, when an election to national parliament takes place and returned candidates are declared, the framers of the Constitution have incorporated this provision, namely sub-article (3) of Article 56, for appointment of a member of parliament as Prime Minister, so that no break takes place in the continuity of the government. This provision has been incorporated so that even if the parliament does not sit in its first meeting, there cannot be any vacuum in the running of the governance and for such continuity of the government, the President shall appoint the majority leader of the new parliament as Prime Minister, who then shall from his or her cabinet according to her desire in accordance with the relevant provisions of the Constitution. Therefore, it appears that though there may be a break between one parliament and another parliament, the continuity of the government cannot have any break, and even if the Prime Minister becomes disqualified to continue as Prime Minister, he or she will still continue under Article 57 unless and until the next Prime Minister takes upon the office. The tenure of the Minister is also the same as provided by Article 58, in that he/she will also continue to hold office until his or her successor enters upon such office. Therefore, it appears from this chapter of the Constitution, dealing with the executive branch of the State, that the government cannot have any break in its continuity and the framers of the Constitution have nicely balanced different Articles of the Constitution to provide such continuity of the government.

20. Now, the provisions dealing with the election are incorporated under Part -VII of the Constitution wherein, although all provisions are not relevant for the purpose of this writ petition, sub-article (3) of Article 123 is relevant. It appears from the said provisions that in case of dissolution of parliament by expiration of its tenure, the general election of members of Parliament shall be held within a period of 90 days preceding such dissolution and if such dissolution of parliament takes place for any other reason, such election shall be held within 90 days after such dissolution. Proviso to sub-article (3) provides that such elected members of the parliament shall not assume office as members of parliament except after the expiration

of the term referred to in Clause-(a) of sub-article (3). This means that, until the five years term has expired from the first meeting of the last parliament, the members of new parliament cannot assume office in reality. However, this provision has to be read with the provisions, in particular the 'deeming clause', as incorporated in Article 148 as quoted above.

21. It appears from Article 148 that it has been incorporated under a different part of the Constitution, namely Part-XI, under the heading 'Miscellaneous'. This article under sub-article (1) provides that the persons elected or appointed to offices mentioned in third schedule shall take oath as mentioned therein before entering upon such office. Sub-article (2) provides that under this Constitution when oath is required to be taken by any such person before entering such office, such oath may be administered by such person or at such place as may be designated in the Constitution. Sub-article (2A), as incorporated by the 14th amendment to the Constitution, provides that such taking of oath or administering of oath must be done within three days from publication of the official gazette of results of election, by the election commission and an additional three days may be allotted to administer such oath to the members of the parliament, by the Chief Election Commissioner, if for any reason the person designated in the Constitution does not administer oath. Sub-article (3) of this Article 148, which is the crux of all disputes in this writ petition, has provided a 'deeming clause'. According to this provision, where a person is required by the Constitution to make an oath before entering upon any office, he shall be deemed to have entered upon such office immediately after he takes the oath. Therefore, it appears that, the framers of the Constitution in one place of the Constitution has provided that the MPs shall not assume office before expiration of the tenure of the last parliament, in another place it has provided that an MP shall be deemed to have assumed such office once he takes oath even before the first meeting of parliament or even before dissolution of the last parliament. As stated above, there is a latent purpose in the Constitution for incorporating this deeming provision which is the continuity of the government or the executives. This purpose become more clear when we see the prescribed form of oath to be taken by the MPs as incorporated in the 3rd Schedule to the Constitution. Unlike other oaths therein, the MPs take oath to discharge their duties upon which they do not enter immediately, rather they are about to enter. Even it is stated in the petition by the writ petitioner himself under paragraph 4 that though the first meeting of the 10th parliament was held on 29.01.2014, the cabinet was formed before the said meeting, i.e. on 12.01.2014, and the MPs took oath even before i.e. on 09.01.2014. This scenario will be found in respect of other parliamentary elections of Bangladesh as well.

22. Once the MPs are declared elected or returned by the Election Commission by gazette, it becomes necessary for them to take oath and this necessity arises because of the relevant provisions of the Constitution in order to form a new government. This intention of the Legislature is very much clear in sub-article (3) of Article 56 of the Constitution whereby the President is required to appoint a newly elected MP, who commands majority support of the members of parliament, as Prime Minister of the country. Therefore, for such appointment of an MP as Prime Minister, the first meeting of the parliament is not necessary to take place. Rather, it is the discretion of the Hon'ble President to appoint a member of parliament who, according to him, commands the majority support of newly elected members

of parliament. The exact same thing has happened in the 11th Parliamentary Election and the incidents unfolded thereafter. When the MPs took oath on 03.01.2019, on the same day the President realized that Sheikh Hasina, the newly elected MP in the said election, was commanding the majority support of the elected MPs and for such satisfaction of the president under the Constitution, he is not required to wait until the first meeting of parliament. This provision in the Constitution has been incorporated, amongst others, for the sake of continuity of the government in the best interest of democracy. Therefore, after appointing Prime Minister on 03.01.2019, the Prime Minister determined as to who would be the Ministers, State Ministers and Deputy Ministers in her cabinet and, accordingly, such MPs and some non-MPs were also appointed as Ministers, State Ministers and Deputy Ministers by the President in accordance with the relevant provisions of the Constitution. As discussed above, this 'deeming clause' has been incorporated in sub article (3) of Article 148 just to facilitate such working and continuity of the government. Though, upon taking oath, the MPs in reality have not assumed office of members of parliament, yet they have assumed office by way of legal fiction created by the Constitution and that legal fiction must be interpreted by this Court limiting the same to be used for the said purpose only. It is apparent from the examination of the relevant provisions of the Constitution as mentioned above that our legislature has deliberately created this legal fiction so that the next executive government can be formed and appointed by the President. This intention of the legislature has been made clear by proviso to sub article (3) of Article 123 wherein it has been provided that such MPs shall not assume office as members of parliament except after the expiration of the term of the previous parliament. This means that, the MPs who took oath even before the first meeting of the parliament shall not in fact or in reality assume such office of members of parliament before expiration of the tenure of the last parliament.

23. Admittedly, the MPs elected in the 11th parliamentary election did not sit in the first meeting of the parliament before expiration of the tenure of the last parliament. They sat in the first meeting of the parliament on 30.01.2019 i.e. two days after the expiration of the tenure of the 10th parliament. Therefore, even though by way of legal fiction they have in the meantime assumed office of members of parliament, in reality they have not assumed such office until and unless the first meeting of the 11th parliament had taken place. This being the position, we do not find any substance in the submissions of the learned advocates for the petitioner that on the day the MPs in the 11th parliament took oath, they assumed the office of MP and as such on that day there were more than 600 MPs in the parliament. This contention is totally misconceived and bereft of real intent of the concerned Articles of the Constitution. Therefore, for such misconceived concept or idea, we are not inclined to issue any Rule in this writ petition. At the same time, since the idea is a misconceived one and bereft of any logic, we are also not inclined to issue any certificate under Article 103 of the Constitution as prayed for by the learned advocates for the petitioner.

24. Accordingly, this application under Article 102(2)(a)(ii) and (b)(ii)of the Constitution of the People's Republic of Bangladesh is rejected in summary.

19 SCOB [2024] HCD 76

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 2191 OF 2022

Ali Imam
... Petitioner
Vs.
The Judge, Artha Rin Adalat, Chattogram and others
... Respondents

Mr. A.B.M. Altaf Hossain, Senior Advocate with
Mr. Md. Ziaul Haque,
Mr. Syed Misbahul Anwar and
Mr. Md. Sohrab Sarker, Advocates
.....For the petitioner

Mr. Ahsanul Karim, Senior Advocate
With
Mr. Aminul Haque and
Mr. Tanveer Hossain Khan, Advocates
….. For the respondent No. 2

Heard on 28.7.2022 and Judgment on 04.8.2022

Present:
Mr. Justice J.B.M. Hassan
And
Mr. Justice Razik-Al-Jalil

Editors' Note:
In the instant writ petition, the petitioner came before the Court when on the application under section 7(c) of the Bangladesh Passport Order, 1973 read with section 57 of the Artha Rin Adalat Ain, 2003 of the respondent no. 2, the Artha Rin Adalat passed an order against the plaintiff directing him to submit the passport and restraining him from going out of the country. The petitioner claimed that as a mere mortgagor he cannot be held liable and there is no provision relating to deposit of passport, curtailing freedom of movement in the Artha Rin Adalat Ain 2003. The High Court Division mentioning the case reported in 22 BLC (AD) 53 held that under section 6 (5) of the Act 2003, the plaintiff would also be liable with the same responsibilities as principle borrower. Moreover, the Court held that under article 36 of the Constitution freedom of movement is subject to the supervision by the court. The Court also held that under section 57 of the Act of 2003, the Adalat can pass any supplementary order to ensure justice.

Key Words:
Section 7(c) of the Bangladesh Passport Order; Sections 6(5), 34(1) and 57 of the Artha Rin Adalat Ain, 2003; Article 36 of the Constitution; Seizure of the passports, Freedom of movement

6(5) and 34(1) of the Artha Rin Adalat Ain, 2003:
Thus, the apex Court held that three categories of persons including mortgagor shall be liable for the decretal dues jointly and severally. Although the mortgagor defendants comes after principal borrower but this observation does not help the petitioner to escape from the liabilities of decretal dues, if any, inasmuch as according to section 6(5) of the Act, 2003 he will be one of the judgment debtors and responsibility are

equal/same with the principal borrower subject to 2nd proviso to section 6(5) of the Act, 2003. Therefore, on failure to adjust the decretal dues by the mortgaged property, the petitioner shall have to face consequence under section 34 (1) of the Act, 2003 by way of civil imprisonment alongwith principal borrower. ...(Para-13)

Article 36 of the Constitution:
On a plain reading of the aforesaid provisions, it is apparent that right of a citizen to move freely throughout the country as well as to leave and re-enter Bangladesh is guaranteed by this provision. But it is conditional i.e subject to any reasonable restriction to be imposed by law in the public interest. ...(Para-15)

Article 36 of the Constitution:
Our apex Court precisely observed that freedom of movement envisage in Article 36 is not absolute and it shall be subjected to supervision by the Court. At the same time, the apex Court required the public interest as well as the provision of law, for imposing condition in order to interfere with the right to freedom of movement. ...(Para-19

6(5) and 34(1) of the Artha Rin Adalat Ain, 2003:
Section 6(5) of the Act, 2003 incorporates provisions to the effect that in passing the decree, the mortgagor shall be liable for the decretal dues jointly and severally along with the principal borrower and 3rd party guarantor. Thereby, he would become the judgment debtor and execution case shall proceed against all the judgment debtors. Section 34(1) of the Act, 2003 authorises the Adalat to award civil imprisonment in the execution proceeding against all the judgment debtors subject to conditions incorporated in section 34 of the Act in order to compel the judgment debtors to repay the decretal dues. Therefore, these are the provisions to the Adalat to assess the circumstances as to how the decree, if passed, would be realized from the judgment debtors. ...(Para-23, 24)

57 of the Artha Rin Adalat Ain, 2003:
Section 57 of the Act, 2003, in addition, authorizes the Adalat to pass any supplementary order to secure ends of justice, on consideration of the facts and circumstances under the proceedings. Therefore, we are of the view that section 57 is the appropriate provision incorporated in the statute (Act, 2003) authorizing the Adalat to pass the necessary order in order to ensure realization of the decretal dues. As such, in the public interest to ensure realization of public money, the Artha Rin Adalat exercised the statutory authority under section 57 of the Act, 2003 and by the impugned order directed the petitioner to deposit his passport. Hence, Article 36 of the Constitution has not been violated in passing the impugned order by the Adalat.
...(Para-25)

57 of the Artha Rin Adalat Ain, 2003 read with Article 36 of the Constitution:
Since the Banks are the custodian of the public money and the plaintiff-Bank is in the run of realisation of public money from the loan defaulters, of course the anxiety of the Bank attracts the public interest as envisaged under Article 36 of the Constitution. Therefore, considering all these aspects, the Adalat rightly passed the impugned order in the public interest having legal sanction under section 57 of the Act which does not call for any interference. ...(Para-29)

JUDGMENT

J.B.M. Hassan, J:

1. By filing an application under Article 102 of the Constitution, the petitioner obtained the Rule Nisi in the following terms:

> "Let a Rule Nisi be issued calling upon the respondents to show cause as to why the impugned order No. 92 dated 25.1.2022 passed by the learned Judge, Artha Rin Adalat, Chattogram (respondent No. 1) in Artha Rin Suit No. 21 of 2012 containing direction to submit the passport and restraining to go out of the country (Annexure-E to the writ petition) should not be declared to have been passed without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper."

2. Relevant facts for disposal of the Rule Nisi are that the respondent No. 2, International Finance Investment & Commerce Bank Limited (IFIC), as plaintiff instituted Artha Rin Suit No. 21 of 2012 before the Artha Rin Adalat, Chattogram against the petitioner and others for realisation of loan amounting to Tk.61,03,31,623.97/- with upto date interest. The petitioner alongwith others as defendants have been contesting the suit by filing written statements.

3. In the suit, the plaintiff-bank filed an application on 25.11.2019 under section 7(c) of the Bangladesh Passport Order, 1973 read with section 57 of the Artha Rin Adalat Ain, 2003 ("**the Act of 2003**") praying for necessary order for seizure of the passports of the defendant Nos. 2-6 (including petitioner).

4. The petitioner along with others filed written objection in the said application. After hearing the application, the Artha Rin Adalat, Chattogram (**"the Adalat"**) by the impugned order dated 25.1.2022 allowed the application and thereby directed the defendants Nos. 2-6 including the petitioner to deposit their respective passports by 31.1.2022 before the Court. The Adalat also communicated the order to the Additional Inspector General of Police, Special Branch so that the defendants including the petitioner cannot leave the country within 31.1.2022. Challenging the said order the defendant No. 4 filed this writ petition and obtained the present Rule Nisi.

5. While the petitioner moved the writ petition, this Court declined to entertain the writ petition for not complying with the Court's order dated 25.1.2022 by depositing the passport within 31.1.2022. Thereafter the petitioner deposited his passport on 01.03.2022 and by filing affidavit the petitioner moved this writ petition.

6. Mr. A.B.M. Altaf Hossain, learned Senior Advocate with Mr. Md. Ziaul Haque, Mr. Sayed Misbahul Anwar and Mr. Md. Sohrab Sarker, learned Advocates appear on behalf of the petitioner while Mr. Ahsanul Karim, learned Senior Advocate with Mr. Aminul Haque and Tanveer Hossain Khan, learned Advocates appear on behalf of respondent No. 2-Bank.

7. Learned Advocate for the petitioner submits as follows:

(i) The petitioner is a mere mortgagor relating to the loan in question and as per 1st proviso to section 6(5) of the Act, 2003 his liabilities stand after exhausting the process against the principal borrower. Therefore, the suit which is still pending and

the petitioner stands in a far away from the liability in question, the Artha Rin Adalat erred in law directing the petitioner to submit his passport. In support of his submission, Mr. Altaf refers to the case of Sekendar (Md) and another vs. Janata Bank Ltd. and others reported in 22 BLC (AD) 53;

(ii) Article 36 of the Constitution guaranteed freedom of movement to the petitioner giving the right to move freely to leave and re-enter Bangladesh. But curtailing this right, the Artha Rin Adalat passed the impugned order directing to deposit passport;

(iii) Although regarding freedom of movement Article 36 of the Constitution incorporates a condition as to reasonable restriction imposed by law in the public interest. But there is no such law so far in the Artha Rin Adalat Act, 2003 incorporating provisions requiring the defendants to deposit passport with the Adalat and as such, the impugned order curtailing petitioner's fundamental right as to freedom of movement, has been passed without any backing of law. In support of his submission learned Advocate has referred to the case of Durnity Daman Commission vs. GB Hossain and others, reported in 74 DLR (AD) 1, the case of ICICI BANK LTD. Vs. KAPIL PURI & ORS. reported in 2017 SCC (Delhi) HCD 7377 and the case of State Bank of India v. Prafulchandra v. Patel & Ors. reported in AIR 2011 (Gujrat) 81.

8. In contrast, Mr. Ahsanul Karim, learned Senior Advocate for the respondent No. 2-Bank contends as follows:-

(a) Section 6(5) of the Act, 2003 provides that the principal borrower, 3rd party mortgagor and 3rd party guarantor involved in the loan in question, shall be made defendants in the suit and all of them shall be liable jointly and severally and the decree, if any, shall be operative against all of them jointly and severally. Therefore, only on plea of mortgagor the petitioner cannot escape from the liability and after passing the decree he will become the judgment-debtor.

(b) Section 34(1) of the Act, 2003 provides that in order to compel the judgment-debtor to adjust the decretal dues the Artha Rin Adalat is empowered to award civil imprisonment to the judgment-debtor.

(c) Considering the facts and circumstances of the case, the Artha Rin Adalat being satisfied as to the allegations brought by the plaintiff bank that the defendant shall leave the country in order to avoid the decree, if any, as a preventive measure the Artha Rin Adalat directed the petitioner and other defendants to deposit passport.

(d) The Adalat has the authority under section 57 of the Act, 2003 to pass any supplementary order required for ends of justice intended under this Act and to prevent the misuse of the Court proceedings. Therefore, having the statutory provisions in the Artha Rin Adalat Ain and considering the facts and circumstances of the case, the Adalat passed the impugned order which does not call for any interference by this Court.

9. Regarding the cases cited by the petitioner, Mr. Ahsanul Karim further contends that in spite of decision reported in 22 BLC (AD) 53, the petitioner stands as a judgment-debtor although after the principal borrower and so the body warrant may come upon him at any stage which he cannot deny. The Indian cases cited by the petitioner shall not be applicable in this particular case inasmuch as the language of the Constitution are not the same and the impugned order was passed for the public interest in order to protect the public money. Further, the case reported in 74 DLR (AD) 1 as cited by the petitioner does not debar the Adalat to pass order directing to submit the passport.

10. We have gone through the writ petition, affidavit-in-opposition filed by the respondent-bank, cited cases and other materials on record.

11. The respondent-Bank provided credit facilities in the year 2005 and 2006 in favour of the defendant No. 1, a proprietary firm owned by the defendant No. 2. Eventually, the liabilities having not been adjusted, the Bank instituted the Artha Rin Suit No. 21 of 2012 on 22.3.2012 for recovery of the aforesaid loan amounting to Tk.61,03,31,623.97 with interest as on 23.6.2011. On the basis of the plaintiff's application containing allegations that the defendants including the petitioner are taking attempt to leave Bangladesh for foreign country forgood, the Adalat assigning details reasons, passed the impugned order which led the petitioner to file this writ petition.

12. To appreciate the submissions of the learned Advocate for the petitioner, we have gone through the cited decision reported in 22 BLC (AD) 53 and in paragraph 19 of the said judgment, the apex Court held as under:

> *"19. The provisions of the Code of Civil Procedure will be applicable in filing and adjudicating upon a suit under the Artha Rin Adalat Ain, if' those provisions are not inconsistent with the provisions of the Ain. In filing a suit against the principal debtor, the financial institution may implead the third party mortgagor or the third party guarantor, if he is involved in the loan. These are three persons against whom a suit of the nature can be filed seeking relief. There is no scope under the scheme of the Ain to implead in the category, of defendants other than those mentioned above or any third party can add as defendant. The judgment, order or decree of the Artha Rin Adalat can be jointly and severally executable. The execution proceeding shall be proceeded against all judgment debtors subject to the condition that the Adalat shall execute the decree against the principal debtor and subsequently, against the third party mortgagor or the third party guarantor for the recovery of the loan, as the case may be. There is a second proviso providing that if the third party mortgagor or third party guarantor repays the total amount of dues, the decree can be transferred in their favour and that they also can realize the total amount against the principal debtor.*"

13. Thus, the apex Court held that three categories of persons including mortgagor shall be liable for the decretal dues jointly and severally. Although the mortgagor defendants comes after principal borrower but this observation does not help the petitioner to escape from the liabilities of decretal dues, if any, inasmuch as according to section 6(5) of the Act, 2003 he will be one of the judgment debtors and responsibility are equal/same with the principal borrower subject to 2nd proviso to section 6(5) of the Act, 2003. Therefore, on failure to adjust the decretal dues by the mortgaged property, the petitioner shall have to face consequence under section 34 (1) of the Act, 2003 by way of civil imprisonment alongwith principal borrower.

14. The whole contention advanced by the learned Advocate for the petitioner is centering Article 36 of the Constitution and so to appreciate the issues in question, let us first read the article 36 which runs as follows:

> "*36. <u>Subject to any reasonable restrictions imposed by law in the public interest</u>, every citizen shall have the right to move freely throughout Bangladesh, to reside and settle in any place therein and to leave and re-enter Bangladesh."*
>
> (Underlined)

15. On a plain reading of the aforesaid provisions, it is apparent that right of a citizen to move freely throughout the country as well as to leave and re-enter Bangladesh is guaranteed by this provision. But it is conditional i.e subject to any reasonable restriction to be imposed by law in the public interest.

16. Referring to this condition as to reasonable restrictions by the law, Mr. Altaf submits that the Act, 2003 does not provide any such provision authorizing the Adalat requiring the defendants to deposit passport and as such, having no enacted law, the right of petitioner guaranteed under Article 36 of the Constitution as to leaving the country and to re-enter Bangladesh cannot be interfered by taking his passport.

17. We have examined all the cited cases as referred to by the petitioner relating to Article 36 of the Constitution.

18. Besides the Indian cases, we find that in 74 DLR (AD) 1, our apex Court has discussed the issue and applicability of Article 36 with regard to citizens of the country. In particular, in the aforesaid case (74 DLR (AD) 1), the apex Court held as under:

> "*19. All rights in an organized society are relative rather than absolute. With respect to the ambit of reasonable restrictions, the legislative view of what constitute reasonable restriction shall not be conclusive and final and that it shall be subjected to supervision by the Court. It is the duty of the Court to see whether the individual crosses the "Lakshman Rekha" that is carved out by law is dealt appropriately (Dharmendra Kirthal V. State of U.P.,:AIR 2013 SC 2569). Most basic rule while testing whether a law falls within the ambit of reasonable restriction is that no general or abstract rule shall be adopted for the application of all cases. Reasonable implies intelligent care and the deliberation. The legislation which arbitrarily or expressively invests the right cannot be set to contend the quality of reasonableness and unless it strikes a proper balance between the freedom guarantee. The restrictions imposed shall have a direct or proximate nexus with the object which the legislature seeks to achieve and the restriction so imposed must not be excessive of the said object.*
>
> *20. Freedom of movement as envisaged in our Constitution is not absolute meaning thereby that the same is subject to certain limitation. Despite the long standing ideal of free movement, it has in practice always been subject to state restrictions. The right to leave one's country has never been considered as absolute right. The requirement of restriction to be reasonable means that the High Court Division has the power to Judge the reasonableness of restrictions in question. The reasonableness demands proper balancing of the fundamental rights of the people. It is the judiciary which has to finally judge the reasonableness of restriction. The restriction can be imposed by law only not an executive order (Chintanmon Rao V. State of Madhya Pradesh: AIR 1951 SC 118).*
>
> *24. The provision provided in Article 36 safeguard the right to go abroad against executive interference which is not supported by law; and law here means 'inacted law.' No person can be deprived of his right to go abroad unless there is a law made by the State for so depriving him and the deprivation is effected strictly in accordance with law. In the exercise of his rights and freedom, everyone shall be subject only to such limitations as are determined by law. In an organized society, there can be no absolute liberty without social control. Liberty is not unbridled licence. Some restrictions on freedom of movement are legitimate if imposed for limited purposes in*

a fair and non-discriminatory manner. Limitations on the freedom is justified but the limits must generally be reasonable, prescribed by law, and demonstrably justified in a free and democratic society. It was what Edmund Burke called "regulated Freedom'. Freedoms if absolute would always be detrimental to the smooth functioning of the society as the individual interests of all individuals would be priorised. The State can truncate the enjoyment of the freedoms through law. The protection of the collective is the bone marrow and that is why liberty in a civilized society cannot be absolute. There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The language of Article 36, clearly indicates that the protection it secures is limited one. In no case may a person be arbitrarily deprived of the right to enter his or her own country, and that there are few, if any, circumstances in which deprivation of the right to enter a person's own country could be considered reasonable. Legislation which arbitrarily or excessively invades the right cannot be a proper balance between the freedom guaranteed and the general welfare.

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25. With the discussion made above, it is observed:-
1. The fundamental right guaranteed under Article 36 of the Constitution is non-absolute right. The right to leave one's country has therefore never been considered an absolute right. The right may be restricted in certain circumstances.
2. Article 36 of the Constitution permits imposition of restrictions. However, such restrictions must be by way of the law enacted and must be reasonably needed in the public interest.
3. Without backing of law imposition of restriction on the freedom of movement by an executive order will be unconstitutional.
4. The legislative view of what constitute reasonable restriction shall not be conclusive and final and that it shall be subjected to supervision by the Court.
5. A restriction in order to be referred to as reasonable shall not be arbitrary and shall not be beyond what is required in the interest of the public. The restriction imposed shall have a direct or proximate nexus with the object sought to be achieved by the law.
6. Freedoms if absolute would always be detrimental to smooth functioning of the society. Reasonableness demands proper balancing.
7. The right to leave the country and to possess a passport may be restricted, most notably if the person's presence is required due to their having been charged with a criminal offence. However, merely because a person is involved in a criminal case, he is not denude of his fundamental rights.
8. Restriction may be imposed on travel in order to prevent exit from the country by persons who leave quickly to avoid due process of law. However, this would be subject to confirmation by the appropriate Court within a period of 3 working days."

(Underlines Supplied)

19. In the cited case there were 5 (five) writ petitions which were filed challenging an executive order passed by the Anti Corruption Commission. However, from the above mentioned paragraphs, our apex Court precisely observed that freedom of movement envisage in Article 36 is not absolute and it shall be subjected to supervision by the Court. At the same time, the apex Court required the public interest as well as the provision of law, for imposing condition in order to interfere with the right to freedom of movement.

20. Referring to this case, Mr. Altaf's submission is that within the four corners of the Act, 2003 there is no provision authorising the Adalat to require the defendants to deposit passport curtailing the right of movement to leave and re-enter the country.

21. We have to keep in mind that the impugned order is not an executive order. In disposing of the suit, the Artha Rin Adalat passed the said judicial order. Therefore, question arises whether the Adalat has the authority under the Act, 2003 to pass the impugned order. In other words, whether there is any provision in the Act, 2003 for interfering with the movement of petitioner requesting him to deposit passport.

22. To answer the question, we have gone through the relevant provisions of sections 6(5), 34(1) and 57 of the Act, 2003 which run as follows:

"৬(৫) আর্থিক প্রতিষ্ঠান মূল ঋণগ্রহীতার (Principal debtor) বিরুদ্ধে মামলা দায়ের করার সময়, তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) বা তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) ঋণের সহিত সংশ্লিষ্ট থাকিলে, উহাদিগকে বিবাদী পক্ষ করিবে, এবং আদালত কর্তৃক প্রদত্ত রায়, আদেশ বা ডিক্রী সকল বিবাদীর বিরুদ্ধে যৌথভাবে ও পৃথক পৃথক ভাবে (Jointly and severally) কার্যকর হইবে এবং ডিক্রী জারীর মামলা সকল বিবাদী-দায়িকের বিরুদ্ধে একইসাথে পরিচালিত হইবে:

"তবে শর্ত থাকে যে, ডিক্রী জারীর মাধ্যমে দাবী আদায় হওয়ার ক্ষেত্রে আদালত প্রথমে মূল ঋণগ্রহীতা-বিবাদীর এবং অতঃপর যথাক্রমে তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) ও তৃতীয় পক্ষ গ্যারান্টর (Third Party guarantor) এর সম্পত্তি যতদূর সম্ভব আকৃষ্ট করিবে :,,

আরো শর্তথাকে যে, বাদীর অনুকূলে প্রদত্ত ডিক্রীর দাবী তৃতীয় পক্ষ বন্ধকদাতা (Third party mortgagor) অথবা তৃতীয় পক্ষ গ্যারান্টর (Third party guarantor) পরিশোধ করিয়া থাকিলে উক্ত ডিক্রী যথাক্রমে তাহাদের অনুকূলে স্থানান্তরিত হইবে এবং তাহারা মূল ঋণগ্রহীতার (Principal debtor) বিরুদ্ধে উহা প্রয়োগ বা জারী করিতে পারিবেন।

৩৪। (১) উপ-ধারা (১২) এর বিধান সাপেক্ষে, অর্থঋণ আদালত, ডিক্রীদার কর্তৃক দাখিলকৃত দরখাস্তের পরিপ্রেক্ষিতে, ডিক্রীর টাকা পরিশোধে বাধ্য করিবার প্রয়াস হিসাবে, দায়িককে ৬ (ছয়) মাস পর্যন্ত দেওয়ানী কারাগারে আটক রাখিতে পারিবে।"

৫৭। এই আইনের অধীন অভিপ্রেত ন্যায় বিচারের উদ্দেশ্য সাধনকল্পে অথবা আদালতের কার্যক্রমের অপব্যবহার রোধকল্পে প্রয়োজনীয় যে কোন পরিপূরক আদেশ প্রদানে আদালতের সহজাত ক্ষমতা কোন কিছু দ্বারা সীমিত করা হইয়াছে বলিয়া গণ্য হইবে না।"

23. Section 6(5) of the Act, 2003 incorporates provisions to the effect that in passing the decree, the mortgagor shall be liable for the decretal dues jointly and severally along with the principal borrower and 3rd party guarantor. Thereby, he would become the judgment debtor and execution case shall proceed against all the judgment debtors.

24. Section 34(1) of the Act, 2003 authorises the Adalat to award civil imprisonment in the execution proceeding against all the judgment debtors subject to conditions incorporated in section 34 of the Act in order to compel the judgment debtors to repay the decretal dues. Therefore, these are the provisions to the Adalat to assess the circumstances as to how the decree, if passed, would be realized from the judgment debtors.

25. Section 57 of the Act, 2003, in addition, authorizes the Adalat to pass any supplementary order to secure ends of justice, on consideration of the facts and circumstances under the proceedings. Therefore, we are of the view that section 57 is the appropriate provision incorporated in the statute (Act, 2003) authorizing the Adalat to pass the necessary order in order to ensure realization of the decretal dues. As such, in the public interest to ensure realization of public money, the Artha Rin Adalat exercised the statutory authority

under section 57 of the Act, 2003 and by the impugned order directed the petitioner to deposit his passport. Hence, Article 36 of the Constitution has not been violated in passing the impugned order by the Adalat.

26. Further, analysing the Article 36 of the Constitution, in 74 DLR (AD) 1, our apex Court held that by the Court process, in other words, under the supervision of the Court, any order curtailing the movement of the citizen can be passed because it is not the absolute right of citizen to free movement.

27. In this particular case, we find that the liability was created in the year 2005 and 2006 for a huge amount of Tk.61,03,31,623.97 as on 23.06.2011.The suit was instituted in the year 2012 and by this time a huge interest has been accrued with the liabilities which may not be realized by the mortgaged property and thereby, the body warrant may come against the Judgment debtors including the petitioner. Moreover, in passing the order the Adalat took into consideration about the conduct and present position of the defendants as well as pendency of a good number of cases against the defendants both civil and criminal.

28. In course of hearing it has also been revealed that the defendant No.2 (father of petitioner) has left the country long before. Further, although the present petitioner has deposited the passport, as this court declined to hear the writ motion before depositing passport as per Court's order.But the other defendants did not deposit their passports so long. Considering all these facts and circumstances and the plaintiff's anxiety as to the allegation that the defendants shall leave the country to frustrate the decree, the Adalat, having legal sanction under section 57 of the Act, 2003, directed the defendants to submit their respective passports before the Court. Moreover, we are observing that it is a common phenomena in the present days, that a good number of Bank defaulters have been leaving the country siphoning public money from the public Bank.

29. Since the Banks are the custodian of the public money and the plaintiff-Bank is in the run of realisation of public money from the loan defaulters, of course the anxiety of the Bank attracts the public interest as envisaged under Article 36 of the Constitution. Therefore, considering all these aspects, the Adalat rightly passed the impugned order in the public interest having legal sanction under section 57 of the Act which does not call for any interference.

30. Although in the cited Indian cases i.e 2017 SCC (Delhi) HCD 7377 and AIR 2011 (Gujrat) 81, the High Court Division of Delhi and Gujrat did not encourage the interference in free movement of bank-defaulters considering article 21 of the Indian Constitution. But those cases are not applicable in this particular case because of the context of our society as mentioned above that the Bank defaulters are fleeing from the country siphoning public money in abroad and that our Constitution incorporates right to free movement of the citizen keeping in mind about the condition i.e. subject to imposition of reasonable restriction in the public interest. Therefore, the cited cases as referred to by the petitioner are not applicable in this particular case.

31. In view of above discussions, we do not find any merit in the Rule Nisi.

32. In the result, the Rule Nisi is discharged without any order as to costs.

33. Since it is an old suit of 2012, the Adalat is directed to dispose of the suit expeditiously.

34. Communicate a copy of the judgment and order to the respondents at once.

19 SCOB [2023] HCD 85

HIGH COURT DIVISION
First Appeal Number 111 of 1979

Ilias Mondal being dead substituted by his legal heirs Sufia Bewa and others

Vs.

Hazrat Ali being dead his heirs Md. Aminul Islam and others

Mr. Md. Shafiul Alam, Advocate
... for appellants number 1(d)-1(h)

Mr. K B Rumy, Advocate
... for appellant number 3

Mr. Munsur Habib with Ms. Shimul Sultana, Advocates
… for respondents 4, 5 (a)-(b) and 9

Hearing concluded on 16.05.2022
Judgment delivered on 29.05.2022

Present:
Mr. Justice Md. Ruhul Quddus
And
Mr. Justice Kazi Ebadoth Hossain

Editors' Note:
In this suit the High Court Division analyzing the evidence on record, not only disbelieved the plaintiffs' claim but also found that the defendants, except defendant number 6 Haripada Mahato, had no lawful title over the suit land. Court then came to the conclusion that the rightful owner of the suit property was unavailable for a long period. It then directed to the Deputy Commissioner of Rajshahi to commence an inquiry into whether any rightful owner of the suit property is available or not. If no rightful owner is available, the Court ordered, the suit land except the share of defendant number 6 (Haripada Mahato) would vest in the Government.

Key Words:
Subsection (3) of Section 92 of the State Acquisition and Tenancy Act, 1950; Rule 6, Subrules (2) and (3) of the Tenancy Rules, 1954; Article 143 (1) (c) of the Constitution; Hindu law of inheritance; exchange deed; paper transaction; chance litigants;

According to the Hindu law, there is no scope to inherit property by a daughter when a son is alive. ...(Para 36)

A plaintiff's failure never means that the defendant is the lawful owner of the subject matter:
On a contradictory claim of title on land between the plaintiff and defendant, if the plaintiff fails, everyone thinks that the claimant-defendant is the owner of the suit land. It is absolutely a wrong notion and misconceived social psychology. A plaintiff's failure never means that the defendant is the lawful owner of the subject matter. In a case like the present one where the defendants, besides resisting the plaintiffs' claim, fail to establish their lawful title over the suit land, they should not be allowed to continue with the possession, if any, over the same. ...(Para 39)

Subsection (3) of Section 92 of the State Acquisition and Tenancy Act, 1950 read with rule 6, Subrules (2) and (3) of the Tenancy Rules, 1954 and article 143 (1) (c) of the Constitution:

It prima-facie appears that the rightful owner of the suit property is unavailable for a long period. Under the circumstances, the Deputy Commissioner of Rajshahi is to commence an inquiry into whether any rightful owner of the suit property is available or not. The Deputy Commissioner will also follow the procedure as laid down in Subsection (3) of Section 92 of the State Acquisition and Tenancy Act, 1950 read with rule 6, Subrules (2) and (3) of the Tenancy Rules, 1954. If no rightful owner is available, the suit land except the share of defendant number 6 (Haripada Mahato) to the extent of 10 *kathas* in plot number 133 would vest in the Government under Article 143 (1) (c) of the Constitution read with Section 92 (3) of the State Acquisition and Tenancy Act. ...(Para 41)

JUDGMENT

Md. Ruhul Quddus, J:

1. This first appeal is directed against judgment and decree dated 14.05.1979 passed by the Sub-ordinate Judge (now Joint District Judge), Rajshahi in Other Class Suit Number 71 of 1994 dismissing the suit.

2. The plaintiffs' case in brief was that the land as described in the schedule of the plaint belonged to Gunjari Bewa, who got it from her father Bandhu Mahato. The plaintiffs were residents of West Dinajpur, West Bengal, India and had some land properties there. They had executed and registered an exchange deed in favour of Gunjari Bewa on 17.08.1962 exchanging their property in India. Gunjari Bewa had also executed a power of attorney in favour of plaintiff number 3 Ilias Mondal for execution and registration of a deed of exchange conveying the suit land in favour of the plaintiffs on the same date. The plaintiffs got the said power of attorney reauthenticated and revalidated at Rangpur in Miscellaneous Case Number 743 of 1962-63 on 11.10.1962.

3. It was further stated in the plaint that the suit land originally belonged to Bandhu Mahato, who died leaving behind his widow Kulai Mahatoni. Bandhu Mahato was the second husband of Kulai Mahatoni and Gunjari Bewa was their daughter. Deceased Fakir Mahato was the first husband of Kulai Mahatoni and Daman Mahato was their son. Daman Mahato did not inherit their entire property, but a part thereof. After the death of Kulai Mahatoni, the suit land was recorded in the name of Gunjari Bewa. Defendants number 1-9 created some collusive documents showing Daman Mahato as executant and threatened the plaintiffs to dispossess from the suit land on 15.03.1974 that clouded their right, title and interest over the same. The cause of action for institution of the suit thus arose.

4. Defendants number 1-9 contested the suit by filing a joint written statement stating that the suit was not maintainable, barred by limitation and the cause of action as pleaded was fictitious. Their positive case was that the suit land belonged to Kulai Mahatoni, not to Bandhu Mahato. Her first husband Fakir Mahato died immediately before the CS operation and son Daman Mahato was a minor at the time. After the CS operation, Kulai Mahatoni married Bandhu Mahato and within their wedlock Gunjari was born. Kulai Mahatoni died leaving behind her son Daman Mahato (by her first husband Fakir Mahato) and daughter Gunjari Bewa (by her second husband Bandhu Mahato). During the lifetime of Kulai Mahatoni, she had transferred 1.91 acres of land from plot number 222 and .14 acres from

plot number 133 to Buddhu Mahato, who subsequently got his name mutated in the Jamindar Seristha and paid rents against the land. Buddhu Mahato died leaving behind his son Babu Ram Mahato, who subsequently died leaving his two sons, namely, defendants number 4 and 5, who inherited the said 1.91 acres of land from plot number 222 and .14 acres of land from plot number 133. The land was recorded in their names in SA Khatian Number 39 and 11. Thereafter, Daman Mahato transferred .17 acre of land (equivalent to 10 *kathas* in local measurement) from plot number 133 in favour of defendant number 6 Haripada Mahato on 05.03.1941. Defendant number 6 constructed a dwelling house thereon and was residing there. This land was recorded in his name against SA Khatian Number 27 and RS Khatian Number 70. Daman Mahato also transferred .35 acre of land from plot number 133 to Laxmi Narayan Misra by an unregistered deed of gift in 1345 BS. The said .35 acre was recorded in the name of Laxmi Narayan Misra in SA Khatian Number 28. Subsequently, Laxmi Narayan transferred the said .35 acre to defendants number 7-9 by a registered deed dated 14.10.1963. Said defendants number 7-9 also got 2.08 acres from plot number 133 by way of exchange from Behari Mahato, who got the same by inheritance from his father Shibu Mahato. Shibu Mahato got the land by way of purchase from Daman Mahato. Although the said Shibu Mahato purchased 2.08 acres from Daman Mahato, wrongly 1.08 acres were recorded in his name in the SA Khatian. Daman Mahato went to India in 1971 and died there leaving his two sons, namely, defendants number 2 and 3, who transferred 2.76 and 2.75 acres of land to defendant number 1 by way of two exchange deeds both dated 16.10.1973. In this way, the defendants got the entire suit land. The power of attorney as claimed by the plaintiffs was a false and forged document.

5. On the aforesaid pleadings, learned trial Judge framed the issues, namely, (i) whether the suit was maintainable in its present form, (ii) whether there was any defect of party, (iii) whether the suit was barred by limitation, (iv) whether the plaintiffs had the right, title, interest and possession over the suit property; (v) whether the plaintiffs were entitled to get the decree as prayed for, (vi) what other relief they were entitled to, and (vii) weather the suit property was valued and stamped properly.

6. In order to prove their case, the plaintiffs examined five witnesses. Of them plaintiff number 3 Ilias Mondal deposed as PW 1. He stated that plaintiff number 2 and 1 were his mother and nephew respectively. The suit land belonged to Bandhu Mahato. On his death, his daughter Gunjari Bewa got the land by way of inheritance but it was recorded in the name of her mother Kulai Mahatoni, who was not the real owner of the same. However, after the death of her parents, Gunjari Bewa became the owner of the land, she possessed the same and her name was recorded in the sherista of ex-landlord. The SA record was published in the names of Gunjari Bewa and Daman Mahato. He stated that they could not yet get their exchange deed executed and registered, but for that purpose a case was pending before the concerned authority. In the RS Khatian, their names were recorded and they were possessing the entire suit land. It was not a fact that Kulai Mahatoni owned and possessed the entire suit land or transferred 1.91 acres from plot number 222 and .14 acres from plot number 133 to Buddhu Mahato. It was also not a fact that Daman Mahato transferred .17 acre of land from plot number 133 to Haripada Mahato (defendant 6), or that Daman and Gunjari gifted any part of the suit land. It was also not a fact that Shibu Mahato purchased 2.08 acres from Daman Mahato and the defendants number 7-9 got title from him, or that defendant number 1 got rest of the suit land. PW 1 produces some old rent receipts showing payment of rent in the Zaminder's sherista (vide Exhibit-1 series), some rent receipts showing payment of rent in the Revenue Office in the names of Daman Mahato and Gunjari Dasi (Exhibit-2 series), original

power of attorney (Exhibit-3), certified copy of the exchange deed (Exhibit-4) and the CS Khatian in the name of Kulai Mahatoni (Exhibit-5).

7. PW 1 flatly denied all the defendants' questions put to him. In cross-examination, he admitted that he had seen SA Khatian in the name of Babu Ram Mahato.

8. PW 2 Alef Mondal, an adjacent land owner stated that the suit land belonged to Bandhu Mahato. As he died before the CS operation, it was recorded in the name of his widow Kulai Mahatoni in the CS Khatian. Gunjari was the daughter of Bandhu Mahato and Kulai Mahatoni and she inherited her father's property, which the plaintiffs were possessing.

9. In cross-examination, PW 2 could not say how many years ago Kulai Mahatoni had died. He, however, affirmed that after the departure of Gunjari Bewa, the plaintiffs came and started possessing the suit land.

10. PW 3 Dabir Uddin Sarker stated that the suit land belonged to Bandhu Mahato, who died before the CS operation leaving behind his widow Kulai Mahatoni and daughter Gunjari Bewa. Bandhu Mahato was the second husband of Kulai Mahatoni and her first husband was Fakir Mahato. After Bandhu's death, Gunjari possessed the suit land. Daman Mahato also possessed a part of the suit land.

11. In cross-examination, PW 3 stated that he was a barber by profession. Bandhu Mahato died before 2/3 years of starting of the CS operation. At that time Daman Mahato was 25/30 years old. He could not say how Bandhu Mahato got the suit land and admitted that defendants number 2 and 3 were residing at the old homestead of Bandhu Mahato. Kulai Mahatoni, Gunjari and Daman were also residing at the same homestead. He denied the defendants' suggestion that the entire suit land belonged to them.

12. PW 4 Sonardi stated that the plaintiffs possessed the entire suit land. His sons were cultivating 13 *bighas* thereof as a sharecropper. The plaintiffs possessed the land, and the defendants did not.

13. In cross-examination, PW 4 stated that defendants number 7-9 got some land by exchange from Behari Mahato and they were possessing the said land.

14. PW 5 Mafizuddin stated that he was a day labourer. It was not a fact that plaintiff number 3 was his wife's uncle. Plaintiff number 1 himself cultivated a portion of the land and the remaining portion was cultivated by *bargadar*. Defendants number 7-9 did not possess any land in the suit *mouza*. The homestead of defendants number 2, 3 and 6 situated in different places. He (PW 5) did not receive any notice from the Court and came along with PW 1.

15. On the other hand, defendant number 5 Ganesh Mahato deposed as DW 1. He stated defendant number 4 was his elder brother and he deposed on behalf of the both. The suit land belonged to Kulai Mahatoni, widow of Fakir Mahato. She transferred 1.91 acres of land from plot number 222 and .14 acres of land from plot number 133 to Buddhu Mahato in 1336 BS. Buddhu Mahato got his name mutated in the Zamindar's sherista and paid rent to the landlord. He died leaving behind Babu Ram Mahato to inherit the property. Babu Ram Mahato was the father of defendants 4-5 and they were owning and possessing that part of the suit land. He produced two old rent receipts showing payment of rent in the Zaminder's

sherista, which were marked as Exhibits A and A-1, three other old rent receipts in the name of his father [Exhibits A (2), A(3) and A(4)]; some rent receipts showing payment of rent in the Revenue Office in support of payment of rent against the claimed land (Exhibit-B series) and the certified copy of the CS Khatian (Exhibit-C).

16. DW 1 further stated that Kulai Mahatoni died leaving behind her son Daman Mahato. Fakir Mahato was her first husband and Bandhu was the second. Fakir Mahato was no more alive at the time of preparation of CS Khatian. He (DW 1) had heard it from his father that Kulai Mahatoni married Bandhu Mahato one year after the CS operation. The suit land did not belong to Bandhu Mahato. Gunjari Bewa did not inherit the suit land and never possessed it. Defendant number 6 had his homestead on 10 *kathas* of land in Plot Number 133 while defendants number 7-9 possessed $7\frac{1}{4}$ *bighas,* he himself possessed 8 *kathas* and defendant number 1 possessed the remaining land in the said plot. Plaintiff Number 3 Ilias forcibly took all the papers relating to the suit land from Daman Mahato, when he left for India in 1971. The defendants possessed the entire land within the knowledge of the plaintiffs.

17. In cross-examination, DW 1 stated that his grandfather Buddhu Mahato died 25/30 years back. Kulai Mahatoni had transferred the land to Buddhu Mahato without any written instrument. It is not a fact that exhibits-A to A (4) were created for the purpose of the litigation. He, however, stated that Gunjari Bewa left for India in 1962. At that time, she was 43/44 years old and was a widow. He heard that the plaintiffs had exchanged land with Gunjari Bewa, but could not exactly say the area of the land. She resided at the homestead of her husband. He denied the suggestion that the defendant created forged documents.

18. Defendant number 9 Abul Hoque deposed as DW 2 and stated that defendants number 7-8 were his full brothers. He deposed on their behalf as well. They possessed 7 ¼ *bighas* of land in the suit plot number 133. They got 2.08 acres of land from Behari Lal by way of exchange on 21.06.1962 and purchased 0.35 acre from Laxmi Narayan Misra. The exchanged land was recorded in the name of Shibu Mahato against SA Khatian Number 26. He was the father of Behari Lal Mahato and had acquired it by way of purchase from Daman Mahato.

19. In cross-examination, DW 2 stated that they had resided at Malda District in West Bengal. They came to the then East Pakistan on 29.06.1962. He had meeting with Behari Lal at Malda and saw papers regarding the suit land. Behari Lal had told him that their purchase was done orally and the exchange deed was not yet registered. He could not reply if the plaintiffs got the suit land by way of exchange from Gunjari Bewa.

20. DW 3 Haripada Mahato (defendant number 6) stated that he had title and interest over 10 *kathas* of land in plot number 133. He was residing thereon with his family. This land belonged to him by virtue of purchase from Daman Mahato about 40 years back. He produced the original sale deed dated 08.03.1941, which was marked as Exhibit-G. He also proved some old rent receipts which were marked as Exhibit-H series and the S A Khatian Number 27 recorded in his name as Exhibit-I (with objection).

21. In cross-examination, DW 3 stated that 10 *kathas* of land was purchased in his name during his childhood. The plaintiffs had their homestead in a plot other than the suit land.

22. DW 4 Tulshi Ram Mahato, a 95 years old villager stated that he had seen Kulai Mahatoni in the village Hapania. Fakir Mahato was her first husband and Bandhu Mahato

was the second. He used to visit the village Hapania. His son and elder sister got married there. At the time of CS operation, Kulai Mahatoni was a widow. Her first husband Fakir Mahato died 2/3 years before the CS operation. After 2/3 years of the CS operation, she married Bandhu Mahato who was a resident of village Monipur under Tanore Police Station. Monipur was 3 miles away from Hapania. Gunjari was born after 8/9 years of her (Kulai's) second marriage. Daman Mahato was 5/6 years old at the time of CS operation. In cross-examination, DW 4 denied that defendant number 5 was his nephew.

23. DW 5 Laxmi Narayan Misra stated that he owned and possessed 35 decimals of land in plot number 133 by virtue of gift from Daman Mahato and Gunjari Bewa. The suit land belonged to Kulai Mahatoni. The SA Khatian in respect of the said 35 decimals of land was recorded in his name. He paid rent against the land and got rent receipts. Subsequently, he sold out the said 35 decimals of land to defendants number 7-9 in 1963 (Exhibit-E). Since then, they (defendants 7-9) were possessing the land. The land did not belong to Bandhu Mahato. He saw him (Bandhu Mahato) and he died about 40 years back.

24. In cross-examination, DW 5 stated that he did not remember the plot number of his homestead. He resided in Hapania with his family. At the time of partition of India, he was 62/65 years old and was a priest (cy‡ivwnZ) by occupation. He did not witness the second marriage Kulai Mahatoni with Bandhu Mahato. Daman purchased stamp paper for the deed of gift in his favour and Moghu wrote the deed of gift. He denied the defendants' suggestion that he had resided in India.

25. DW 6 Hazrat Ali (defendant number 1) stated that he had 16 *bighas* of land in the schedule. He got this 16 *bighas* from defendants number 2 and 3 by registered exchange deed, which they were possessing.

26. In cross-examination, DW 6 stated that he migrated from Malda District of West Bengal in 1369 BS. The plaintiffs also came from West Bengal. He gave 4 *bighas* of land to defendants number 2 and 3 in exchange of said 16 *bighas*. He had 45 *bighas* of land in West Bengal. The exchanged 16 *bighas* were agro and *bhiti* land. It was not correct to say that the 4 *bighas* did not belong to him and it was not also correct to say that the exchange deed was a forged one. He did not see Gunjari Bewa and it was not correct to say that the plaintiffs got the suit land by way of exchange from Gunjari Bewa.

27. DW 7 Aminul Islam stated that defendant number 1 (DW 6) was his father. A deed writer of Chapai Nawabganj Sub-Registry Office named Heras Uddin was the scribe of the exchange deed. Defendant number 1 Hazrat Ali and defendant umber 2 Puran Mahato executed the exchange deed dated 16.10.1973 by putting their left thumb impressions in his presence (marked as Exhibit-J). The parties to the exchange deed got possession of their respective exchanged land and since then they have been possessing the same.

28. In cross-examination, D W 7 stated that he was a deed writer at Nawabganj Sub-Registry Office. The land situated at Tanore Police Station within the jurisdiction of Rajshahi Sadar Sub-Registry Office. The deed was registered at Nawabganj because Nawabganj Sub-Registry Office was nearer to their house. He denied the suggestion that the exchange deed was forged and collusive.

29. DW 8 Bhupendra Nath Mahato (defendant 3) stated that the suit land belonged to his paternal grandmother Kulai Mahatoni. On her death, his father Daman Mahato got the suit land by inheritance. Gunjari Bewa was his aunt and Fakir Mahato was his paternal grandfather. He heard that Bandhu Mahato was the father of Gunjari Bewa. They were

possessing 25 *bighas* of land out of 36 *bighas*. They (defendants 2-3) had transferred 16 *bighas* of land to defendant number 1 in exchange of 4 *bighas*. Gunjari Bewa had no title and possession in the suit land. Defendants number 2, 5 and 6 had their homestead in the suit land. The plaintiffs did not possess the same.

30. In cross-examination, DW 8 stated that neither he nor defendant number 2 could read and write. He could not say whether the SA Khatian was prepared in the name of his father and aunt Gunjari Bewa, but he was told like that. They (defendants 2-3) had transferred 16 *bighas* of land to defendant number 1 by way of exchange, because the exchanged land was nearer to their house. He denied the defendants suggestion that the suit land originally belonged to Bandhu Mahato.

31. DW9 Fakaruddin, an adjacent land owner stated that defendants number 1-9 possessed the suit land. His homestead was 10/12 miles away from the suit land. He could not say the plot number of the suit land but stated that plot number 146 of Mouza Hapania belonged to him. He denied the suggestion that he had no land adjacent to the suit land.

32. DW10 Aynal Hoque stated that he knew the parties as well as the suit land. Defendants number 1-9 possessed the same and the plaintiffs did not. He had land adjacent to the suit land. He denied the suggestion that defendant number 1 was his maternal uncle. He affirmed that his maternal grandfather was Khabir Uddin, but could not say whether defendant 1's father was Khabir Uddin or not. He, however, stated that he used to call defendant number 1 as uncle by curtsey.

33. After conclusion of hearing, learned Judge of the trial Court dismissed the suit by the impugned judgment and decree mainly on the ground that the plaintiffs could not establish the title of Gunjari Bewa over the suit land, challenging which the plaintiffs preferred this first appeal.

34. Mr. Shafiul Alam, learned Advocate appearing for appellants number 1(d) to 1(h) and Mr. K B Rumy, learned advocate for appellant number 3 make their submissions in similar line. Their submissions in brief are that the plaintiffs got the land from Gunjari Bewa by way of exchange and were possessing the suit land. They recorded oral evidence and produced documentary evidence, namely, old rent receipts in the name of Gunjari Bewa, the power of attorney executed and registered by Gunjari Bewa in favour of the plaintiff number 3 was re-authenticated and revalidated by proper authority in a miscellaneous case; certified copy of the exchange deed and the CS Khatian. This evidence documentarily proved their title and possession over the suit land. Alongside the plaintiffs' witnesses, some of the DWs also admitted the possession of Gunjari Bewa and recording of her name in the SA record. On the other hand, the defendants claimed title over the suit land by way of purchase from Kulai Mahatoni, gift and sale by Daman Mahato and exchange from the sons of Daman Mahato, but hopelessly failed to prove the same by producing instrument of transfer, and making an absurd claim of oral sale and gift by unregistered deed. The exchange deeds as produced by defendant number 1 are also fictitious and do not raise any confidence. Learned trial Judge without considering the evidence as produced by the plaintiffs and admission regarding possession of the plaintiffs through Gunjari Bewa and recording of her name in the SA Khatian, dismissed the suit and thereby committed wrong.

35. Mr. Munsur Habib, learned Advocate appearing for the respondents submits that the plaintiffs are to prove their own case. They cannot take advantage of the weakness of defendants' case. On critical scrutiny of the plaint and evidence of the plaintiffs' witnesses, it clearly appears that Gunjari Bewa was the daughter of Kulai Mahatoni by her second husband. Their marriage took place after the CS operation and the CS record was prepared

and published in the name of Kulai Mahatoni, wife of Fakir Mahato. According to Hindu Law, there was no scope on the part of Gunjari Bewa to inherit the property from Kulai Mahatoni but her son Daman Mahato by her first husband Fakir Mahato. So the trial Court rightly dismissed the suit and there is nothing to interfere with.

36. We have considered the submissions of the learned Advocates, examined the evidence on record and gone through the impugned judgment and decree. According to the plaintiffs, Bandhu Mahato was the original owner of the suit land. He was the second husband of Kulai Mahatoni. Within their wedlock Gunjari Bewa was born. After death of Bandhu Mahato, Gunjari Bewa inherited the land, but Kulai's name was recorded in the CS Khatian though she was not the owner of the land. In the admitted CS Khatian Number 4 (Exhibit-5 = Exhibit-C) the name of Kulai Mahatoni's husband was written as *"late Fakir Mahato"* (her first husband). It means that the CS operation was held after the death of her first husband Fakir Mahato and before her second marriage with Bandhu Mahato. Besides, none of the plaintiffs' witnesses stated as to how Bandhu Mahato acquired the suit land, and no documents in support of Bandhu's title was produced before the court, or referred to in the plaint. DWs 1 and 4 stated that Bandhu Mahato and Kulai Mahatoni got married after the CS operation. Under the circumstances, the preparation of CS record in the name of Kulai Mahatoni as a widow of Bandhu Mahato was simply absurd. It is really difficult to believe that Bandhu Mahato was the owner of the suit land and Gunjari Bewa inherited the land from Bandhu Mahato in the capacity of his daughter. In view of the CS Khatian (Exhibit-5 = Exhibit-C), the most reliable record of right and admitted to both the parties, Kulai Mahatoni appears to be the original owner-in-possession of the suit land in her individual capacity. Admittedly, Daman Mahato and Gunjari Bewa was the son and daughter of Kulai Mahatoni. According to the Hindu law, there is no scope to inherit property by a daughter when a son is alive. The other documents as adduced in evidence by the plaintiffs do not help them establishing the basic title of Gunjari Bewa derived from Bandhu Mahato. Therefore, we do not find that the plaintiffs have been able to prove their title over the suit land derived from Gunjari Bewa and as such the learned trial Judge committed no wrong in dismissing the suit.

37. At the same time, we notice that defendant number 1 claimed 16 *bighas* of land from defendants number 2-3 by exchanging only four *bighas* and registration of the exchange deeds [vide Exhibits-J and J(1)] in the registry office of another jurisdiction, but he did not prove any document in support of his title and possession over the four *bighas*. None of the defendants number 1-3 produced any rent receipt in support of their possession or that of their predecessors over the exchanged land to support their claim of exchange. Under the circumstances, the story of exchanging 16 *bighas* of land for only four *bighas* is not believable. In the written statement, the defendants stated that Kulai Mahatoni was the owner of the suit land, and her son Daman Mahato left for India in 1971. Exhibit-2 series show that plaintiff number 3 (PW 1) paid rent in the names of Daman Mahato and Gunjari Dasi (Gunjari Bewa) against 8.26 acres of land in Khatian Number 25 from 1959 to 1976. It means that the real owner of the suit land Daman Mahato left for India and was not in the control and management of the land. In such a position, the exchange deeds [Exhibits-J and J (1)] were mere a paper transaction and did not pass any title in favour of defendant number 1.

38. Similarly defendants number 4-5 claimed 1.91 acres and 14 decimals of land derived from their grandfather Buddhu Mahato stating that he had purchased the land from Kulai Mahatoni, but they did not describe about the mode of transfer in the written statement. In the oral evidence, DW 1 stated that the sale was without any written instrument. Under the facts and circumstances of the present case, and in view of the prevailing culture of grabbing minority's property in our rural area, it is difficult to believe the story of transfer to Buddhu

Mahato without any written instrument. For the same reason, the story of gift of 35 decimals of land to DW 5 Laxmi Narayan Misra without any registered instrument, and oral sale of 2.08 acres of land to Shibu Mahato (father of Behari Lal Mahato) without any registered deed is unbelievable. We, however, find that defendant number 6 Haripada Mahato (DW 3) adduced the original sale deed executed and registered by Daman Mahato transferring 10 *kathas* of land in his favour. He also adduced the rent receipts showing payment of rent against his land. We thus hold that the defendants except defendant number 6 Haripada Mahato have no lawful title over the suit land.

39. It is our common experience that on a contradictory claim of title on land between the plaintiff and defendant, if the plaintiff fails, everyone thinks that the claimant-defendant is the owner of the suit land. It is absolutely a wrong notion and misconceived social psychology. A plaintiff's failure never means that the defendant is the lawful owner of the subject matter. In a case like the present one where the defendants, besides resisting the plaintiffs' claim, fail to establish their lawful title over the suit land, they should not be allowed to continue with the possession, if any, over the same.

40. It appears from the rent receipts (Exhibit-2 series) that Daman Mahato and Gunjari Bewa were in joint possession over the suit land. Subsequently, plaintiff number 3 paid rent in their names. In cross-examination, DW 1 also stated that he heard the plaintiffs had exchanged land with Gunjari Bewa but could not say about the area of land and admitted *"she resided at the homestead of her husband."* Similarly in the cross-examination of DW 2, he could not reply if the plaintiffs got the suit land by way of exchange from Gunjari Bewa. DW 5 Laxmi Narayan Misra clearly stated that he owned and possessed 35 decimals of land in plot number 133 by way of gift from Daman Mahato and Gunjari Mahato. DW 8 Bhupendra Nath Mahato, son of Daman Mahato and grandson of Kulai Mahatoni, in his cross-examination, could not say whether the SA Khatian was prepared in the name of his father and aunt (Gunjari Bewa). If the above mentioned evidences are critically assessed and considered with Exhibit-2 series, it will be clear that Daman Mahato and Gunjari Bewa were in joint possession over the suit property and some of the defendants were under the notion that she (Gunjari Bewa) was one of the two owners of the suit land, and the plaintiffs got possession over a part of the suit land through her. It, however, does not appear that the defendants took any step for their dispossession from that part of the suit land. Thus it can be presumed that the defendants contested the suit as chance litigants.

41. In view of the above, it prima-facie appears that the rightful owner of the suit property is unavailable for a long period. Under the circumstances, the Deputy Commissioner of Rajshahi is to commence an inquiry into whether any rightful owner of the suit property is available or not. The Deputy Commissioner will also follow the procedure as laid down in Subsection (3) of Section 92 of the State Acquisition and Tenancy Act, 1950 read with rule 6, Subrules (2) and (3) of the Tenancy Rules, 1954. If no rightful owner is available, the suit land except the share of defendant number 6 (Haripada Mahato) to the extent of 10 *kathas* in plot number 133 would vest in the Government under Article 143 (1) (c) of the Constitution read with Section 92 (3) of the State Acquisition and Tenancy Act.

42. Accordingly, the first appeal is dismissed with modification of the impugned judgment and decree with direction upon the Deputy Commissioner of Rajshahi to commence an inquiry in the manner stated above.

43. Send down the lower court's record. Communicate a copy of the judgment to the Deputy Commissioner of Rajshahi.

19 SCOB [2024] HCD 94

HIGH COURT DIVISION
(CRIMINAL REVISIONAL JURISDICTION)

CRIMINAL MISCELLANEOUS CASE NO. 28743 OF 2017

Justice Md. Joynul Abedin (Rtd.)

.....Petitioner

Vs.

The State and another

..... Opposite -parties

Mr. Moinul Hossain, Senior Advocate
with
Mr. Md. Abdur Rahim, Advocate.
..... For the petitioner.

Mrs. Rona Naharin, D.A.G with
Mr. A.K.M. Amin Uddin, D.A.G and
Mrs. Helena Begum (China), A.A.G.
..... For the Opposite-party.
Mr. Md. Khurshid Alam Khan, Advocate,
…For the Anti-Corruption Commission.

Heard on :03.07.2018 and 31.07.2018,
Judgment on: 31.07.2018

Present:
Mr. Justice Md. Nazrul Islam Talukder
And
Mr. Justice K.M. Hafizul Alam

Editors' Note:
In this case the petitioner prayed for anticipatory bail under section 498 of the Code of Criminal Procedure being aggrieved by a news report published in the Daily Janakantha. Thus, with the anticipation of arrest and harassment, he came to this Court. The Court held that mere fear cannot be the reason for granting anticipatory bail and there must be reasonable belief for malicious intention. Moreover, the court found that the bench had no jurisdiction to dispose of the matter and thus discharged the rule.

Key Words
Anticipatory Bail; Section 498 of the Code of Criminal Procedure; Section 21, 26, 27 of the Anti-Corruption Commission Act, 2004;

Section 498 of the Code of Criminal Procedure, 1898:
Now it is well settled that our High Court Division or the Court of Sessions can exercise the power under Section 498 of the Code of Criminal Procedure where the perception of the Court is that a proceeding that has been lodged against the accused is for ulterior motive either political or otherwise for harassing the accused and not for securing the justice, or to achieve a collateral purpose for harassment or humiliation. ...(Para-28)

Section 21 of the Anti-Corruption Commission Act, 2004:
The journalists of "The Daily Janakantha" as part of their duty and responsibility, published the news reports with a view to bringing this matter to the notice of the people and authorities by which it cannot be said that it has created an apprehension of

arrest by the Durnity Daman Commission under Section 21 of the Anti-Corruption Commission Act, 2004. ...(Para-40)

From the reported cases, it is found that all the cases were filed either mentioning or non-mentioning the name of the persons/accused. But in the instant case in hands, not a single case has been filed against the petitioner and the ad-interim bail has been granted to the petitioner till submission of the charge-sheet. Since no case has been filed against petitioner, the question of granting anticipatory bail to the petitioner till submission of the police report is a misconceived one and it is a vague proposition of law. ...(Para-42)

It is pertinent to note that anticipatory bail may be granted even to a person against whom no first information report has been lodged subject to the condition that a reasonable belief/ground exists for imminence of a likely arrest for malicious and omnibus reasons. ...(Para-42)

The anticipatory bail is neither a passport to the commission of crimes nor shield against any and all kinds of accusations, likely or unlikely. The anticipatory bail cannot be granted to a person/accused for the reason that he or she is in mere fear that he or she may be arrested and the same cannot be granted on vague apprehension of arrest. Mere fear is not a belief for which reason the accused/person may be granted anticipatory bail. Anyway, if we make the Rule absolute in this matter, the floodgate of the anticipatory bail will be open and everyone will come before the Court for anticipatory bail on fancy grounds. ...(Para-42)

JUDGMENT

Md. Nazrul Islam Talukder, J:

1. On an application under Section 498 of the Code of Criminal Procedure, this Rule, at the instance of the petitioner, was issued calling upon the opposite-parties to show cause as to why the petitioner should not be granted anticipatory bail till submission of the police report if any, after such investigation as reported and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. It may be noted that at the time issuance of the Rule, the petitioner was admitted to anticipatory bail till submission of the police report after investigation, if any, as it reported in the newspaper on executing a bond at the satisfaction of the Chief Metropolitan Magistrate, Dhaka.

3. Being aggrieved by the same, the Anti-Corruption Commission preferred Criminal Petition For Leave To Appeal No.7105 of 2017 before the Appellate Division and the learned Judges of the Appellate Division by judgment and order dated 24.07.2017 disposed of the appeal allowing the petitioner to remain on anticipatory bail till disposal of Criminal Miscellaneous Case No.28743 of 2017 as well as directing the High Court Division to dispose of the aforesaid criminal miscellaneous case on merit as expeditiously as possible.

4. The facts leading up to issuance of the Rule are as follows:-

5. It is stated that in the application that the petitioner was enrolled in the High Court of the then East Pakistan as an Advocate on 21.03.1969 and continued his career as a practicing

lawyer before the High Court Division of Bangladesh since then. Subsequently, the petitioner became enrolled in the Appellate Division of the Supreme Court of Bangladesh as an Advocate on 25.04.1980. Thereafter the petitioner was chosen to be elevated as a Judge of the High Court Division of the Supreme Court of Bangladesh on 01.06.1996. Thereafter, the petitioner was also elevated as a Judge of the Appellate Division of the Supreme Court in the year 2004 and went into retirement therefrom on 01.01.2010 as a Judge of the Appellate Division of the Supreme Court of Bangladesh. It is stated that soon after the petitioner laid down his robe, Respondent No.2 Anti-Corruption Commission (hereinafter referred to as the ACC) by a letter dated 18.07.2010 asked the petitioner to submit a statement in respect of his properties and assets. The petitioner accordingly submitted his statement of properties and assets on 08.08.2010 to the ACC. Thereafter by a further notice dated 25.10.2010, the said Commission asked for further statement and following the same, he submitted further statement of properties on 03.11.2010. The ACC found no cause to move against the petitioner for long 6 (six) years. After long 6 (six) years of silence, the ACC asked the petitioner to attend its office and furnish further statements of properties and assets by way of further clarification of his earlier statements. The petitioner also complied with the same.

6. Following the news report published in the "Daily Janakantha" on the 5th and 7th June 2017, he came to know that the ACC is trying to arrest the petitioner immediately before filing of this F.I.R by dint of Section 21 of the Anti-Corruption Commission Act, 2004.

7. And thereby being aggrieved by the said news report published in "The Daily Janakantha", the petitioner approached this Court with an application under Section 498 of the Code of Criminal Procedure for anticipatory bail and obtained this Rule along with ad-interim anticipatory bail till submission of the police report if any after the investigation.

8. At the very outset, Mr. Moinul Hossain, learned Senior Advocate appearing for the petitioner, submits that the petitioner is a retired judge of the Appellate Division of the Supreme Court of Bangladesh and an old man of 74 years and it is not quite necessary to harass and humiliate him by the way adopted by the Commission and as such, the petitioner may be entitled to be directed to remain on anticipatory bail until the charge-sheet is filed.

9. He next submits that the petitioner being a responsible citizen and a retired judge of the highest court is ready to face the case if any and that he will not misuse the order of anticipatory bail in any manner.

10. He then submits that it will be an abuse of power and disrespect to judge of the highest court to allow the police/ACC to arrest him though he is promise bound to surrender before the concerned court as and when the charge sheet if any is filed.

11. He candidly submits that if the petitioner is enlarged on anticipatory bail making the Rule absolute, there is no chance of his absconding or tampering with the evidence and that he will not abuse or misuse the privilege of bail in any manner.

12. He vigorously submits that the Anti-Corruption Commission being empowered by section 21 of the ACC Act, 2004 may arrest any person who has acquired or is in possession of any movable or immovable property disproportionate to his declared sources of income and as such, the accused-petitioner may be allowed to remain on anticipatory bail making the Rule absolute.

13. He lastly submits that no FIR has yet been lodged, but the petitioner is apprehending that he may be arrested by the police/ACC in the name of so-called enquiry as it is reported in the newspaper and in that case, he will be harassed and humiliated and to avoid such harassment, he requires protection of the Court.

14. On the other hand, Mr. Khurshid Alam Khan, learned Advocate, appearing for the Anti-Corruption Commission, vehemently opposes the Rule and categorically submits that no case has been initiated by lodging FIR against the petitioner and as such, in the absence of any case, there is no reasonable apprehension of arrest, harassment and humiliation in a pending enquiry if any and that for granting anticipatory bail, there must be a case against the petitioner and mere apprehension of harassment and humiliation in the absence of any case cannot be taken into consideration for allowing the prayer for anticipatory bail by making the Rule absolute.

15. He next submits that for hearing the case of Durnity Daman Commission, there are some specific benches of High Court Division to hear and dispose of the application relating to Durnity Daman Commission but the Rule issuing bench had no jurisdiction to hear and dispose of any application of the cases of Durnity Daman Commission but the learned judges of that bench going beyond the jurisdiction enlarged the petitioner on anticipatory bail till submission of the police report and accordingly the Rule along with the ad-interim order of anticipatory bail suffers from lack of jurisdiction of the court which issued the same.

16. In contrast to the aforesaid submissions of the learned Advocate for the ACC, Mr. Hossain submits that it is true that no case has yet been filed/started but the fact remains that there is no bar to giving protection to the petitioner by granting anticipatory bail if there are bona fide reasons to grant the same.

17. We have gone through the application for anticipatory bail and perused the materials annexed therewith. We have also heard the learned Advocates for the respective parties and the learned Deputy Attorney-General for the State.

18. Since the learned Advocates for the respective parties have made elaborate submissions and counter submissions on anticipatory bail with reference to many legal decisions, we want to discuss a little bit about the concept of anticipatory bail before coming to a decision in this Rule.

19. It may be noted that pre-arrest bail or anticipatory bail is an extraordinary relief which can be granted only in extraordinary or exceptional circumstances upon a proper exercise of the discretion of the Court. There is no specific provision or Section in our Code of Criminal Procedure underlying the direction and for exercising the power under Section 498 of the Code of Criminal Procedure. Unlike Section 438 of the Code of Criminal Procedure of the Indian jurisdiction, there is no such provision or law in our Code of Criminal Procedure under which the pre-arrest bail under Section 498 can be granted. The concept of anticipatory bail in this country has been developed by the pronouncement of different judgments by the Courts time to time. The concept of granting anticipatory bail was initially raised and discussed in the case of **The Crown-Versus-Khushi Muhammad reported in 5 DLR (FC)(1953) 86,** wherefrom we find that a case was filed against one Khushi Muhammad under section 366 of the Penal Code out of a faction inimical relationship. Khusi Mohammad, a respectable man, apprehended that he would soon be taken into custody by the police. Being aggrieved by the same, he submitted an application for pre-arrest bail before the learned

Sessions Judge alleging, inter-alia, that he may be released on bail pending investigation and trial if any considering the circumstances and apprehension of arrest but the bail was rejected by the learned Sessions Judge by the following order which runs as follows:

> "This is an application on behalf of Khushi Muhammad for bail in anticipation of his possibly being arrested for the offence punishable under section 366, P.P.C. His learned Advocate has argued that the case against him will prima facie be a weak one, but that is not enough for the grant of an order of this nature. He entirely failed to satisfy me that if the petitioner were to be arrested and refused bail, such an order would in all probability be made not from motives of furthering the ends of justice in relation to the case, but for some ulterior motive and with the object to injure the petitioner, or that the petitioner would in such an eventuality suffer irreparable loss. I, therefore, reject this petition."

20. After his petition had been dismissed by the sessions judge, Khushi Muhammad waited for a fortnight and then presented a petition in the High Court. The contents of which are practically identical with the petition presented by him in the Court of Sessions Judge.

21. Upon hearing the parties, Mr. Justice Kayani, the learned judge of High Court observed that "As I have pointed out above, the High Court has power to "direct that any person be admitted to bail.", and giving these words their full weight, I see no escape from the conclusion that the power extends not only to the grant of bail to persons who are in the custody of the High Court or of an inferior Court or a police officer but also includes a power to give directions that persons should be admitted to bail who are not in custody."

22. Due to divergence of judicial opinion on this question and against the decision of High Court, the Crown presented a petition for special leave to appeal before the federal court and then leave was granted.

23. Upon hearing the parties, the Federal Court allowed the appeal setting aside the judgment of High Court and held that a person cannot be admitted to bail against whom a report or F.I.R has been lodged at the police station but who has not been placed in custody or under any other form of restraint or against whom no warrant of arrest has been issued.

24. Subsequently, in that regard, a lenient view was taken by the Supreme Court of Pakistan in the case of **Sadiq Ali vs the State reported in PLD 1996(SC)589,** where it was held that for the grant of bail to a person whose arrest on a criminal charge by police without a warrant is proved to be imminent and certain and where the circumstances would justify the grant of bail.

25. Later on, the above view was further extended in new dimension in the case of **Shah Zillur Rahman Versus The State reported in PLD(1959) Dhaka 192**, wherein the question of granting anticipatory bail was exhaustively considered by the learned judges and it was decided that on principle it is true that in case of concurrent jurisdiction the lower court should be moved first but it is not a hidebound Rule.

26. At a later date, in the case of **Zahoor Ahmed and in the case of Zahoor Ahmed vs State, reported in PLD 1974 Lahore 256,** the question of granting anticipatory bail was exhaustively considered and it was held that in exceptional circumstances, an application for anticipatory bail may also be moved before the higher court.

27. Eventually, in the case of **Muhammad Ayub Versus Muhammad Yaqub reported in PLD(1966)(SC) 1003,** the learned judges examined the true nature and scope of section 498 of the Code of Criminal Procedure and it was decided that section 498 of the Code of Criminal Procedure is ancillary and subsidiary to the provisions of sections 496 and 497 of the Code of Criminal Procedure and that granting anticipatory bail under Section 498 may be construed to extend that the power of High Court Division or the court of sessions to grant bail even in cases where these courts would not be competent to grant bail under section 497 of the Code of Criminal Procedure.

28. Now it is well settled that our High Court Division or the Court of Sessions can exercise the power under Section 498 of the Code of Criminal Procedure where the perception of the Court is that a proceeding that has been lodged against the accused is for ulterior motive either political or otherwise for harassing the accused and not for securing the justice, or to achieve a collateral purpose for harassment or humiliation.

29. The concept of granting anticipatory bail was elaborately and exhaustively discussed in the case of **the State Versus Abdul Wahab Shah Chowdhury, reported in 51 DLR (AD) 1999-243,** wherefrom it is abundantly clear that pre-arrest bail is an extra-ordinary remedy, an exception to the general law of bail, can be granted only in extra-ordinary and exceptional circumstances upon proper and intelligible exercise of discretion. Anyway, the anticipatory bail may be granted to an accused on the following grounds and circumstances:

1) Where a person is unnecessarily harassed or disturbed due to any motive of political victimization or otherwise by starting a malicious prosecution.
2) Where a person is physically incapable to go to the lower Court concerned for seeking bail due to serious illness or bodily infirmity to travel a long distance and in that circumstances he can move the High Court Division.
3) Where an accused does not feel secure to appear before lower Court due to volatile public sentiment which is not congenial for his appearance before the lower Court he may move the High Court Division directly.
4) When there are other exceptional circumstances for granting anticipatory bail, the petitioner may come before this Court for anticipatory bail.

30. In the case of **State vs Zakaria Pintu reported in 31 BLD (AD) 20=62 DLR (AD) 420**, the essentialities for the anticipatory bail are as follows:-

i) Assumption of jurisdiction to consider anticipatory bail is an extra-ordinary one.
ii) Discretion of the High Court Division in granting bail, very wide though, must be encompassed by judicial circumspection based on established legal principles, without resorting to arbitrary consideration.
iii) The Judges concerned must go through the FIR meticulously and it must be reflected in their order that they have thoroughly scanned the facts and the allegations scripted in the FIR.
iv) Sometimes it is imperative on the part of the Court to refuse pre-arrest-bail when allegations against the petitioners are of serious nature, because the Court must always nurture in their introspection that justice must eventually be done by ensuring punishment for the offenders, as otherwise the fabrics of the civilized society will crumble.
v) The Judges must not be oblivious of the interest of the victims and the society as a whole, for justice connotes even handedness.
vi) Anticipatory bail application must be considered in the backdrop of the possibility that investigation process, in consequence of enlarging the accused on bail, may be impeded.

vii) Prevailing situation should not be ignored.

31. The aforesaid view was re-echoed in the decision taken in the case of **Durnity Daman Commission and another-Versus- Dr. Khandaker Mosharraf Hossain and another reported in 66 DLR (AD) (2014) 92,** wherein it was clearly held as under:-

1) Anticipatory bails shall not survive post charge-sheet stage.
2) An omnibus statement that he is a political personage and the Magistrates or the lower court/tribunal Judges, as the case may be, are controlled by the government (which has neither factual nor legal basis these days) is not enough. Equally well, the Judges of the High Court Division concerned must also assign reason for their satisfaction on this primordial point, which must be reckoned to be the door opener.
3) To open the jurisdictional door they shall satisfy themselves that reasons for apprehension have specifically, explicitly, plausibly, credibly and with sufficient clarity been assigned, instead of relying on any generalized pretension. That must be treated as the precursor.
4) Political threshold of the petitioner or claim rivalry by itself without further ado shall not be ground for entertaining an application.
5) Non-availability of the offence cited in the FIR cannot be reason for High Court Division's intervention for even the Magistrate/lower court/ tribunal judges are competent enough to enlarge on bail a person accused of non-bailable offences in discovering cases.
6) Effect of the accused freedom on the investigation process must not be allowed to obfuscation.
7) The High Court Division must scrutinize the text in the FIR with expected diligence and the allegations are heinous in nature and keeping in mind the ordains figured and the paragraphs reported in 51 DLR (AD)242.
8) Interest of the victim in particular and the society at large must be taken into account in weighing in respective rights.
9) If satisfied in all respects, the High Court Division shall dispose of the application instantaneously by enlarging the accused on a limited bail, not normally exceeding four weeks, without issuing any Rule. It must be conspicuously stated in the bail granting order that in the event of any filance of bail application, the Court below will consider the same using its own legal discretion without reference to the High Court Division's anticipatory bail order.

32. In the case of **Gurbakash Singh vs State of Punjab, reported in A.I.R (1980) (SC) 1632**, it was held as follows:-

> firstly, Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has 'reason to believe' that he may be arrested for a non-bailable offence. The use of the expression 'reason to believe' shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief' for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively, because it is then alone that the Court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at

any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the Commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.
secondly, if an application for anticipatory bail is made to the High Court or the Court of Sessions it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under section 437 of the Code, as and when, an occasion arises. Such a course will defeat the very object of Section 438.
thirdly, the filing of a First Information Report is not a condition precedent to the exercise of the power under section 438 of the Code of Criminal Procedure rather the imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F.I.R is not yet filed.
fourthly, Anticipatory bail can be granted even after the F.I.R is filed, so long as the applicant has not been arrested.
fifthly, the provisions of section 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under section 437 of the Code of Criminal Procedure or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

33. We have stated earlier that the learned Advocates for the respective parties, in support of their submissions and contentions, have referred to many legal decisions taken in the cases of **The Crown-Versus-Khushi Muhammad reported in 5DLR(FC)(1953)86, Sadiq Ali vs the State reported in PLD 1996(SC)589, Shah Zillur Rahman Versus The State reported in PLD(1959) Dhaka 192, Zahoor Ahmed and in the case of Zahoor Ahmed vs State, reported in PLD 1974 Lahore 256, Muhammad Ayub Versus Muhammad Yaqub reported in PLD(1966)(SC)1003, The State Versus Abdul Wahab Shah Chowdhury, reported in 51DLR(AD)1999-243, State vs Zakaria Pintu reported in 31 BLD(AD)20=62DLR(AD)420, Durnity Daman Commission and another-Versus- Dr. Khandaker Mosharraf Hossain and another reported in 66DLR(AD)(2014)92, Gurbakash Singh vs State of Punjab, reported in A.I.R (1980) (SC)1632.**

34. We have meticulously examined and perused the decisions referred to by the learned Advocate for the petitioner and the learned Advocate for the Anti-Corruption Commission. It appears that some of the cases cited before us were discussed in the reported case of **The State-Versus-Abdul Wahab Shah Chowdhury, reported in 51DLR(AD)-1999.** On going through all the decisions of our jurisdiction and other jurisdiction, we do find that the anticipatory bail has been granted to persons against whom a case has been filed either mentioning or without mentioning the name of those persons. The apprehension of the petitioner is that the petitioner may be arrested in connection with the enquiry under Section 21 of the Anti-Corruption Commission Act, 2004 since the news report was published in the **"The Daily Janakantha**" for holding investigation into the alleged amassed wealth of the petitioner, which is claimed to be disproportionate to his known source of the income. The further apprehension of the petitioner, after publication of the newspaper reports in the "The Daily Janakantha" is that the petitioner is a responsible citizen and a retired judge of the highest court and if the petitioner is arrested, it will cause harassment and humiliation to the petitioner.

35. In this regard, we want to speak something about the role of our newspaper. It is worthwhile to mention that newspaper is a printed publication media which contains different

news and articles on various subjects. Newspapers play an important role in democracy to take the role of spokesman for people of all classes. They act as a bridge between the government and the people. They help in preventing social exploitation that can threaten the existence of democracy.

36. In a democracy, there should be an efficient and fearless press to act as watchdog of democracy. Newspapers make people aware of every field of society. In the present age, corruption is present in all walks of life. Newspapers play an important role in highlighting the menace of corruption and thereby the people are made aware of the corrupt practices if any prevalent in various departments and agencies of government and other private organizations.

37. But of course, yellow Journalism is always disapproved, discarded and not appreciated at all. Newspaper should concentrate on giving only the true picture of the society.

38. It is worthwhile to mention that yellow journalism means and includes exaggeration of news reports, scandal mongering, sensationalism created and published by unprofessional and unethical fashion, eye-catching headlines of news reports for increased sales of newspapers, which are not legitimated and well-researched news without proper support and justification and news report without verifying its truth and accuracy etc.

39. The "Daily Janakantha" is one of the leading Bengali-language daily newspaper in the country. It is also the largest circulating newspaper in the country. They published the news reports under caption "**সাবেক বিচারপতির দুর্নীতি তদন্তে সুপ্রীম কোর্ট প্রশাসনের বাধা**" and "**সাবেক এক বিচারপতির তদন্তে থেমে নেই দুদক**", which have been annexed in the application for anticipatory bail.

40. We have gone through the contents of the news reports. On a plain reading of the news reports, we do not find any reference of any officer of the Anti-Corruption Commission or the police, who have divulged anything about the steps to arrest or harass or humiliate the petitioner during pendency of the enquiry. They just only published the newspaper reports in "The Daily Janakantha" getting news from the Anti-Corruption Commission. And the journalists of "The Daily Janakantha" as part of their duty and responsibility, published the news reports with a view to bringing this matter to the notice of the people and authorities by which it cannot be said that it has created an apprehension of arrest by the Durnity Daman Commission under Section 21 of the Anti-Corruption Commission Act, 2004. Section 21 of the Anti-Corruption Commission Act, 2004 is a statutory law by which the Anti-Corruption Commission, with the approval of the court, may arrest any person, when there is a bona fide reason to believe that a person has acquired or is in possession, in his own name or in the name of any other person, any movable or immovable property disproportionate to his declared sources of income. This section is not only applicable to the petitioner rather it is applicable to all the people. Many cases are filed against the person or accused in this country. So because of the statutory Section 21 of the Anti-Corruption Commission Act, 2004, it cannot be said that there is an apprehension of arrest of the petitioner and he will be arrested pursuant to the publication of newspaper reports in "The Daily Janakantha".

41. It is stated in the application that on 18.07.2010, the petitioner received the notice from the Anti-Corruption Commission for submitting wealth-statement and having received the same, he submitted wealth-statement on 08.08.2010. Upon receiving the further notice from the Anti-Corruption Commission, he submitted further statement of properties on 03.11.2010. But since then no step for arresting the petitioner has been taken as yet. Besides

this scenario, the Anti-Corruption Commission has not taken any approval from the court with a view to arresting the petitioner. Moreover, being aggrieved by the notice of ACC for submitting wealth-statements, the petitioner filed writ petition before the High Court Division but the same was rejected as being not pressed. In spite of aforesaid fact, the ACC/Police did not take any steps to arrest him. Under the aforesaid facts and circumstances, the apprehension of arrest of the petitioner as disclosed in the application is not plausible and credible since the same was not explained with sufficient clarity and the apprehension was explained relying on generalized pretension.

42. From the reported cases, it is found that all the cases were filed either mentioning or non-mentioning the name of the persons/accused. But in the instant case in hands, not a single case has been filed against the petitioner and the ad-interim bail has been granted to the petitioner till submission of the charge-sheet. Since no case has been filed against petitioner, the question of granting anticipatory bail to the petitioner till submission of the police report is a misconceived one and it is a vague proposition of law. It is pertinent to note that anticipatory bail may be granted even to a person against whom no first information report has been lodged subject to the condition that a reasonable belief/ground exists for imminence of a likely arrest for malicious and omnibus reasons. The anticipatory bail is neither a passport to the commission of crimes nor shield against any and all kinds of accusations, likely or unlikely. The anticipatory bail cannot be granted to a person/accused for the reason that he or she is in mere fear that he or she may be arrested and the same cannot be granted on vague apprehension of arrest. Mere fear is not a belief for which reason the accused/person may be granted anticipatory bail. Anyway, if we make the Rule absolute in this matter, the floodgate of the anticipatory bail will be open and everyone will come before the Court for anticipatory bail on fancy grounds. In our country, many proceedings of enquiry are going on for the alleged offences under Sections 26 and 27 of the Anti-Corruption Commission Act, 2004 and other allegations/offences of corruption. But if we start granting anticipatory bail to all persons/accused on the given facts and circumstances, then it will create chaos to the administration of justice and it will affect the whole criminal justice system of the country.

43. Furthermore, the Rule issuing bench had no jurisdiction to issue Rule and grant anticipatory to the petitioner since that court had no jurisdiction to hear and dispose of any matter of the Durntiy Daman Commission.

44. It may be noted that the scope and guideline for granting anticipatory bail have been well defined, underlined and demarcated by the Appellate Division in many milestone judgments including the judgments cited and discussed above.

45. Having considered all the facts and circumstances of the case, the submissions advanced by the learned Advocates for the respective parties and the propositions of law cited and discussed above, we do not find any merit in this Rule and we are not inclined to allow the petitioner to remain on anticipatory bail making the Rule absolute.

46. Accordingly, the Rule is discharged.

47. In consequence thereof, the ad-interim order of anticipatory bail granted to the petitioner till submission of the police report if any is recalled and vacated.

48. Let a copy of this judgment and order be communicated to the Chairman, Anti-Corruption Commission at once.

19 SCOB [2024] HCD 104

HIGH COURT DIVISION
(SPECIAL STATUTORY JURISDICTION)
Trade Mark Application No. 04 of 2010

DANISH FOODS LTD.
....Petitioner
Vs.
RANI FOOD INDUSTRIES LTD and another .....Opposite Parties

Mr. Rokanuddin Mahmud, Senior Advocate with
Mr. Tanjibul Ul Alam, Advocate
Ms. Tarana Afroze, Advocate
.....For the petitioner

Dr. M. Zahir, Senior Advocate with
Mr. Abdul Matin Kashru, Advocate
Mr. Md. Ismail Miah, Advocate
Mr. Shah Muhammad Ezaz Rahman, Advocate
...For the opposite parties

Heard on: 22.05.2013, 30.05.2013, 03.06.2013, 05.06.2013, 06.06.2013, 09.06.2013, 11.06.2013 and Judgment on: 20.06.2013

Present:
Mr. Justice Md. Ashfaqul Islam
And
Mr. Justice Md. Ashraful Kamal

Editors' Note:
In this case the petitioner Danish Food Limited filed an application under Section 42 and 51 of the Trade Marks Act, 2009 for removal of trade mark consisting of the word 'RANI' granted by the respondent No.2 in favour of the respondent No.1 from the register. High Court Division, however, hearing both sides, found that section 51 has no manner of application in this case and stipulations provided in section 42 of the Act, have not been fulfilled so as to order the removal. Therefore, it rejected the application.

Key Words:
Sections 41 and 42 of the Trade Marks Act, 2009; honest intention; honest purpose;

Sections 41 and 42 of the Trade Marks Act, 2009:
Section 42 of the Trade Marks Act, 2009 deals with the removal and impose limitation of the mark from the registrar book for non use of the trade mark. According to sub section (1) of section 42 of the Trade Mark Act, 2009, on the basis of any application by any aggrieved person, High Court Division or Registrar of Trade Mark can remove any mark from the register book, if the applicant of the trade mark registration of the goods or service or constituting company under section 41 of the Trade Marks Act, 2009 has no honest intention or 1(one) month prior registration of the mark had not use the mark for honest purpose or has no use the mark for honest purpose after 5(five) years and above from the date of registration. ...(Para 26)

Section 42 of the Trade Marks Act, 2009:
Both the conditions set out in cl. (a) are cumulative and not disjunctive. Cl. (a), therefore, will not apply where even though there had been no bona fide intention on the part of the application for registration to use to trade mark but, in fact, there has been a bona fide use of the trade mark in relation to those goods by any proprietor

thereof for the time being up to a date one month before the date of the application under S. 42(1). Similarly, Cl. (a) will not apply where, though there had been a bona fide intention on the part of the applicant for registration to use the trade mark, in fact, there has been no bona fide use of the trade mark in relation to those goods by any proprietor thereof for the time being up to a date one month before the date of the application. ...(Para 29)

Burden of proof:

When a trade mark is register the presumption would be that it is for use as such. If anyone contents that the registration was not bonafide to use that trade mark then he must show that what other purpose the registration was done. The burden of proving the facts is on the person who seeks to have the trade mark removed from the register. ...(Para 32)

There leaves no doubt or dispute that the registration of the trade mark confers a valuable right. The person in whose name the trade mark has been registered may take action against any person have passing of the goods. The registered trade mark confers an exclusive right of use of the trade mark in relation to the goods in which a trade mark is registered. As a person obtained a right on and from the date of registration, he can ordinarily to be deprived of his right only if it is seen that application was not a bonafide one but if it obtained for bonafide use he may not be fastened with any liability owing to non user on the part of the criticizer. ...(Para 34)

JUDGMENT

Md. Ashraful Kamal, J:

1. This Rule was issued at the instance of the petitioner Danish Food Limited under Section 42 and 51 of the Trade Marks Act, 2009 calling upon the respondent Nos.1 and 2 to show cause as to why the registered trade mark No. 90755 in Class-30 consisting of the word 'RANI' granted by the respondent No.2 in favour of the respondent No.1 should not be removed from the Register of Trade Marks and the Register be rectified accordingly.

2. Brief facts, necessary for the disposal of this Rule are as follows;

The petitioner' case is one Q.M. Babar Chaklader, sole proprietor of Chaklader Food Products had been manufacturing, marketing and selling 'spices' with trade mark word RANI in English and Bengali since 2004. Thereafter, on 14.03.2005, the said Babar Chaklader filed an application being No. 90428 before the respondent No.2 for registration of his trade mark 'RANI' in respect of Chili Powder, Turmeric Powder, Coriander Powder, Cumin Powder and all other goods included in Class-30.

3. After that, by virtue of Deed of Assignment dated 24.08.2009 and subsequent amendment thereto, the present petitioner mutated its name in place of its predecessor Babor Chaklader vide order dated 08.08.2010 passed by the Registrar of the Trade Marks allowing TM-16 dated 14.07.2010 and accordingly petitioner became the owner of the trade mark word and device 'RANI'. Then, the petitioner obtained C.M. License (quality control license) from the department of Bangladesh Standard and Testing Institution (BSTI), Dhaka in respect of their RANI branded 'Spices' being C.M. License No. 14883/G-6/2010 and 14884/G-6/2010 dated 21.07.2010.

4. But, on 05.07.2011, the Registrar of Trade Marks cancelled his earlier order dated 08.08.2010 under section 91(5) of the Trade Marks Act, 2009.

5. Thereafter, the petitioner came to know that respondent No.1 secretly filed a trade mark application consisting with very deceptively and confusingly similar trade mark word 'RANI' under No. 90755 dated 02.04.2005 in class-30 in the office of the respondent No.2 and got registration on 16.04.2010 inspite of the predecessor of the petitioner's prior application in the same class being No. 90428 dated 14.03.2005.

6. The respondent No.1 has never used the trade mark RANI in Bangladesh in respect of Spices and they have no bonafidy and definite intention to use same in respect of the goods mentioned in the application. The entry relating to the registration of trade mark No. 90755 in Class 30 was made without sufficient cause and fraudulently and the entry has been wrongly remaining on the register.

7. The Respondent No.1 by filing affidavit in opposition contested the application stating inter alia that the Family Food Industries filed Trade Mark Application No. 90755 dated 02.04.2005 in Class-30 as per Trade Marks Act, 1940 and the said application for registration of Trade Marks has been accepted. After that the Registrar issued the order of advertisement in the Trade Marks journal under section 15(1) of the Trade Mark which was communicated to the Family Food Industries vide memo No. 8831/2007 dated 24.04.2007 directing the Family Food Industries to deposit requisite fee and the negative of the mark before the Trade Mark Registrar for publishing the said Trade Mark Application. Accordingly, Family Food Industries submitted requisite fees and other things to the Registrar for publishing the said Trade Mark Application in the Trade Marks journal. Thereafter, it was published at page 2189 of the Trade Marks Journal No. 244 for the month of October-December/2007. Against the said publication, one Remfry & Son Limited filed a notice of opposition (T.M-5) on behalf of Aujan Industries Co. (L.L.C). Saudi Arabia following an assignment from Rani International Inc. of 244 whittier Circle Orlando, Florida 23306, U.S.A. Thereafter, Family Food Industries on receiving the duplicate copy of the said T.M-5 filed counter statement (T.M-6) as per Rule 32 of the Revised Trade Mark Rules 1963. On receiving the said counter statement Aujan Industries Co. (L.L.C) did not file evidence in support of opposition (T.M-6) as per Rule 32 of the Revised Trade Marks Rules, 1963 and they took several adjournments for filling evidence. Ultimately, the Assistant Registrar-4 by order dated 17.01.2010 declared the Opposition Case No. 2423 of 2009 abandoned and directed to proceeded the Trade Mark Application No. 90755 in class-30.

8. Thereafter the opponent of the said Opposition Case No. 2423 of 2009 Aujan Industries filed Review Petition under section 151 of the Code of Civil Procedure wherein Family Food Industries Ltd. filed written objection. The Assistant Registrar-4 on 24.03.2010 after hearing both the sides rejected the said review petition and issued registration certificate of registered Trade Mark No.90755 dated 02.04.2005 in Class-30. Thereafter, on an application dated 01.06.2010 filed by the Family Food Industries Limited on form T.M-.33, the Assistant Registrar has changed the Register as 'RANI Food Industries Ltd'. After publishing the Trade Mark Application No. 90755 in Class-30 published in the Trade Mark Journal No. 244 for the month of October-December, 2007 at page 2189 the learned Advocate A.B.M Shamsud Doulah on behalf of his client filed application on Form T.M-55 seeking time for filing opposition (T.M-5) against the Trade Mark Application No. 90755 in |Class-30 and the Opposition Case No. 2425 of 2009 was started and ultimately did not file any opposition and as a result the learned Assistant Registrar -4 by decision and order dated 04.06.2009

dismissed the Opposition Case No. 2425 of 2009 which was communicated to the learned Advocate of both sides by letter dated 08.06.2009 of the Assistant Registrar-4.

9. Mr. Rokanuddin Mahmud along with Mr. Mr. Tanjibul-Ul Alam, Ms. Tarana Afroze, learned Advocates appearing for the petitioner submits that granting registration certificate to Rani Food Industries Ltd., the Trade Mark Registrar did not carry out a complete search under Rule 23. Next, he submits that while issuing show case notice to Family Food Industries (Rani Food Industry) during the process of search, the Registrar failed to mention the application No. 90428 dated 14.03.2005, which was the application filed by the predecessor of the petitioner. Since the application for registration of trade mark 'Rani' filed by the Babar Chaklader is prior to the application filed by the Family Food Industries (Rani Food Industry), the Registrar is duty bound to consider the application of Babar Chaklader while processing the application of Family Food Industries. Lack of such reference clearly demonstrate that while granting registration of trade mark to Rani Food, the search was incomplete and such incompleteness is fatal to the registration process.

10. Mr. Mahmud further submits that no show cause notice dated 10.04.2007 under section 14(1) of TA 1940 was ever served upon the Babar Chaklader (Applicant of Application No. 90428 dated 14.03.2005). In the absence of any such service of notice upon the Babar Chaklader, the question of deemed lapse under Rule 24 does not arise at all.

11. He also submits that the mark was never abandoned as no order has been passed in the order sheet of Application 90428 dated 14.03.2005, therefore, the question of application for restoration by giving TM 56 does not arise at all.

12. Mr. Rokan further submits that the Registrar issued show cause notice to Babar Chaklader on 10.04.2007, which was 2 (two) years after his application dated 14.03.2005. This delay blatantly proves that the Registrar failed to comply with Rule 23 by making incomplete charge in the Registrar. He further submits that admittedly till 10.04.2007 the application of Babor Chaklader was alive so the registrar failed to consider the application 90428 in class-30 as prior one while giving show cause notice to RANI Food on 02.05.2006. This lone aspect is sufficient to strike off the trademark registration given to Rani Food.

13. Mr. Mahmud further submits that according to section 20 (1) of Trade Marks Act, 2009, registration of a trade mark shall be effective from the date of application and admittedly Rani Food submitted its application on 02.04.2005 and it has been admitted by Rani Food that it has never used the trade mark RANI till to date, therefore, on the face of the record, the trade mark RANI has not been used for more than 5 years from the registration and as such provision of Section 51 shall be attracted and the argument put forward by Rani Food that it has been prevented from using the trademark due to lack of gas connection is not tenable and therefore would not be a valid ground of defence. In this regard Mr. Mahmud refers Nabisco Biscuit & Bread Vs. Baby Food Products Ltd. 28 (2008) BLD (HCD) 304.

14. Mr. Mahmud finally submits that fraud has been committed by Family Food Industry at the time of submitting its application for registration of the mark RANI by making a specific statement in TM-1 that it had been using the mark, whereas, admittedly Family Food Industry never used the said mark at the time of submits its application TM-1 or prior to submitting the said application. The mark RANI was registered in the name of the respondent without any bonafidy use on their part which is admitted fact as per Order dated 14.10.2010. Admittedly Rani never manufactured, marketed and sold any spices with the trade mark

'RANI' which is yet to be manufactured till filling for registration. Since fraud vitiated everything, there is no scope to allow Rani Food to continue its registration of trade mark, which was obtained by making false statement.

15. Mr. Rokanuddin Mahmud finally submits that the trade mark RANI was registered in the name of the respondent No.1 without any bonafide intention on their part to use the trade mark in relation to such goods for which the same was registered and that there has in fact been no bonafide use of the trade mark in relation to those goods up to filing of the application. Since the respondent No.1 had no definite and present intention on the date of filing application to use the trade mark in Bangladesh and have not used their mark in respect of their goods for a continuous period of five years or more up to a date of one month before filing this application and as such the trade mark of the respondent No.1 being No. 90755 in Class 30, is liable to be removed from the register under section 42(1)(a) and (b) of the Trade Marks Act, 2009. While filing the application for registration of the trade mark, the respondent No.1 resorted to misrepresentation and fraud by inserting a statement in TM 1 that he had been using the trade mark since April 02, 2005 whereas the respondent No.1 is not using the said mark till to date.

16. Dr. M. Zahir alongwith Mr. Abdul Matin Kashru, Mr. Md. Ismail Miah, Mr. Shah Muhammad Ezaz Rahma, learned Advocates appearing for the respondent No.1 submits that Trade Marks registry issued notice dated 10.04.2007 under section 14(1) askeing Babar Chaklader to show cause within 3(three) months as to why his TM application being No. 90428 should not be rejected and the registrar got authority to issue such notice but Babar Chaklader did not give any reply to the said show cause notice as such his application (TM 90428) was abandoned by operation of law under rule 24(2) of the Trade Marks Rules, 1963 and no further reference to the applicant is necessary under the said sub-rule (2) of Rule 24.

17. Dr. Zahir further submits that ababdonment under rule 24(2) of the Trade Mark rules 1963 is different from abandonment under section 16(3) of the Trade Marks Act, 1940. A trade mark application becomes abandoned under rule 24(2) before acceptance of the application for registration and in such a case no further reference to the applicant is required under law. On the other hand, a trade mark is abandoned under section 16(3) with prior notice to the applicant if the registration is not completed within 12(twelve) months from the date of application. Section 16(3) must be read in conjunction with section 16(1) which makes it clear that such abandonment takes place only when the application has been accepted.

18. Dr. Zahir further submits that neither Babar Chaklader nor the appellant filed any application on TM-56 within 2(two) months under rule 24(3) of the Trade Marks Rules, 1963 for restoration of TM application 90428. He also submits that since TM application never restored by the applicant by filling TM-56 under rule 24(3) there is no scope for change the name etc. in TM application No. 90428 inasmuch as mutation in an abandoned TM application is not possible unless and until it is restored to its file as per the provisions of law.

19. He also submits that mutation and restoration are two different things. Mutation is done by filing TM-16. On the other hand an abandoned application is restored by filing TM-56. Mutation is not possible as long as an application remains abandoned and not restored as per the provisions of law.

20. Dr. Zahir further submits that since the TM application No. 90428 filed by the Babar Chaklader was abandoned in 2007 and never restored, thereafter, the said application cannot

be treated as a pending application before the Trade Mark Registry and as such, section 127 of the new Trade Marks Act, 2009 does not apply to the present case. Accordingly, the Registrar of Trade Marks is under no obligation to give notice to the petitioner under section 91 of the new Act and no formal cancellation by the Trade Mark Registry is required under law.

21. He submits that for the purpose of use of a trade mark under section 42 of the new Act the limitation should be considered from the actual date of registration and not from the date of application the mark of RANI Food Industries was registered on 26.08.2010 and thus the 5(five) years time limit is yet to expire so as to attract the provisions of section 42.

22. Dr. Zahir finally submits that the petitioner completely failed to show that the Family Food Industry had no bonafide intention to use the trade mark, when the application for registration was made.

23. This Trade Mark Application has been hotly contested and the learned Advocates on both sides have debated the points raised therein at sufficient length.

24. The petitioner who is an earlier user of the Trade Mark and also earlier applicant of the trade mark being aggrieved has filed this application under section 42 of the Trade Mark Act, 2009 alleging that the Respondent No.1 had no definite and honest intention on the date of filing application to use the trade mark in Bangladesh and have not used their mark in respect of their goods for a continuous period of five years or more up to a date of one month before filling application and respondent No.1 resorted to fraud by making misstatement in the application for registration.

25. Though the petitioner filed this Trade Mark application under section 42 and section 51, but from a plain reading of this Trade Mark Application it is abundantly clear that on the ground of *non-user* of the trade mark, the petitioner filed this trade mark application, therefore, section 51 of the Trade Mark Act, 2009 has no manner of application in this Rule.

26. Section 42 of the Trade Marks Act, 2009 deals with the removal and impose limitation of the mark from the registrar book for non use of the trade mark. According to sub section (1) of section 42 of the Trade Mark Act, 2009, on the basis of any application by any aggrieved person, High Court Division or Registrar of Trade Mark can remove any mark from the register book, if the applicant of the trade mark registration of the goods or service or constituting company under section 41 of the Trade Marks Act, 2009 has no honest intention or 1(one) month prior registration of the mark had not use the mark for honest purpose or has no use the mark for honest purpose after 5(five) years and above from the date of registration.

27. It is necessary to quote the relevant section 42 of the Trade Mark Act, 2009 which runs thus:-

> "*৪২। ট্রেডমার্ক ব্যবহার না করিবার কারণে নিবন্ধন বহি হইতে কর্তন এবং সীমাবদ্ধতা আরোপ-*
> *(১) যদি কোন সংক্ষুব্ধ ব্যক্তি নিম্নবর্ণিত কোন কারণে হাইকোর্ট বিভাগে বা নিবন্ধকের নিকট, নির্ধারিত পদ্ধতিতে, আবেদন করেন, তাহা হইলে সংশ্লিষ্ট পণ্য বা সেবার নিবন্ধিত ট্রেডমার্ক নিবন্ধন বহি হইতে কর্তন করা যাইবে-*
> *(ক) পণ্য বা সেবার ট্রেডমার্ক নিবন্ধনের আবেদনকারী বা ধারা ৪১ এর অধীন গঠনাধীন কোম্পানীর সৎ উদ্দেশ্য না থাকা সত্ত্বেও, সংশ্লিষ্ট পণ্য বা সেবার*

ট্রেডমার্ক নিবন্ধন করা হইয়াছে এবং আবেদন দাখিলের পুর্ববর্তী ১(এক) মাস পর্যন্ত আবেদনকারী বা উক্ত কোম্পানী কর্তৃক উক্ত পণ্য বা সেবার ট্রেডমার্ক সৎ উদ্দেশ্যে ব্যবহার করা হয় নাই; অথবা

(খ) ট্রেডমার্ক নিবন্ধিত হইবার পরবর্তী ৫ (পাঁচ) বৎসর বা তদূর্ধ্ব সময় পর্যন্ত উক্ত পণ্য বা সেবার ট্রেডমার্ক আবেদনকারী বা কোম্পানী কর্তৃক সৎ উদ্দেশ্যে ব্যবহার করা হয় নাই।

(২) নিম্নবর্ণিত ক্ষেত্রসমূহ ব্যতীত, ট্রাইব্যুনাল উপ-ধারা (১) এর অধীন দাখিলকৃত কোন আবেদন প্রত্যাখ্যান করিবে না, যদি-

(ক) ধারা ১০ এর অধীন আবেদনকারীকে অভিন্ন বা প্রায় সাদৃশ্যপূর্ণ পণ্য বা সেবার ট্রেডমার্কের নিবন্ধনের অনুমতি প্রদান করা হয়, অথবা-

(খ) ট্রাইব্যুনালের নিকট প্রতীয়মান হয় যে, উক্ত পণ্য বা সেবার ট্রেডমার্ক, নির্দিষ্ট তারিখ বা মেয়াদের মধ্যে, আবেদনকারী বা কোম্পানী কর্তৃক সৎ উদ্দেশ্যে ব্যবহার করা হইয়াছে।

(৩) যদি কোন সংক্ষুব্ধ ব্যক্তি নিম্নবর্ণিত কোন কারণে হাইকোর্ট বিভাগে বা নিবন্ধকের নিকট, নির্ধারিত পদ্ধতিতে, আবেদন করেন, তাহা হইলে ট্রাইব্যুনাল সংশ্লিষ্ট পণ্য বা সেবার নিবন্ধিত ট্রেডমার্কের ব্যবহার বন্ধ করিবার লক্ষ্যে সীমাবদ্ধতা আরোপ করিতে পারিবে-

(ক) পণ্য বা সেবার ট্রেডমার্ক বিক্রয়ের উদ্দেশ্যে বা অন্যভাবে বাংলাদেশের কোন নির্দিষ্ট স্থানে ব্যবসায়ের উদ্দেশ্যে বা বাংলাদেশের বাহিরে নির্দিষ্ট কোন বাজারে রপ্তানি করিবার উদ্দেশ্যে নিবন্ধিত হইয়াছে কিন্তু নিবন্ধিত হইবার পরবর্তী ৫(পাঁচ) বৎসর বা তদূধর্ব সময় পর্যন্ত উক্ত পণ্য বা সেবার ট্রেডমার্ক আবেদনকারী বা কোম্পানী কর্তৃক সৎ উদ্দেশ্যে ব্যবহার করা হয় নাই; অথবা

(খ) ধারা ১০ এর অধীন একাধিক ব্যক্তিকে অভিন্ন বা প্রায় সাদৃশ্যপূর্ণ পণ্য বা সেবার ট্রেডমার্ক নিবন্ধনের অনুমতি প্রদান করা হইয়াছে, এবং উহা বিক্রয়ের উদ্দেশ্যে বা অন্যভাবে রপ্তানী করিবার উদ্দেশ্যে ব্যবহার করা হয়।

(৪) উপ-ধারা (১) এর দফা (খ) বা উপ-ধারা (২) এর উদ্দেশ্য পূরণকল্পে, আবেদনকারী কর্তৃক ট্রেডমার্কের ব্যবহার না করাকে এইরুপ যুক্তি হিসাবে উত্থাপন করা যাইবে না, যাহা-

(ক) বিশেষ পরিস্থিতির কারণে ঘটিয়াছে, এবং

(খ) ব্যবসায় পরিত্যাগের ইচ্ছা বা ট্রেডমার্ক ব্যবহার না করিবার কারণে ঘটে নাই।

28. Sub-section (1) of Section 42 of the Trade Marks Act, 2009 provides for two cases in which a registered trade Mark may be taken off the register in which it is registered. The first case is set out in cl. (a) of S. 42(1) and the second in cl. (b) of that sub-section. There are two conditions to be satisfied before cl. (a) can become applicable. These conditions are:-

1. That the trade mark was registered without any bona fide intention on the part of the applicant for registration that it should be used in relation to those goods by him, and

2. That there has, in fact, been no bona fide use of that trade mark in relation to those goods by any proprietor thereof for the time being up to a date one month before the date of the application under S. 42(1).

29. Both the conditions set out in cl. (a) are cumulative and not disjunctive. Cl. (a), therefore, will not apply where even though there had been no bona fide intention on the part of the application for registration to use to trade mark but, in fact, there has been a bona fide use of the trade mark in relation to those goods by any proprietor thereof for the time being up to a date one month before the date of the application under S. 42(1). Similarly, Cl. (a)

will not apply where, though there had been a bona fide intention on the part of the applicant for registration to use the trade mark, in fact, there has been no bona fide use of the trade mark in relation to those goods by any proprietor thereof for the time being up to a date one month before the date of the application.

30. C1. (b) of S. 42 (1) applies where for a continuous period of five years or longer from the date of registration of the trade mark, there has been no bona fide use thereof in relation to those goods in respect of which it is registered by any proprietor thereof for the time being. Thus, where there has been a non- user of the trade mark for a continuous period of five years and the application for taking off the trade mark from the register has been filed one month after the expire of such period, the person seeking to has the trade mark removed from the register has only to prove such continuous non-user.

31. Section 42 is a Penal Provision. It provides for civil or evil consequences. It takes away valuable right of a register proprietor. It, therefore, can be taken way only when the condition laid down therefore are satisfied.

32. When a trade mark is register the presumption would be that it is for use as such. If anyone contents that the registration was not bonafide to use that trade mark then he must show that what other purpose the registration was done. The burden of proving the facts is on the person who seeks to have the trade mark removed from the register.

33. In the present case, the petitioner completely failed to prove that the registration of the Trade Mark RANI in the name of the respondent No.1 was not bonafide to use that trade mark and the same had not been used for a contineous period of 5 years in terms of section 46(1)(b) of the Act.

34. There leaves no doubt or dispute that the registration of the trade mark confers a valuable right. The person in whose name the trade mark has been registered may take action against any person have passing of the goods. The registered trade mark confers an exclusive right of use of the trade mark in relation to the goods in which a trade mark is registered. As a person obtained a right on and from the date of registration, he can ordinarily to be deprived of his right only if it is seen that application was not a bonafide one but if it obtained for bonafide use he may not be fastened with any liability owing to non user on the part of the criticizer.

35. In the present case, it appears to us that the application of the respondent No.1 was bonafide. But it has been prevented from using the trade mark due to lack of gas connection.

36. In light of the aforesaid provisions of law and ratio decidendi, we are of the view that this application is not maintainable and the application should be rejected.

37. In the result, the application is rejected.

19 SCOB [2024] HCD 112

HIGH COURTDIVISION
Civil Revision No. 6660 of 2023

Reliance Insurance Limited represented by its Chief Executive Officer ...Petitioner

Vs.

Phoneix Finance and Investments Limited represented by its Principal Officer and others ...Opposite-parties

For the Petitioner: Mr. Ehsan A Siddiq with
Mr. Syed Mohammad Raihan Uddin and Mr. Mohammad K. Shahnewaz, Advocates.

Opposite-parties: Not represented.

Date of hearing and judgment: 09.01.2024

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

Editor's Note
The question arose in this case was regarding the admissibility of evidence. Phoneix Finance and Investments Ltd. sued Reliance Insurance Ltd. and presented a witness (P.W-1) who provided testimony during examination-in-chief. However, due to the plaintiffs' repeated failure to produce P.W-1 for cross-examination by the defendant, the trial court closed the cross-examination. The defendant submitted an application to hold the evidences provided by P.W-1 to be inadmissible and argued that without cross-examination, they were unable to test the veracity of P.W-1's statements and exhibited documents, which hinders their ability to present a proper defense. The trial court rejected the application and the defendants instituted the instant Civil Revision. The High Court Division allowed the revision, emphasizing the importance of cross-examination as a fundamental right and a crucial element in ensuring a fair trial. However, the plaintiffs retain the option to present new witnesses, or the case can proceed with the defendant presenting their own witnesses.

Keywords:
Admissibility of evidence; Cross-examination; Money Suit;

In absence of cross-examination, mere examination-in-chief cannot be admitted as evidence when the defendants cannot get any opportunity to test the veracity of such testimony as well as the documents so have been produced and exhibited by the plaintiff-witness. In essence, the evidence ended in chief has got no evidentiary value at all.

...(Para 13)

J U D G M E N T

Md. Mozibur Rahman Miah, J:

1. At the instance of the defendant no. 1 in Money Suit No. 01 of 2016, this rule was issued calling upon the opposite-party nos. 1 and 2 to show cause as to why the order no. 89 dated 30.10.2023 passed by the learned Joint District Judge, Environment Court, Chattogram in the said suit should not be set aside and why the evidence of P.W-1 should not be excluded from the record of the Money Suit No. 01 of 2016 and/or such other or further order or orders be passed as to this court may seem fit and proper.

2. At the time of issuance of the rule, all further proceedings of the suit was stayed for a period of 1(one) month when this court directed to serve the notice of the rule through special messenger. From the office note, we find that, the notice of the rule has duly been served upon the opposite-parties.

3. The salient facts leading to issuance of the rule are:

The present opposite-party nos. 1 and 2 as plaintiffs filed the aforesaid suit seeking following reliefs:

> *"(a) A decree be passed against the defendant Nos. 1-3 for a sum of Tk. 10,00,40,645.58 together with interest at the rate of 21% per day in accordance with the insurance rule from the date of loss till recovery;*
> *(b) Cost of the suit be decreed against the defendant nos. 1-3;*
> *(c) Any other relief or reliefs as the Ld. Court deems fit and proper be awarded to the plaintiff."*

4. In the said suit, the present petitioner who is the defendant no. 1 along with two others entered appearance by filing written statement denying all the material averments so made in the plaint and eventually prays for dismissing the suit.

5. At the trial, the plaintiffs adduced 1(one) witness who completed recording examination-in-chief. After completion of examination-in-chief, the next date was fixed for cross-examining the said witness by defendants. Then on two consecutive occasions, the said P.W-1 was cross-examined and then the suit was adjourned for cross-examining that P.W-1. As on repeated occasions, the plaintiffs failed to produce that P.W-1 for cross-examination by the defendants, the learned Judge of the trial court then imposed taka 1,000/- as cost and finally vide order being no. 86 dated 16.05.2023, the cross-examination of the plaintiff was declared closed and it was fixed on 26.06.2023 for recording testimony of the defendant's witnesses. At this, the defendants on 30.10.2023 filed an application to exclude the evidence of that P.W-1 reasoning that, the evidence of the P.W-1 is not admissible because after the examination-in- chief is completed as the P.W-1 failed to make himself available, the defendant side could not cross-examine the said witness to check the veracity of the

deposition given in the examination-in-chief and hence, the said chief cannot be admissible as evidence.

6. However, against that very application, the plaintiffs did not file written objection and the learned Judge of the trial court vide impugned order dated 30.10.2023 that is, on the very date of filing application rejected the same vide impugned order holding that, since the defendants got the opportunity to cross-examine the plaintiff's witness so there has been no scope to exclude the examination-in-chief from the evidence of the P.W-1.

7. It is at that stage, the defendant no. 1 as petitioner came before this court and obtained the instant rule and order of stay.

8. Mr. Ehsan A Siddiq, the learned counsel appearing for the petitioner upon taking us to the revisional application and all the documents appended therewith at the very outset contends that, since the witness of the plaintiffs could not be cross-examined by the defendants so the validity of the documents so have been produced and exhibited could not be examined and therefore, the said evidence made by the plaintiffs as P.W-1 through examination-in-chief will remain as evidence for the plaintiffs which remains unchallenged at the instance of the defendants.

9. The learned counsel further contends that, though on several occasions, the plaintiff witness remained absent and on the failure of producing the P.W-1 even the learned Judge of the trial court imposed cost and on the following day of imposing fine, the learned Judge himself found that the cost had not been deposited so the learned Judge of the trial court has got no other option but to dismiss the suit under order XVII, rule 2(3) of the Code of Civil Procedure yet the learned Judge proceeded with the suit which cannot be sustained in law.

10. The learned counsel next contends that, if the evidence given by the P.W-1 remains in place as of evidence of the plaintiffs and the said P.W-1 could not be cross-examined in that case, the defendant will not take his defence that has been asserted in the written statement.

11. However, in support of his such submission, the learned counsel for the petitioner has relied upon a host of decisions. On going through those decisions, we find that, though there has been no specific provision for excluding the evidence for want of cross-examining of the witness but it has been settled in those cited decisions that no evidence is admissible against a party unless and until, it is given opportunity to cross-examine the said witness.

12. As we have found earlier that in spite of serving notice through special messenger upon the opposite-parties who are the plaintiffs in the suit but they did not bother to turn up to oppose the rule. However, we have also very meticulously gone through the documents including the plaint, written statement, application as well as the orders so passed by the learned Judge of the trial court prior to passing the impugned order.

13. Only point to be adjudicated in disposing of the instant rule is, whether the examination-in-chief so given by the P.W-1 can be regarded as any evidence in absence of cross-examining that witness. Though there has been no straight jacket rule either in the Code of Civil Procedure or in the Evidence Act in that respect but we find from the authorities so cited by the learned counsel for the petitioner that, in absence of cross- examination, the chief given by the plaintiff's witness will be excluded but in those decisions, it has been settled, such kinds of evidence which ended in only examination-in-chief has not been taken as any evidence meaning not to take into account of the examination-in-chief as evidence. We find substance to those authorities vis-à-vis the submission so placed by the learned counsel for the petitioner basing on that. So in absence of cross-examination, mere examination-in-chief cannot be admitted as evidence when the defendants cannot get any opportunity to test the veracity of such testimony as well as the documents so have been produced and exhibited by the plaintiff-witness, In essence, the evidence ended in chief has got no evidentiary value at all.

14. Regard being had to the above facts and circumstances, we find merit in this rule which is liable to be made absolute.

15. Accordingly, the rule is made absolute however without any order as to cost.

16. The deposition (examination-in-chief) so given by the P. W-1 is hereby excluded.

17. However, the plaintiffs are at liberty to adduce any other witnesses if so desires if not then the defendants can proceed with their own witness.

18. At any rate, the order of stay granted at the time of issuance of the rule stands recalled and vacated.

19. However, the learned Joint District Judge, Environment Court, Chattogram is hereby directed to dispose of the Money Suit No. 01 of 2016 as expeditiously as possible preferably within a period of 3(three) months from the date of receipt of the copy of this judgment taking into account of the above observation.

20. Let a copy of the judgment be communicated to the learned Joint District Judge, Environment Court, Chattogram forthwith.

19 SCOB [2024] HCD 116

HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Civil Revision No. 5301 of 2001

Shaikh Ali Iman
... Preemptee-Petitioner
Vs.

Hazari Lal Mondal being dead his legal heirs Subodh Kumar Mondol and others
... Preemptors-Opposite parties

Mr. Abul Kalam Azad with
Mr. Munshi Abdul Hamid, Advocates
...For the preemptee-Petitioner

Mr. Mrinal Kanti Biswas, Advocate
...For the Preemptors-Opposite parties

Judgment on : 28th February 2021

Present:
Mr. Justice Muhammad Khurshid Alam Sarkar

Editors' Note:
In this case while adjudicating the issue as to whether the pre-emptor had knowledge about the transfer of property within the statutory limitation, the High Court Division held that it is the legal presumption that the transfer notice was duly served to the pre-emptor. If in fact, it was not, then it has to be proved in the trial court producing the dispatch book/register of the Registering or other concerned Officer or by examining the process server. The High Court Division also held that the trial Court must frame issue relating to service of notice while adjudicating preemption cases. Finally, the High Court Division issued some guidelines for the subordinate Courts to be followed while dealing with pre-emption cases.

Key Words:
Section 89 and 96 of the State Acquisition and Tenancy Act; preemption cases; preemptor; preemptee; notice of transfer; dispatch book/register;

Section 89 of the SAT:
No sale of a property, in which existence of co-sharers would be apparent from the records, can be completed without serving notice upon the co-sharers inasmuch as the law forbids the Registering Officer to register a sale-deed without obtaining the notice together with the process-fees from the seller and, thereafter, the Registering Officer is duty bound to transmit the notice to the Revenue Officer who shall, then, serve the said notice by registered post. And, in the light of use of the word 'shall' by the Legislature in each of the steps mentioned in Section 89 of the SAT Act, the legal presumption is that all the State/Government functionaries have performed their duties assigned under Section 89 of the SAT Act. If any preemptor claims that s/he was never served with the notice under Section 89 of the SAT Act, then, in turn, the preemptee shall have to prove its service. However, for an effective adjudication of a preemption case, the preemptor may either apply to the trial Court for production of the 'dispatch book/register' of the Registering Office and that of the Revenue Office of the relevant dates or may apply to the Court for examining the process-server of the Revenue Office to prove contrary to the legal presumption. If the office/person responsible for serving notice under Section

89 of the SAT Act proves before the Court the fact of serving the said notice upon the preemptor, then, it would be for the notice receiver, being a preemptor in a preemption case, to rebut before the trial Court by any other ocular evidence with corroboration that he has never received the notice under Section 89 of the SAT Act. ...(Para 12)

Sections 89 and 96 of the SAT:

It is mandatory for the preemptor to satisfy the Court by adducing ocular evidence that the preemptor has never received the notice under Section 89 of the SAT Act, against the legal presumption of due accomplishment/performance by the Government officials; without first proving as above, Section 96 of the SAT Act does not directly/automatically entitle a preemptor to avail the second limitation of time i.e. 'within four months (currently two months) from the date of knowledge of transfer'.

...(Para 13)

The preemptor is at liberty to claim damage/compensation from the learned Advocates whom he had engaged at the trial Court and the appellate Court:

The above ground of the lawyer's mistake apparently sounds logical inasmuch as it is a pertinent issue for consideration of this Court that when a litigant, being not conversant with the legal provisions, engages a lawyer and if because of the latter's incompetency or negligence, the litigant loses a legal right, whether this Court should interfere with the impugned Judgment. Since it was the professional duty of the learned Advocates for the preemptor at the trial Court and at the appellate Court to apply for production of the 'dispatch book' of the Sub-Registry Office as well as that of the Revenue Office, and because of not performing their professional duty diligently, the preemptor has been deprived of contesting and establishing a legal right, this Court is of the view that the preemptor shall be at liberty to claim damage/compensation from the learned Advocates whom he had engaged at the trial Court and the appellate Court.

...(Para 17)

Guidelines for the learned Judges of the sub-ordinate judiciary for dealing with the preemption cases under Section 96 of the SAT Act:

I find it to be the Constitutional as well as statutory duty of this Court, to lay down some guidelines for the learned Judges of the sub-ordinate judiciary for dealing with the preemption cases under Section 96 of the SAT Act and, also, the necessary directions for the relevant State-functionaries:

(1) In all the preemption cases under Section 96 of the SAT Act, if the preemptor denies the fact of receiving notice under Section 89 of the SAT Act, the learned Judges of the trial Court must frame an issue as to whether or not notice under Section 89 of the SAT Act was served upon the preemptor by the concerned Registering Officer and the Revenue Officer.

(2) The Registrar of the High Court Division of the Supreme Court of Bangladesh is directed to circulate this Judgment to all the learned District Judges of the country with a direction upon them to arrange an in-house meeting/workshop for 2(two) hours in order to apprise and enlighten all the learned Judges about the guidelines set out hereinbefore in this Judgment.

(3) The Secretary, Ministry of Land is directed to prepare a Form/format of the Notice under sub-Sections (4) & (5) of Section 89 of the SAT Act to be used by the Revenue Officers of Bangladesh as compliance with the above-mentioned provisions of Section 89 of the SAT Act. He is further directed to disseminate the said notice to all the Upazillas of the country with an Office

Order that the Revenue Officers must serve notice under Section 89 of the SAT Act immediately after being informed about the transfer of a land by the Registering Officers, failure of which negative remarks shall be recorded in their respective service books.

(4) The Inspector General of Registration under the Ministry of Law is directed to circulate a gazetted notice to all the Registering Officers of the country directing that they must comply with the provisions of Sub-Sections (4) & (5) of Section 89 of the SAT Act without fail with a consequential order that in case of failure to serve notice under the provision of Section 89, they shall face disciplinary action for gross negligence in performing their duties.

(5) The Secretary, Ministry of Land, the Registrar of the High Court Division of the Supreme Court of Bangladesh and the Inspector General of Registration are directed to file affidavits of compliance on or before 05/05/2021.

...(Para 21)

JUDGMENT

Muhammad Khurshid Alam Sarkar, J:

1. Instant Rule was issued at the instance of the preemptee-petitioner ((hereinafter referred to either as preemptee or the petitioner) and the same is directed against a Judgment of reversal, being Judgment and Order dated 28.05.2001 passed by the learned Additional District Judge, 3rd Court, Khulna in Miscellaneous Appeal No. 19 of 1999, reversing the Judgment and Order dated 09.02.1999 passed by the Court of Assistant Judge, Fultala, Khulna in Miscellaneous Case No. 9 of 1995.

2. The background facts of filing this revisional application are that the predecessor of this application's opposite parties, late Hazari Lal Mondal, as the preemptor, filed the above-mentioned preemption case on 19.04.1995 making the averments that he is a co-sharer of the suit-Jote of 1.65 acres of land and the other two co-sharers Fatik Mondol and Ramala Bala Mondol (opposite party Nos. 2 & 3) have sold the suit land through registered sale deed No. 824 of 1991 dated 12.06.1991 to the preemptee without serving notice upon the preemptor and other co-sharers; that the suit land is situated in 'Bil Dakatia' which was under water for nearly 12 years and no one could cultivate the land; that in the year 1995, some land were ready for cultivation and when on 17.03.1995, the preemptee came to possess the land upon disclosing for the first time that he purchased the property, the preemptor came to know from the preemptee about the sale of the suit land on the said date of 17.03.1995; that thereafter the preemptor went to the sub-Registrar's office and got a certified copy of the sale deed on 18.03.1995 and came to know clearly that opposite party Nos. 2 and 3 had sold the suit land on 12.06.1991 to the preemptee through registered sale-deed No. 824 of 1991 at a price of Tk. 10,000/- (ten thousand) only; that the preemptee is not a co-sharer of the Joma and he is a stranger and he never made the transaction known to the preemptor or any other person before 17.03.1995 and he did never possess the suit land; that the preemptor is a farmer owning 5 bighas land and he deposited the value of the land and compensation money. So, by filing the Miscellaneous Case, he prayed for preemption and cost.

3. The opposite party No. 1 (preemptee-petitioner) submitted written objection contending, inter alia, that the case is not maintainable, barred by limitation and bad for defect of parties; that the recorded tenants sold share at the highest price and handed over possession to the preemptee; that one relative of the preemptor, Nira Mondol, was present at

the time of sale and the preemptee along with Nira Mondol had met the preemptor with a proposal to buy the land from the sellers but he refused and, then, the preemptee purchased the land; that the seller also went to the preemptor and proposed to sell the land to the preemptor and when he refused to purchase the land, the seller sold the same to the preemptee; that from the date of purchase, the preemptee is possessing and enjoying the suit land without any hindrance; that the preemptor knows everything about the sale of case-land, because the preemptee mutated his name and paid rent and in the recent survey his name was recorded; that the preemptors are not co-sharers and they are not tillers/cultivators and they have over 100 bighas of land. So, the case should be dismissed with cost.

4. On perusal of the application for preemption, written objections and evidence adduced by both the parties, the trial Court arrived at the decision that the application for pre-emption is liable to be rejected on the ground of the preemptor's failure to approach the Court within the four months time from the date of his knowledge of transfer of the case-land and, accordingly, the pre-emption case was dismissed. The preemptor-opposite party preferred an appeal being Miscellaneous Appeal No. 19 of 1999 and the learned Additional District Judge allowed the appeal by reversing the Judgment and Order passed by the trial Court.

5. Mr. Abul Kalam Azad, the learned Advocate appearing for the preemptee takes me through the evidence adduced by the PW1 and submits that since the PW1 himself has submitted the certified copy of the mutation of the land in question as exhibit-2 in the trial Court, no further evidence is required to prove the date of knowledge of sale of this property. In an effort to elaborate his submission on this count, he submits that from the aforesaid exhibit-2 it is evident that the Mutation Case of the land in question was registered as Mutation Case No. 10/92-93 and, therefore, the preemptor was competent to file the case only within four months of the date of knowledge in the year 1993. Then, the learned Advocate for the preemptee, by taking me through the deposition of all the PWs, submits that the deposition of the PW1 with regard to the place of knowledge is contradictory with that of the PW2 and PW3 inasmuch as the PW1 states that their father came to know for the first time about the sale upon seeing the preemptee in the case-land, whereas the PW2 and PW3 stated that they saw the preemptee to survey/measure the case-land. Mr. Azad continues to submit that there is no mentioning about presence of any person who would corroborate the father of PW1's claim as to disclosure by the preemptee about the purchase of the case-land. He argues that since the PW1 has admitted the fact of the seller's migration to India from this country permanently in the year 1991, the normal presumption is that the preemptor had the information about the transfer of this property by the seller. By referring to the case of Abdul Mazid Howlader & Another Vs Lehajuddin Howlader and Others 16 BLD(AD) 197, he submits that since the case was filed long after 4 (four) years of sale of the case-land, a heavy burden lay on the preemptor to discharge the onus of proof that he did not have the knowledge about the transfer of property. Mr. Abul Kalam Azad, the learned Advocate for the preemptee, then, takes me through the Judgment of the trial Court and that of the appellate Court and submits that the appellate Court's Judgment is not a proper Judgment of reversal. He submits that while the learned Judge of the trial Court has judiciously dealt with all the issues of the case, the learned Judge of the appellate Court in a slipshod manner reversed the decision of the trial Court by simply trying to find out the loopholes of the OPWs.

6. Per contra, Mr. Mrinal Kanti Biswas, the learned Advocate for the preemptor-opposite parties, by taking me through the depositions of the PWs and DWs submits that the date of

knowledge as to transfer of the case-land has sufficiently been proved by the PWs inasmuch as it has been admitted by the DWs that the case-land was under water for more than 12 years and the preemptor came to know about the transfer lately on 17.03.1995 only when the preemptee had been in the case land and disclosed to the preemptor about the fact of purchasing the case-land. Mr. Biswas next submits that there is no contradiction in the depositions of PWs as to the date of knowledge of transfer of the case-land, rather the deposition of PW1 is corroborated by that of the other PWs inasmuch as when the preemptee had been in the case-land to measure the same, the preemptor had asked the preemptee about the reason of his presence in the case-land and, that is how, the depositions of each of the PWs have been substantiated. With regard to the arguments placed by the learned Advocate for the petitioner as to the mutation-document, which has been marked as exhibit-2, the learned Advocate for the preemptor Mr. Biswas argues that though the exhibit-2 contains the Mutation Case Number as 10/1992-93, but there is no date of passing any Order by any officer on this Mutation Case. In elaborating his above count of submissions, the learned Advocate for the preemptor submits that the preemptor obtained this copy only on 14.01.1998, which is long after the filing of this preemption case, and, further, the said copy was submitted by the preemptor in the Court to show his standing as a co-sharer in the Khatian.

7. Mr. Biswas, in an endeavour to put forward the practical scenario of Bangladesh, contends that the Sub-Registry Office and the Revenue Office of this country usually do not bother to serve notices under Section 89 of the SAT Act. He therefore prays for sending the case back on remand in order to enable the preemptor to prove the fact that he never received the notice under Section 89 of the SAT Act from the Revenue Office. With regard to the submissions advanced by the learned Advocate for the purchaser that the preemptor was aware of the selling of this property long ago as he had knowledge about the seller's migration to India from this country, Mr. Biswas submits that the PW1 never made any deposition to the effect that Fotik (the seller) had migrated to India permanently. In an endeavour to explain the preemptor's deposition on the aforesaid issue, he submits that preemptor is the son of the original preemptor who simply stated that the seller had visited India with Nagendranath. In corroboration of his submissions, the learned Advocate for the preemptor refers to the case of Abdul Sattar Vs. Osimuddin, 42 DLR 24 and submits that mere obtaining information about transfer of any immoveable property does not trigger counting of limitation period. He submits that the limitation period starts only after having definite information of sale of property to a stranger, by obtaining certified copy of the registered deed of sale of the co-sharer's land.

8. After hearing the learned Advocates for both the sides, perusing the revisional application and counter affidavits together with their annexures, examining the Lower Court Record (LCR) and reading the relevant statutory laws and case-laws, it appears to this Court that the first issue to be adjudicated upon by this Court is - whether the preemptor-opposite parties had filed the case within the statutory period as prescribed in Section 96 of the State Acquisition and Tenancy Act, 1950 (shortly, SAT Act); i.e. the first issue is about limitation and the second issue is whether a litigant/party (here in this case, the preemptor) may seek any remedy from this Court as to the bonafide mistake of his lawyer at the trial Court or if the mistake is committed by the learned Judge of the trial Court and appellate Court.

9. Given that the case was filed invoking Section 96 of the SAT Act (under the provisions of the old law i.e. before the amendment of the said Section on 20.09.2006), quotation of the same would assist the Court in effectively adjudicating upon this revisional application. The

old version of Section 96 of the SAT Act consisted of as many as 12 (twelve) sub-Sections with a few Provisos and the amended version is enacted with as many as 18 (eighteen) sub-Sections with 2(two) Provisos. Therefore, for the sake of brevity, quotation of the same is being avoided. Instead, I read the entire provisions of both the old and amended versions of Section 96 of the SAT Act. From an inquisitive reading of both the versions concurrently, it appears to me that in a case under Section 96 of the SAT Act, there may be many issues, such as; (i) whether the case-land is sold to the preemptee or the preemptee (transferee) has got the case-land as gift or by exchange or by partition or through usufructuary mortgage or vide waqf or as the dedication for religious/charitable purpose, (ii) whether the preemptor is a co-sharer/contiguous land-owner (by the new law, the categories of the co-sharer by purchase and the contiguous land-owner have been omitted/dropped/discontinued; only the co-sharers by inheritance are currently entitled to claim preemption), (iii) whether the case has been filed within the prescribed time (previously the time was four months and presently the time is two months from the date of serving notice under Section 89 of the SAT Act), (iv) if it is proved that no notice was served under Section 89 of the SAT Act, then, whether the preemptor approached the Court within four months (presently two months) from the date of knowledge of transfer (previously, preemptor was allowed to file preemption case after lapse of even infinite time if the reason for the delay was plausible; but currently no preemption case shall be allowed after three years from the date of registration of the sale deed), (v) whether the preemptor shall encounter the impediment i.e. incompetent under Section 90 of the SAT Act to purchase the case-land, (vi) whether the preemptor has deposited the appropriate amount of money in the Court, (vii) whether all the co-shares have been impleaded as the parties of the case, (viii) whether the preemptor has deposited the appropriate amount of money in the Court and (ix) whether the sold-land (case-land) is a homestead (newly inserted in the amended law that no preemption case shall be filed for the sold homestead).

10. Since in this case, the core issue is about the statutory time-limit of filing the case, I find it useful to quote the relevant part of Section 96, namely, sub-Section (1) of Section 96 of the SAT Act. Section 96(1) of the SAT Act (as it was before the amendment of this law by Act No. xxxiv of 2006) runs as follows;

> **96. Right of pre-emption:** (1) If a portion or share of a holding of a raiyat is transferred, one or more co-sharer tenants of the holding may, within four months of the service of the notice given under Section 89, or, if no notice has been served under Section 89, within four months of the date of the knowledge of the transfer, apply to the Court for the said portion or share to be transferred to himself or themselves; and if a holding or a portion or a share of a holding is transferred, the tenant or tenants holding land contiguous to the land transferred may, within 4 months of the date of the knowledge of such transfer, apply to the Court for the holding or portion or share to be transferred to himself or themselves. (emphasis supplied)

11. It would not be difficult for any reader to have an understanding that there are two time-schedules for filing preemption cases, covering two different situations; the first time-schedule for filing a preemption case is 4 (four) months from the date of serving the notice under Section 89 of the SAT Act. So, the first situation arises when the notice is served upon the preemptor under Section 89 of the SAT Act. Given the employment of the words, *'...four months of the service of notice given under Section 89',* there is no scope for any one to read or interpret or assume that *'four months from the date of receipt of the notice'* is the limitation of time for filing a preemption case. And the second situation is – when the notice under

Section 89 of the SAT Act has not been received by the premptor, but the preemptor has come to know about the transfer of property by some other means and, in that scenario, the time schedule for filing a preemption case is 4 (four) months from the date of knowledge about transfer of the land. So, clearly the clock of limitation of time starts immediately after 'serving notice' under Section 89 of the SAT Act. To this end, I find it pertinent to look at the provisions of Section 89 of the SAT Act, which is quoted below;

> **89. Manner of Transfer:** (1) Every such transfer shall be made by registered instrument, except in the case of a bequest or a sale in execution of a decree or of a certificate signed under the Bengal Public Demands Recovery Act, 1913, and a Registering Officer shall not accept for registration any such instrument unless the sale price, or where there is no sale price, the value of the holding or portion or share thereof transferred is stated therein and unless it is accompanied by-
> (a) a notice giving the particulars of the transfer in the prescribed form together with the process fee prescribed for the transmission thereof to the Revenue-officer; and
> (b) such notices and process fees as may be required by sub-Section (4).
>
> (2) ……(not relevant)
> (3) ……(not relevant)
> (4) If the transfer of a portion or share of such a holding be one to which the provisions of section 96 apply, there shall be filed notices giving particulars of the transfer in the prescribed form together with process fees prescribed for the service thereof on all the co-sharer tenants of the said holding who are not parties to the transfer and for affixing a copy thereof in the office of the Registering Officer or the Court house or the Office of the Revenue Authority, as the case may be.
> (5) The Court, Revenue Authority or Registering Officer, as the case may be, shall transmit the notice referred to in clause (a) of sub-section (1) to the Revenue-officer and shall serve the notice on the co-sharer tenants referred to in sub-section (4) by registered post and shall cause a copy of the notice to be affixed in the Court house or in the Office of the Revenue Authority or of the Registering Officer, as the case may be : (underlined by me)

12. From a plain reading of the provisions of Section 89 of the SAT Act, it is vividly clear that no sale of a property, in which existence of co-sharers would be apparent from the records, can be completed without serving notice upon the co-sharers inasmuch as the law forbids the Registering Officer to register a sale-deed without obtaining the notice together with the process-fees from the seller and, thereafter, the Registering Officer is duty bound to transmit the notice to the Revenue Officer who shall, then, serve the said notice by registered post. And, in the light of use of the word 'shall' by the Legislature in each of the steps mentioned in Section 89 of the SAT Act, the legal presumption is that all the State/Government functionaries have performed their duties assigned under Section 89 of the SAT Act. If any preemptor claims that s/he was never served with the notice under Section 89 of the SAT Act, then, in turn, the preemptee shall have to prove its service. However, for an effective adjudication of a preemption case, the preemptor may either apply to the trial Court for production of the 'dispatch book/register' of the Registering Office and that of the Revenue Office of the relevant dates or may apply to the Court for examining the process-server of the Revenue Office to prove contrary to the legal presumption. If the office/person responsible for serving notice under Section 89 of the SAT Act proves before the Court the

fact of serving the said notice upon the preemptor, then, it would be for the notice receiver, being a preemptor in a preemption case, to rebut before the trial Court by any other ocular evidence with corroboration that he has never received the notice under Section 89 of the SAT Act.

13. And, when the Court shall be satisfied that actually no notice under Section 89 of the SAT Act was ever served upon the co-sharers, that would be the second situation under Section 96 of the SAT Act and, only in that scenario, the question of application of the second time-schedule under Section 96 of the SAT Act comes into play. Because, given the employment of the expression by the Legislature 'if no notice has been served under Section 89', it is mandatory for the preemptor to satisfy the Court by adducing ocular evidence that the preemptor has never received the notice under Section 89 of the SAT Act, against the legal presumption of due accomplishment/performance by the Government officials; without first proving as above, Section 96 of the SAT Act does not directly/automatically entitle a preemptor to avail the second limitation of time i.e. 'within four months (currently two months) from the date of knowledge of transfer'.

14. In this case, since the sale-deed has been registered by the Registering Officer i.e. Sub-Register of the concerned jurisdiction, it shall be presumed by the Court that the Sub-Register has registered the sale-deed only after being furnished with the notice containing the particulars (name and address) of the preemptor together with process fees for sending the same to the preemptor's address by registered post through the Revenue Officer and, further, it shall be the presumption of the Court that the concerned Revenue Officer has also served the notice upon the preemptor duly, for, the PW1 himself has proved the document of mutation as exhibit-1. Had it been the preemptor's case that he never received any notice from the Revenue Officer, it was incumbent upon the preemptor to apply for the production of the 'dispatch register' of the Revenue Officer as well as that of the Sub-Register. Since, evidently the preemptor neither applied to the Court for production of the dispatch registers of the sub-Registry Office and Revenue Office, nor did examine any relevant witness/es to nullify the legal presumption; further, since from the evidence (Exhibit 1) produced by the PW1 himself that after completion of transfer of the case-land, the mutation took place in the year 1993, this Court finds that notice was duly served by the Revenue Office and, accordingly, this Court has no option other than to hold that the preemptor did not approach the Court in filing the preemption case within 4 (four) months from the date of service of notice under Section 89 of the SAT Act.

15. Now, let me take up the second issue, namely, whether this case is worthy of sending back to the trial Court for giving an opportunity to the preemptor to call for the 'dispatch registry' of the Revenue Office and Sub-Registry Office and/or examine the process-server as a witness.

16. It was the submission of the learned Advocate for the preemptor that while it was the duty of the learned Advocate of the preemptor at trial Court to apply for production of 'dispatch book/register' of the Revenue Office, the learned Presiding Judge of the trial Court can not also shrug off his duty to call for the said document on his own towards ensuring fair disposal of the case, in that it is a fact directly linked with the statutory provision; and it was his argument that enjoyment of a right of a citizen engraved in a statute can not be deprived, simply because of the mistake committed by the lawyer dealing with the case or because of the ignorance of the learned trial Judge as to the status of a law endowing a specific right on a litigant party.

17. The above ground of the lawyer's mistake apparently sounds logical inasmuch as it is a pertinent issue for consideration of this Court that when a litigant, being not conversant with the legal provisions, engages a lawyer and if because of the latter's incompetency or negligence, the litigant loses a legal right, whether this Court should interfere with the impugned Judgment. Since it was the professional duty of the learned Advocates for the preemptor at the trial Court and at the appellate Court to apply for production of the 'dispatch book' of the Sub-Registry Office as well as that of the Revenue Office, and because of not performing their professional duty diligently, the preemptor has been deprived of contesting and establishing a legal right, this Court is of the view that the preemptor shall be at liberty to claim damage/compensation from the learned Advocates whom he had engaged at the trial Court and the appellate Court.

18. Also, as per the *ratio* laid down in the case of Akram Ali Vs Khasru Miah 19 ALR (HCD) 124, the learned Judges of the trial Court and the appellate Court ought to have considered the said issue as one of the vital issues inasmuch as when a statute sets out a legal condition for adjudication of a suit/case, the Court is duty bound to deal with the said law-point, even if the said legal issue is not raised or pointed out by the parties of the suit/case. The learned Judges of the trial Courts should bear in their minds that they are duty bound to frame issues of a suit/case, not only on the basis of the pleadings (i.e. plaint, written statements, application and written objections), but also with reference to the list of the documents submitted before them with the pleadings of the parties and, also, on the basis of the laws involved in the particular suit/case. And, further, they are competent to recast the issues even after taking deposition of the witness with the exhibits, if submitted, subject to allowing the parties of the suit/case to make out their respective cases on the issues recast by the Court by producing their new or corroborative evidence. After completion of deposition and cross-examinations of all the PWs and DWs, the learned Judges of the trial Courts are empowered to call for any documentary and/or oral evidence, if they consider it to be vital for fair and effective adjudication of a suit/case, as laid down in the afore-cited case of Akram Ali Vs Khasru Miah 73 DLR 82 (relevant para-75).

19. Given that apparently the learned Judge of the trial Court has not framed the issue on serving notice under Section 89 of the SAT Act, my primary view is in favour of sending this case back to the trial Court for framing an issue as to whether the preemptor was served with the notice under Section 89 of the SAT Act. However, in the light of the production of the document as to the mutation of the case-land by the plaintiff himself as exhibit-1, my ultimate final view is that the preemptor, in fact, was issued with the notice under Section 89 of the SAT Act and, that is why, his lawyers have not hammered on the said issue in the lower Courts.

20. It follows that since the preemptor did not file the preemption case within four months of being served with the notice under Section 89 of the SAT Act, the preemption case is destined to be dismissed. Even, for the sake of argument, if this Court remands the case and the preemptor succeeds in establishing the above-discussed legal point at the trial Court that he was never issued with the notice under Section 89 of the SAT Act, in that scenario, his case would depend upon proving that he has filed the preemption case 'within four months of the date of knowledge of transfer'. Given that the aforesaid factual issue has already been adjudicated upon by the trial Court upon finding that the preemptor had the knowledge of the transfer in question, this Court is also in agreement with the trial Court's above-mentioned findings, particularly in view of clear admission by the PW1 that he was aware of the sellers'

migration to India immediately after the sale of the case-land; a very vital material evidence which the appellate Court failed to appreciate and assess.

21. Thus, I find merit in the Rule. However, before parting with this Judgment, it appears to me to be pertinent and useful and, in fact, I find it to be the Constitutional as well as statutory duty of this Court, to lay down some guidelines for the learned Judges of the sub-ordinate judiciary for dealing with the preemption cases under Section 96 of the SAT Act and, also, the necessary directions for the relevant State-functionaries:

(6) In all the preemption cases under Section 96 of the SAT Act, if the preemptor denies the fact of receiving notice under Section 89 of the SAT Act, the learned Judges of the trial Court must frame an issue as to whether or not notice under Section 89 of the SAT Act was served upon the preemptor by the concerned Registering Officer and the Revenue Officer.

(7) The Registrar of the High Court Division of the Supreme Court of Bangladesh is directed to circulate this Judgment to all the learned District Judges of the country with a direction upon them to arrange an in-house meeting/workshop for 2(two) hours in order to apprise and enlighten all the learned Judges about the guidelines set out hereinbefore in this Judgment.

(8) The Secretary, Ministry of Land is directed to prepare a Form/format of the Notice under sub-Sections (4) & (5) of Section 89 of the SAT Act to be used by the Revenue Officers of Bangladesh as compliance with the above-mentioned provisions of Section 89 of the SAT Act. He is further directed to disseminate the said notice to all the Upazillas of the country with an Office Order that the Revenue Officers must serve notice under Section 89 of the SAT Act immediately after being informed about the transfer of a land by the Registering Officers, failure of which negative remarks shall be recorded in their respective service books.

(9) The Inspector General of Registration under the Ministry of Law is directed to circulate a gazetted notice to all the Registering Officers of the country directing that they must comply with the provisions of Sub-Sections (4) & (5) of Section 89 of the SAT Act without fail with a consequential order that in case of failure to serve notice under the provision of Section 89, they shall face disciplinary action for gross negligence in performing their duties.

(10) The Secretary, Ministry of Land, the Registrar of the High Court Division of the Supreme Court of Bangladesh and the Inspector General of Registration are directed to file affidavits of compliance on or before 05/05/2021.

22. In the result, the Judgment and Order dated 28.05.2001 passed by the learned Additional District Judge, 3rd Court, Khulna is set aside and the Judgment and Order dated 09.02.1999 passed by the learned Assistant Judge, Fultala, Khulna is restored and upheld. However, there shall not be any Order as to costs.

23. Let the matter be posted in the list on 05/05/2021 to ensure the compliance by the Registrar of the High Court Division of the Supreme Court of Bangladesh, the Inspector General of Registration and the Secretary, Ministry of Land.

19 SCOB [2024] HCD 126

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No.3618 of 2022

Mosarrof Hosen and another
..... Petitioners
-Versus-
Artha Rin Adalat No.1, Dhaka and others ..... Respondents

Mr. A.B.M. Altaf Hossain with
Mr. Mohammad Jamal Hossain, Advocates .....For the petitioners

Mr. Shamim Khaled Ahmed with
Mr. Nikhil Kumar Biswas, Advocates
.....For respondent No.2

Heard on: 09.02.2023
Judgment on: The 3rd of April 2023

Present:
Mr. Justice Abu Taher Md. Saifur Rahman
And
Mr. Justice A.K.M. Rabiul Hassan

Editors' Note:
This writ petition was filed challenging the ex-parte judgment and decree passed by the Artha Rin Adalat on the ground that the trial court has violated the provision of section 10 of the Artha Rin Adalat Ain, 2003 by not giving opportunity to the petitioner to submit written statement. Another question was raised by the opposite party as to the maintainability of the writ petition. The Court found that as the petitioner appeared before the trial court to submit the written statement, he should have been given the opportunity as per the law. Moreover, the Court also held that alternative remedy would not be a bar in case of exercise of the jurisdiction under article 102 of the constitution by the High Court Division.

Key Words:
Section 10, 19, 41 of the Artha Rin Adalat Ain, 2003; Ex-parte Decree; Article 102 of the Constitution; Alternative remedy

On perusal of the aforesaid provision, it transpires that before passing an ex-parte judgment and decree the trial Court has to be satisfied at first, the following requirement has been fulfilled mainly that (a) the date was fixed for ex-parte hearing and (b) the defendant does not appear on that day or (3) the defendant is not found present after he was called. ...(Para-12)

In the instant case, we have noticed that the trial Court below for the first time fixed the date for an ex-parte hearing on 28.02.2022, and on that day the petitioner appeared before the trial Court along with an application prayed for time to submit the written statement, which was rejected and thereby passed the ex-parte judgment and decree on the same day in presence of the petitioner as evident from Annexure – B to the writ petition. So it is crystal clear that in violation of the mandatory provision of section

19(1) of the Ain 2003, the ex-parte judgment and decree has been passed and, as such, it is a nullity in the eye of the law. ...(Para-13)

So far the contention as raised by the learned Advocate for the respondent No.2 regarding the maintainability of the writ petition is concerned, we are of the view that the presence of an alternative remedy is not debarred. The exercise of jurisdiction by the High Court Division under Article 102 of the Constituent, when the proceedings of the Trial Court are absolutely void or where the trial Court purported to act in a judicial capacity which is not properly constituted or where there is error apparent on the face of the record or where the trial Court conclusion is based on no evidence on record whatsoever or where the decision of the trial Court is vitiated by malafide or the trial Court has acted without jurisdiction or acted in excess of jurisdiction or acted contrary to the fundamental principals or acted malice in law interval is called for. Our this also get support from the decision in the case of *Fariduddin Mahmud vs. Md Saidur Rahman and Others* as reported in 63 DLR (AD) page 93 para 20. ...(Para-15)

JUDGMENT

Abu Taher Md. Saifur Rahman, J

1. This Rule was issued on an application filed by the petitioner under Article 102 of the constitution, calling upon respondents to show cause as to why the ex-parte judgment and decree dated 28.02.2022 (decree signed on 02.03.2022) passed by Artha Rin Adalat No. 1, Dhaka in Artha Rin Suit No. 70 of 2021 shall not be declared to have been made without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. For disposal of this Rule, the relevant facts may briefly be stated as follows:

3. That the respondent No. 2, Agrani Bank Limited as plaintiff filed an Artha Rin Suit No. 70 of 2021 against the petitioners and others on 29.11.2021 for the realization of the outstanding loan amounting to **Tk.47,73,19,585/-** (Taka Forty seven crore, Seventy three lac, Nineteen thousand and five hundred eighty five paisa) where in the date was fixed on 16.02.2022 for submitting the written statement. The petitioner neither appeared nor filed a written statement on that day. Thereafter, the trial Court fixed the next date on 28.02.2022 for an ex-parte hearing, and on that day the petitioner appeared before the trial Court and prayed for time for submitting the written statement, which was rejected and thereby passed the ex-parte judgment and decree on the same day. Being aggrieved, the petitioner has preferred this application before this Court and obtained the instant Rule and stay.

4. At the time of issuance of the Rule, this Court was pleased to stay all further operation of the aforesaid ex-parte judgment and decree dated 28.02.2022 for a period of **3 (three**) months from the date, which was time to time extended by this Court.

5. Mr. A.B.M. Altaf Hossain, the learned Advocate for the petitioner mainly submits that in the instant case in violation of the mandatory provision of section 19(1) of the Artha Rin Adalat Ain, 2003, the trial Court passed the impugned ex-partejudgment and decree, which is absolutely illegal and not sustainable in law. In support of his contention, he pointed out that section 19(1) of the Artha Rin Adalat Ain, provides that where on the day fixed for hearing of a suit the defendant does not appear in the Court, or, after the suit is admitted for hearing, the defendant is not found present after he was called, the Court shall dispose of the suit ex-parte.

6. In the aforesaid Artha Rin Suit, the date was fixed for the ex-parte hearing on 28.02.2022. The petitioner appeared on that day before the trial Court along with an application for submitting the written statement, which was rejected, and in the presence of the petitioner the trial Court passed the impugned ex-parte judgment and the decree, which is a clear violation of the provision of section 19(1) of the Artha Rin Adalat Ain, 2003 and, as such, the impugned ex-parte judgment and decree is passed without lawful authority and has no legal effect.

7. He further contended that after appearance before the trial, the defendant–petitioner is entitled to get total 60 (sixty) days time to submit the written statement as per the provision of section 10 of the Artha Rin Adalat Ain, 2003. In the instant case, the petitioner appeared before the trial Court on 28.02.2023 along with an application to submit the written statement, but the trial Court below without giving any opportunity to submit the written statement passed the ex-parte judgment and decree which is also a clear violation of the provision of section 10 of the Arha Rin Adalat Ain, 2003 and, as such, the impugned judgment and decree is liable to be set aside.

8. As against this, Mr. Shamim Khaled Ahmed, the learned Senior Advocate mainly submits that as against the ex-parte judgment and decree, the petitioner could have preferred an application under section 19(2) of the Artha Rin Adalat Ain, 2003 or may prefer an appeal under section 41 of the Artha Rin Adalat Ain, 2003, but the petitioner without invoking the aforesaid provisions of law filed the instant Writ petition, which is not maintainable. In support of his contention, he relied upon the decisions as reported in 59 DLR (AD) page 6, 23 BLT (AD) page 196, and 16 MLR (AD) page 151.

9. Heard the submissions of the learned Advocates of both sides and perused the instant writ petition along with other materials on record thoroughly.

10. The only issue for determination of this Rule is to see whether the impugned ex-parte judgment and decree passed in Artha Rin Suit No.17 of 2021 is without lawful jurisdiction or not.

11. We have to keep in mind that Artha Rin Adalat Ain, 2003 is a special law with an overriding provision over other laws and has prescribed a special procedure which is mandatory in nature. In order to appreciate the contention of the learned Advocate of the petitioner it is necessary to examine the relevant provision of section 19(1) of the Artha Rin Adalat Ain, 2003, which reads as follows:

> "19. Provisions for ex-parte decree – (1) Where on the day fixed for hearing of a suit the defendant does not appear in the Court, or, after the suit is admitted for hearing, the defendant is not found present after he was called, the Court shall dispose of the suit ex-parte."

12. On perusal of the aforesaid provision, it transpires that before passing an ex-parte judgment and decree the trial Court has to be satisfied at first, the following requirement has been fulfilled mainly that (a) the date was fixed for ex-parte hearing and (b) the defendant does not appear on that day or (3) the defendant is not found present after he was called.

13. **In the instant case, we have noticed that the trial Court below for the first time fixed the date for an ex-parte hearing on 28.02.2022, and on that day the petitioner appeared before the trial Court along with an application prayed for time to submit the written statement, which was rejected and thereby passed the ex-parte judgment and decree on the same day in presence of the petitioner as evident from Annexure – B to the writ petition.** So it is crystal clear that in violation of the mandatory provision of section

19(1) of the Ain 2003, the ex-parte judgment and decree has been passed and, as such, it is a nullity in the eye of the law. For proper adjudication of this matter, section 10 of the Ain 2003 also needs to be read out, which reads as follows:

> "10 – Time for submission of written statement – (1) subject of the provisions of sub-section (2), the Artha Rin Adalat shall not accept any written statement filed by the defendant after the expiry of 40 (forty) days after he has appeared in the Court, and in such a case the Court shall immediately decide the suit ex-parte.
> (2) Notwithstanding the provisions of sub-section (1), subject to the condition of payment of Taka not less than Taka 2,000 (two thousand) and not more than Taka 5,000 (five thousand) as cost, the Court may extend the said period by a further period of 20 (twenty) days."

14. In the instant case, we have noticed that the petitioner appeared before the trial Court below on 28.02.2022. In view of the aforesaid provision section 10 of the Ain 2003, the petitioner is entitled to get total 60 (sixty) days time to submit the written statement, but herein the trial Court below without allowing any single day to the petitioner passed the ex-parte judgment and decree, which is unbelievable and unlawful. We have examined the entire order sheet of the trial Court (Annexure – B) wherein we find that after filing the aforesaid Artha Rin Suit, the trial Court without giving any opportunity to the petitioner to contest the suit and thereby passed the ex-parte judgment and decree vide order No.6 dated 28.02.2022, which is also unbelievable.

15. So far the contention as raised by the learned Advocate for the respondent No.2 regarding the maintainability of the writ petition is concerned, we are of the view that the presence of an alternative remedy is not debarred. The exercise of jurisdiction by the High Court Division under Article 102 of the Constituent, when the proceedings of the Trial Court are absolutely void or where the trial Court purported to act in a judicial capacity which is not properly constituted or where there is error apparent on the face of the record or where the trial Court conclusion is based on no evidence on record whatsoever or where the decision of the trial Court is vitiated by malafide or the trial Court has acted without jurisdiction or acted in excess of jurisdiction or acted contrary to the fundamental principals or acted malice in law interval is called for. Our this also get support from the decision in the case of *Fariduddin Mahmud vs. Md Saidur Rahman and Others* as reported in 63 DLR (AD) page 93 para 20.

16. In the instant case on the face of the record, it transpires that the trial Court below passed the ex-parte judgment and decree in violation of the mandatory procedure as laid down under sections 19(1) and 10 of the Artha Rin Adalat Ain, 003, which is absolutely nullity in the eye of law. So the contention as raised by the respondent No.2 is not acceptable. We have also gone through the decisions as cited by the learned Advocate for the respondent No.2. In the facts and circumstances of this case which are not applicable.

17. Under the aforesaid reasons and observation, we find substance in this Rule.

18. As a result, the Rule is made absolute.

19. The impugned ex-parte judgment and decree dated 28.02.2022 (decree signed on 02.03.2022) passed in the Artha Rin Suit No.17 of 2021 is hereby declared illegal and passed without lawful authority and has no legal effect.

20. The trial Court is hereby directed to hear the matter afresh and dispose of the aforesaid Artha Rin Suit No.17 of 2021 in accordance with law.

21. Communicate this judgment and order at once.

19 SCOB [2024] HCD 130

HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

CIVIL REVISION No. 2685 OF 2023

Md. Julhas Uddin Jibon
Vs.
Md. Ayub Khan and others

Mr. Minhazul Hoque Chowdhury, Advocate
… For the petitioner.

Mr. Probir Neogi, Senior Advocate,
Mr. Md. Saidul Alam Khan, Advocate,
Mr. Abdur Raihan, Advocate,
Mr. Shafiqul Islam, Advocate and
Mr. Abdullah-Al-Mamun, Advocate
… For opposite party No. 1

Mr. Habibul Islam Bhuiyan, Senior Advocate,
Mr. Md. Nurul Amin, Senior Advocate
with

Heard on: 23.04.2024, 07.05.2024.
Judgment on: 09.05.2024.

Present:
Mr. Justice Md. Badruzzaman
And
Mr. Justice Sashanka Shekhar Sarkar

Editors' Note:
In this case, the plaintiff filed the suit for specific performance of part of the contract where part unperformed was large. At the time of filing the suit he did not deposit the balance consideration money at the court. He deposited consideration money after few days of filing the suit and that too was less than the agreed amount. The defendant prayed for rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 but the trial Court rejected the application for rejection of plaint. The defendant then filed this revisional application. The High Court Division, upon hearing and analyzing section 15 and 21A of the Specific Relief Act came to the conclusion that the plaint should have been rejected for not depositing the balance consideration money at the time of filing the suit in full. It also directed the Sub-ordinate Courts to strictly follow the expressed provisions of the statute as well as the law settled and declared by our Apex Court.

Key Words:
Sections 14, 15, 16, 17 and 21 A(b) of the Specific Relief Act; Section 115(1) of the Code of Civil Procedure; specific performance of contract; Order VII Rule 11 of the Code of Civil Procedure; rejection of plaint; return of plaint;

Section 17 of the Specific Relief Act:
It is of the essence of specific performance that except under special circumstances the court shall not direct specific performance of a part of a contract (Ref. Cutts v. Brown ILR 6 Cal. 398). The general rule is that a contract is either to be performed in its entirety or not to be performed at all. This General rule of law is embodied in section 17 of the Specific Relief Act. ...(Para 15)

Sections 14 & 17 of Specific Relief Act:

Section 14 of Specific Relief Act contemplates the first exception to the general rule laid down in section 17. For application of the provisions of section 14 of the S.R Act two conditions must co-exist, namely, (1) the part left unperformed bears only a small portion to the whole in value and (2) the part performed admits of compensation in money. ...(Para 18)

Section 15 of Specific Relief Act:

Under section 15 of the Specific Relief Act, if the unperformed part is large, or does not admit of compensation in money, the case falls under second exception as employed in section 15 of the Act. Under this section if the part of a contract left unperformed is considerably large or does not admit of compensation in money, the party (vendor) who cannot perform his promise in full is not entitled to a decree for specific performance of contract. But the other party (purchaser) can sue for specific performance on payment of full consideration without abatement of price provided he relinquishes all claims to further performance and all rights to compensation either for the deficiency, or for the loss or damage sustained by him due to the defendant's fault. ...(Para 20)

Section 14, 15 & 16 of the Specific Relief Act:

Section 16 of the Specific Relief Act assumes that the parts of the contract are severable, and that performance of one part has become either impossible or unlawful. Section 16 differs from sections 14 and 15 in including the element of illegality. In sections 14 and 15 only inability is contemplated as to a part of the contract. On the other hand, in section 16 is included the case where a part of the contract though it can be, but ought not to be specifically performed. This section recognizes the distinction between divisible and indivisible illegal contracts. ...(Para 24)

Section 15 of the Specific Relief Act:

In this case, the plaintiff filed the suit for specific performance of part of the contract where part unperformed is large. As per claim of the plaintiff the defendant is unable to perform the whole of his part because the quantum of land, after measurement, was found less and that substantial part of the contract can be performed and the part unperformed is a considerable portion of the whole. Accordingly, this suit obviously comes under the second exception provided in section 15 of the Specific relief Act. As such, to get a decree of specific performance of the part of the contract (i.e for .2123 acre land), the plaintiff must be willing to pay total consideration of Tk. 12.75 crore for said .2123 acre land though as per contract said amount was fixed as the value of entire .2825 acre land. But the plaintiff unilaterally measured the suit land as .2123 acre instead of .2825 acre as was agreed to purchase by him and he is willing to pay part consideration of Tk. 9,58,16,814.16 as value of .2123 acre land instead of entire consideration of Tk. 12.75 crore and with such calculation the plaintiff deposited balance consideration of Tk. 6,08,16,814.23 instead of agreed balance of Tk. 9.25 crore. As per section 15 of the Specific Relief Act the plaintiff was required to file the suit for specific performance of the part of the contract for .2123 acre land by depositing Taka 9.25 crore out of total consideration of Tk. 12.75 crore and being failed to do so, the suit is barred under section 15 of the Specific Relief Act. ...(Para 25)

It is now well settled that if the balance consideration is not deposited in Court at the time of filing of a suit for specific performance of the contract, the plaint must be rejected. ...(Para 29)

It is to be mentioned that admittedly, the plaintiff did not deposit the balance consideration money at the time of filing of the suit for specific performance of contract on 12.10.2022. Though the trial Court registered the suit but it fixed the next date on 20.10.2022 for admission hearing of the suit and withheld service of summons upon the defendants. This type of practice in original jurisdiction is unknown to law. Since balance consideration was not deposited at the time of filing of the suit, the trial Court should have refused to register the suit for noncompliance of the provisions under section 21A(b) of the Specific Relief Act and returned the plaint to the plaintiff.

...(Para 37)

JUDGMENT

Md. Badruzzaman, J:

1. This Rule was issued calling upon opposite party No. 1 to show cause as to why order dated 05.06.2023 passed by learned Joint District Judge, 1st Court, Kishoreganj in Other Class Suit No. 233 of 2022 rejecting an application filed under Order VII rule 11 read with section 151 of the Code of Civil Procedure filed by the defendant- petitioner for rejection of the plaint should not be set aside.

2. At the time of issuance of Rule, this Court vide order dated 21.06.2023 stayed further proceeding of Other Class Suit No. 233 of 2022 now pending in the aforesaid Court.

3. Facts, relevant for the purpose of disposal of this Rule, are that opposite party No. 1 as plaintiff instituted Other Class Suit No. 233 of 2022 in 1st Court of Joint District Judge, Kishoreganj praying for a decree of specific performance of contract in respect of 0.2123 acre land out of 0.2825 acre land agreed to be sold by defendant No. 1 by deed of agreement dated 03.11.2020. The case of the plaintiff is that defendant No. 1 entered into registered written agreement with the plaintiff on 03.11.2020 by which defendant No. 1 agreed that he would transfer 0.2841 acre land in favour of the plaintiff at a consideration of Taka 12,75,00,000/- out of which the plaintiff paid Taka 1,50,00,000/- as earnest money and it was agreed that the defendant would execute and register relevant deed of transfer within 1 (one) year from the date of execution of the agreement. It was also stipulated in the agreement that if the quantum of the land was found more or less, the consideration money would be adjusted on the basis of actual quantum of land. After the agreement, the plaintiff found that though 0.2825 acre land was agreed to be transferred but actually, there was 0.2123 acre land. Defendant No. 1 did not comply with the terms and conditions of the agreement in spite of repeated requests of the plaintiff in-person and through legal notice and finally refused to execute and register the sale deed. The plaintiff then filed the suit for specific performance of contract in respect of 0.2123 acre land by fixing its proportionate value of Taka 9,58,16,814.16. It has also stated that defendant No. 1 received Taka 1,50,00,000/- at the time of execution and registration of the agreement and thereafter, he received Taka two crore through direct cash payment in the account of the defendant maintained with Islami Bank Bangladesh Limited and that defendant No. 1 also admitted said payment of Taka two crore in a Salish held on the same day i.e. on 06.04.2022. In the aforesaid way, the plaintiff paid total Taka 3.5 crore out of actual consideration of Taka 9,58,16,814.16 against .2123 acre land. Accordingly, the plaintiff filed the suit by depositing balance amount of Taka 6,08,16,814.16 through Treasury Challan.

4. Defendant No. 1 entered appearance in the suit and thereafter, filed an application under Order VII rule 11 read with section 151 of the Code of Civil Procedure for rejection of the plaint on the ground that as per agreement the plaintiff paid only Taka 1,50,00,000/- as earnest money and there was balance consideration of Taka 11,25,00,000/- but the plaintiff with false statement fixed total consideration of Taka 9,58,16,814.16 without consent of the defendant. The defendant also denied the contention in regards payment of Taka 2,00,00,000/- (Taka two crore) by the plaintiff. It has also contended that since the plaintiff was agreed to purchase 0.2825 acre land, he should have filed the suit for .2825 acre land instead of .2123 acre land and there is no scope under law to file a suit for specific performance of a part of the contract. Moreover, the plaintiff did not deposit balance consideration at the time of filing the suit and as such, the plaint is liable to be rejected in view of the provision under section 21 A(b) of the Specific Relief Act.

5. The plaintiff contested the application by filing written objection, reiterating the contention as stated in the plaint and further contending that a plaint cannot be rejected upon considering the statements made in an application for rejection of plaint and as such, the application was liable to be rejected.

6. The trial Court, upon hearing the parties and considering the materials on record, dismissed the application by impugned order dated 05.06.2023 which has been challenged by defendant No. 1 by filing this application under section 115(1) of the Code of Civil Procedure and obtained the instant Rule and order of stay, as stated above.

7. Plaintiff-opposite party No. 1 filed counter affidavit to contest the Rule. By annexing deposit slip and money receipt dated 6.4.2022 (Annexure II and II-A) to the counter-affidavit in respect of payment Tk. 2,00,00,000/- (Taka two crore) plaintiff-opposite party No.1 stated that after execution of the deed of agreement, he paid Taka two crore to the defendant in cash in his account maintained with Islami Bank Limited and a Salish was held on 06.04.2022 wherein the defendant by admitting the payment of Taka two crore gave a money receipt in his business Letter-pad in presence of witnesses.

8. Mr. Habibul Islam Bhuiyan, learned Senior Counsel appearing with Mr. Md Nurul Amin, learned Senior Counsel and Mr. Minhazul Hoque Chowdhury, learned Advocate for the petitioner submits that in view of the provisions under section 21A(b) of the Specific Relief Act, the plaintiff was required to deposit at the time of filing of the suit the balance consideration of Taka 9,25,00,000/- but the plaintiff did not deposit any amount at the time of filing of the suit on 12.10.2022, but deposited only Taka 6,08,16,814.16 on 24.10.2022 and as such, the plaint was liable to be rejected under section 21A(b) of the Specific Relief Act. In support of this contention learned Advocate has referred to the case of *Abul Kalam (Md) vs. Md Mohi Uddin and others 69 DLR (AD) 239, Panasonic Power Division vs. Chemico Bangladesh Limited and others 69 DLR (AD) 333, Imran (Md) vs. Shamim Kamal and others 60 DLR 597* and some other unreported decisions of the Appellate Division and the High Court Division.

9. Learned Advocate further submits that there is no scope under law to enforce a contract partially by payment of proportionate value but the plaintiff unilaterally reduced the agreed land to .2123 acre instead of .2825 acre and fixed consideration of said land at Tk. 9,58,16,814.16 and deposited less balance amount out of time for specific performance of a part of the contract and as such, the plaint is liable to be rejected on this ground also. Mr.

Bhuiyan finally submits that the Court below without taking into consideration of the expressed provision of law as well as settled principles declared by our Apex Court illegally refused to reject the plaint by rejected the application for rejection of the plaint and as such, committed an error of law resulting in an error in the decision occasioning failure of justice.

10. Mr. Probir Neogi, learned Senior Counsel appearing with Mr. Md. Saidul Alam Khan, learned Advocate appearing for opposite party No. 1 submits that as per letters of section 21A(b) of the Specific Relief Act, if the balance consideration is not deposited at the time of filing of the suit a plaint cannot be rejected for that reason and for that fault, the agreement might not be enforced upon trial of the suit. The learned Advocate further submits that the balance amount was paid within the period of limitation of filing of the suit and as such, it cannot be said that the deposit was not made at the time of filing of the suit and the decisions as have been relied upon by the learned Advocate for the petitioner are not applicable in this particular case. Learned Advocate further submits that there is no bar to file a suit for specific performance of a part of the contract and whether the quantum of land which has been agreed to be transferred was found more or less after measurement is a disputed question of fact which can only be decided during trial upon taking evidence and on this ground, a plaint cannot be rejected. Learned Advocate finally submits that the trial Court, upon considering the relevant provisions of law and facts of the case, rightly refused to reject the plaint and as such, interference is not called for by this Court.

11. We have heard the learned Advocates, perused the plaint, the application for rejection of plaint, counter-affidavit filed by the plaintiff-opposite party, the impugned order and other documents available on record. It is not denial of the fact that defendant No. 1 agreed to transfer 0.2825 acre land to the plaintiff at a consideration of Taka 12.75 crore and entered into a registered deed of agreement on 03.11.2020 with the plaintiff and on that date, defendant No. 1 received Taka 1.5 crore as earnest money. The plaintiff contended that he again paid Taka 2 (two) crore on 06.04.2022 to defendant No. 1 through depositing in cash in the account of defendant No. 1 maintained by him with Islami Bank Limited and the defendant by admitting the payment gave a money receipt on the same day on 06.04.2022 in presence of the witnesses in his business Letter-pad. In course of hearing though the learned Advocate for the petitioner denied subsequent payment of Taka two acre made by the plaintiff to defendant No. 1 but at the time of pronouncement of this judgment, defendant No. 1, who is present before us, admits that he received said 2 (two) crore Taka in cash through his bank account on 06.04.2022 and he gave money receipt. In that view of the above, it is admitted that defendant No. 1 received total Taka 3.5 crore against the total consideration as per agreement dated 03.11.2020. Mr. Bhuiyan candidly submits that if the Rule is made absolute and the plaint is rejected, his client is ready to refund said 3.5 crore Taka if he is allowed 90 (ninety) days time from date to pay the amount.

12. From the above facts it is clear that the defendant agreed to transfer .2825 acre land to the plaintiff at a consideration of Taka 12.75 crore and a registered deed of agreement for sale was concluded upon receiving Tk. 1.5 crore as earnest money on the date of agreement and then defendant No.1 received Tk. 2 (two) crore. Accordingly, total Taka 3.5 crore was paid by the plaintiff to defendant No. 1 and balance consideration stood at Tk. 9.25 crore. Accordingly, the plaintiff was required to file the suit for specific performance of the contract upon depositing balance consideration of Tk. 9.25 but he deposited Tk. 6,08,16,814.16 as balance consideration with a plea that he, upon field measurement, found only .2123 acre land instead of .2825 acre land and the proportionate value of said .2123 acre land was Tk.

9,58,16,814.16. The plaintiff filed the suit for specific performance of a part of the contract in respect of .2123 acre land.

13. Now question arises whether a decree can be passed in a suit for specific performance of a part of the contract.

14. The general presumption is that it is an entire contract intended by the parties to be dealt with as a whole and not piecemeal, unless and until the contrary is shown (Ref: Hiralal v. Janardan, AIR 1938 Bom. 134). All agreements, as a rule, must be considered in their entirety. If the court is not in a position to compel the plaintiff coming for specific performance to perform the whole of the contract, it will not compel the defendant to perform his part (Ref: Kuraum v. Gakul, AIR 1938 Cal. 234).

15. It is of the essence of specific performance that except under special circumstances the court shall not direct specific performance of a part of a contract (Ref. Cutts v. Brown ILR 6 Cal. 398). The general rule is that a contract is either to be performed in its entirety or not to be performed at all. This General rule of law is embodied in section 17 of the Specific Relief Act. For ready reference section 17 is quoted below:

> *"17. Bar in other cases of specific performance of part of contract-* The court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections."

16. "*.....except in cases coming under one or other of the three last preceding sections*" employed in section 17 of the Specific Relief Act are sections 14, 15 and 16 of the Act. Those **three exceptions** contemplated in sections 14, 15 and 16 of the Specific Relief Act exhaust all the circumstances under which a partial performance of a contract will be enforced (Ref. William Graham Krishna Chandra Dey AIR 1925 PC 45).

17. Section 14 of the Act is quoted verbatim below:

> *"14. Specific performance of part of contract where part unperformed is small.* – Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency."

18. Section 14 of Specific Relief Act contemplates the **first exception** to the general rule laid down in section 17. For application of the provisions of section 14 of the S.R Act two conditions must co-exist, namely, (1) the part left unperformed bears only a small portion to the whole in value and (2) the part performed admits of compensation in money.

19. Section 15 laid down **second exception** of the general rule, which reads as follows:

> "*15. Specific performance of part of contract where part unperformed is large.* – Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in

default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all rights to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant."

20. Under section 15 of the Specific Relief Act, if the unperformed part is large, or does not admit of compensation in money, the case falls under **second exception** as employed in section 15 of the Act. Under this section if the part of a contract left unperformed is considerably large or does not admit of compensation in money, the party (vendor) who cannot perform his promise in full is not entitled to a decree for specific performance of contract. But the other party (purchaser) can sue for specific performance on payment of full consideration without abatement of price provided he relinquishes all claims to further performance and all rights to compensation either for the deficiency, or for the loss or damage sustained by him due to the defendant's fault.

Illustration (a) of section 15 of the Act reads as follows :

(a) A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to A, and the other 50 bighas to a stranger, who refuses to part with them. A cannot obtain a decree against B for the specific performance of the contract; but if B is willing to pay the price agreed upon, and to take the 50 bighas which belong to A, waiving all right to compensation either for deficiency or for loss sustained by him through A's neglect and default, B is entitled to a decree directing A to convey those 50 bighas to him on payment of the purchase-money.

21. In *Pokhar Das v. Mela Ram, AIR 1927 Lah. 773; 102 I.C. 754* it is held that "where vendor agrees to sell certain property to vendee, but he is not legally entitled to sell whole of the property, the vendee can claim specific performance of contract to the extent of the property as is lawfully saleable by vendor provided vendee is ready to pay the full price". Section 15 of the Specific Relief Act applies only when "a party to contract is unable to perform the whole of his part of it".

22. As per **second exception** laid down in section 15 of the Specific Relief Act the following criteria are to be complied with to give a decree for specific performance of part of the contract against the seller:

(a) The seller is unable to perform the whole of his part.
(b) Substantial part of the contract can be performed.
(c) The part unperformed is a considerable portion of the whole, or does not admit of compensation in money.
(d) The purchaser-plaintiff relinquishes all claim to further performance and all rights to compensation either for the deficiency or for the loss or damage sustained by him through default of the defendant-seller, and the plaintiff elects to take part of the contract as the defendant is capable of performing on payment of the consideration agreed for the whole.
(e) Specific performance of the remaining part of the contract cannot be granted under s. 15 unless the plaintiff is willing to pay the consideration stipulated for the entire contract for a portion only of the property.

23. Section 16 of the Specific Relief Act laid down **third exception** of the general rule which reads as follows:

> "16. *Specific performance of independent part of contract.* – When a part of a contract which, taken by itself, can and ought to be specially performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part."

24. Section 16 of the Specific Relief Act assumes that the parts of the contract are severable, and that performance of one part has become either impossible or unlawful. Section 16 differs from sections 14 and 15 in including the element of illegality. In sections 14 and 15 only inability is contemplated as to a part of the contract. On the other hand, in section 16 is included the case where a part of the contract though it can be, but ought not to be specifically performed. This section recognizes the distinction between divisible and indivisible illegal contracts.

25. In this case, the plaintiff filed the suit for specific performance of part of the contract where part unperformed is large. As per claim of the plaintiff the defendant is unable to perform the whole of his part because the quantum of land, after measurement, was found less and that substantial part of the contract can be performed and the part unperformed is a considerable portion of the whole. Accordingly, this suit obviously comes under the **second exception** provided in section 15 of the Specific relief Act. As such, to get a decree of specific performance of the part of the contract (i.e for .2123 acre land), the plaintiff must be willing to pay total consideration of Tk. 12.75 crore for said .2123 acre land though as per contract said amount was fixed as the value of entire .2825 acre land. But the plaintiff unilaterally measured the suit land as .2123 acre instead of .2825 acre as was agreed to purchase by him and he is willing to pay part consideration of Tk. 9,58,16,814.16 as value of .2123 acre land instead of entire consideration of Tk. 12.75 crore and with such calculation the plaintiff deposited balance consideration of Tk. 6,08,16,814.23 instead of agreed balance of Tk. 9.25 crore. As per section 15 of the Specific Relief Act the plaintiff was required to file the suit for specific performance of the part of the contract for .2123 acre land by depositing Taka 9.25 crore out of total consideration of Tk. 12.75 crore and being failed to do so, the suit is barred under section 15 of the Specific Relief Act.

26. It is contended by the defendant that the plaintiff filed the suit on 12.10.2022 and deposited Taka 6,08,16,814.16 as the balance consideration through Treasury Challan on 24.10.2022, that is, after 12 days from the date of filing of the suit. Now, question arises, whether such deposit can be considered that it was made as per provision of section 21A(b) of the Specific Relief Act.

27. From the order sheet of the trial Court, it appears that the suit was instituted on 12.10.2022 without depositing any balance consideration money and the plaintiff vide Treasury Challan No. 31 dated 24.10.2022 deposited Taka 6,08,16,814.16. So, admittedly, the plaintiff did not deposit said amount at the date of filing of the suit.

28. Section 21A(b) of the Specific Relief Act provides that no contract for sale of any immovable property can be specifically enforced unless the balance amount of consideration of the contract is deposited in the Court at the time of filing the suit for specific performance of the contract. In the case of *Abul Kalam (Md) vs. Md Mohiuddin and others 69 DLR (AD) 239,* similar issue was raised before the Appellate Division and the Appellate Division resolved the issue holding as follows:

> "We have considered the provision of section 21 A(b) of the Act. The language of the section is so unambiguous that it does not require any interpretation to come to conclusion that in case of failure of depositing the balance amount at the time of filing the suit for specific performance of the contract, the suit cannot be maintained. Even then, from the impugned judgment and order, it appears that the High Court Division considered various decisions of this Court and of the Indian jurisdiction and came to the finding that the deposit of the balance consideration of the contract before filing a suit for specific performance of the contract is a condition precedent and that having not been done in the instant case, that suit was barred under the provision of section 21A(b) of the Act. Therefore, the plaint was liable to be rejected under Order VII, rule 11 of the Code of Civil Procedure. We find no error with the view taken by the High Court Division in view of the language used in section 21A(b) of the Act."

29. It is now well settled that if the balance consideration is not deposited in Court at the time of filing of a suit for specific performance of the contract, the plaint must be rejected. Thus contention of Mr. Neogi that a plaint cannot be rejected on the ground of non-deposition of balance consideration at the time of filing of the suit has no leg to stand.

30. It appears that the plaintiff paid total of Taka 3.5 Crore (Taka three crore and fifty lac) to defendant No. 1-petitioner against the total consideration as per the contract. Since, the suit is barred under the provisions of sections 15 and 21A(b) of the Specific Relief Act, the trial Court should have rejected the plaint under Order VII rule 11 of the Code of Civil Procedure and being failed to do so, committed an error of law resulting in an error in the decision occasioning failure of justice.

31. It appears that the learned Judge of the trial Court upon misconception of law and misinterpretation of the law settled by our Apex Court in the case of *Abul Kalam (Md) vs. Md Mohi Uddin and others 69 DLR (AD) 239,* came to a perverse finding that the law settled by the Appellate Division in that case is not applicable in the instant case and refused to reject the plaint. When the Appellate Division in expressed terms declared a law and settled an issue, no inferior Court can deviate there from. Accordingly, the learned Judges of the subordinate courts should be more careful in explaining the law declared by our Apex Court.

32. In view of the above, we find merit in this Rule.

33. In the result, the Rule is made absolute, however, without any order as to costs.

34. The impugned order dated 05.06.2023 is set aside and the application filed by defendant No. 1 under Order VII, rule 11 of the Code of Civil Procedure is allowed. The plaint of Other Class Suit No. 233 of 2022 is hereby rejected.

35. We are also of the view that the plaintiff is entitled to get back Taka 3.50 crore from defendant No. 1 which he received from the plaintiff against the agreement and Taka 6,08,16,814.16 deposited by the plaintiff through Treasury Challan before the trial Court. Since defendant No. 1-petitioner is ready to refund said amount of Taka 3.5 crore to the plaintiff and prays for three months time for making the payment, we are inclined to allow the time.

36. Accordingly, defendant-petitioner is directed to refund Tk. 3.5 crore (Taka three crore and fifty lac) to the plaintiff within 3 (three) months from date in default, the plaintiff would be at liberty to realize Taka 3.5 crore with interest @ 10% per annum with effect from the date of respective payments through execution process. The trial Court is also directed to pass necessary order for refund of Taka 6,08,16,814.16 without any delay.

37. **It is to be mentioned that** admittedly, the plaintiff did not deposit the balance consideration money at the time of filing of the suit for specific performance of contract on 12.10.2022. Though the trial Court registered the suit but it fixed the next date on 20.10.2022 for admission hearing of the suit and withheld service of summons upon the defendants. This type of practice in original jurisdiction is unknown to law. Since balance consideration was not deposited at the time of filing of the suit, the trial Court should have refused to register the suit for noncompliance of the provisions under section 21A(b) of the Specific Relief Act and returned the plaint to the plaintiff.

38. **It is to be further noted that** there are so many instances before us where some of the subordinate courts are being registering suits for specific performance of contract and fixing dates for admission hearing of the suit without considering whether the balance consideration was deposited during filing of the suit in compliance of the provisions under section 21A(b) of the Specific Relief Act and the settled principle of law that 'the balance consideration is to be deposited in Court at the time of filing of a suit for specific performance of the contract failing which the plaint must be rejected'. For such type of unwarranted mistakes on the part of some of the sub-ordinate courts, the innocent litigants are suffering for no fault of their own. The Sub-ordinate Courts should strictly follow the expressed provisions of the statute as well as the law settled and declared by our Apex Court. Our considered view is that justice would be best served if the subordinate courts having original jurisdiction refuse to register the suit and return the plaint to the plaintiff when he fails to deposit balance consideration at the time of filing of a suit for specific performance of contract. We are also of the view that a **General Notification** is required to be circulated by the learned Registrar General of the Supreme Court among the learned Judges of the subordinate courts in this regard.

39. Accordingly, the learned **Registrar General of the Supreme Court of Bangladesh** is directed to circulate through a **General Notification** among the learned Judges of the sub-ordinate courts that "the Sub-ordinate Civil Courts having original jurisdiction should strictly follow the provisions of section 21A(b) of the Specific Relief Act and the law declared by the hon'ble Appellate Division in *Abul Kalam (Md) vs. Md Mohi Uddin and others, 69 DLR (AD) 239* and if the plaintiff fails to deposit balance consideration at the time of filing of a suit for specific performance of the contract, the Court must refuse to register the suit and return the plaint to the plaintiff".

40. Communicate a copy of this judgment to:

1. The learned Registrar General, Supreme Court of Bangladesh.
2. Mr. Sohag Ranjan Paul, the then learned Joint District Judge, 1st Court, Kishoregonj.

19 SCOB [2024] HCD 140

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 6147 OF 2022

Prof. Dr. Md. Rahmat Ullah
...Petitioner
Vs.
Government of Bangladesh and others
....Respondents

Mr. Md. Ahsanul Karim, Senior Advocate with
Ms. Syeda Nasrin, Advocate
.....For the petitioner
Mr. Mohammad Sazzad Hossain, Advocate
....For the respondent Nos. 3 and 4

Heard on: 16.03.2023, 01.06.2023, 15.06.2023 and 16.08.2023
Judgment on: 29.08.2023

Present:
Mr. Justice Zafar Ahmed
And
Mr. Justice Md. Bashir Ullah

Editors' Note:
In the instant case, the High Court Division examined whether the Syndicate of the University of Dhaka has the power to release a Professor of Law temporarily (সাময়িক অব্যাহতি) from all academic and administrative duties of the University and in view of the stand taken by the University whether formal departmental proceedings have been initiated against the petitioner Professor. The Court found that the term 'সাময়িক অব্যাহতি' (temporary release) used against the petitioner is not synonymous to 'suspension' because the committee formed by the Syndicate, being not formed in accordance with law, cannot be termed as a statutory Enquiry Committee. The Court also found that the Syndicate did not take any decision to initiate any formal departmental proceedings against the petitioner by framing formal charge. Based on these grounds, the Court held that the Syndicate's decision to release the petitioner temporarily from his duties is beyond the purview of law and the said decision was taken without lawful authority and without jurisdiction.

Key Words:
Article 52 and 56 (3) of the Dhaka University Order, 1973; clause 45(3) of the First Statutes; temporary release; suspension

Article 56(3) of the Dhaka University Order, 1973:
It is clear that the Syndicate did not frame any formal charge against the petitioner under Article 56(3) of the Order, 1973. The committee formed by the Syndicate cannot be termed as a statutory Enquiry Committee. It can be termed as a fact-finding committee. Accordingly, the show cause notice dated 08.06.2022 can be considered as a notice in relation to the fact-finding committee, not a statutory notice forming part of a

formal disciplinary proceedings inasmuch as no formal disciplinary proceeding were initiated against the petitioner. ...(Para 15)

It is true that the power to 'appoint' includes the power to 'suspend'. It is well settled that an order of interim suspension can be passed while a departmental enquiry is pending against the delinquent even though there is no such term in the service rules. ...(Para 16)

<u>The Syndicate's decision to release the petitioner temporarily from his duties is beyond the purview of law:</u>

In the instant case, the Syndicate did not deliberately use the term 'suspension' (সাময়িক বরখাস্ত), rather it used the term 'সাময়িক অব্যাহতি' (temporary release) which is not synonymous to 'suspension' for the reason that the syndicate did not take any decision to initiate any formal departmental proceedings against the petitioner by framing formal charge. The Syndicate formed a committee which seems to be merely a fact-finding committee. In our view, there was no exigency or circumstances envisaged by law to release the petitioner temporarily from his duties. Moreover, the term 'temporary release from duties' is uncommon in service jurisprudence. The University Order, Statutes and Service Regulations do not recognise such action. Therefore, we have no hesitation to hold that the Syndicate's decision to release the petitioner temporarily from his duties is beyond the purview of law and the said decision was taken without lawful authority and without jurisdiction. ...(Para 16)

<u>Article 52 of the Dhaka University Order, 1973:</u>

The learned Advocate appearing for the respondent Dhaka University submits that the petitioner filed the instant writ petition prior to disposal of the appeal and as such, the instant writ petition is premature and the same is not maintainable. Article 52 of the Order, 1973 provides provisions for appeal to the Chancellor. Challenging the Syndicate's decision and the office order temporarily releasing the petitioner from duties, he preferred an appeal to the Chancellor. Clause 45(5) of the First Statutes states that appeal to the Chancellor can be made against any order passed by the Syndicate on the recommendation of the Tribunal. In this case, the Syndicate's decision was taken without any recommendation of the Tribunal. Therefore, the decision and subsequent office order in question are not appealable under Article 52 of the Order, 1973. Authority for this proposition of law is the case of *Samia Rahman vs. Government of Bangladesh and others,* 17 SCOB [2023] HCD 182 in which one of us was party. The appeal in question was misconceived and not being a statutory appeal, the instant writ petition is maintainable. ...(Para 17)

JUDGMENT

<u>Zafar Ahmed, J.</u>

1. In the instant writ petition, the petitioner challenged the letter being No. প্রশাসন-১/৭০৫৩৮ dated 24.04.2022 issued by the respondent No. 3 under the signature of respondent No. 5 (Annexure-F1) releasing the petitioner from all kinds of academic and administrative duties of the University of Dhaka pursuant to the decision of the Syndicate dated 20.04.2022 (Annexure-F) and also letter being No. রেজি/প্রশাসন-৪ dated 24.04.2022 removing him from the post of Dean of the Faculty of Law (Annexure-F2).

2. This Court, on 08.06.2022, issued a Rule Nisi and passed an interim order staying operation of impugned letter dated 24.04.2022 (Annexure-F1) so far as it relates to releasing the petitioner from the academic activities for a period of 06 (six) months from date.

3. Challenging the interim order, the respondent Dhaka University filed Civil Petition For Leave to Appeal (CP) No. 1914 of 2022 before the Appellate Division. The Apex Court did not interfere with the interim order and, vide order dated 02.02.2023 directed this Bench to dispose of the Rule on merit.

4. The Vice Chancellor and Registrar of the University of Dhaka filed a joint affidavit-in-opposition.

5. It is stated in the writ petition that the petitioner was appointed as a Lecturer of the Department of Law, University of Dhaka, vide appointment letter dated 06.08.1999 with effect from 13.12.2000. He was made permanent in the said post on 29.03.2004. Eventually, he was promoted to the post of Professor on 03.07.2014. He was elected as Dean of the Faculty of Law for three consecutive terms from 2016 to till date. He was elected as a Member of Dhaka University Syndicate four times, member of the Senate five times, Secretary of the Dhaka University Teachers' Association (DUTA) one time (2016-2017) and President of the DUTA twice (2020-2021 and 2021-2022). He was the Member of Bangladesh Judicial Service Commission (BJSC) for five years (2017-2022).

6. On 17.04.2022, while the Dhaka University was celebrating the historical Mujib Nagar Day, the petitioner as the President of the DUTA gave speech dedicating his deepest respect to the Father of the Nation Bangabandhu Sheikh Mujibur Rahman, his family members, the great four leaders of the Nation and our heroic freedom fighters. While describing the historical background, formation and role of the Mujib Nagar Government, he mentioned the names of all Ministers who were responsible and entrusted with different ministries of the Mujib Nagar Government. Thus, generally the name of the erstwhile Minister of Foreign Affairs, Law and Parliamentary Affairs, namely Khondaker Mostaq Ahmad came into chronology. The petitioner also expressed his hatred and dissatisfaction to that Minister who was subsequently involved in the brutal and tragic assassination of our Father of the Nation along with his family members. It is stated that the petitioner's speech was twisted and protest was made. The Vice Chancellor was asked to expunge the statements of the petitioner, who during his speech expunged those. Subsequently, on the same day it was published in some of the newspapers that the petitioner had payed his respect to the then Minister of Foreign Affairs, Law and Parliamentary Affairs in his speech. On the following day (18.04.2022), the petitioner held a press conference explaining his position in clear terms.

7. Thereafter, an urgent meeting of the Syndicate was held on 20.04.2022 in which the following decisions were taken (Annexure-F):

> "সিদ্ধান্ত : (১) আইন বিভাগের অধ্যাপক ড. মো: রহমত উল্লাহ মুজিবনগর সরকারের সাথে ঘৃণিত খুনী মোস্তাকের নাম সম্পৃক্ত করে শ্রদ্ধা জ্ঞাপনের সংশ্লিষ্ট বক্তব্যের নিন্দা জ্ঞাপন করা হয়।
>
> (২) অধ্যাপক ড. মো: রহমত উল্লাহ-কে ঢাকা বিশ্ববিদ্যালয়ের সকল একাডেমিক ও প্রশাসনিক দায়িত্ব থেকে সাময়িক অব্যাহতি দেয়া হলো।
>
> (৩) তাঁর কাছ থেকে উল্লেখিত নিন্দনীয় বক্তব্য প্রদানের লক্ষ্য ও উদ্দেশ্য বিষয়ে লিখিত ব্যাখ্যা চাওয়া হোক।
>
> (৪) অধ্যাপক ড. মো: রহমত উল্লাহ-এর বক্তব্য পর্যালোচনা করে সুপারিশসহ রিপোর্ট প্রদানের জন্য নিম্নোক্তদের সমন্বয়ে একটি কমিটি গঠন করা হলো:
>
> .....
>
> ....."

8. In accordance with the decision of the Syndicate, the Registrar issued the impugned letter dated 24.04.2022 (Annexure-F1) informing the petitioner that he had been temporarily released from all kinds of academic and administrative duties of the University in view of the decision of the Syndicate. Subsequently, he was also removed from his elected post of Dean of the Faculty of Law.

9. On 12.05.2022, the petitioner preferred an appeal before the Hon'ble Chancellor. However, he did not receive any response and hence, the instant writ petition.

10. It appears from the supplementary affidavit filed by the petitioner that the Registrar of the University issued a show cause notice dated 08.06.2022 to the petitioner. The said show cause notice is reproduced below:

"কারণ দর্শানোর নোটিশ"

তারিখ: ০৮/০৬/২০২২

অধ্যাপক ড. মো. রহমত উল্লাহ
আইন বিভাগ
ঢাকা বিশ্ববিদ্যালয়
মহোদয়,

আপনার সদয় অবগতির জন্য জানানো যাচ্ছে যে, আপনি ঢাকা বিশ্ববিদ্যালয়ের শিক্ষক সমিতির সভাপতি ও আইন বিভাগের অধ্যাপক ড. মো. রহমত উল্লাহ গত ১৭ এপ্রিল, ২০২২ তারিখ ঢাকা বিশ্ববিদ্যালয় কর্তৃক আয়োজিত মুজিবনগর দিবসের আলোচনা সভায় আপনার প্রদত্ত বক্তব্যকে কেন্দ্র করে উদ্ভুত পরিস্থিতি এবং এ বিষয়ে আপনার বক্তব্য পর্যালোচনা করে সুপারিশসহ রিপোর্ট প্রদানের জন্য সিন্ডিকেট (২০-০৪-২০২২) কর্তৃক একটি কমিটি গঠন করা হয়েছে এবং আপনার বিরুদ্ধে নিম্নোক্ত অভিযোগ আনয়ন করা হয়েছে:

আপনি ঢাকা বিশ্ববিদ্যালয়ের শিক্ষক সমিতির সভাপতি হিসেবে গত ১৭ এপ্রিল, ২০২২ তারিখ ঐতিহাসিক মুজিবনগর দিবসে ছাত্র-শিক্ষক কেন্দ্রে আলোচনা সভায় আপনার বক্তব্যের এক পর্যায়ে মুজিবনগর সরকারের বিভিন্ন মন্ত্রণালয়ের দায়িত্বে নিয়োজিত সদস্যদের প্রতি শ্রদ্ধা জানাতে গিয়ে তাঁদের সাথে তৎকালীন পররাষ্ট মন্ত্রণালয়ের দায়িত্বে নিয়োজিত বঙ্গবন্ধুর ঘৃণিত খুনি বিশ্বাসঘাতক খন্দকার মোশতাকের প্রতিও শ্রদ্ধা নিবেদন করে বক্তব্য দেন যা অগ্রহণযোগ্য ও নিন্দনীয়;

আপনার উপরোক্ত বক্তব্যের পরিপ্রেক্ষিতে ১৭ এপ্রিলের পর ১৮-০৪-২০২২ তারিখ বাংলাদেশ ছাত্রলীগ ঢাকা বিশ্ববিদ্যালয় শাখা প্রতিবাদ স্মারকলিপি, ঢাকা বিশ্ববিদ্যালয় শিক্ষক সমিতি ২০.০৪.২০২২ ও ঢাকা বিশ্ববিদ্যালয় শিক্ষকদের একটি সংগঠন নীলদল ২০-০৪-২০২২ তারিখে বিবৃতি প্রদান করে। বিবৃতিতে এই ধরনের বক্তব্যের তীব্র নিন্দা ও প্রতিবাদ জানানো হয় এবং ঘৃণাভরে প্রত্যাখ্যান করা হয়। বিবৃতিতে আরো উল্লেখ করা হয় যে, এই বক্তব্য অধ্যাপক ড. মো. রহমত উল্লাহর নিজস্ব বক্তব্য, এর দায় দায়িত্ব শিক্ষক সমিতি বা নীলদল নিবে না। যদিও আপনি ১৮ই এপ্রিল ২০২২ সাংবাদিক সম্মেলনে এবং সিন্ডিকেট (২০-০৪-২০২২) সভায় উপস্থিত হয়ে পূর্বাপর অবস্থান তুলে ধরে অনিচ্ছাকৃত ভুলের জন্য দুঃখ প্রকাশ ও ক্ষমা প্রার্থনা করেন। কিন্তু সিন্ডিকেটে উপস্থিত সকল সম্মানিত সদস্য মনে করেন যে, ঢাকা বিশ্ববিদ্যালয়ে মহান মুক্তিযুদ্ধ এবং জাতির পিতা বঙ্গবন্ধু শেখ মুজিবুর রহমানের সুমহান মর্যাদা ক্ষুন্ন হয় এমন কোন মন্তব্য, বক্তব্য ও আচরণ কোনক্রমেই গ্রহণযোগ্য নয়;

অতএব, আপনার মতো একজন দায়িত্বশীল শিক্ষকের নিকট থেকে এ ধরণের অগ্রহণযোগ্য বক্তব্য দেশ বা জাতি কখনো আশা করে না। এমতাবস্থায়, আপনার উল্লেখিত নিন্দনীয় বক্তব্য প্রদানের লক্ষ্য ও উদ্দেশ্য বিষয়ে লিখিত ব্যাখ্যা চিঠি ইস্যুর তারিখ থেকে আগামী ৭ (সাত) কার্যদিবসের মধ্যে জানানোর জন্য এবং উপরোক্ত বিষয়ে

আপনি ব্যক্তিগত শুনানি দিতে আগ্রহী কিনা তাও লিখিতভাবে জানানোর জন্য আদিষ্ট হয়ে আপনাকে অনুরোধ জানাচ্ছি।

আপনার বিশ্বস্ত
প্রবীর কুমার সরকার
রেজিস্ট্রার (ভারপ্রাপ্ত)
ঢাকা বিশ্ববিদ্যালয়

11. The petitioner replied to the show cause notice on 19.06.2022 clarifying his position.

12. The case of the respondent Dhaka University, which is summarized in paragraph No. 7 of the affidavit-in-opposition, is that after the petitioner's speech, there was a huge uproar from all walks of the society condemning the petitioner's speech. Recognizing the exigency of the situation the Vice-Chancellor convened a meeting of the Syndicate. The Syndicate in its meeting dated 20.04.2022 duly formed a Committee as required by Article 56(3) of the Dhaka University Order, 1973 and clause 45(3) of the First Statutes. Pending enquiry, the petitioner was lawfully suspended as it is a universal practice that an employee may be suspended during a disciplinary proceeding. The Syndicate being the appointing authority of the petitioner (Article 24(f) of Dhaka University Order, 1973) has the power and authority to suspend him temporarily. Therefore, contrary to the petitioner's allegations, the University authorities have done nothing wrong in forming an enquiry committee or placing him under suspension.

13. In the instant case, the issues before us for adjudication are whether the Syndicate has the power to release the petitioner temporarily (সাময়িক অব্যাহতি) from all academic and administrative duties of the University and in view of the stand taken by the University whether a formal department proceedings have been initiated against the petitioner.

14. Under Article 56(3) of the Dhaka University Order, 1973 (in short, the 'Order, 1973') a teacher of the University may be dismissed on the grounds mentioned therein subject to an enquiry into the charges held by the Enquiry Committee. Under clause 45(4) of the First Statutes of the University if a *prima facie* case is established as a result of the enquiry, a Tribunal shall consider the case and recommend to the Syndicate such action as it deems fit. The procedures to be followed by the Enquiry Committee and the Tribunal have been laid down in the Enquiry Committee and Tribunal (Teachers and Officers) Regulations, 1980.

15. The impugned decision of the Syndicate dated 20.04.2022 has already been quoted above. It is clear that the Syndicate did not frame any formal charge against the petitioner under Article 56(3) of the Order, 1973. The committee formed by the Syndicate cannot be termed as a statutory Enquiry Committee. It can be termed as a fact-finding committee. Accordingly, the show cause notice dated 08.06.2022 can be considered as a notice in relation to the fact-finding committee, not a statutory notice forming part of a formal disciplinary proceedings inasmuch as no formal disciplinary proceeding were initiated against the petitioner.

16. The petitioner was temporarily released from his duties which the University in its affidavit-in-opposition termed as suspension. It is true that the power to 'appoint' includes the power to 'suspend'. It is well settled that an order of interim suspension can be passed while a departmental enquiry is pending against the delinquent even though there is no such term in the service rules. In ***Subramaniam vs. State of Kerala,*** (1973) KLR 47= (1973) KLJ 31, it was held that before ordering the suspension, the appointing authority must come to a conclusion that the allegations are such that in the interests of maintenance of the purity of administrative or the upkeep of proper standard, discipline and morale in the service, it would not be proper to associate the delinquent with the day to day work until he is cleared of the charges. In the instant case, the Syndicate did not deliberately use the term 'suspension' (সাময়িক বরখাস্ত), rather it used the term 'সাময়িক অব্যাহতি' (temporary release) which is not synonymous to 'suspension' for the reason that the syndicate did not take any decision to initiate any formal departmental proceedings against the petitioner by framing formal charge. The Syndicate formed a committee which seems to be merely a fact-finding committee. In our view, there was no exigency or circumstances envisaged by law to release the petitioner temporarily from his duties. Moreover, the term 'temporary release from duties' is uncommon in service jurisprudence. The University Order, Statutes and Service Regulations do not recognise such action. Therefore, we have no hesitation to hold that the Syndicate's decision to release the petitioner temporarily from his duties is beyond the purview of law and the said decision was taken without lawful authority and without jurisdiction.

17. The learned Advocate appearing for the respondent Dhaka University submits that the petitioner filed the instant writ petition prior to disposal of the appeal and as such, the instant writ petition is premature and the same is not maintainable. Article 52 of the Order, 1973 provides provisions for appeal to the Chancellor. Challenging the Syndicate's decision and the office order temporarily releasing the petitioner from duties, he preferred an appeal to the Chancellor. Clause 45(5) of the First Statutes states that appeal to the Chancellor can be made against any order passed by the Syndicate on the recommendation of the Tribunal. In this case, the Syndicate's decision was taken without any recommendation of the Tribunal. Therefore, the decision and subsequent office order in question are not appealable under Article 52 of the Order, 1973. Authority for this proposition of law is the case of ***Samia Rahman vs. Government of Bangladesh and others,*** 17 SCOB [2023] HCD 182 in which one of us was party. The appeal in question was misconceived and not being a statutory appeal, the instant writ petition is maintainable.

18, In view of the foregoing discussions, we find merit in the Rule.

19. In the result, the Rule is made absolute. The impugned decision of the Syndicate releasing the petitioner from all academic and administrative duties of the Dhaka University and subsequent office orders issued pursuant to the said decision of the Syndicate are declared to have issued without lawful authority and are of no legal effect.

19 SCOB [2024] HCD 146

HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)
Criminal Appeal No. 8306 of 2017 with Criminal Appeal No. 8307 of 2017 with Criminal Appeal No. 8308 of 2017

Md. Nurul Islam
...Appellant in all the appeals
Vs.
The state and another
...Respondent in all the appeals

Mr. Ashok Kumar Banik, Advocate with
Mr. Amio Chackraborty, Advocate
... For the appellant in all the appeals

Mr. Shaheen Ahmed, Advocate
…For respondent No. 2 in all the appeals
Mr. S.M. Golam Mostofa, DAG with
Mr. Md. A. Mannan, AAG
...For the State in all the appeals.

Heard on 11.05.2023, 25.05.2023, 01.06.2023, 14.06.2023 09.08.2023, 10.08.2023, 14.08.2023. Judgment delivered on 21.08.2023.

Present:
Mr. Justice Md. Shohrowardi

Editor's Note

The appellant came to this court when in a case of misappropriation of property he was convicted under section 409 of the Penal Code and under Section 5(2) of the Prevention of Corruption Act, 1947. The Court found that to prove the case the prosecution had submitted photocopy of all the exhibited documents. The Court also found that there was no proof of distribution of the misappropriated allowances by the appellant and that the prosecution failed to provide the explanation under section 66 of the Evidence Act 1872 regarding the non production of the original document. Thus, finding merit, the High Court Division allowed the appeal.

Key Words

Misappropriation of property; Evidence Act, 1872; Section 409 of the Penal Code, 1860; Section 5(2) of the Prevention of Corruption Act, 1947; Section 10 of the Criminal Law Amendment Act, 1958; Section 66 of the Evidence Act 1872

Section 64 and 65 of the Evidence Act, 1872:

Section 64 of the Evidence Act, 1872 states that documents must be proved by primary evidence except in the cases hereinafter mentioned. Primary evidence means the document itself produced for the inspection of the court. In the instant case, no original document was produced before the court and during the investigation, the investigating officer also did not seize any original document. The secondary evidence may be given of the existence, condition or the contents of the document in the cases mentioned in section 65 of the Evidence Act, 1872. The prosecution failed to prove any of the exception mentioned in section 65 of the Evidence Act, 1872. ...(Para-44)

Section 66 of the Evidence Act, 1872:

The prosecution proved the photocopy of alleged letter of admission of guilt of the accused Md. Nurul Islam as exhibit-1 and the photocopy of the deposit slips as exhibit-II. No original letter of admission of guilt and deposit slip was proved by the prosecution. Admittedly all the documents lie with the Sonali Bank Ltd. Neither the investigating officer seized those documents nor any original document was proved by the prosecution. Furthermore, the investigation officer PW. 9 Rabindranath Chaki stated that seized documents were not attested by any officer of the bank. The prosecution failed to give any explanation under section 66 of the Evidence Act, 1872 for not producing original documents. No evidence was adduced by the prosecution to show that the original document was lying with the accused Md. Nurul Islam. Therefore, exhibits- 1, 2, 4, 5, 6 and 7 in Special Case No. 8 of 2012, exhibits- 2 to 7 in Special Case No. 9 of 2012, and exhibits 1 to 5 in Special Case No. 10 of 2012 are not admissible in evidence. ...(Para-49)

JUDGMENT

Md. Shohrowardi, J:

1. The above-mentioned criminal appeals have arisen out of the impugned judgments and orders dated 16.5.2017 passed by the trial court against the appellant. Therefore, all the appeals were heard analogously and disposed of by this single judgment.

2. The criminal appeals mentioned hereinabove are directed under section 10 of the Criminal Law Amendment Act, 1958(Act No. II of 1958) challenging the legality of the impugned judgment and order dated 16.05.2017 passed by Special Judge, Bogra in Special Case Nos. 08 of 2012, 09 of 2012 and 10 of 2012 arising out of Khetlal Police Station Case No.3 dated 09.04.2008 corresponding G.R. No. 36 of 2008(Khetlal) convicting the appellant in all cases under Section 409 of the Penal Code, 1860 and sentencing him thereunder to suffer rigorous imprisonment for 05 (five) years and also convicting him under section 5(2) of the Prevention of Corruption Act, 1947 in all cases and sentencing him thereunder in all cases to suffer rigorous imprisonment for 05(five) years and to pay a fine of Tk. 1,11,840, in default, to suffer rigorous imprisonment for 03(three) months in Special Case No. 8 of 2012, to pay a fine of Tk. 6,05,705, in default, to suffer rigorous imprisonment for 03(three) months in Special Case No. 9 of 2012 and to pay a fine of Tk. 5,37,160, in default, to suffer rigorous imprisonment for 03 months in Special Case No. 10 of 2012. All the sentences will run concurrently.

3. The prosecution case, in short, is that the accused Md. Nurul Islam is the Jamadar-cum-Messenger, Sonali Bank Limited, Khetlal Branch, Joypurhat and prepared vouchers for withdrawing the allowances of the old, widow, insolvent and disabled persons from the bank since 16.03.2004 and he was also assigned to deliver the money to the beneficiaries. From 16.03.2004 to 22.04.2007, the accused prepared false vouchers for withdrawal of the allowances of those persons and had withdrawn total Tk. 12,42,595 and in connivance with the Harun-Or-Rashid, Sub-Assistant Accountant (Agriculture) and Ali Akbar and others misappropriated the said amount without distributing the allowaness to the beneficiary. When the above matter was detected, the accused had given an undertaking to pay the misappropriated amount and accordingly, he paid Tk. 10,000 on 24.04.2007 and Tk. 10,000 on 26.04.2007 by challans. The matter was reported to the authority of the bank. After that, an enquiry committee was formed and after scrutiny of the records, the enquiry committee

found that the accused misappropriated total Tk. 12,62,595 and deposited total Tk. 20,000. Md. Abdul Mozid Sheikh, Manager in Charge, Sonali Bank, Khetlal Branch, Joypurhat lodged FIR on 09.04.2008 at 12.15 against accused Md. Nurul Islam under sections 409/420 of the Penal Code, 1860.

4. P.W. 7 Md. Kamrul Hasan, Deputy Director, Anti-Corruption Commission, Bogra took up investigation of the case. During investigation, he visited the place of occurrence, seized the documents, and recorded the statement of witnesses under section 161 of the Code of Criminal Procedure, 1898. After completing the investigation, the investigating officer found the truth of the allegation of misappropriation against accused No. 1. Md. Nurul Islam 2. Md. Ali Hasan 3. Md. Mojibur Rahman 4. Saidur Rahman and 5. Md. Harun-or-Rashid. During the investigation, Md. Akbar Ali and Md. Reaz Uddin Mollah died for which they were not sent up in the charge sheet. The Anti-Corruption Commission, Head Office, Dhaka vide separate memos dated 06.06.2011 approved to submit 3(three) charge sheets against the accused persons under sections 409/420/109 of the Penal Code, 1860 read with section 5(2) of the Prevention of Corruption Act, 1947. After that, the investigating officer submitted 3 (three) charge sheets against five accused persons. After submission of the charge sheets, the case records were sent to the Senior Special Judge, Bogra and the cases were registered as Special Case No. 8 of 2012, 9 of 2012 and 10 of 2012 and after taking cognizance of the offence against the accused persons sent those cases to the Special Judge, Bogra for trial.

5. During the trial, charge was framed against the accused persons in all the cases under sections 409/109 of the Penal Code, 1860 read with section 5(2) of the Prevention of Corruption Act, 1947 and the charge was read over and explained to accused persons and they pleaded not guilty to the charge and claimed to be tried following the law. In Special Case No. 8 of 2012, the prosecution examined total 9 witnesses, in Special Case No. 9 of 2012, the prosecution examined total 11 witnesses and in Special Case No. 10 of 2012, the prosecution examined 10 witnesses to prove the charges against the accused persons. After examination of the prosecution witnesses, the accused persons were examined under section 342 of the Code of Criminal Procedure, 1898 and they pleaded not guilty to the charge and declined to adduce any D.W. After concluding the trial, the trial Court by impugned judgments and orders convicted the accused Md Nurul Islam as stated above and acquitted the accused Md. Ali Hasan, Manager, Sonali Bank Limited, Khetlal Branch, 2. Md. Mojibur Rahman, former Manager, Sonali Bank Ltd. Khetlal Branch 3. Md. Saidur Rahman, Senior Officer, Sonali Bank, Khetlal Branch and 4. Md. Harun-or-Rashid Sub-Accountant (Krishi), Sonali Bank Limited, Khetlal Branch from the charge framed against them.

6. Prosecution witnesses examined in Special Case No. 8 of 2012.

7. P.W. 1 Abdus Sattar Khan is the Principal Officer (retired), Sonali Bank, Khetlal Branch. He stated that from 04.03.2007 to 19.06.2008, he was posted at Sonali Bank Ltd, Khetlal Branch, Joypurhat. The allowances for the old, widow, insolvent and disabled persons used to distribute from the said branch after each 03 months. During his tenure, it was found that Tk. 12,54,705 was misappropriated from 16.03.2004 to 22.04.2007. The accused Md. Nurul Islam had given an undertaking as regards the misappropriation of the said money. The bank employees 1. Md. Nurul Islam 2. Saidur Rahaman 3. Harun-or-Rashid and 4. Abdur Rahman misappropriated Tk. 11,840 from 16.3.2004 to 15.03.2005 by creating forged documents. The accused Md. Nurul Islam deposited Tk. 20,000. He proved the photocopy of the letter of confession written by accused Md. Nurul Islam as exhibit-1 and his signature on the photocopy as exhibit-1/1. The bank employee Ali Akbar died. 1. The

accused Md. Nurul Islam, 2. Harun-Or-Rashid and 3. Md. Saidur Rahman discharged their duty along with me in the bank. He proved the attested photocopy of the deposit slip of Tk. 20,000 as exhibit 2. During cross-examination, he stated that there was a duty register in the bank and Ali Akbar was one of the officers of the bank and he is now dead. He stated that Md. Ali Akbar was responsible for the distribution of the allowances and the office order was kept with the bank and accused Md. Nurul Islam was the Jamadar-Cum-Messenger of the bank. A messenger discharged his duty inside and outside the bank. The second officer and the cashier jointly disbursed the cash. As per the office order, accused Md. Nurul Islam was not discharging his duty for payment of money. The Upazilla Welfare Officer and the Women Affairs Officer were assigned for the payment of the allowances and there is a passbook in the name of the recipient of allowances. They prepared the muster roll for payment of allowances. From Junior Officers up to Managers used to pass the vouchers. He denied the suggestion that the accused Md. Nurul Islam did not deposit Tk. 20,000. He admitted that no expert opinion was taken as regards exhibit 1. He denied the suggestion that he along with all officers of the bank misappropriated the money and falsely implicated the accused Md. Nurul Islam in the case. During cross-examination, he stated that accused Md. Saidur Rahman and Harun-or-Rashid retired from the service. He admitted that as per the order of the higher authority, the FIR was lodged on 30.07.2007. He denied the suggestion that accused Md. Saidur Rahman and Harun-or-Rashid were not involved with the distribution of the allowances.

8. P.W. 2 Abdus Samad is the Senior Officer, Sonali Bank, Kalai Branch. He stated that the occurrence took place from 16.3.2004 to 15.03.2005 and he was a member of the enquiry committee. After enquiry, the enquiry committee submitted a report to the Area Office, Joypurhat. He proved the photocopy of report dated 13.01.2011 as exhibit-5 and his signature as exhibit-5/1. He proved the photocopy of the enquiry report as exhibit-6 and his signature as exhibit-6/1. During enquiry, he found the truth of misappropriation against the accused persons. During cross-examination, he stated that he did not record the statement of the beneficiary of the allowances and none of the beneficiaries made any allegation to the effect that they did not get the allowances. He affirmed that at the time of disbursement of the allowances initially in the register and finally in the ledger the matter of disbursement of the allowances were mentioned and an officer was entrusted to discharge the said duty. There is no nexus between the draft register and the ledger of 2004 regarding the payment of allowances. The accused Md. Nurul Islam was not involved with the work done relating to the ledger.

9. P.W. 3 Abdul Mazid Sheikh stated that on 30.07.2007 he was the Manager-in-charge of Sonali Bank, Khetlal Branch and accused Md. Nurul Islam was a Messenger. From 16.03.2004 to 22.04.2007 he received cash from the cash counter and distributed the allowances for the old, widows, insolvent and disabled persons. He withdrew Tk. 12,62,595 and misappropriated. Subsequently, he deposited Tk. 20,000 by two instalments in the sundry deposit skim. He made confessional as regards the misappropriation. After informing the matter to the higher authority, an enquiry committee was formed and the enquiry committee found that he misappropriated total Tk. 12,62,595. He proved the FIR as exhibit-3 and his signature as exhibit-3/1. The investigating officer found the involvement of the accused Abdur Rahman, Md. Saidur Rahman and Harun-or-Rashid. During cross-examination, he stated that he could not remember who was responsible for the distribution of the allowances during his period. By order of the head of the branch, the work was distributed. In the daily register, the total amount of disbursement of allowance was mentioned and accused Md. Nurul Islam is the Jamader-cum-Messenger. The second officer of the branch used to approve

the vouchers. The accused Nurul Islam was not empowered to pass any voucher. The manager and the second officer used to pass the vouchers. The name of the beneficiary of the allowances was sent by the Social Welfare Officer and the representatives. The officer was responsible for posting in the ledger. The manager is responsible for the supervision of the daily allowances. He denied the suggestion that the accused Md. Nurul Islam is not responsible for the misappropriation of allowances. He also denied the suggestion that accused Md. Nurul Islam did not deposit any money in the sundry account. He admitted that as per the order of the authority he lodged the FIR. He denied the suggestion that he and other officers of the bank were involved with the alleged misappropriation.

10. P.W. 4 Md. Atiqul Islam is the Senior Officer, Sonali Bank Limited. He stated that on 28.01.2011, he was posted at Sonali Bank Ltd, Khetlal Branch, as Officer (Cash). On that day at 1.30 pm, Manager Samsul Alam presented documents in his presence which were seized and the seizure list was prepared. He along with Officer Amzad Hossain signed the seizure list. He proved the seizure list as exhibit-4 and his signature as exhibit-4/1.

11. P.W. 5 S. M. Samsul Alam is the Senior Principal Officer, Sonali Bank Ltd. He stated that on 23.01.2011 he was posted as Manager, Sonali Bank Limited, Khetlal Branch. On that day, the investigating officer seized the documents from him. The documents mentioned in the seizure list were given to his custody. During cross-examination, he stated that he had no personal knowledge about the documents.

12. P.W. 6 Bishawnath Singh is a retired officer of the Sonali Bank. He stated that in 2011, he was posted at the Area Office, Joypurhat and he was a member of the enquiry committee formed to enquire into the allegation of misappropriation of Sonali Bank, Khetlal Branch. He along with Abdus Samad submitted the summary sheet and the report. During the enquiry, he found the truth of the allegation against the accused persons. He proved his signature in the report as exhibit-6/2. During cross-examination, he stated that none of the beneficiaries of the allowances made any allegation during the enquiry. Initially, the names of the beneficiaries of allowances were sent from the office of the Social Welfare. He denied the suggestion that the accused was not involved with the alleged occurrence.

13. P.W. 7 Md. Kamrul Ahasan is the Deputy Director of the Anti-Corruption Commission. He stated that in 2011 he was posted at the Anti-Corruption Commission, Rajshahi Division. He was appointed as investigating officer of the case vide memo dated 09.02.2011. After completing the investigation, he obtained the approval and submitted charge sheet against the accused Md. Nurul Islam, Md. Abdur Rahman, Md. Saidur Rahman and Md. Harun-or-Rashid under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947. He denied the suggestion that he did not investigate the case properly.

14. P.W. 8 Dilip Kumar Ghosh is the Auditor of Sonali Bank Limited. He stated that while he was discharging his duty at head office on 05.11.2007, he conducted an audit in the office of the Sonali Bank Ltd, Khetlal Branch and submitted a report on 05.11.2007 and during his enquiry, he found truth of misappropriation against the accused persons. He proved the report dated 05.11.2007 as exhibit-7 and he proved his signature as exhibit-7/1.

15. P.W. 9 Rabindranath Chaki is the Assistant Director, Anti Corruption Commission. He stated that he was posted at Bogra from 22.04.2009 to 31.08.2011. At that time, he was appointed as investigating officer of the case. During the investigation, he seized 06 items of

documents on 23.01.2011 at 13.30. The Manager of Sonali Bank Ltd, Khetlal Branch, Joypurhat presented those documents. He prepared the seizure list and took the signatures of the witnesses on the seizure list. He proved his signature as exhibit-4/1. He proved the photocopy of ledger No. 1, (pages Nos. 1 to 700), as material exhibit-I. He proved the copy of the statement of accounts of the allowances for the old, widow and others as material exhibit-II. He proved a copy of the register of the acid burning and disabled persons (7 pages) as material exhibit-III. He proved the photocopy of the payment of the allowances of the freedom fighters (6 pages) as material exhibit-IV. He proved the photocopy of the draft register (20 pages) as material exhibit V. He proved the photocopy of 340 debit vouchers as material exhibit IV and photocopy of the D-half as material exhibit I to VII. After investigation, he found the truth of the allegation against the accused persons and submitted a memo of evidence. During cross-examination made on behalf of the accused Harun-or-Rashid and Md. Saidur Rahman, he admitted that the name of the accused Harun-or-Rashid and name of Md. Saidur Rahman was not mentioned in the FIR and recommended to discharge them from the case. During cross-examination on behalf of the accused Md. Nurul Islam, he affirmed that during the investigation, none of the beneficiaries of the allowances made any allegation. He affirmed that during the investigation, he did not seize the office order issued as regards distribution of the work. Harun-or-Rashid was responsible for the distribution of the allowances. He affirmed that no document was seized during the investigation as regards the disbursement of the allowances by the accused Md. Nurul Islam. No opinion was taken from the expert as regards the confession of the accused Md. Nurul Islam. The departmental action was taken against the officers of the bank who distribute the allowances. The submitted documents were not attested by the officers of the bank. He denied the suggestion that accused Md. Nurul Islam was falsely implicated in the case. The exhibited documents were not attested by the officer of the bank.

16. Prosecution witnesses examined in Special Case No. 9 of 2012.

17. P.W. 1 Abdul Mazid Sheikh is the informant. He stated that the occurrence took place from 2004 to 2007. From 16.03.2005 to 15.03.2006 accused Md. Nurul Islam misappropriated total Tk. 6,05,705 out of total misappropriation of Tk. 12,62,595. The accused Md. Nurul Islam admitted in writing that he misappropriated the amount. Subsequently, he deposited Tk. 20,000 on two dates. After enquiry, the Area Officer found the total misappropriation of Tk. 12,62,595 against the accused Md. Nurul Islam and he deposited Tk. 20,000. He misappropriated total Tk. 12,42,595. After getting approval from the authority, he lodged the FIR. He proved the photocopy of the FIR as exhibit-1 and his signature on the photocopy as exhibit-1/1. During cross-examination, he stated that in 2005, he joined the office of the Sonali Bank, Khetlal Branch and at the time of misappropriation, he was the Manager-in-Charge of the Bank. Officer Akbar Ali was responsible for the distribution of the allowances. The list of the beneficiary of the allowances was sent by the Office of Social Welfare and there is a passbook in the name of each beneficiary. The paid amount is mentioned in the passbook, draft book and the ledger. An officer is assigned to post the allowances. He admitted that the Second Officer and Manager used to pass the vouchers. The accused Md. Nurul Islam is the Messenger-cum-Jamader. He is responsible for the distribution of the letters and as the Messenger has no authority to pass any voucher. The beneficiaries of the allowances did not make any allegation to him and the assigned officer signed the register. Money Suit No. 1 of 2009 was filed in the Court of Joint District Judge, First Court, Joypurhat against accused Md. Nurul Islam for recovery of money. He along with the officer lodged the FIR. He denied the suggestion that since he along with the officer lodged the FIR, the officers of the bank were not implicated as accused in the FIR. He denied

the suggestion that he along with the officers were involved with the misappropriation and that accused Md. Nurul Islam did not deposit any money. During cross-examination on behalf of the accused Md. Saidur Rahman and Harun-or-Rashid, he affirmed that the accused Md. Saidur Rahman and Harun-or-Rashid were not involved with the distribution of the allowances and they obtained all service benefits.

18. P.W. 2 Md. Akmal Hossen is the Inspector of Police. He stated that on 09.04.2008 he was posted as Officer-in-Charge, Khetlal Thana and on that day, he recorded the FIR. He proved his signature in the FIR as exhibit-1/2. He proved the photocopy of the form of FIR as exhibit-2 and his signature on the photocopy as exhibit-2/1. During cross-examination, he affirmed that after getting approval from the Anti-Corruption Commission, he lodged the FIR on 09.04.2008.

19. P.W. 3 Dilip Kumar Ghosh stated that on 05.11.2007 he was posted as Branch Inspector, Sonali Bank Limited, Head Officer, Dhaka. He conducted a special audit in the office of Sonali Bank Ltd. Khetlal Branch as regards the payment of allowances of the old, widows, disabled etc. During the audit, he found that the accused Md. Nurul Islam misappropriated the money and accused Md. Ali Ahasan, Mujibur Rahman and Harun-or-Rashid are responsible for negligence of duty. The accused Md. Nurul Islam admitting the guilt deposited Tk. 20,000 by 02 installments and he also had given an undertaking to deposit the misappropriated amount. He submitted an audit report as regards the responsibility of the accused and the officers. He proved the forwarding as exhibit-3(photocopy) and the photocopy of the audit report as exhibit-4. He proved his signatures on the photocopy of 12 pages as exhibits-4/1 to 4/12. During cross-examination on behalf of the accused Md. Saidur Rahman and Harun-or Rashid he affirmed that the original audit report is available at the head office. During cross-examination on behalf of the accused Md. Nurul Islam, he stated that accused Harun-or-Rashid was responsible for the distribution of the allowances and accused Akbar Ali passed the vouchers and there was no written order upon the accused Md. Nurul Islam to distribute the allowances but illegally he distributed the allowances. He denied the suggestion that accused Md. Nurul Islam was not involved with the distribution of the allowances. He affirmed that during his audit, he found the signature of the accused Md. Nurul Islam but he did not seize those documents. The accused Md. Nurul Islam was the Jamader-cum-Messenger and he has no authority to pass any voucher. The accused Nurul Islam did not sign the allowance book and D-half.

20. P.W. 4 Md. Abdus Sattar Khan is the Manager, Sonali Bank Ltd., Joypurhat Branch. He stated that from 04.03.2007 to 19.06.2008 he was the Manager of Sonali Bank Ltd, Joypurhat Branch and at that time Md. Ali Akbar was discharging his duty for distribution of the allowances for the old, widow etc. After his joining, the matter of misappropriation was detected. The accused Md. Nurul Islam misappropriated the allowances and in writing admitted the fact of misappropriation and had given an undertaking to deposit the amount. Subsequently, he deposited Tk. 20,000 by 2 installments but he did not deposit the entire amount. The area office of the bank formed an enquiry committee headed by Abdus Samad and Bishowjit was a member of the committee. After enquiry, the enquiry committee submitted its report against the accused Md. Nurul Islam and others. Subsequently, the head office of the Bank also formed a two-member enquiry committee and submitted a report. He proved the photocopy of the letter of confession written by accused Md. Nurul Islam as exhibit-5 and his signature on the photocopy as exhibit-5/1. He affirmed that accused Reazuddin and accused Ali Akbar died. He denied the suggestion that accused Md. Nurul Islam did not deposit Tk. 20,000 and he was not involved with the misappropriation of

money. He denied the suggestion that accused Md. Nurul Islam did not distribute the allowances. The Jamadar-cum-Messenger discharged his duty as an internal messenger. He affirmed that Md. Ali Akbar is responsible for the distribution of the allowances and none made any allegation stating that he did not get the allowance. He affirmed that the accused Md. Nurul Islam had written the undertaking. He denied the suggestion that accused Md. Nurul Islam did not write the undertaking.

21. P.W. 5 S.M. Abus Samad is the Senior Officer, Sonali Bank Ltd, Khalai Branch. He stated that on 20.05.2007 he was posted at Sonali Bank, Area Office, Joypurhat. On 20.05.2007 on the basis of the memo No. 1089 a two members committee was formed headed by him and Bishawnath Singh was the member of the committee to enquire into the occurrence that took place at Sonali Bank Ltd, Khetlal Branch, Joypurhat from 16.03.2004 to 20.04.2007. They enquired about the irregularity as regards the payment of allowances of the old, widow and the distressed lady and submitted a report. During the enquiry, it was found that at the time of the distributor of the allowances, the D-half was not filled up and without making an entry in the draft register intentionally prepared the vouchers and the same D-half has been mentioned more than once in the register and few forged D-half was also mentioned in the register. During the enquiry, they found irregularity as regards the withdrawal of Tk. 12,62,595. The accused 1. Md. Nurul Islam 2. Harun-or-Rashid 3. Md. Mojibur Rahman 4. Md.Ali Hasan and 5. Md. Saidur Rahman are responsible for the irregularity. All of them are present in court. He proved the photocopy of the enquiry report as exhibit-6 and his signature on the photocopy of each page of the report as exhibits-6/1 to 6/28. On 30.01.2011, he submitted a report for each year to the investigating officer. He proved the photocopy of the report as exhibit-7 and his signature on the photocopy as exhibits-7/1 and 7/2. During cross-examination, he stated that money was withdrawn through the vouchers. After the distribution of the allowances, it is required to be mentioned in the passbook and D-half and also in the register of the bank. There was an office order to that effect. No muster roll was prepared in the case and no allegation of the recipients of the allowances was taken and the officers are responsible for entry in the passbook, D-half and ledger. Bank officer Harun-or-Rashid was responsible for the distribution of allowances. He admitted that during the enquiry, he did not find any office order to the effect that accused Md. Nurul Islam discharged the duty to distribute the allowances. He is a fourth class employee. No beneficiary of the allowances made any allegation and the list of the beneficiaries was supplied by the Office of Social Welfare. He affirmed that the officers of the bank passed the vouchers for payment of the allowances. He denied the suggestion that accused Md. Nurul Islam was not involved in the misappropriation.

22. P.W. 6 Bishawnath Singh is an Officer (retired), Sonali Bank Ltd, Area Office, Joypurhat. He stated that on 20.05.2007, he was posted at the Area Office of Sonali Bank, Joypurhat. He along with P.W. 5 S.M. Abdus Samad enquired as regards irregularity regarding the distribution of the allowances from 30.03.2004 to 20.05.2007. He proved his signature in the photocopy of the enquiry report (exhibit-6) as exhibit-6/29 to 6/56 and submitted the report accordingly for each year. He proved his signature on the photocopy of the report (exhibit-7) as exhibits-7/3 to 7/4. The accused Md. Nurul Islam misappropriated Tk. 12.62,595 and there was an office order that Harun-or-Rashid would distribute the allowances but he did not discharge his duty and through the accused Md. Nurul Islam, he discharged his duty. The accused Saidur Rahman was also responsible for the distribution of the allowances. The accused Ali Hasan and Mojibur Rahman also did not discharge their duty. During cross-examination, he affirmed that he did not find the passbook of the beneficiary of the allowances. In the D-half, the addresses of the beneficiaries of the

allowances were mentioned. There was a rule to mention the payment of allowances in the D-half and passbook after making entries in the draft register and the ledger. The officer who distributes the allowances is responsible for making entries in the draft register. He denied the suggestion that accused Md. Nurul Islam was not involved in the misappropriation.

23. P.W. 7 Atiqul Islam is the Officer Cash, Sonali Bank, Syedpur Branch, Nilphamari. He stated that on 23.01.2011, he was the Officer-Cum-Cash, Sonali Bank, Khetlal Branch, Joypurhat. On that day, the documents were seized from the Manager of the Bank. He proved the photocopy of the seizure list as exhibit-8 and his signature on the photocopy of the seizure list as exhibit-8/1 and handed over the seized documents to the custody of the Manager of the Bank.

24. P.W. 8 Md. Kamrul Ahasan is the Deputy Director of Anti-Corruption Commission. He stated that on 09.02.2011, he received the case docket from the investigating officer Rabindra Nath. After obtaining approval from the higher authority, he submitted a police report against the accused 1. Md. Nurul Islam 2. Ali Hasan 3. Mojibur Rahman 4.Saidur Rahman and 5.Harun-or-Rashid under sections 409/109 of the Penal Code, 1860 read with section 5(2) of the Prevention of Corruption Act, 1947. During cross-examination, he stated that he only perused the records but he did not investigate the case. He denied the suggestion that without any investigation, he submitted a charge sheet as he wished.

25. P.W. 9 Md. Abdul Baset is the Director of the Anti-Corruption Commission (retired). He stated that on 15.03.2010 he was posted at Bogra and at that time, he was appointed as investigating officer of the case. During the investigation, he was transferred and handed over the documents to the subsequent investigation officer. Defence declined to cross-examine P.W. 9.

26. P.W. 10 S.M. Samsul Alam is the Senior Principal Officer, Sonali Bank. He stated that on 23.01.2011, he was posted as Manager, Sonali Bank Ltd, Khetlal Branch. On that day, at 1/1.30 pm investigating officer seized 06 sets of documents, prepared the seizure list and handed over those documents in his custody. The documents mentioned in the exhibit-8 were given in his custody. During cross-examination, he affirmed that the officer who passed the vouchers is responsible for the payment made through the vouchers and the manager is not responsible. Manager Ali Hossain and Mojibur Rahman were discharged from the departmental proceedings brought against them.

27. P.W. 11 Rabindranath Chaki is the Director of the Anti-Corruption Commission, Pabna. He stated that while he was posted at Bogra from 26.4.2009 to 31.01.2011 as investigating officer, he visited the place of occurrence, recorded the statement of witnesses and seized the documents. On 23.01.2011 at 1.30 pm in the presence of witnesses, he seized the current ledger-1 dated 01.01.2004 from the Sonali Bank, Khetlal Branch. He seized 20 registers as material exhibit-I series. He proved the report dated 05.11.2007 submitted by Dilip Kumar Ghosh, Branch Inspector. He proved the enquiry report dated 05.11.2007 submitted by Dilip Kumar Ghosh as material exhibit-II. He proved the register as regards the payment of allowances of old, widows and others, total 341 pages, as material-III. He proved the enquiry report submitted by P.W. 5 Abdus Salam and P.W. 6 Bishownath Singh dated 30.07.2007 as material exhibit-IV. He proved the D-half of total 1165 persons as material exhibit-V. He found the truth of the allegation against the accused persons and submitted a memo of evidence. During the investigation, he found the truth of the allegation against the accused Md. Nurul Islam, Md. Ali Hossain, Mojibur Rahman, Md. Saidur Rahman and

Harun-or-Rashid and submitted a memo of evidence on 29.01.2011. He denied the suggestion that there was no supervising officer in this case. He stated that he seized the GD dated 01.08.2007. He affirmed that none made allegation as regards the nonpayment of allowances. He affirmed that he did not get the office order regarding the distribution of the allowances. Harun-or-Rashid discharged his duty as regards the distribution of the allowances and Md. Saidur Rahman was responsible for posting the register. He affirmed that the Manager of the Bank used to pass the vouchers. No document was seized to show that Md. Nurul Islam distributes the allowances. He denied the suggestion that he deposed falsely.

28. The evidence of prosecution witnesses adduced in Special Case No. 10 of 2012.

29. P.W. 1 Md. Mazid Sheikh is the informant. He stated that the occurrence took place from 16.03.2004 to 22.04.2007 and accused Md. Nurul Islam was the Jamadar-cum-Messenger, Sonali Bank Ltd, Khetlal Branch, Joypurhat. He used to make payment of the allowances of the old, widows and distressed ladies. He withdrew the excess amount and misappropriated the allowances by creating forged vouchers. He admitted the fact and deposited Tk. 20,000 in 2 equal instalments on 24.04.2007 and 26.04.2007 and informed the matter to the authority. An enquiry committee was formed by the Area Office. The enquiry committee found the truth of the allegation of misappropriation of Tk. 12,62,595 and accused Md. Nurul Islam deposited Tk. 20,000. Subsequently, he lodged the FIR on 30.07.2007 against the accused. Initially, the Thana authority made a GD Entry and subsequently lodged the FIR. He proved the photocopy of the FIR as exhibit-1 and his signature on the photocopy as exhibit-1/1. The original FIR is available with the records of Special Case No. 8 of 2012. During cross-examination, he stated that he joined in 2006 and at the time of occurrence, he was not the manager of Sonali Bank, Khetlal Branch. He admitted that the head of the branch issued the office order as regards the distribution of the work of the officers and the office order is preserved in the office. He admitted that based on the vouchers, the payment was made and the paid amount was mentioned in the register. He admitted that accused Md. Nurul Islam used to distribute the letter and he has no authority to pass the vouchers. The Manager and the Second Officer used to pass the vouchers. No office order was issued to show that none of the recipients of the allowances made any allegation. He denied the suggestion that accused Md. Nurul Islam did not misappropriate the money and he also did not make any confession.

30. P.W. 2 Md. Akmol Hossain is the Inspector of Police. He stated that on 09.06.2008 he was posted at Khetlal Thana and he filled up the FIR. He proved the photocopy of the FIR form as exhibit-2 and his signature on the FIR form as exhibit-2/1. In the FIR, he mentioned the GD No. 20 dated 01.08.2007 and the GD was seized along with the FIR.

31. P.W. 3 S.M. Abdus Samad is the Senior Officer, Sonali Bank Ltd, Adamdighi Branch, Bogra. He stated that while he was discharging his duty as an Officer, Joypurhat in 2007, the authority in writing instructed him and Bishawnath Singh to enquire into the allegation made as regards the irregularity regarding payment of the allowances of the old, widows and the distressed people. During the enquiry, the enquiry committee found the irregularity and truth of misappropriation of Tk. 12,62,595 against the accused Md. Nurul Islam. The accused Harun-or-Rashid, Md. Saidur Rahman, Abu Taleb and Akbar Ali were also involved in the occurrence. The enquiry committee submitted the report on 01.07.2007. He proved the photocopy of the report dated 01.07.2007 as exhibit-3 and he proved his signature on the photocopy of the said report as exhibit-3/1. There was a rule to enter in the ledger and the register after payment of the allowances. There was a passbook in the name of each

beneficiary of the allowances. After payment of the allowances, the same is mentioned in the passbook and one copy of the passbook was preserved by the bank. The office order regarding the duty of the officers and employees was passed by the Manager. He affirmed that the accused Md. Nurul Islam was the Jamader-Cum-Messenger and he had no authority to pass any voucher and the Second Officer was authorized to pass the vouchers. He stated that he found the signature of the accused Md. Nurul Islam on each voucher. He denied the suggestion that there was no signature on the vouchers and none of the beneficiaries of the allowances made any allegation.

32. P.W. 4 Dilip Kumar Ghosh is the Senior Principal Officer. He stated that in 2007 he was posted as Audit Officer, Head Office, Sonali Bank Ltd. At that time, at the instruction of the Sonali Bank, Head Office, he visited the Sonali Bank Ltd, Khetlal Branch to conduct an audit regarding the irregularities of the said branch and after conducting the audit submitted the audit report on 05.07.2011. He proved a photocopy of the audit report as exhibit-4 and he proved his signature as exhibit-4 and 4/1. During cross-examination, he stated that at the relevant time, Ali Akbar was the responsible officer of the Sonali Bank and accused Md. Nurul Islam was the Jamader-Cum-Messenger. Based on the vouchers, the money was withdrawn and there was a passbook against each beneficiary of the allowances and photocopy of the passbook is called D-half. He affirmed that the accused Md. Nurul Islam had no authority to pass any voucher and none of the beneficiaries of the allowances filed any complaint. He denied the suggestion that accused Md. Nurul Islam did not misappropriate any amount.

33. P.W. 5 Bishawnath Singh is the officer of Sonali Bank, Joypurhat Branch. He stated that in 2007 he conducted an enquiry as regards the financial irregularity of the Sonali Bank Ltd, Khetlal Branch, Joypurhat. After enquiry, he submitted a report on 01.07.2007. He proved his signature in the said report as exhibit-3/2. During cross-examination, he affirmed that he found excess withdrawal of allowances amounting to Tk. 8,26, 675. He denied the suggestion that he submitted the report as he wished.

34. P.W. 6 Md. Atiqul Islam is the Senior Officer, Sonali Bank Ltd. He stated that on 23.01.2011 he was posted as Officer (Cash), Sonali Bank Ltd, Khetlal Branch, Joypurhat. On that day at 1/1.30 pm the investigating officer seized documents from Samsul Alam and prepared the seizure list. He proved the photocopy of the seizure list as exhibit-5 and his signature on the photocopy as exhibit-5/1. During cross-examination, he affirmed that the ledger book was seized and the concerned officer of the bank maintained the ledger and he has no personal knowledge about the seized documents.

35. P.W. 7 Md. Abdus Sattar Khan stated that from 04.03.2007 to 19.07.2008 he was posted at Sonali Bank Ltd, Khetlal Branch, Joypurhat and at that time, the Senior Officer, Ali Akbar was in charge of distribution of the money of the old, widows and the disabled persons. He stated that after taking charge, he found that the excess amount was withdrawn from 2004 and at that time, he interrogated the Jamader-Cum-Messenger Md. Nurul Islam and he admitted the fact of misappropriation and by applying admitted that from 16.03.2004 to 22.04.2007 he withdrew total TK.12,62,595 by creating forged vouchers. The accused Md. Nurul Islam deposited Tk. 20,000 in two equal instalments on 20.04.2007 and 26.04.2007. He affirmed that the matter was reported to the higher authority who instructed to lodge the FIR. Subsequently, the Manager-in-Charge lodged the FIR. During cross-examination, he affirmed that the accused was the Jamadar-Cum-Messenger of the Bank. At the relevant time, he distributed the work along with the officers and employees of the bank and he also produced

the list of distribution of work to the investigating officer and as per the list of distribution work Ali Akbar was entrusted to disburse the allowances. The list of the beneficiaries of the allowances was supplied by the office of the Social Welfare and there was a passbook against each beneficiary of the allowances and the photocopy of the passbook is called D-half. After the disbursement of the allowances, the bank officials made an entry in the register. An enquiry was held against Ali Akbar. He denied the suggestion that accused Md. Nurul Islam did not misappropriate any amount.

36. P.W. 8 S.M. Samsul Alam is the Manager (SPO), Sonali Bank Ltd, Sonatala Branch, Bogra. He stated that on 23.1.2011 he was posted at Sonali Bank Ltd, Khetlal Branch, Joypurhat. On that day at 1.30 pm, the investigating officer seized 06 sets of documents and handed over those documents to his custody. He signed the seizure list, he proved his signature on the seizure list as exhibit-5/2. During cross-examination, he stated that he had no personal knowledge about the seized documents.

37. P.W. 9 Md. Kamrul Ahasan is the Deputy Director, Anti-Corruption Commission. He stated that from 01.06.2010 to 15.01.2014 he was posted at Bogra. He stated that after the transfer of the previous investigating officer, by order of the Anti-Corruption Commission, he took up investigation of the case and he perused the memo of evidence submitted by the previous investigating officer. After approval by the Anti-Corruption Commission for submitting the charge sheet he perused the docket and submitted the charge sheet against the accused 1. Md. Nurul Islam 2. Md. Saidur Rahman 3. Abu Taleb and 4. Harun-or-Rashid. During cross-examination, he affirmed that the accused Md. Nurul Islam was the Jamader-Cum-Messenger and there was no written order that accused Md. Nurul Islam distributed the allowances.

38. P.W. 10 Rabindranath Chaki is the Assistant Director of, the Anti-Corruption Commission. He stated that from 26.04.2009 to 31.01.2011 he was posted at Joypurhat. Following the order dated 22.07.2010 of the Anti-Corruption Commission, he took up investigation of the case and on 23.01.2011 at 13.30 he seized 06 sets of documents from the Manager, Sonali Bank Ltd. He seized the ledger book No. 1 dated 01.01.2004, total pages 1 to 700, and at pages 412,418,415 and 473 the payment of allowances for the old, widows and disabled people were mentioned. He proved the current ledger page Nos. 412,418 and 473 as material exhibit-I, the draft register of the allowances for the old, widows and disabled people (total 10 pages, photocopy) as material exhibit-II series. The register of the allowances for the old, widows and others as material exhibit-III series. Register of payment of the allowances of the old, widows, and disabled people as material exhibit-IV. The report submitted by Dilip Kumar Ghush dated 05.11.2007 as exhibit-4, debit vouchers, total 340 pages, as material exhibit-V. The report submitted by Abdus Samad dated 30.07.2007 as material exhibit-VI and the photocopy of the D-half as material exhibit-VII. He proved his signature on the carbon copy of the seizure list dated 23.01.2011 as exhibit-5/3. During cross-examination, he stated that Harun-or- Rashid was responsible for the distribution of allowances and during the investigation he did not seize the office order regarding the distribution of the work of the officers and employees of the Bank. He affirmed that the bank authority has taken action against the persons responsible for the distribution of the allowances. He did not seize any document to show that accused Md. Nurul Islam distributed the allowances. He did not send the handwriting of the officers who made the posting after disbursement of the allowances. He affirmed that the accused Md. Nurul Islam had no authority to distribute the allowances. The list of the beneficiaries of the allowances was supplied by the Office of Social Welfare, Khetlal.

39. The learned Advocate Mr. Ashok Kumar Banik appearing along with learned Advocate Mr. Amio Chackraborty on behalf of the appellant submits that the appellant is a Jamader-Cum-Messenger of the Sonali Bank and admittedly officers Harun-or-Rashid, Akbar Ali and Md. Saidur Rahman was assigned to prepare and pass the vouchers for payment of the allowances of the old, widows and the distressed people and no document was proved by the prosecution to show that accused Md. Nurul Islam misappropriated the money. He further submits that photocopies of the documents regarding payment of allowances for the old, widows and distressed people were seized by the investigating officer and the prosecution intentionally and malafide did not produce original documents to shield the officers of the Bank. He also submits that the appellant did not deposit any amount by instalment and no expert opinion was taken from the CID to ascertain the signature of the appellant on the undertaking exhibit-I. In support of his submission, he relied on the decision made in the case of Dudh Meher vs Jobed Ali Pahlowan reported in 16 BLC 432, Bangladesh vs. Mirpur Semipucca Kalayan Samity reported in 54 DLR 364.

40. The learned Advocate Mr Shaheen Ahmed appearing on behalf of respondent No. 2 submits that by creating forged vouchers the accused Md. Nurul Islam withdrew the allowances for the old, widows, disabled and distress people and without distributing allowances misappropriated total Tk. 12,62,595. The prosecution proved the audit report dated 05.11.2007 and 03.08.2011 and the audit team of the bank found the truth of the allegation of misappropriation of total Tk.12,62,595 against the appellant. He further submits that appellant by applying (exhibit-I) admitted that he withdrew excess Tk.12,62,595 and also had given the undertaking to pay the entire amount and subsequently by 2 equal instalments deposited Tk. 20,000 on 20.04.2007 and 24.06.2007(exhibit-2) and misappropriated Tk. 12,42,595. He also submits that accused Md. Nurul Islam admitted his guilt and his original confession was lying with the Head Office of the bank and the photocopy of the documents was exhibited without any objection. There is no illegality in the impugned judgment and order passed by the trial Court.

41. I have considered the submission of the learned Advocates of both parties, evidence of the prosecution witnesses, perused the impugned judgments and orders passed by the trial court and the records.

42. On perusal of the records, it appears that the accused Md. Nurul Islam is the Jamader-Cum-Messenger and he discharged his duty inside and outside the bank and carried out the orders of the officers of the bank. Admittedly, he has no authority to distribute the allowances of the old, infirm, disabled and distressed people. The prosecution case is that although the accused Md. Nurul Islam is a Jamader-Cum-Messenger, he prepared the vouchers and on the opposite side of each voucher, he signed and received the allowances and misappropriated the same.

43. On perusal of the records, it reveals that the photocopy of register and all the documents relating to the withdrawal of Tk. 12,62,595 were proved as material exhibits-I-VII. Except FIR, no original document was proved by the prosecution. A scrutiny of the photocopy of the vouchers, further reveals that there is no signature of the accused Md. Nurul Islam on the opposite side of the vouchers. By giving suggestions to the prosecution witnesses, the accused Md. Nurul Islam denied that he did not sign exhibits 1 and 2 which are photocopies of the original. No expert opinion was taken by the investigating officer as regards the signature of the accused Md. Nurul Islam to prove that he signed exhibits 1 and 2. After the occurrence, an enquiry committee was formed headed by Abdus Samad and Bishawnath Singh who were examined as P.Ws. 2 and 6 in Special Case No. 8 of 2012, P.Ws. 5 and 6 in Special Case No. 9 of 2012, and P.Ws. 3 and 5 in Special Case No. 10 of

2012. The enquiry committee submitted a report on 30.01.2011 (two pages) and the audit report on 5.11.2007. The photocopy of those reports were proved as exhibit-7 in Special Case No. 8 of 2012, exhibit-3 in Special Case No. 9 of 2012 and exhibit-4 in Special Case No. 10 of 2012. The photocopy of report dated 30.01.2011 was proved as exhibit-5 in Special Case No. 9 of 2007.

44. Section 64 of the Evidence Act, 1872 states that documents must be proved by primary evidence except in the cases hereinafter mentioned. Primary evidence means the document itself produced for the inspection of the court. In the instant case, no original document was produced before the court and during the investigation, the investigating officer also did not seize any original document. The secondary evidence may be given of the existence, condition or the contents of the document in the cases mentioned in section 65 of the Evidence Act, 1872. The prosecution failed to prove any of the exception mentioned in section 65 of the Evidence Act, 1872.

45. In the case of BEPZA vs Abdul Mannan reported in 66 DLR (2004) 86 para 20 it has been held that;

> "As regards admissibility of the photocopies of some documents of the tender file which were marked as Exhibits-l series, in the instant case the High Court Division elaborately discussed the relevant provisions of law as to the admissibility of documentary evidence. The photocopies of some documents of the tender file are secondary evidence. Admissibility of secondary evidence is regulated by section 63 of the Evidence Act, 1872. The High Court Division rightly noticed that admittedly the original tender documents are in the possession of the defendant-petitioner. Section 65 of the Evidence Act provides that secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person legally bound to produce it, or when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest."

46. In the case Bangladesh vs Mirpur Semipucca Kalyan Samity Semi reported in 54 DLR 364 para 18 it has been held that;

> "Secondary evidence of documents mentioned in section 65(a) may be given if the procedure laid down in section 66 is strictly complied with. Before the reception of secondary evidence, it must e proved that the documents were in possession of a person against whom it has been sought to be proved and such person though noticed has failed to produce it."

47. In the case of Dudh Meher vs Jobed Ali Pahlowan report in 16 BLC 431 it has been held that Para 24, 26

> "Furthermore, the plaintiff challenged the wasiatnama it appears that the original wasiatnama has not been produced by the defendant before the Court and a certified copy was marked exhibit No. 1 but said certified copy of the wasiatnama has not been proved in accordance with law. The defendants claim the property and for the RS record created by dint of said wasiatnama but original of the said wasiatnama never seen the light of the sun. Furthermore there is no explanation regarding non filing of the original wasiatnama of the defendants and thus said wasiatnama has not been acted upon."
>
> "It has been held in the case of Hazi Waziullah alias Waziullah Miah vs The Additional Deputy Commissioner, Revenue, Noakhali and Assistant Custodian of Vested and Non-Resident Property reported in 41 DLR (AD) 97, that "Secondary

evidence of a document is admissible in the case mentioned in section 65 of the Evidence Act and if the original is not available, reason for non-availability must be given."

48. On perusal of the records, it transpires that none of the recipient of the allowances made allegation that they did not obtain the allowances. The departmental action was taken against the officers of the bank who distributed the allowances. PW 1 Abdus Sattar Khan is the Principal Officer of the Sonali Bank Ltd. In Special Case No. 8 of 2012, he stated that accused Ali Akbar Khan was responsible for the distribution of allowances. PW. 1 Abdul Mozid in Special Case No. 9 of 2012 stated that the Second Officer and Manager used to pass the vouchers. PW. 3 Dilip Kumar Ghosh stated in Special Case No. 9 of 2012 that Harunur Rashid was responsible for the distribution of allowances and accused Akbar Ali passed the vouchers. He also stated that accused Md. Nurul Islam had no authority to pass vouchers and he also did not sign the passbook and D-half. PW. 6 Bishownath Debnath stated that the accused Saidur Rahman was responsible for distribution of allowances. The investigation officer PW. 11 Rabindra Nath Chaki stated that Harunor-Rashid was responsible for distribution of allowances and accused Md Saidur Rahman was responsible for posting in the register. The Manager of the Bank used to pass the vouchers. No document was exhibited to prove that accused Md. Nurul Islam distributed the allowances. The above evidence of the prosecution witnesses depicts that accused Md. Nurul Islam was not involved in the distribution of the allowances. The concerned officers of the Bank and the Managers who discharged their duty at the relevant time are responsible for the misappropriation of the allowances for the old, women, infirm and distressed persons. The accused Md. Nutul Islam is a scapegoat.

49. The prosecution proved the photocopy of alleged letter of admission of guilt of the accused Md. Nurul Islam as exhibit-1 and the photocopy of the deposit slips as exhibit-II. No original letter of admission of guilt and deposit slip was proved by the prosecution. Admittedly all the documents lie with the Sonali Bank Ltd. Neither the investigating officer seized those documents nor any original document was proved by the prosecution. Furthermore, the investigation officer PW. 9 Rabindranath Chaki stated that seized documents were not attested by any officer of the bank. The prosecution failed to give any explanation under section 66 of the Evidence Act, 1872 for not producing original documents. No evidence was adduced by the prosecution to show that the original document was lying with the accused Md. Nurul Islam. Therefore, exhibits- 1, 2, 4, 5, 6 and 7 in Special Case No. 8 of 2012, exhibits- 2 to 7 in Special Case No. 9 of 2012, and exhibits 1 to 5 in Special Case No. 10 of 2012 are not admissible in evidence.

50. Because of the above evidence, facts and circumstances of the case, I am of the view that the prosecution failed to prove the charges framed in Special Case Nos. 8 of 2012, 09 of 2012 and 10 of 2012 against the accused Md. Nurul Islam beyond all reasonable doubt.

51. In find merit in the appeals.

52. In the result, all appeals are allowed.

53. The impugned judgments and orders of conviction and sentence passed by the trial court against the accused Md. Nurul Islam in Special Case Nos. 8 of 2012, 09 of 2012 and 10 of 2012 are hereby set aside.

54. The accused Md. Nurul Islam is acquitted from the charges framed against him.

55. Send down the lower Court's record at once.

19 SCOB [2024] HCD 161

HIGH COURT DIVISION
Criminal Miscellaneous Case No.22300 of 2018

Advocate Abu Saleh Ahmadul Hasan
...Accused-Petitioner
Vs.
The State
… Opposite Party

Mr. Nur Alam, with
Mr. Md. Ashif Hasan, Advocates
.... For the accused-petitioner

Mr. Muniruzzaman, Advocate
....For the opposite party No.2

Mr. S.M. Fazlul Haque, D.A.G with
Mr. M. A. Kamrul Hasan Khan (Aslam), DAG
… For the State

Heard and Judgment on: 18.01.2023

Present:
Mr. Justice S M Kuddus Zaman
And
Mr. Justice Fahmida Quader

Editors' Note:
Rule was issued in the instant case calling upon the opposite parties to show cause as to why the proceedings of a C. R. Case filed under section 27 of the Real Estate Unnayan and Bobosthapana Ain, 2010 should not be quashed under section 561A of the Code of Criminal Procedure. The High Court Division found that the complainant without making full payment of the price of the apartment filed the CR case against the developer for not completing the construction work, for which there remains no element of initial cheating by the developer in this case. Moreover, article 24 of the deed of contract between the petitioner and opposite party No.2 for purchase of apartment provides for provision of arbitration for settlement of any dispute arising out between the parties while the construction work is in progress. The dispute as stated in the petition of complaint falls within the purview of article 24 of the deed of contract. So, the complainant should have approached the learned District Judge for appointment of Arbitrators under the Arbitration Act, 2000. Finally, the High Court Division refusing to accept the argument of the learned Advocate for the opposite party No.2 that a legal notice served upon the concerned Advocate for the petitioner for completion of construction work could be treated as a notice for Arbitration, observed that a legal notice cannot be construed as a notice for arbitration and a notice for arbitration cannot be addressed to the Advocate of the concerned party.

Key Words:
Section 561A of the Code of Criminal Procedure, 1898; Section 27 of the Real Estate Unnayan and Bobosthapana Ain, 2010; Arbitration Act, 2000

Section 27 of the Real Estate Development and Management Act, 2010:
There is no allegation in the petition of complaint that there is no progress of construction of the second apartment or the petitioner has sold out the same to any

other person. It has merely been stated that the petitioner did not complete the construction work of the second apartment. But since the complainant did not make full payment for above apartment he cannot expect the completion of the construction worker or transfer of ownership of the above apartment. In view of above materials on record we are unable to find any element of initial cheating in this case. As such section 27 of the Real Estate Development and Management Act, 2010 does not have any application in the facts and circumstances of this case. (Para 12 &13)

Appointment of Arbitrators under the Arbitration Act, 2000:
A legal notice cannot be construed as a notice for arbitration and a notice for arbitration cannot be addressed to the Advocate of the concerned party:
A legal notice cannot be construed as a notice for arbitration nor a notice for arbitration can be addressed to the Advocate for the concerned party. A notice for arbitration must be designated as such and be addressed directly to the party concerned. Even if a party on receipt of such a notice for arbitration does not respond or proceed for arbitration then the notice giver party should approach the concerned District Judge for appointment of Arbitrators under the Arbitration Act, 2000. The door for settlement of above dispute through arbitration is still open for the parties of this proceeding. (Para 16)

JUDGMENT

S M Kuddus Zaman, J:

1. On an application under section 561A of the Code of Criminal Procedure the Rule was issued calling upon the opposite parties to show cause as to why the proceedings of C. R. Case No.369 of 2017 under section 27 of the Real Estate Unnayan and Bobosthapara Ain, 2010, now pending in the Court of learned Metropolitan Magistrate No.27, Dhaka should not be quashed and/or pass such other or further order of orders as to this Court may seem fit and proper.

2. Facts in short are that the opposite party No.2 as complainant lodged a complaint to the Chief Metropolitan Magistrate, Dhaka alleging that he entered into a contract with the accused-petitioner namely Poxel Homes Ltd a property Development Company, for purchase of two apartments being Nos.A-3 and B-3. Pursuant to above contract the petitioner has completed the construction of apartment No.A-3 and handed over the same to the complainant by executing and registering a sale deed. But in spite of repeated requests the petitioner did not complete the construction and handover the possession of apartment No. 3-B nor executed and registered a deed of transfer for the same.

3. On consideration of materials on record the learned Magistrate of Metropolitan Magistrate Court No.27, Dhaka framed charge against the petitioner under section 27 of the Real Estate Development and Management Act, 2010.

4. Being aggrieved by above order of framing of charge and initiation of above proceedings under the Real Estate Development and Management Act, 2010 the sole accused as petitioner moved to this court and obtained this rule.

5. Mr. Nur Alam learned Advocate for the petitioner submits that Clause No.24 of the deed of contract between the complainant and the accused petitioner dated 22.05.2012 provides for arbitration for settlement of any dispute arising out of above contract between the parties during the progress of construction of above apartments. But the complainant instead of proceeding for settlement of the dispute through arbitration has most illegally filed this criminal case on false and fabulous allegations which is an abuse of the process of the court.

6. The learned Advocate further submits that the complainant did not make full payment of the consideration money of apartment B-3 but he is asking for registration of a sale deed and delivery of possession which is neither reasonable nor the same gives rise to any cause of action for initiation of a criminal proceedings.

7. On the other hand Mr. Muniruzzaman learned Advocate for complainant opposite party No.02 submits that the complainant sent a legal notice to the concerned advocate of the petitioner requesting him to complete the construction work of above mentioned two apartments and handover those to the complainant within the stipulated time as mentioned in above deed of contract. Above notice also served as a notice for arbitration for settlement of above dispute between the parties. Since the petitioner did not respond to above legal notice nor came for arbitration the complainant has rightly and legally initiated the proceeding of this case which calls for no interference.

8. We have considered the submissions of the learned Advocates for respective parties and carefully examined all materials on record.

9. At the very outset it needs to be mentioned that section 27 of the Real Estate Development and Management Act, 2010 provides for punishment for commission of the offence cheating by the Developer Company either against the owner of the land or any purchaser of the plot or apartment from that company.

10. In the petition of complaint it has been stated that on receipt of Tk.80,99,706/- (eighty lac ninety nine thousand seven hundred six) out of Tk.1,03,00,000/- (one core three lac) the price of above mentioned two apartments the petitioner has completed the construction of one apartment and executed and registered a sale deed in favour of the complainant for the same and handed over possession of the apartment to the complainant.

11. It is not disputed that the complainant did not make full payment of the price of the second apartment but he was asking for delivery of possession and execution and registration of a sale deed for the same.

12. There is no allegation in the petition of complaint that there is no progress of construction of the second apartment or the petitioner has sold out the same to any other person. It has merely been stated that the petitioner did not complete the construction work of the second apartment. But since the complainant did not make full payment for above

apartment he cannot expect the completion of the construction worker or transfer of ownership of the above apartment.

13. In view of above materials on record we are unable to find any element of initial cheating in this case. As such section 27 of the Real Estate Development and Management Act, 2010 does not have any application in the facts and circumstances of this case.

14. Moreover Article 24 of the deed of contract between the petitioner and opposite party No.2 for purchase of above mentioned two apartments provides for of arbitration for settlement of any dispute arising out between the parties while the construction work is in progress. The dispute as stated above in the petition of complaint falls within the purview of above Article 24 of the deed of contract. The learned Advocate for the opposite party No.2 submits that a legal notice was sent to the concerned Advocate for the petitioner for completion of construction of work of two apartments and hand over those to the opposite party and that notice could be treated as a notice for Arbitration.

15. We are unable to accept above submissions of the learned Advocate for the opposite party.

16. A legal notice cannot be construed as a notice for arbitration nor a notice for arbitration can be addressed to the Advocate for the concerned party. A notice for arbitration must be designated as such and be addressed directly to the party concerned. Even if a party on receipt of such a notice for arbitration does not respond or proceed for arbitration then the notice giver party should approach the concerned District Judge for appointment of Arbitrators under the Arbitration Act, 2000. The door for settlement of above dispute through arbitration is still open for the parties of this proceeding.

17. Since we have found that there is no element of cheating in this case further continuation of this proceedings will not meet the ends of justice but the same shall cause unnecessary sufferings to the petitioner which amounts to abuse of the process of the court.

18. In above view of the materials on record we find substance in this petition under section 561A of the Code of Criminal Procedure and the rule issued in this connection deserves to be made absolute.

19. Accordingly, the Rule is made absolute.

20. The proceedings of C. R. Case No.369 of 2017 under section 27 of the Real Estate Unnayan and Bobosthapara Ain, 2010 is hereby quashed.

21. Communicate this judgment and order to the Court concerned at once.

19 SCOB [2024] HCD 165

HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Civil Revision No. 9213 of 1991
Civil Revision No. 87 of 1987

Md. Abdul Wadud Khan being dead his heirs: Mahmud Nadir Abdullah Khan and others
....Plaintiff-Respondent-Petitioners
Vs.
Md. Kamrul Islam Khan and others
.... Defendant-Appellant-O.P.s

Ms. Salina Akter, with
Mr. Uzzal Bhowmick, Advocates
....For the petitioners
None appears
....For the opposite parties
Heard on: 26.10.2022
Judgment on: 14.02.2023

Present:
Mr. Justice Md. Zakir Hossain

Editors' Note:
In this case question arose as to whether the plaintiff was a *benamder* of his father as the respondents claimed. The trial court found that the plaintiff was not a *benamder* but the Appellate Court reversed the decision. High Court Division, however, discussed the laws relating to benami transaction and then assessing the evidence on record, came to the conclusion that as per the rules of preponderance of evidence it has been proved that plaintiff was not *benamder* of his father and consequently, set aside the judgment of the Appellate Court.

Key Words:
Section 81 and 82 of the Trusts Act, 1882; Land Reforms Ordinance, 1984; benami transaction; Rules of preponderance of evidence

Section 81 and 82 of the Trusts Act, 1882:
It cannot be denied that the benami transaction was custom of the Country and it was recognized as customary law till Land Reforms Ordinance, 1984 was promulgated. In 1882, the practice of benami transaction received legislative recognition under section 81 and 82 of the Trusts Act, 1882. ...(Para 14)

In this case, the onus of establishing that the transaction is benami, is on the defendants, where it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. ...(Para 16)

On perusal of the oral and documentary evidences, it appears that as per the Rules of preponderance of evidence, the contention of the plaintiff's possession is heavy in weight but the learned District Judge on slipshod statement held that the joint possession of the plaintiff and the defendants without sifting the documents in entirety. The original documents are lying with the plaintiff and produced from the custody of the plaintiff and those were admitted as evidence without any objection from the defendants' side. The burden of showing that the alleged transfer is banami transaction has not been

discharged by the defendants' side. Undisputedly, the father of the defendants in his lifetime did not take any legal action against the transaction nor he filed any suit for declaration that the plaintiff was his benamder. Considering the surrounding circumstances, the relationship between the parties and intention and subsequent conduct of Naybullah Khan, it is as clear as daylight that 94 years ago, Naybyllah Khan took settlement of the suit land for the benefit of his eldest son *i.e* the plaintiff for the purpose of the welfare of his son. ...(Para 25)

JUDGMENT

Md. Zakir Hossain, J:

1. At the instance of the petitioners, the Rule was issued by this Court with the following terms:

> *"Let the records of the Case be called for and a Rule issue calling upon the opposite parties to show cause as to why the judgment and decree complained of in the petition moved in Court today should not be set aside or such other or further order or orders passed as to this Court may seem fit and proper."*

2. Facts leading to the issuance of the Rule are *inter alia* that the predecessor of the instant petitioners being plaintiff filed Other Class Suit No. 405 of 1978 before the Court of the learned Munsif (now Assistant Judge), Naogaon for declaration of title in the suit land as mentioned in the schedule to the plaint.

3. The plaintiff's case, in short, is that the suit property was the khas land of the Ex Zaminder. The plaintiff took settlement of the same by dint of amalnama (Exhibit-1) in the year of 1333 B.S. The zaminder instituted the Rent Suit No. 582 of 1951 against the plaintiff for arrears of rent wherein the plaintiff paid up the demand by challan (Exhibit-3). Accordingly, S.A khatian was prepared in the name of the plaintiff and thereafter, the plaintiff used to pay rent to the Government. But unfortunately, at the time of Revisional Settlement Operation, the suit land was recorded in the names of both the plaintiff and the defendants. On the basis of the objection petition filed by the plaintiff, the Revenue Officer corrected the MRR and accordingly, recorded the entire land in the name of the plaintiff. But since the plaintiff lived far away from the suit land, the defendants managed to record their names in the RS khatin along with the name of the plaintiff though the plaintiff is the absolute owner of the suit land. He has exclusive possession therein and the RS record created cloudy over the suit land, therefore, the plaintiff constrained to file the aforesaid suit. The defendant contested the suit by filing joint written statements denying the material allegations set out in the plaint contending *inter alia* that the suit is not maintainable in its present form.

4. The defendants' case is that their father was a Government service holder and he took *pattan* of the suit land from Brikutsha Estate to this plaintiff as his *benamder* from his own fund for his own benefit. The plaintiff who was minor had no independent source of income and he did not take *pattan* and pay rents. During his life time, Naybullah khan possessed the suit land. He died in 1974 leaving behind the plaintiff and the defendants as his legal heirs. The suit land was correctly recorded in the finally published RS khatian. The plaintiff has got

no exclusive title and possession in the suit land. And, therefore, the defendant prayed for dismissal of the suit.

5. On the pleadings, the learned Munsif, Naogaon was pleased to frame the following issues:

(i) Is the suit maintainable in its present form?
(ii) Has the plaintiff got any cause of action to file the suit?
(iii) Has the plaintiff any exclusive right, title and possession in the suit land?
(iv) To what reliefs, if any, is the plaintiff entitled?

6. After conclusion of the trial, the learned Munsif was pleased to decree the suit. Challenging the legality and propriety of the judgment and decree of the learned Munsif, the defendant-opposite parties preferred Title Appeal No. 81 of 1984 before the Court of the learned District Judge, Naogaon. Upon hearing, the learned District Judge was pleased to allow the said Title Appeal No. 81 of 1984 and as such, set aside the judgment and decree of the Trial Court. Impugning the judgment and decree of the learned District Judge, the petitioners moved this Court and obtained the aforesaid Rule.

7. The Civil Revision was originally filed being No. 87 of 1987 at Rangpur Session and later on, it was renumbered as Civil Revision No. 9213 of 1991.

8. Ms. Salina Akter, the learned Advocate alongwith Mr. Uzzal Bhowmick for the petitioners, submits that the learned Munsif after considering the evidence on record rightly held that the plaintiff is the owner and possessor of the suit land and the learned District Judge turned down the decision of the judgment and decree of the Trial Court holding the view that the original owner of the suit land is Naybullah khan and he purchased the suit land in the name of the plaintiff as benamder in the name of the plaintiff from his own fund. The learned District Judge also held that S.A record was prepared in the name of the plaintiff on the basis of the tenants; ledger of the Ex-land receiver and the plaintiff paid up rent to the Government and S.A stood in his name. The learned District Judge further held that during the revisional settlement operation, the suit land was recorded in the name of the plaintiff and the defendants according to their respective shares.

9. She refers *ratio and obiter* of different judgments reported in 49 DLR (AD) 73, 51 DLR (AD) 81, 55 DLR (HCD) 412, 8 BLT (HCD) 171 and 11 BLT (HCD) 26.

10. None appears to oppose the Rule.

11. The trial Court after considering the entire materials on record held that the plaintiff has got the suit land by way of settlement and he has been possessing the same by paying rent and SA Operation was duly prepared in the name of the plaintiff, but the contention of the defendants is that their father took settlement of suit land from his own fund in the *benami* of the plaintiff; therefore, *onus* lies upon them but they hopelessly failed to discharge the burden of proof that their father took settlement in the name of the plaintiff as his *benamder*. After considering the evidence on record, the trial Court held that the plaintiff has title and possession in the suit land and accordingly, decreed the suit. It is true that father of the plaintiff and defendants did not challenge the settlement made in favour of the plaintiff during his lifetime. The Appellate Court held that Naybullah Khan was a government service holder and he took settlement of the suit land on 18th Jaistha, 1333 BS in the benami of his eldest son Abdul Khan who was at the time a minor boy of 6/7 years of age without any

independent source of income or having any independent fund of his own. It is also stated by the Appellate Court since R.S. Khatian was jointly recorded in the name of the plaintiff and defendants; therefore, Appellate Court held the view the predecessor of the plaintiff Nayeb Ullah took settlement of the suit land showing the plaintiff as his benamdar.

12. Now the pertinent issue is whether the impugned judgment and decree is liable to be interfered with by this Court.

13. Heard the submissions advanced by the learned Advocates for the petitioners along with materials on record with care and attention and seriousness as it deserves. I have also meaningfully waded through the legal position critically involved in this case.

14. It cannot be denied that the benami transaction was custom of the Country and it was recognized as customary law till Land Reforms Ordinance, 1984 was promulgated. In 1882, the practice of benami transaction received legislative recognition under section 81 and 82 of the Trusts Act, 1882.

15. The principles governing the determination of the question whether a transaction is a benami transaction or not, may be summed up thus:

i. *The burden of showing that a transfer is a benami transaction, lies on the person who asserts that it is such a transaction.*
ii. *If it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary.*
iii. *The true character of the transaction is governed by the intention of the person who has contributed the purchase money.*
iv. *The question as to what his intention was, has to be decided on the basis of-*
(a) the surrounding circumstances,
(b) the relationship of the parties,
(c) the motives governing their action in bringing about the transaction, and
(d) their subsequent conduct, etc.

16. In this case, the onus of establishing that the transaction is benami, is on the defendants, where it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts.

17. In case of ***Nurjahan Begum v. Mahmudur Rahman*** 34 DLR (AD) 61 traced the history of benami transaction and also the law propounded by the Privy Council for the following conclusions:

> *"In a benami transaction source of purchase money is an important criteria (sic) but it is not conclusive. The initial presumption in the case of a transfer concluded by a registered deed is in favour of the person whose name appears as the transferee in the deed, but this presumption is rebuttable. Source of consideration money though an important criteria in a benami transaction but in the absence of an unambiguous ownership consideration of other relevant circumstances become important in a case where ownership is disputed. The disputed question of benami cannot be determined only on the consideration of source of consideration money,*

and it becomes incumbent for the Court to fall back upon the surrounding circumstances of the transaction, the position of the parties and the relationship to each other. The motive which could govern their actions, but their subsequent conduct including their dealings and the enjoyment of the property become relevant factors for consideration. In the case of ***Bilas Kunwar vs. Desraj Ranjit Singh (1915)*** *LR 42 1A 202 the Privy Council while adopting the principle an laid down is Gopeekrist Gossain's case, that the criterion in benami cases is the source of money with which the consideration was paid, made an important qualification, in that the source of purchase money is only to be the criterion in the absence of all other relevant circumstances, Among other circumstances possession of the property has been held to be very important. Privy Council in* ***Imambandi Begum vs. Kamleshwari Pershad*** *(1886) LR 13 IA 160 held as under:*

> *"Where there are benami transactions and the question is who is the real owner, the actual possession or receipt of rents of the property is most important"*

18. In the case of ***Ram Narain vs. Mohammad Hadi*** (1898) LR 26 IA 38 the Privy Council laid stress on the factum of possession of the property and the collection of rents. Incidentally, it may be mentioned that in a disputed case of benami, custody of the documents is a relevant factor to be considered:

19. The Supreme Court of India in ***Jaydayal Podar vs. Bibi Hazra*** (1974) 2 SCR 90 had summed up the principles governing determination of benami transaction to which I have respectful approval, in the following words:

> *"It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is, that a deed is a solemn document prepared and executed after considerable deliberation and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances; (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour, (4) the position of the*

> *parties and the relationship, if any between, the claimant and the alleged benamder, (5) the custody of the title deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale."*

20. It appears from the record that the father of the plaintiff; Naybullah Khan took settlement of the suit land in favour of the plaintiff-petitioners in 18 Poush, 1333 B.S and S.A record was prepared in the name of the plaintiff and the plaintiff also paid rent to the Government as well as zamindar. It also appears from the record that the plaintiff's father; Naybullah Khan left this transitory world on 11.01.1974. During his life time i.e within 46 years, Naybullah Khan did not file any suit for declaration that the plaintiff was his benamder nor he raised any question as to the transaction made by him in favour of the plaintiff. S.A khatian was prepared from 1956 to 1962. At that time Naybullah was alive, but he did not raise objection as to S.A khatian. It also appears that all the original documents were produced from the custody of the plaintiff and these documents were admissible as evidence. It is true that the R.S khatian was prepared in favour the plaintiff-petitioners and the defendants jointly and as such, created cloud over the stainless title of the suit land and therefore, the plaintiff was constrained to file a suit for declaration of title and to make a negative declaration that the defendants are not the owners of the suit land. It also appears that since the plaintiff failed to pay rent to the zaminder, the zaminder started rent suit against the plaintiff for realization of the rent in the year of 1951 being Rent Suit No. 582 of 1951 and the plaintiff paid rent to the zaminder. It also appears that during R.S operation, the plaintiff filed objection against the attestation khatian or field survey (মাঠ জরিপ) operation and upon hearing the objection, which were sustained and accordingly the name of the defendants included in the attested khatian had been struck down; but eventually, in collusion with the concerned officials of survey department, the defendants got their names recorded jointly and therefore, the plaintiff was constrained to file the aforesaid suit. Though, for the sake of argument, it is taken as granted that Naybullah Khan got settlment in favour of the plaintiff but his conduct implies that he took settlement for the benefit and welfare of his son; Md. Abdul Wadud Khan.

21. P.W-2, Md. Abur Rahman was 62 years old man. He is a cultivator by profession. He also clearly stated that the plaintiff has been possessing the suit land through bargadar and he unequivocally states that he knows the suit land for 40 years. He admitted that he has no land within the contiguous land of the suit land, but his own land is nearby the suit land. He is an independent and reliable witness. His evidence amply supported the possession of the plaintiff and there is no apparent reason to disbelieve his evidence.

22. P.W-3, Md. Hurmat Ali Mollik clearly spelt out in his evidence that he has been possessing the suit land during last 30 years as the bargadar of the plaintiff.

23. D.W-2, Sheikh Md. Nazmul Haque is a man of 70 years old. In his evidence, he clearly states that he does not know who cultivates the suit land as bargadar.

24. D.W-3, Kamal Uddin Tarafdar states that the father of the defendants used to possess the suit land through bargadar. But none of the bargadars was examined. Therefore, they are not competent witnesses and their evidence does not inspire any confidence.

25. On perusal of the oral and documentary evidences, it appears that as per the Rules of preponderance of evidence, the contention of the plaintiff's possession is heavy in weight but the learned District Judge on slipshod statement held that the joint possession of the plaintiff and the defendants without sifting the documents in entirety. The original documents are lying with the plaintiff and produced from the custody of the plaintiff and those were admitted as evidence without any objection from the defendants' side. The burden of showing that the alleged transfer is banami transaction has not been discharged by the defendants' side. Undisputedly, the father of the defendants in his lifetime did not take any legal action against the transaction nor he filed any suit for declaration that the plaintiff was his benamder. Considering the surrounding circumstances, the relationship between the parties and intention and subsequent conduct of Naybullah Khan, it is as clear as daylight that 94 years ago, Naybyllah Khan took settlement of the suit land for the benefit of his eldest son *i.e* the plaintiff for the purpose of the welfare of his son which is apparent from the subsequent conduct of the Naybullah Khan that means during his lifetime *i.e* in the span of 43 years did not take any legal action challenging the legality and propriety of the settlement rent suit, S.A khatian and other acts of possession, therefore, the learned District Judge without considering the ramification of the law of banami transaction from boarder perspective illegally held that since Naybullah Khan took settlement from his on fund, therefore, the transaction was benami transaction.

26. The learned District Judge failed to appreciate that as soon as R.S record was jointly prepared in the name of the plaintiff and the defendants, the plaintiff was constrained to file the suit for declaration as the joint record of right created cloud over his title in the suit land. Therefore, it can be said that the learned District Judge without considering the materials on record and convoluted question of legal position involved in this case most illegally set aside the finding of the trial Court without assigning cogent reason and most illegally allowed the appeal and as such, the same is liable to be turned down to secure the ends of justice.

27. My penultimate conclusion is that the presumption that the settlement took in favour of the plaintiff for his benefit has not been rebutted by the defendants adducing cogent and reliable evidence. Accordingly, I find substance in the Rule and therefore, the Rule deserves to be made absolute.

28. In the result, the Rule is made absolute, however, without passing any order as to costs. The impugned judgment and decree of the Appellate Court is hereby set aside and restored those of the trial Court.

29. Let a copy of the judgment along with LCRs be transmitted to the Courts below at once.

19 SCOB [2024] HCD 172

HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Civil Revision No. 4016 of 2015

Sannyashi Mondal
.... Plaintiff-petitioner
-Versus-
Nirmol Chandra Mondol and others
....Opposite parties

Mr. Ashim Kumar Mallik, Advocate
....For the plaintiff-petitioner
Mr. Ahmed Nowshed Jamil with
Ms. Syeda Shoukat Ara, Advocates
....For the opposite-party Nos. 1-3

Heard on: 08.02.2023, 22.02.2023, 01.03.2023, 02.03.2023 and 09.03.2023.
Judgment on: 15.03.2023

Present:
Mr. Justice Md. Akhtaruzzaman

Editors' Note:
The petitioner came to the High Court Division for setting aside the compromise judgment and decree on the ground that the decree was fraudulent and illegal as the parties had not signed the compromise decree and were not aware of it. Moreover, they claimed that the engaged lawyers had not also deposed before the court regarding the terms and conditions and consent of the parties of the solenama. They had also questioned about the title of the opposite parties. The Court analyzing the evidence found that the defendant had no title or ownership over the suit land and held that though an advocate has the authority to act on behave of his clients but he should not act on implied authority except for emergency situations. The court also held that the court must inquire into and decide whether there has been a lawful compromise in terms of which the decree should be passed. Moreover, the court held that the compromise should be in writing and signed by the parties and written authority should be given to the appointed lawyers. Thus, for not following the conditions of order 23 rule 3 of Code of Civil Procedure and for not following proper procedure of law, the court made the rule absolute.

Key Words:
Solenama; Compromise Decree; Order 3 Rule 1, 4 of the Code of Civil Procedure; Order 23 Rule 3; In writing; Signed by the parties

No doubt, a pleader stands on the same footing in regard to his authority to act on behalf of his clients. There is inherent in the position of counsel an implied authority to do all that is expedient, proper and necessary for the conduct of the suit and the settlement of disputes. This power, however, must be exercised bonefide and for the benefit of his client. It is prudent and proper to consult his client and take his consent if there is time and opportunity. He should not act on implied authority except when warranted by exigency of circumstances and a signature of the party cannot be obtained without under delay. ...(Para-57)

Rule 3 of Order 23 of the Code of Civil Procedure:

After the institution of the suit, it is open to the parties to compromise, adjust, or settle it by an agreement or compromise. The general principle is that all matters that can be decided in a suit can also be settled using compromise. Rule 3 of Order 23 of the Code lays down that (i) where the court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement in writing and signed by the parties; or (ii) where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall record such agreement, compromise or satisfaction and pass a compromise decree accordingly. ...(Para-61)

The Court must satisfy itself by taking evidence or on affidavits or otherwise that the agreement is lawful:

The Court must satisfy itself about the terms of the agreement. The Court must be satisfied that the agreement is lawful and it can pass a decree by it. The Court should also consider whether such a decree can be enforced against all the parties to the compromise. A Court passing a compromise decree performs a judicial act and not a ministerial work. Therefore, the Court must satisfy itself by taking evidence or on affidavits or otherwise that the agreement is lawful. If the compromise is not lawful, an order recording the compromise can be recalled by the Court. In case of any dispute between the parties to the compromise, the Court must inquire into and decide whether there has been a lawful compromise in terms of which the decree should be passed. The Court in recording compromise should not act casually. Where it is alleged by one party that a compromise has not been entered into or is not lawful, the Court must decide that question. ...(Para 67 & 68)

Order 3 Rule 1 of the Code of Civil Procedure:

Order 3 Rule 1 of the Code of Civil Procedure provides that any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf. The proviso thereto makes it clear that the Court can, if it so desires, direct that such appearance shall be made by the party in person. ...(Para-70)

'In writing' serves as a crucial jurisprudential tenet, offering a measure of certainty and accountability in legal proceedings and contractual relationships:

In the realm of legal nomenclature, the term 'in writing' possesses a nuanced significance that denotes the requirement for a documented, tangible expression of information, typically through the medium of the written word, in order to establish the veracity and enforceability of a legal agreement, communication, or provision. This requirement is often mandated by statutes, contracts, or judicial rules, necessitating that the content in question be meticulously recorded on a durable and comprehensible medium, affording parties involved a clear and reliable record of their intentions and obligations. Consequently, 'in writing' serves as a crucial jurisprudential tenet, offering a measure of certainty and accountability in legal proceedings and contractual relationships, while adhering to the principles of transparency and due process in the administration of justice. ...(Para-72)

Mutual assent simply means that there is an agreement reached by both parties on all aspects of the contract's terms and conditions. In summary, these requirements ensure

that contracts are properly formed with clarity on obligations expected from each participant in business dealings involving procurement matters. ...(Para-75)

The compromise should be reduced in writing and signed by them. They must depose on oath before the Court supporting the terms laid down in the solenama and upon receiving the solenama the Court shall consider the deposition and scrutinize the record to find out whether the terms and conditions settled therein are fair and legal and if satisfied, would pass a decree based on the solenama. If the parties authorized their engaged lawyers to compromise the suit or appeal, in that case, written authority should be given by the respective parties to their appointed lawyers. In that case, the lawyers are empowered to file solenama on behalf of their clients. The statements of the lawyers should be recorded on oath by the Court concerned and it must be read over and explained to them and accepted by the lawyer to be correct. Then the Court accepts the same upon observing the legal formalities. ...(Para-77)

JUDGMENT

Md. Akhtaruzzaman, J:

1. This Rule under Section 115(1) of the Code of Civil Procedure (in short, the Code) is directed against the impugned judgment and decree dated 10.11.2015 (decree signed on 17.11.2015) passed by the learned Additional District Judge, 4th Court, Khulna in Title Appeal No. 85 of 2004 allowing the appeal and reversing the judgment and decree dated 16.03.2004 (decree signed on 23.03.2004) passed by the learned Assistant Judge, Koyra, Khulna in Title Suit No. 05 of 1999.

2. Relevant facts for the disposal of the present revisional application, in short, are that the petitioner as plaintiff instituted Title Suit No. 05 of 1999 in the Court of the learned Assistant Judge, Koyra, Khulna for setting aside the compromise judgment and decree dated 31.03.1956 and 23.06.1956 respectively passed by the learned Munsif, Third Court, Khulna in Title Suit No. 73 of 1955 alleging that the decree is fraudulent, collusive, illegal, void and not binding upon the plaintiff and his predecessor. It is further stated that the disputed land appertaining to C.S. khatian No. 22 of Mouza Chak Harikati under Paikgacha Police Station at present Koyra, Khulna belonged to Baburam Mondol who died leaving behind his 4(four) sons Shyam Mondol, Shibram Mondol, Notobor Mondol and Darpan Mondol. After the demise of Darpan Mondol his property was inherited to his wife Tuni Dasi. After the death of Tuni Dasi, the land was devolved upon 3(three) brothers, namely, Shyam, Shibram and Notobor. Thereafter Notobor died leaving behind his 4(four) sons, namely, Himchand, Bhuban, Jogendra and Hajra Mondol. Jogendra died leaving behind his only son Sannyashi Mondol who subsequently died keeping his son Kinu Mondol as his legal heir. Bhuban and Himchad Mondol were killed in the year 1971. Kinu Mondol was single and died in the year 1965. In this way, the disputed property was owned by plaintiff Sannyashi Mondol and the S.A. khatian of the property was accordingly prepared in his name. On 06.12.1982 defendant Nos. 1-5 created an obstacle in cutting paddy grown by the plaintiff and disclosed the matter of the compromise decree passed in Title Suit No. 73 of 1955. The plaintiff is an illiterate person and after obtaining the certified copy of the compromise decree came to know that the said decree was obtained by the defendants by way of practicing fraud. No notice was served upon him and hence the suit.

3. Defendant No. 1(ka), 1(Ga), and 1(Gha) contested the suit by filing a joint written statement contending, amongst others, that the land appertaining to C.S. Khatian No. 22

belonged to Baburam Mondol who died leaving behind 4(four) sons, namely, Shibram, Notobor, Shyam and Darpon. Darpon Mondal died leaving behind his wife Tuni Dasi and her name was recorded in the C.S. khatian. Notobor sold his share to Bhim Mondol by a kabala dated 12 Shrabon, 1327 B.S. and handed over possession thereto, and started living at village Chandipur within Paikgacha Police Station. Notobor died leaving behind 4(four) sons, namely, Jogendra, Hazra, Himchand, and Bhuban Mondol. Hazra died leaving behind Kinu Mondol as his heir. Jogendra died leaving behind plaintiff Sannyashi as his heir. Bhim died and his share was transferred to his brothers. Due to arrear rent the land of suit Jama was put in the auction in Execution Case No. 1911 of 1938 and Shashadhar Dhali purchased the said land in the auction who was also given possession thereto. Janjali Dasi wife of Shyam Mondol and Noni Bala wife of Shibram took settlement of the said land and got Dakhila on payment of rents. Heirs of Notobor illegally managed to record the land in R.S Khatian without knowledge of Janjali Dasi and Noni Bala. Against that wrong record of right Janjali and Noni Bala filed Title Suit No. 73 of 1955 in the Court of the Third Munsif, Khulna, and the suit was decreed on compromise on 31.03.1956 and they got mutated their names and possessed the same. Plaintiff Sannyashi sold .31 decimals of land on 15.05.1982 by a kabala Deed No. 6254 and 6255 to Sukh Bibi and Mobarok Ali Gazi and delivered possession in favour of them. Monohor is a Mohorar of Khulna Judge Court who created a forged Power of Attorney in favour of him allegedly executed by Sannyasi. Kinu Mondol sold .31 decimals of land by kabala No. 6351 dated 15.05.1982 to Sukh Bibi and gave delivery of possession. Bijon sold $.16\frac{1}{2}$ decimals of land by kabala No. 6253 dated 15.05.1982 to Mobarak Gazi. Bidhu Bhushan and Amullya sold their shares by kabala No. 3901 dated 11.04.1978 to Mobarak Ali Gazi. Janjali Dasi sold 3.30 acres of land to Purna Charan Sana by Patta dated 13.05.1951 which was taken in the benami of his son Kanai Lal Sana. S.A. record was prepared in the name of Kanai Lal alone. Thereafter Kanai Lal transferred .66 acres of land by kabala No.11667 dated 28.11.1979 in favour of Bidhu Bhusan and others and delivered possession thereto. Janjali Dasi died leaving behind 5(five) sons, namely, Bidhu, Amullya, Bimal, Avilash, and Bijoy as her heirs. Bijoy sold some land to Ajit Sarder and Vejali. Noni Bala died leaving behind 3(three) sons, namely, Ossini, Rasik, and Prasanna. Prasanna sold his share to Manik Dhali and after the demise of Manik Dhali his heirs had been possessing the land. Rasik sold his share to Avati Bala whereas Ossini sold his share to Parimol. The heirs of Noni Bala sold their shares to different persons and accordingly delivered possession in favour of them. After service of notice in Title Suit No. 73 of 1955, both the parties engaged advocates and then the Suit was correctly decreed on compromise on 31.03.1956. Monohar filed Title Suit No. 23 of 1986 which was later renumbered as Title Suit No. 05 of 1987 and it was dismissed on contest. Against the said judgment and decree, the plaintiff filed Title Appeal No. 393 of 1991 but it was eventually dismissed. Monohor also filed Title Suit No. 55 of 1992 which was also dismissed on contest. It is not correct that Kinu died long before 1965 and the Patta No. 6069 dated 13.06.1951 was correctly executed by Janjali Dasi. Bidhu Bhushan did not take settlement as a landless cultivator in settlement Case No. 218/77-78. Sannyashi filed Title Suit No. 22 of 1985 in the Court of 3rd Munsif which was dismissed. In the above circumstances, the contesting defendants prayed for the dismissal of the suit with cost.

4. To prove the case, the plaintiff examined 4(four) witnesses. The submitted documents of this side are marked as Exhibit Nos. 1-13. On the other hand, the contesting defendants also examined 4(four) witnesses and the documents adduced by this side have been marked as Exhibit Nos. ‘Ka’-‘Da’.

5. Upon consideration of the evidence on record, the learned Assistant Judge decreed the suit vide judgment and decree dated 16.03.2004.

6. Being aggrieved by and dissatisfied with the judgment and decree the defendant opposite party Nos. 1-3 preferred Title Appeal No. 85 of 2004 before the learned District Judge, Khulna, and subsequently the appeal was transferred to the Court of the learned Additional District Judge, Court No. 4, Khulna who upon taking hearings from both sides allowed the appeal reversing the judgment and decree passed by the trial Court vide the judgment and decree dated 10.11.2015.

7. Being aggrieved by the judgment and decree passed in Title Appeal No. 85 of 2004, the plaintiff preferred this civil revisional application contending, *interalia*, that Shashadhar Dhali was not an auction purchaser and subsequent transfer in favour of Janjali Dasi and Noni Bala was not lawful. It is further contended that the solenama filed in Title Suit No. 73 of 1955 was not signed by either party of the suit and the respective parties were not examined in the dock. The lower appellate Court as the last Court of facts did not discuss the evidence on record and failed to form any opinion as to possession of the suit land. In respect of not putting signatures on the solenama as well as non-examination of the executants of the same in the Court was taken into consideration by the trial Court but the appellate Court below without applying his judicial mind held that the said matter is merely a procedural mistake and thus the appellate Court below has committed an error of law occasioning failure of justice.

8. Mr. Ashim Kumar Mallik, the learned advocate appearing on behalf of the plaintiff-petitioner at first put the attention of this Court on Deed No. 2464 dated 28.07.1920 (Exhibit No. 'Ta') and submitted that the defendants filed the certified copy of this document but did not formally prove the same by calling away the respective volume of the deed from the concerned sub-registry office. He next submits that according to the claim of the defendants, Shashadhar Dhali acquired the land of suit Jama by way of auction purchase in Rent Execution Case No. 912 of 1941 but in the Sale Certificate (Exhibit No. 'Gha') the name of Shashadhar Dhali as the auction purchaser of the disputed land has not been mentioned. Mr. Mallik further contends that no notice whatsoever was served upon the plaintiff in Title Suit No. 73 of 1955 which was decreed on compromise and further that the solemnama as well as compromise decree (Exhibit No. 'Uma-1') were fraudulently obtained by the defendants. Mr. Mallik finally submits that the plaintiff has been possessing the suit land and the C.S, S.A, and R.S records of the land were correctly prepared in the names of the predecessor in interest of the plaintiff as well as in his name, whereas the defendants have failed to prove their chain of Title in obtaining the property in question, despite that the learned Additional District Judge allowed the appeal on wrong observations which is not tenable in law and, as such, the impugned judgment and decree is liable to be set aside by this Court.

9. As against these, Mr. Ahmed Nowshed Jamil along with Ms. Syeda Shoukat Ara, the learned advocates appearing on behalf of the defendant-opposite parties contend that the suit is not maintainable in its present form without challenging the judgment and decree passed in Rent Suit No. 1911 of 1938 as well as Rent Execution Case No. 912 of 1941 which are still in force. Mr. Jamil, the learned advocate further contends that the title of Sannyashi Mondal had been extinguished in the above-mentioned rent suit. Referring to the decisions reported in 61 DLR (AD) 116, 11 BLD (AD) 101, and 25 BLT 564 the learned advocate submits that without establishing his title to the suit land the plaintiff has no *locus standi* to seek relief under section 42 of the Specific Relief Act. The learned advocate further submits that the

summons of Title Suit No. 73 of 1955 was duly served upon the parties and after appearing in the suit both the parties agreed to compromise the matter and accordingly submitted a solenama which was duly accepted by the Court and the suit was then lawfully decreed. Mr. Nowshed Jamil also submits that under Rule 3 of Order 23 of the Code, there are no mandatory requirements to put the signatures of the respective parties in a deed of compromise. According to him, there is no need to examine any witnesses in support of the solenama which has been duly executed by the parties, even if law permits that being empowered the engaged lawyer can put his signature on the solenama, on behalf of his client. In support of his submission, the learned advocate put reliance on the decision reported in AIR 1926 Patna 73.

10. Heard the learned advocates of both parties and perused the judgment and decree passed by the Courts below along with the evidence and materials on records explicitly. It appears that admittedly the C.S. Khatian No. 22 (Exhibit No.8) of the suit land was prepared in the name of Baburam Mondal who died leaving behind 4(four) sons, namely, Shibram, Notobor, Shyam, and Dorpon and S.A. Khatian No. 20 was accordingly prepared in their names. Thereafter Notobor died having behind 4(four) sons, namely, Jogendra, Hazra, Himchand, and Bhuban Mondal. Then Hazra died leaving Kinu Mondal as his heir. Jogendra died leaving behind plaintiff Sannyashi Mondal as his heir. It is found from the materials on record that S.A. Khatian No.20 [Exhibit No. 8(Kha)] and R.S. Khatian No.11 [Exhibit No. 8(Ka)] were prepared in the names of the plaintiff along with his predecessors in interest. It is the definite case of the plaintiff that on 06.12.1982 the defendants for the first time disclosed the matter of compromise decree passed in Title Suit No. 73 of 1955 which, according to the plaintiff, is a fraudulent, void as well as a forged decree, neither the plaintiff nor his constituent attorney had signed on the solenama; none of either party to the suit deposed on oath before the Court supporting the contents of the Solenama.

11. On the other hand, the defendants claimed that due to arrear rent, the land of suit Jama was put in auction in Rent Case No. 1911 of 1938, and Shashadhar Dhali purchased the said land in Rent Execution Case No. 912 of 1941 and got delivery of possession through Court. Then Janjali Dasi and Noni Bala took the settlement of the said land and obtained Dakhila on payment of rent. But the heirs of Notobor illegally managed to record the land in R.S. Khatian in their names against which Janjali and Noni Bala filed Title Suit No. 73 of 1955 in the Court of the 3rd Munsif, Khulna where a compromise decree was passed on 31.03.1956. Thereafter the decree holders mutated their names and started to possess the said land. To appreciate the case of the contesting defendants, the relevant portion of the written statement submitted in Title Suit No. 73 of 1955 is reproduced below:

> "যোগেন্দ্র নাথ মন্ডল মৃত্যুবরণ করিলে সন্ন্যাসী মন্ডলকে অর্থাৎ বাদীকে রাখিয়া যান। ভীম মন্ডল অবিবাহিত অবস্থায় মৃত্যু বরণ করিলে তাহার অংশের জমি সহোদর ভ্রাতাগণ প্রাপ্ত হয়। পরে উক্ত জমার কর বাকী পড়িলে মালেক প ন্যায্য বাকী করের বাবদ তাহাদের সেরেস্তায় লিখিত উপর নটবর মন্ডল দিং নামে খুলনার তৃতীয় মুন্সেফী আদালতে ১৯৩৮ সালের ১৯১১ নং খাজনার নালিশ মামলায় ডিক্রি সিদ্ধ করত তাহা খাজনা জারির বিধান মতে ১৯৪১ সালের ৯১২ নং জারিতে দিয়া গত ১৯৪২ সালের ২৭/১ তারিখে প্রকাশ্যে নিলামে উক্ত বাড়ির মহল নিলাম খরিদ করেন। পরে উক্ত নিলাম ইং ০৪/০৩/৪২ তারিখে আদালত কর্তৃক রীতিমত বহাল হইলে তাহারা রয়নামা প্রাপ্তে তাহা জারিতে দিয়া গত ইং ২৩/০৪/৪৩ তারিখে উক্ত জমি জমার আদালত যোগে দখল প্রাপ্ত হন।
>
> পরে উক্ত জমার মালেক মন্মথ সানা দিং দরগাতী স্বত্ব খাজনায় নিলামে বিক্রয় হইলে তাহাদের উপরিস্ড় মালেক শশধর ঢালী দিং তাহা খরিদ করিয়া তাহার বয়নামা প্রাপ্ত তাহা জারিতে দিয়া উক্ত দরগাতী জমায় আদালত যোগে সেহিরতান দখল লইয়া নালিশী জমি জমায় মালিক হয়েন। উক্ত জমি জমা তৎকালীর দখলীয়কার শ্যাম মন্ডল এবং শিবরাম মন্ডল এর পুত্রগণকে উচ্ছেদ করিবার জন্য প্রস্তুতী গ্রহণ করিলে উক্ত মালেক শশধর ঢালী দিং নিকট হইতে উক্ত জমি জমায় বাবদ ষোল আনায় ৩৬ টাকা তের আনা ৬ পাই কর অবধাবনে শ্যাম মন্ডল এর স্ত্রী জঞ্জালী দাসী, বার আনা অংশে এবং শিবরাম এর স্ত্রী ননীবালা দাসী চার আনা অংশে বন্দোবস্ত গ্রহণ করেন। তাহার

প্রমাণ স্বরূপ ১৩৫৪ সালের ২৭শে পৌষ তারিখে ১৩৫৩/৫৪ সালের করাদি আদায়পূর্বক তাহার উপযুক্ত দাখিলাদী গ্রহণ করিয়া নালিশী জমি জমায় নিজেদের স্বত্ব দখল স্থির রাখেন।"

In the aforesaid premises the crux points before this Court are:-

(1) Whether Shashadhar Dhali and others were auction purchased the suit land in Rent Execution Case No. 912 of 1941 or not?
(2) Whether Janjali Dasi and Noni Bala validly take the settlement of the land from Shashadhar Dhali? and;
(3) Whether Janjali Dasi and Noni Bala had lawfully obtained a compromise decree in Title Suit No.73 of 1955 or not.

12. It is contended in the written statement filed by defendant No. 1, son of Janjali Dasi that after the auction purchase, Shashadhar Dhali obtained a Boynama (Sale Certificate) and on 23.04.1943 got possession of the land through Court. In this respect, D.W.1 Nirmal Chandra Mondal in his examination in chief gives out that:

"C.S. 22 খতিয়ানের জমি মালেক বন্দোবস্ড় দিয়েছিল। পরে বলে নালিশী ঐ জমার জমি খাজনার দায়ে নিলাম হয়েছিল। ঐ নিলাম হয়েছিল বাংলা ১৩৪৩/১৩৪৪ সালে। ঐ ৪৩/৪৪ সালে বন্দোবস্ত হয়েছিল। ঐ নিলাম কিনেছিল শশধর ঢালী। তারা বয়নামা দখলনামা পেয়েছিল। নিলাম ক্রেতারা ননী বালাকে।. আনা ও জঞ্জালী দাসীকে ।।/ আনা অংশে বন্দোবস্ত দিয়েছিল। বাংলা ১৩৪৩/১৩৪৪ সালের দিকে জঞ্জালী দাসী ও ননীবালা বন্দোবস্ড় নিয়েছিল। মালেক প্রজা সম্পর্ক হয়েছিল তাদের মধ্যে। কর খাজনা দিত। ১২ আনা জঞ্জালী দাসী ও ৪ আনা ননী বালা দখল করত। নালিশী জমি কবলা করার পর নটবরের কোন স্বত্ব দখল ছিল না কারণ পরে বন্দোবস্ড় হয়েছিল।"

13. In his evidence, D.W.1 submitted the certified copy of the suit register of Rent Case No.1911 of 1938 (Exhibit No. 'Ga') and a certified copy of Sale Certificate of Rent Execution Case No.912 of 1941.

In reply to cross-examination D.W. 1 states as under:-

"খাজনা জারী মামলার সময় আমি কোর্টে গিয়েছিলাম। ঐ মামলায় কে উকিল ছিল জানি না। ঐ মামলায় দায়িক কে কে ছিল জানি না। কার কার জমি নিলাম হয়েছে জানি না। ঐ নিলামে শ্যাম মন্ডলের কোন জমি নিলাম হয়নি একথা সত্য। ১৯১১/৩৮ নং খাজনা মামলা, ৯১২/৪১ নং জারী মামলা ও ২৭/০১/৪২ তারিখের নিলাম তঞ্চকী, যোগাযোগী, বেআইনী অকার্যকর।... ... ... জঞ্জালী দাসী ও ননী বালা ডিক্রিদার। নিলাম খরিদ করেছিল শশধর ঢালী। ঐ শশধর ঢালীকে আমি দেখিনি। শশধর ঢালী কোথায় নিলাম খরিদ করে তা দেখিনি। ... ... ঐ খতিয়ানের জমিতে কে খাজনা দিত আর কে দিত না সে সম্পর্কে আমার বাস্ড়ব জ্ঞান আছে। জঞ্জালী ও ননী বালা খাজনা দিত। জঞ্জালী ও ননী বালাকে আমি দেখেছি। জঞ্জালী ও ননী বালাকে ইং ১৯৫৩ সালের পৌষ মাসে বন্দোবস্ত দিয়েছিল শশধর। বন্দোবস্ড় দেওয়ার সময় আমি জানি না। জঞ্জালী দাসী ও ননী বালা শশধরকে খাজনা দিত কিনা জানি না, তবে চেক দাখিল আছে এইটুকু জানি।"

[emphasis added]

14. From the evidence of D.W. 1 it appears that on 28.02.2004 he testified himself before the Court and on that day he introduced himself as a man of 50 years old and during the cross-examination he claimed that at the time of auction sale, he was present in the Court. From the written statement it is seen that Rent Case No. 1911 was filed in 1938 and the Rent Execution Case No. 912 was started in the year 1941 and Shashadhar Dhali purchased the auction on 27.01.1942. If D.W.1 claimed that on 28.02.2004 (the date of making deposition before the Court) he was a man of 50 years old, then how on 27.01.1942 he was present in the Court to see the auction proceeding? In my view, at the relevant time, he was not at all born. In this situation, I am of the view that D.W.1 tells a lie regarding his presence before the Court on 27.01.1942 when the rent execution case proceeded.

15. The contesting defendant claimed that after completing the formalities of the auction, the sale was confirmed on 04.03.1942 and the Court issued the Sale Certificate and thereafter auction purchaser Shashadhar Dhali got possession of the said land on 23.04.1943.

16. Exhibit No. 'Ga' is the certified copy of the suit register of Rent Case No.1911 of 1938 and Exhibit No. 'Kha' is the certified copy of the Sale Certificate issued in Rent Execution Case No. 912 of 1941. But on perusal of these 2(two) documents, it is not found that Shahadhar Dhali was the auction purchaser of the suit land. During the hearing, the learned advocate of the defendant-opposite party put the attention of this Court to Exhibit No.5 and argued that the name of auction purchaser Shashadhar Dhali is found on this document which was vehemently opposed by the learned advocate of the plaintiff-petitioner.

17. On perusal of Exhibit No.5, it is evident that though it is a sale certificate it does not attract the case in hand as well as the execution case mentioned by the defendant-opposite partitas in their written statement. Rather this is a Sale Certificate of Rent Case No.223 of 1946. So, on going through Exhibit No.5 as well as Exhibit Nos. 'Ga' and 'Gha' I am of the view that Shashadhar Dhali was not at all the auction purchaser of the suit land under Rent Execution Case No. 912 of 1941.

18. It has been observed from the deposition of D.W. 1 that this witness in his evidence has failed to prove the existence of the rent case and rent execution case as well as the matter of auction purchase by Shashadhar Dhali. Other D.Ws also do not corroborate the evidence of D.W.1 regarding the auction purchase of Shashadhar Dhali. In respect of auction purchase made by Shashadhar Dhali, in his evidence D.W.2 Bipin Bihari Sarker divulges, "নালিশী জমায় ৪২ বিঘা জমি। ঐ জমি ২০/৫০ বছর আগে নিলাম হয়েছিল।" So from the evidence of D.W.2 it is clear that he has no definite knowledge about the auction purchase and it further appears from his evidence that he could not say who participated in the auction sale.

19. Regarding acquiring the ownership of Shashadhar Dhali the learned Assistant Judge in his judgment dated 16.03.2004 has observed:

> "বিবাদীপক্ষ দাবী করিয়াছে যে, ১৯১১/৩৮ নং খাজনা মামলার ডিক্রির ভিত্তিতে ৯১২/৪১ নং খাজনা জারী মামলায় নটবর দিং এর জমি নিলাম হয় এবং শশধর ঢালী দিং নিলাম খরিদ করে। বিবাদীপক্ষ হইতে এই খাজনা জারী মামলার স্যুট রেজিষ্ট্রারের জাবেদা নকল ও এই খাজনা জারী মামলায় নিলামের বয়নামার জাবেদা নকল দাখিল করা হইয়াছে। **বয়নামাতে নিলাম ক্রেতার নাম শশধর নয়।"** (emphasis added)

20. The contesting defendant-opposite parties in their written statement more specifically claimed that Janjali Dasi and Noni Bala Dasi took settlement of the land from Shashadhar Dhali upon paying rent to him and accordingly obtained Dakhila dated 27 Poush 1354 B.S. and possessed the same lawfully. But while testifying before the Court, D.W.1 Nirmal Chandra Mondal in his Examination-in-chief more clearly stated: **"বাংলা ১৩৪৩/৪৪ সালের দিকে জঞ্জালী দাসী ও ননী বালা বন্দোবস্ত নিয়েছিল।"**

21. This witness was cross-examined by the plaintiff and in his cross-examination D.W.1 gives out that:

> "জঞ্জালী ও ননী বালাকে ইং ১৯৫৩ সালের পৌষ মাসে বন্দোবস্ত দিয়েছিল শশীধর। বন্দোবস্ত দেওয়ার সময় আমি জানি না। জঞ্জালী দাসী ও ননী বালা শশীধরকে খাজনা দিত কিনা জানি না, তবে চেক দাখিল আছে এইটুকু জানি।" (emphasis put)

22. From going through the averments of the written statement and the evidence of D.W.1 it appears clearly that the defendants have failed to prove the matter of auction purchased by Shashadhar Dhali and also failed to establish when Janjali and Noni Bala took settlement of land from Shashadhar Dhali. Moreover, the contesting defendant-opposite parties had failed to submit any documents of settlement in the names of Janjali and Noni Bala obtained from Shashadhar Dhali.

23. In this respect, the learned Assistant Judge has observed:

> "নটবরের পুত্র যোগেন্দ্র মারা গেলে পুত্র সন্ন্যাসী একমাত্র ওয়ারিশ থাকার কথা উভয়পক্ষ কর্তৃক স্বীকৃত। নিলাম ক্রেতা বা কথিত শশধরের নিকট থেকে ননীবালা ও জঞ্জালী দাসীর বন্দোবস্ত নেওয়ার কথা বিবাদীপক্ষ দাবী করলেও কোন বন্দোবস্তের কাগজ আদালতে দাখিল করেনি। জঞ্জালী দাসী দিং মালেক বরাবর কোন খাজনা আদায় দিয়ে মালেক প্রজা সম্পর্ক সৃষ্টি হওয়া বিবাদী পক্ষ প্রমাণ করেনি।"

24. From the above discussion it is seen that the contesting defendants had failed to prove the acquisition of ownership of Shashadhar Dhali as well as the subsequent title acquired by Janjali and Noni Bala by adducing oral and documentary evidence and, as such, the trial Court has taken the correct view on the disputed matter. But without taking into consideration the evidence as well as materials on record, the appellate Court below allowed the appeal, and in deciding Title Appeal No.85 of 2004 the learned Additional District Judge has observed:

> "বিবাদী দাবী করেন যে, নালিশী জোতের ভূমি বাবদ উপরস্থ মালিক নটবর মন্ডল গং বিরুদ্ধে খাজনা বাকী মামলা দায়ের করিয়াছিলেন এবং ডিক্রি জারী মামলা দায়ের করিয়া নীলাম বিক্রয় করিয়াছেন। বাদীপক্ষের দাখিলী প্রদর্শনী-খ(৬) চিহ্নিত খাজনা জারী মামলার স্যুট রেজিষ্ট্রারের জাবেদা নকল এবং প্রদর্শনী-খ(৫) চিহ্নিত নীলামের বয়নামার জাবেদা নকল পর্যালোচনায় দেখা যায় যে, সি,এস ২২নং খতিয়ানের সাকুল্য ১৩.৯০ একর ভূমি বাবদ খাজনা মামলায় ডিক্রি হয় এবং শশধর ঢালী নীলাম খরিদ্দার হন। বিজ্ঞ নিম্ন আদালত তর্কিত রায়ে বয়নামাতে নিলাম ক্রেতার নাম শশধর নয় মর্মে উল্লেখ করিলেও কে নিলাম ক্রেতা তাহা উল্লেখ করেন নাই। কাজেই বিজ্ঞ নিম্ন আদালত এই বিষয়ে ভুল পর্যবেক্ষণ করিয়াছেন। উপরোক্ত খাজনা মোকদ্দমা, খাজনা জারী মোকদ্দমার মাধ্যমে নিলাম বিক্রয় এবং নিলাম ক্রেতাকে আদালতযোগে দখল প্রদানযোগে বয়নামার মাধ্যমে ইহাই প্রতিষ্ঠিত হয় যে, সি.এস. রেকর্ডীয় মালিকগণের তর্কিত জোতে স্বত্বের অবসান ঘটিয়াছে।"

25. In my view, the observations made by the appellate Court below on this point are not proper and correct.

26. The contesting defendants though claimed that Jonjali Dasi and Noni Bala obtained the land by way of settlement from Shashadhar Dhali but they have failed to produce any documents to prove their chain of title in the suit land. S.A. and R.S khatians were not prepared in their names which gives indications that the suit land is not being possessed by them.

27. The defendant in their written statement also contends that the land appertaining to C.S. Khatian No. 22 measuring 13.90 acres of land belonged to Shibram, Notobar, Shyam Mondal, and Tuni Dasi with their equal shares. Among them, Notobor Mondal sold his share to Vim Mondal on 12 Shrabon 1327 B.S to realize his debts by dint of a kabala deed and handed over possession thereto.

28. In this respect, D.W.1 in his examination-in-chief states that Notobar sold his share to Vim Mondal in 1327 B.S. But while he was cross-examined by the plaintiff, this witness narrates that:

"১৩২৭ সালে আমার জন্ম হয়েছিল কিনা স্মরণ নাই। আমার কোন সালে জন্ম স্মরণ নাই। ১৯২৭ সালে ভীম মন্ডল ও নটবরের সাথে কি কথাবার্তা হয়েছিল তা বলিতে পারি না। . . . ভীম ঐ জমি দখল করেছিল কিনা তা আমি নিজে দেখিনি।"

29. During the examination, D.W.1 submitted the certified copy of deed No. 2464 dated 28.07.1920 (Exhibit No. 'Ta'). On perusal of this document, it appears that it is a certified copy of the said deed. The defendant did not file the original copy of the deed. The defendants did not call for the respective volume of the above-mentioned deed from the relevant Sub-registry Office to prove the certified copy as Exhibit No. Ta. Corresponding Bangla date *i.e.* 12 Shrabon, 1327 B.S. was not written in this deed. Under the settled principle of law, there is no scope to take into consideration of a certified copy of a deed without formally proving the same by calling upon the volume of the deed from the respective Sub-registry Office. The learned trial Court did not consider this deed as genuine and observed:-

"বিবাদীপক্ষ দাবী করিয়াছে যে, নটবর তার অংশের জমি ১৩২৭ সালে ১২ই শ্রাবণ তারিখের কবলা মূলে ভীম মন্ডলের নিকট বিক্রয় করে। বিবাদীপক্ষ হইতে ভীম মন্ডলের নামীয় ২৮/০৭/১৯২০ তারিখের ২৪৬৪ নং কবলার জাবেদা নকল দাখিল করিয়াছে। এই দলিল নালিশী জমির বলিয়া প্রমাণিত নয়।"

30. But on misreading as well as misconceiving the evidence on record and ignoring the relevant provisions of the Evidence Act the learned Additional District Judge, Khulna has misconstrued Exhibit No. 'Ta' and thus came to an erroneous decision observing as under:-

"বিবাদীপক্ষের দাখিলী ২৮/০৭/১৯২০ ইং তারিখের ২৪৬৪ নং দলিল (প্রদর্শনী-ট) দৃষ্টে দেখা যায় যে, নটবর মন্ডল তাহার হিস্যা প্রাপ্ত ভূমি হইতে ৫ বিঘা ১৮ কাঠা ৪ ছটাক ১০ গন্ডা ভূমি ভীম মন্ডল বরাবর হস্তান্তর করিয়াছেন। বিজ্ঞ নিম্ন আদালত উক্ত দলিলমূলে হস্তান্তরিত ভূমি নালিশী ভূমি প্রমাণিত নয় মর্মে উল্লেখ করিয়াছেন। কিন্তু কোন কারণ ব্যাখ্যা করেন নাই। পর্যালোচনায় দেখা যায় যে, দলিলে উল্লেখিত থানা, মৌজা সঠিক আছে। নটবর পৈত্রিক ভূমি ব্যতিত উক্ত মৌজায় অন্য কোন ভূমি অর্জন করিয়াছেন বলিয়া প্রমাণ নাই। ফলে অত্র আপীল আদালত মনে করেন যে, নটবর নালিশী জোতের ভূমি হস্তান্তর করিয়াছেন।"

31. Admittedly, the disputed 13.90 acres of land originally belonged to the predecessor in the interest of plaintiff Sannyashi Mondol and the C.S., S.A, and R.S. khatians of the land in question were correctly prepared in their names.

32. The plaintiff in his plaint stated that he has been peacefully possessing the land but while on 06.12.1982 he went to cut paddy from the disputed land then defendant Nos. 1-5 restrained him from cutting the crops and subsequently disclosed that they had obtained a compromise decree in Title Suit No. 73 of 1955. As an illiterate villager, he became surprised and thereafter with the help of others was able to obtain the certified copy of the judgment and decree of the above-mentioned suit on 23.06.1983 and then came to know that Jonjali Dasi and Noni Bala obtained the collusive, fraudulent and a forged compromise decree in the said title suit where no notice was served upon him and, as such, filed the above-mentioned suit praying for setting aside the compromise decree passed in Title Suit No. 73 of 1955.

33. Monohor Chandra Roy, the constituent attorney of the plaintiff Sannyashi Mondal deposed as P.W.1 in the case in hand, and in his evidence, this witness divulges that the suit land was never been auctioned sold. The alleged proceeding was false, fraudulent, collusive, and paper transaction only. The auction purchaser did not get possession of the said land. P.W.1 further says that Jonjali Dasi and Noni Bala did not obtain settlement of the land. The matter of taking settlement by Jonjali Dasi and Noni Bala is false.

34. In reply to the cross-examination done by the defendants, P.W.1 states that the matter of the auction purchase by Shashadhar Dhali is false. This witness denied the defence suggestion that Jonjali Dasi and Noni Bala obtained settlement of the land from Shahadhar Dhali. P.W.1 further denied the defence suggestion that the summons of Title Suit No. 73 of 1955 were duly served upon the plaintiff.

35. In his evidence, P.W.2 Horendro Nath Roy @ Mondal gives out that the suit land is being possessed by the plaintiff. The defendant Nos.1-5 put an obstacle on 06.12.1982 while the plaintiff Sannyashi Mondal went for cutting paddy from the suit land and at the same time they (defendants) disclosed the matter of judgment and decree passed in Title Suit No.73 of 1955. In his evidence this witness further states:

> "০৬/১২/৮২ তারিখের পূর্বে দেঃ ৭৩/৫৫ নং মামলা সম্পর্কে কখনো শুনিনি। ঐ মামলার নোটিশ জারী হয়েছিল কিনা তা বাপ-দাদার কাছ থেকে শুনিনি। খাজনা মামলার কথাও কোন দিন শুনিনি। নিলাম হওয়ার কথা বা আদালত মাধ্যমে দখল দেওয়ার কথা জানি না।"

36. P.W.2 was cross-examined by the defendants and in his cross-examination, this witness more clearly says that plaintiff Sannyashi Mondal has been staying in the locality even after 06/12/1982. This witness denied the defence suggestions that defendant Nos.1-5 did not put constraint on the plaintiff in cutting paddy on 06.12.1982 or that they did not disclose the matter of the disputed decree on the same day.

37. In his testimony, P.W.3 Tajendro Nath Dhali @ Bholanath states that the suit land has been possessed by the plaintiff.

38. In reply to cross-examination, this witness says that 3/4 years ago he saw Sannyashi Mondal cultivating his land.

39. In his deposition P.W.4 Norendra Nath Roy states that the suit land has been possessed by Monohor.

40. In reply to cross-examination, this witness narrates that Monohor represented Sannyashi Mondal.

41. From the above, it appears that the P.Ws have corroborated the case of the plaintiff and are also able to prove the possession of the plaintiff in the suit land. The learned advocate of the contesting defendants submits that the decree under challenge was passed on 31.03.1956 but the plaintiff had instituted the present suit on 26.06.83. As such, the suit is hopelessly barred by limitation. As against this, the learned advocate of the plaintiff's side contends that the plaintiff has been able to prove that no summons was served upon the defendant in Title Suit No. 73 of 1955. The compromise decree of the said suit was fraudulently obtained by the plaintiff of that suit. Since fraud vitiates everything, then after gathering knowledge on 06.12.1982 the present plaintiff filed the suit in hand well within the limitation period prescribed by law.

42. It is found from the deposition of the P.Ws that summons of Title Suit No.73 of 1955 were not served upon the present plaintiff Sannyashi Mondal and taking into consideration the matter the learned Assistant Judge in his judgment and decree dated 16.03.2004 has observed:

> "বিবাদীপক্ষ দাবী করিয়াছে যে, খুলনার ৩য় মুনসেফী আদালতের দেঃ ৭৩/৫৫ নং মামলা জঞ্জালী দাসী দিং করলে ঐ মামলার বিবাদীদের অর্থাৎ সন্নাসী দিং এর সহিত জঞ্জালী দাসী দিং এর সোলে সুত্রে ডিক্রি হয় বলিয়া

বিবাদীপক্ষ দাবী করিয়াছে। এই ডিক্রি বাদীপক্ষ তঞ্চকী, যোগসাজসী ও বাদীর উপর বাধ্যকর নয় বলে দাবী করেছে। সন্নাসী ঐ সোলেতে স্বাক্ষর করেনি বলেও বাদীপক্ষ দাবী করেছে। দেঃ ৭৩/৫৫ নং মামলার নথি তলবান্তে অত্র মামলার নথিতে সামিল করা হইয়াছে। দেঃ ৭৩/৫৫ নং মামলার নথিতে থাকা উক্ত সোলেনামা পক্ষগণ কর্তৃক আদৌ স্বাক্ষরিত নয় বলিয়া দেখা যায়। ঐ সোলেনামার সমর্থনে কোন পক্ষ থেকেই কোন জবানবন্দী প্রদান করা হয়নি বলিয়াও দেখা যায়। ইং ১২/০৩/৫৬ তারিখে সম্পাদিত ও দাখিলী সোলেনামার ৬নং শর্ত মোতাবেক ঐ তারিখ থেকে ১০ দিনের মধ্যে রেজিষ্ট্রি কবলা বা তাহার টিকিট আদালতে দাখিল না করিলে বাদীগণের মামলা ডিসমিস হইবে মর্মে উল্লেখ দেখা যায়। এরূপ কোন কবলা বা দলিলের টিকিট উক্ত ১২/০৩/৫৬ তারিখ থেকে ১০ দিনের মধ্যে আদালতে দাখিল হয়নি বা উক্ত সময়ের মধ্যে কবলা রেজিষ্ট্রিও করা হয়নি বলিয়াও দাখিলী টিকিট দৃষ্টে দেখা যায়। সোলেনামার শর্ত মোতাবেক বাদীর ঐ মামলা ডিসমিস হওয়ার কথা। কিন্তু উল্লেখিত ১০ দিন পরেও ঐ সোলেসুত্রে দেঃ ৭৩/৫৫ নং মামলাটি ডিক্রি হয়, যাহা সোলের শর্তের বিপরীত হইতেছে। পক্ষগণ কর্তৃক স্বাক্ষরিত নয় এমন সোলেনামা দাখিল করিয়া উক্ত সোলে সূত্রে ডিক্রি করায় দেঃ ৭৩/৫৫ নং মামলাটির সোলে ডিক্রি ঐ মামলার বাদীপক্ষ প্রতারণামূলক ভাবে হাসিল করিয়াছে বলিয়া আদালত মনে করেন। সোলেনামা এই মামলার বাদীপক্ষ কর্তৃক সম্পাদিত বা স্বাক্ষরিত নয়-তা দ্বারা বাদীপক্ষকে আইন বাধ্য করা যায় না। দেঃ ৭৩/৫৫ নং মামলার বাদীপক্ষ কর্তৃক প্রতারণা প্রমাণিত হওয়ায় এবং উক্ত ডিক্রির বিষয়ে ০৬/১২/৮২ তারিখে বাদীপক্ষ জানার দাবী করায় ও সে মর্মে সাক্ষ্য প্রদান করায় অত্র মামলা তামাদি দোষে বারিত নহে মর্মে সিদ্ধান্ত গৃহীত হইল। বিবাদীপক্ষ হইতে ডিক্রি হওয়ার পরবর্তী সময়ের হস্তান্তরের দলিল দাখিল করা হইয়াছে। নালিশী মামলায় যেহেতু বাদী সন্নাসী ৩নং বিবাদী ছিল এবং সোলেনামাটিতে সন্নাসীকে যেহেতু পক্ষ দেখানো হয়েছে, তাই নালিশী জমিতে সন্নাসীর স্বত্ব দখল থাকুক বা না থাকুক ঐ সোলে ডিক্রির বিরুদ্ধে মামলা করার অধিকার সন্নাসীর আছে বলিয়া আদালত মনে করেন। প্রতারণা প্রমাণিত হওয়ায় নালিশী ডিক্রি ভয়েড বলিয়া আদালত মনে করেন। সে কারণে উক্ত ডিক্রি রদ রহিত বা বাতিল না চেয়ে বাদীর উপর বাধ্যকর নহে ঘোষণার অত্র মামলা আইনতঃ অচল নহে বলিয়া আদালত মনে করেন।"

43. Exhibit No.1 is the solenama filed in Title Suit No. 73 of 1955 whereas Exhibit No.11 is the compromise decree passed in the above suit dated 31.03.1956 where it is evident that neither the plaintiff nor the defendant put their signatures on it. Moreover, the parties to the solenama did not depose before the Court supporting the contents of the same but the learned Munsif, Third Court, Khulna accepted the solenama and eventually passed the decree on 31.03.1956. The plaintiff claimed that the compromise decree was fraudulently obtained by Jonjali Dasi and Noni Bala and, as such, the matter of the compromise decree was not disclosed by them for a long time, and on 06.12.82 the defendants for the 1st time disclosed the same while the plaintiff went to harvest paddy from his property. It is further seen from the evidence of the respective parties that the defendants have failed to prove that summons of Title Suit No. 73 of 1955 was served upon the plaintiff Sannyashi Mondal and none of the witnesses of the defendants are able to prove the matter. On the other hand, the P.Ws in their testimony state that they did not hear that summons were served upon plaintiff Sannyashi Mondal in Title Suit No. 73 of 1955.

44. On perusal of the record, it appears that in the plaint the plaintiff stated that on 06.12.1982 he went to the disputed property for cutting paddy but defendant Nos. 1-5 put resistance to it and disclosed that they got a compromise decree regarding disputed land in the name of their mother Jongali Dasi. The matter was brought to the notice of the Chairman of the local Union Parishad who requested both the parties to present before him on 15.05.1983 with relevant papers/documents in support of their respective claims. On 06.12.1982 the plaintiff for the first time came to know about the compromise decree passed in Title Suit No. 73 of 1955. Before that it was not at all within his knowledge. Then the appointed attorney of the plaintiff went to the Court on 15.06.1983 and engaged Advocate Md. Tayabur Rahman to enquired into the matter and on 23.06.1983 obtained the certified copy of the compromise decree passed in Title Suit No. 73 of 1955 and came to know about the disputed decree. The plaintiff further learnt that in the said suit a false wokalatnama had been filed on his behalf. Upon obtaining the certified copy of the disputed decree and after

engaging a lawyer plaintiff filed Title Suit No. 162 of 1983 on 16.06.1983 in the Court of the learned Munsif, Khulna. Against the said compromise decree the suit was subsequently transferred to the learned Assistant Judge, Koyra, Khulna on 25.02.1999 and it was then renumbered as Title Suit No. 5 of 1999 which was decreed on 16.03.2004

45. After going through the evidence and materials on record, it appears palpably that after getting certified copy on 23.06.1983 of the disputed compromise decree passed in Title Suit No. 73 of 1955 the plaintiff came to know about the said decree and then on 26.06.1983 filed Title Suit No. 182 of 1983 which was subsequently renumbered as Title Suit No. 5 of 1999. I have also considered the evidence of the witnesses and the exhibited documents and of the view that Title Suit No. 182 of 1983 was filed within the limitation period and as such it is not barred by limitation.

46. On going through the order passed by the learned Munsif, Third Court, Khulna dated 31.03.1956 (Exhibit No. 11) it is palpably clear that in passing the impugned judgment and decree the learned Munsif admittedly did not record the evidence of the parties to the solenama and upon hearing the learned advocate only, he accepted the solenama and passed the impugned decree. In passing the judgment and decree in the instant suit, the learned Assistant Judge, Koyra, Khulna has considered the solenama and the compromise decree passed on 31.03.1956 and thus disbelieved the same and held the opinion that the said compromise decree was obtained by practicing fraud. The relevant observations made by the learned Assistant Judge have already been quoted earlier.

47. But in reversing the judgment and decree, specifically, in respect of the compromise decree passed in Title Suit No. 73 of 1955 the learned Additional District Judge, 4th Court, Khulna has observed:-

> "বিজ্ঞ নিম্ন আদালত তর্কিত রায়ে দেওয়ানী-৭৩/৫৫ নং মোকদ্দমায় তর্কিত সোলেনামাটি প্রতারনামূলকভাবে হাসিল করা হইয়াছে মর্মে সিদ্ধান্ত গ্রহণ করিয়াছেন। উক্ত মোকদ্দমার নথির আদেশনামা পর্যালোচনায় দেখা যায় যে, মোকদ্দমাটি সোলে সূত্রে ডিক্রি হইয়াছে এবং যথারীতি ডিক্রি ড্রনআপ হইয়াছে। নথিতে রক্ষিত কথিত সোলেনামার দরখাস্তটি সামিল আছে। **একথা সঠিক যে, তাহাতে সন্নাসী মন্ডল গং কিংবা জজ্ঞালী দাসী গং এর স্বাক্ষর নাই। তবে আদেশনামায় ১৩/১২/১৯৫৫ ইং তারিখে উভয় মোকদ্দমার উভয় পক্ষ হাজির হইয়া আপোষের কথা বলিয়া সময় প্রার্থনা করিয়াছেন মর্মে দেখা যায়। ইহার পর ১৯/০১/৫৬, ১৩/০৩/৫৬, ২১/০৩/৫৬ ইং তারিখে উভয় পক্ষ হাজির হইয়া আপোষনামার জন্য সময় প্রার্থনা করিয়াছেন।**
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> দাখিলী সোলেনামার ৬নং শর্তে দরখাস্ত দাখিলের দিন হইতে ১০(দশ) দিনের মধ্যে বিবাদীপক্ষ বরাবর এক কবলা দলিল রেজিষ্ট্রির শর্ত থাকে এবং ব্যর্থতায় মোকদ্দমা ডিসমিস হইবে উল্লেখ থাকে। বিবাদীর দাখিলী প্রদর্শনী-ত চিহ্নিত দলিলের সই মহুরী নকল দৃষ্টে দেখা যায় যে, জঞ্জালী দাসী সন্নাসী মন্ডল গং বরাবর ১.২৪ একর ভূমি বাবদ কবলা দলিল ২৮/০৩/১৯৫৬ ইং তারিখ সম্পাদন ও রেজিষ্ট্রি করিয়া দিয়াছেন। ৩১/০৩/১৯৫৬ ইং তারিখের ২১ নং আদেশনামা দৃষ্টে দেখা যায় যে, পূর্বোক্ত রেজিষ্ট্রি দলিলের রশিদ আদালতে দাখিল করা হইয়াছে এবং উক্ত আদেশে উক্ত রশিদ বিবাদী অর্থাৎ সন্নাসী মন্ডল গং উঠাইয়া নিতে পারিবেন মর্মে উল্লেখ আছে। তর্কিত সোলেমানার দরখাস্তে বিজ্ঞ বিচারকের স্বাক্ষরযুক্ত ২৩/০৬/১৯৫৬ ইং তারিখে সোলেনামাটি ডিক্রির অংশ মর্মে আদেশ প্রদান করা হইয়াছে। অর্থাৎ দাখিলী সোলেনামার ৬নং শর্ত পূরণের পরই উক্ত সোলেনামাটি ডিক্রির অংশ গণ্য হইয়াছে। ফলে **তর্কিত সোলেনামায় পক্ষগণের দস্তখত না থাকিলেও কয়েকটি ধাপ পরিক্রমা পূর্বক সোলেসূত্রে চূড়ান্ত ডিক্রি হয়। সোলেনামায় পক্ষগণের দস্তখত না থাকাটি একটি পদ্ধতিগত ত্রুটি হইতে পারে। তবে যতগুলো ধাপ অতিক্রমপূর্বক সোলেসূত্রে ডিক্রি হইয়াছে তাহাতে কোন প্রতারনার আশ্রয় নেওয়ার সুযোগ কম।** বিবাদী পক্ষের দাখিলী ২৮/০৩/৫৬ ইং তারিখের ৩৭৪৮নং দলিলের সই মহুরী নকল (প্রদর্শনী-ত) হইতে ইহাই প্রমাণিত হয় যে, তর্কিত সোলেসূত্রে ডিক্রি কার্যকর হইয়াছে। (emphasis supplied)

48. From the above observations made by the learned Additional District Judge, this Court is of the view that the learned Additional District Judge in passing the impugned

judgment and decree did not consider the provisions of Order 23 Rule 3 of the Code along with the case laws pronounced by the superior courts. He has a lack of knowledge in considering a compromise decree as well as a lack of knowledge in procedural laws, especially, on the Code of Civil Procedure. It is highly dissatisfactory that being a senior member of the subordinate judiciary, the learned Additional District Judge, 4th Court, Khulna has no preliminary knowledge of the Code of Civil Procedure and if he deals with civil litigation in such a manner in that case, this Court is of the view that the litigants are not safe in his Court. In this situation, my considered view is that Mr. Nurul Alam Biplob, the learned Additional District Judge needs vigorous training on the procedural laws as well as on handling civil litigation. It is expected that the concerned authorities will take immediate steps for him based on the observations made above.

49. Mr. Ahmed Nowshed Jamil, the learned advocate of the defendant- opposite parties submits that there are no mandatory provisions of law that in every compromise the respective parties should be examined on oath before the Court and put their signatures on the solenama and the appointed advocate being the authorised representative of the respective parties are legally empowered under the Wokalatnama to act anything in favour of his client and, as such, the learned advocate has authority to put signature on the solenama and to depose before the Court accordingly. I have already mentioned earlier that Mr. Jamil has submitted a case law reported in AIR 1976 Patna 73 and submits that an advocate has the authority to compromise a suit without having any instructions from the respective party if the same seems to be bonafide in the interest of the parties.

50. In the case of ***Sourindra Nath Mitra*** v**.** ***Heramba Nath Bandopadhya****,* reported in AIR 1923 P.C. 98 it was held by their Lordships of the Judicial Committee of the Privy Council that:

> "On principle, there does not seem to be any reason for interfering with a compromise consented to by the pleader duly authorized on this behalf, unless fraud or collusion is imputed to the pleader. No such collusion or fraud has been pleaded in the petition. No doubt, ignorance of the compromise, want of instructions to the pleader, and possibly fraud practiced by the opposite party has been vaguely stated in the petition. These are, however, not sufficient to effect the compromise filed in the present case."

51. The above-mentioned *ratio* was subsequently adopted in the case of ***Laurentius Ekka*** v**.** ***Dukhi Koeri*** [AIR 1926 Patna 73].

52. In the present case at hand, the plaintiff-petitioner claimed that the compromise decree [Exhibit No. 'Uma-1'] was obtained by the defendant-opposite parties in collusion as well as by practicing fraud where none of the parties to Suit No. 73 of 1955 put their signatures on the solenama and further that neither the parties nor their engaged lawyers had deposed before the Court to prove that the terms and conditions settled by the parties in the solenama are fair and those were settled with their consent.

53. Rule 1 of Order III of the Code of Civil Procedure says:

> "Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person."

54. Rule 4, Clause (1) of that Order says:
"No pleader shall act for any person in any Court unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorised by or under a power-of-attorney to make such appointment."

55. Therefore, when an advocate so appointed under Rule 1 of Order III of the Code, he can appear, plead, and act on behalf of the client.

56. In the case of ***Govindammal*** v. ***Marimuthu Maistry and others*** [AIR 1959 Mad 7] the Madras High Court observed:

"The decisions appear to be fairly clear that even in cases where there is no express authorisation to enter into a compromise under the inherent authority impliedly given to the Vakil he has the power to enter into the compromise on behalf of his client. But in the present state of the clientele world and the position in which the Bar now finds itself and in the face of divided judicial authority and absence of statutory backing, prudence dictates that unless express power is given in the vakalat itself to enter into compromise, in accordance with the general practice obtaining, a special vakalat should be filed or the specific consent of the party to enter into the compromise should be obtained. If an endorsement is made on the plaint etc. it would be better to get the signature or the thumb impression of the party affixed thereto, making it evident that the party is aware of what is being done by the vakil on his or her behalf."

57. No doubt, a pleader stands on the same footing in regard to his authority to act on behalf of his clients. There is inherent in the position of counsel an implied authority to do all that is expedient, proper and necessary for the conduct of the suit and the settlement of disputes. This power, however, must be exercised bonefide and for the benefit of his client. It is prudent and proper to consult his client and taken his consent if there is time and opportunity. He should not act on implied authority except when warranted by exigency of circumstances and a signature of the party cannot be obtained without under delay.

58. In the case of ***United States*** v. ***Beebe*** [(1901) 180 under Section 343 (Z16)] it was held that an attorney who is clothed with no other authority than that arising from his employment in that capacity has no implied power by virtue of his general retainer to compromise and settle his client's claim or cause of action except in situations where he is confronted with an emergency and prompt action is necessary to protect the interests of the client and there is no opportunity for consultation with him. Generally, unless such an emergency exists, either precedent special authority from the client or subsequent ratification by him is essential in order that a compromise or settlement by an attorney shall be binding on his client.

59. It has been further observed in the said case that:
"Obviously, therefore, if a litigant instructs his attorney not to compromise his case, the attorney is bound by such instructions, even though he honestly believes that a compromise settlement would be to the best interest of his client. On the

> other hand, there can be no question but that an attorney may be specially authorised to enter into a compromise which will be binding on the client, though it has been held that an attorney employed to bring suit for damages or to settle by compromise is not authorised to compromise without first consulting his client, especially after suit has been started. Some cases hold that the authority of an attorney to compromise is presumed until the contrary is shown: United States v. Beebe (Z16); at least it is not to be presumed that this was done, without lawful authority, and slight evidence in such a case may be sufficient to authorise the belief that he was clothed with all the power he assumed to exercise."

60. It appears from the materials on record that the solenama filed in Title Suit No. 73 of 1955 was not at all signed by either party of the suit or they were sworn in and deposed before the Court to support the contents of the solenama. The learned Assistant Judge observed that the same was obtained fraudulently by the plaintiff of the above-mentioned suit and, as such, taking into consideration other facts and circumstances he decreed the suit. In this situation, my considered view is that the submission put forward by Mr. Ahmed Nowshed Jamil, the learned advocate of the defendant-opposite party bears no substance.

61. After the institution of the suit, it is open to the parties to compromise, adjust, or settle it by an agreement or compromise. The general principle is that all matters that can be decided in a suit can also be settled using compromise. Rule 3 of Order 23 of the Code lays down that (i) where the court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement in writing and signed by the parties; or (ii) where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall record such agreement, compromise or satisfaction and pass a compromise decree accordingly.

62. As to the power of an advocate, in the case of ***Sarath Kumar Dasi*** v. ***Amulyadhan*** [AIR 1923 PC13] the Privy Council held that it is not competent for a pleader to enter into a compromise on behalf of his client without his express authority to do so.

63. A Division Bench of the Bombay High Court in the case of ***Laxmidas Ranchhoddas*** v. ***Savitabai*** [(1955) 57 BLR 988] has discussed the position of an advocate to file a compromise petition on behalf of his client. According to the observation of the Court:

> "It is impossible for a member of the Bar to do justice to his client and to carry on his profession according to the highest standards unless he has the implied authority to do everything in the interests of his client. This authority not only consists in putting forward such arguments as he thinks proper but also in settling the client's litigation if he feels that a settlement would be in the interests of his client and it would be foolish to let the litigation proceed to a judgment. This implied authority has also been described as an actual authority of counsel or an advocate. This authority may be limited or restricted or even taken away. If a limitation is put upon the counsel's authority, his implied or actual authority disappears or is destroyed. In such a case he has only an ostensible authority as far as the other side is concerned. When the actual authority is destroyed and merely the ostensible authority remains, then although the other side did not know of the limitation put upon the authority of an advocate, the Court will not enforce the settlement when in fact the client had withdrawn or limited the authority of his advocate."

64. From the above discussion it is by now settled that without having any written or implied authority from the client, the engaged advocate is not in a position to file solenama on behalf of his/her client.

65. The role of the advocate in doing public justice has been discussed by Lord Denning M.R. in Rondel's Case [1967 1Q.B. 443] which is reproduced below:

> "A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end. Provided only that he is paid a proper fee, or in the case of a dock brief, a nominal fee. He must accept the brief, and do all he honourably can on behalf of his client. I say all he honourably can, because his duty is not only to his client. All those who practice that the Bar have from time to time been confronted with cases civil and criminal which they would have liked to refuse, but have accepted them as burdensome duty. This is the service they do to the public. Counsel has the duty and right to speak freely and independently without fear of authority, without fear of the judges and also without fear of a stab in the back from his own client. To some extent, he is a minister of justice.
>
> It is a mistake to suppose that he is the mouth piece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline.

66. In the case of ***Rondel*** v. ***Worsley*** [(1969) 1 A.C. 191] Lord Reid has made the eloquent and luminous observations in respect of the duties of an advocate while putting submission before the Court. According to him:

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court, concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict, with his client's wishes or with what his client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him."

67. The Court must satisfy itself about the terms of the agreement. The Court must be satisfied that the agreement is lawful and it can pass a decree by it. The Court should also consider whether such a decree can be enforced against all the parties to the compromise. A Court passing a compromise decree performs a judicial act and not a ministerial work. Therefore, the Court must satisfy itself by taking evidence or on affidavits or otherwise that the agreement is lawful. If the compromise is not lawful, an order recording the compromise can be recalled by the Court. In case of any dispute between the parties to the compromise, the Court must inquire into and decide whether there has been a lawful compromise in terms of which the decree should be passed.

68. The Court in recording compromise should not act casually. Where it is alleged by one party that a compromise has not been entered into or is not lawful, the Court must decide that question.

69. Mr. Ashim Kumar Mallik, the learned advocate appearing on behalf of the plaintiff-petitioner vehemently opposed the submission of the learned advocate of the defendant-opposite party and upon putting reliance in the case of ***Pushpa Devi Bhagat*** v. ***Rajinder Singh & others,*** reported in (2006) 5 SCC 566 submits that without putting signature in the solenama and without deposing before the Court by the parties to the solenama the Court has no power to accept the solenama and subsequently passed a decree and further that upon considering the deposition as well as the solenama the Court has a solemn duty to see whether the terms and conditions of the solenama appear to be fair and legal. Mr. Mallik also contends that in the impugned solenama neither the parties nor their advocates put their signatures and none of them had deposed on oath before the Court to prove that the contents of the solenama were fair and legal as well as the parties had validly settled the terms and conditions of the solenama. The learned advocate further submits that the compromise petition was filed in Title Suit No. 73 of 1955 without the knowledge of Sannyashi Mondal and without instruction to his pleader and that it was prejudicial to the plaintiff-petitioner's interest. The learned advocate of the plaintiff-petitioner contends that the words "in writing" and "signed by the parties" occurring in Rule 3 of Order 23 of the Code would contemplate drawing up a document or instrument or a compromise petition containing the terms of the settlement in writing and signed by the parties and in the instant case, there is no such instrument, document or petition in writing and signed by the parties.

70. Now let us first consider the meaning of the words 'signed by parties'. Order 3 Rule 1 of the Code of Civil Procedure provides that any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf. The proviso thereto makes it clear that the Court can, if it so desires, direct that such appearance shall be made by the party in person. Rule 4 provides that no pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment. Sub-rule (2) of Rule 4 provides that every such appointment shall be filed in Court and shall, for the purposes of sub-rule (1), be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.

71. The question whether 'signed by parties' would include signing by the pleader was considered by the Supreme Court of India in ***Byram Pestonji Gariwala*** v. ***Union Bank of India*** [1992 (1) SCC 31] with reference to Order 3 of the Code of Civil Procedure where the Court has observed:

> "30. There is no reason to assume that the legislature intended to curtail the implied authority of counsel, engaged in the thick of proceedings in court, to compromise or agree on matters relating to the parties, even if such matters exceed the subject matter of the suit. The relationship of counsel and his party or the recognized agent and his principal is a matter of contract; and with the freedom of contract generally, the legislature does not interfere except when warranted by public policy, and the legislative intent is expressly made manifest. There is no such declaration of policy or indication of intent in the present case. The legislature has not evinced any intention to change the well recognized and universally acclaimed common law tradition.
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> ... ...
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> 35. So long as the system of judicial administration in India continues unaltered, and so long as Parliament has not evinced an intention to change its basic character, there is no reason to assume that Parliament has, though not expressly, but impliedly reduced counsel's role or capacity to represent his client as effectively as in the past.
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> ... ...
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> 37. We may, however, hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement of compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted."

72. In the realm of legal nomenclature, the term 'in writing' possesses a nuanced significance that denotes the requirement for a documented, tangible expression of information, typically through the medium of the written word, in order to establish the veracity and enforceability of a legal agreement, communication, or provision. This requirement is often mandated by statutes, contracts, or judicial rules, necessitating that the content in question be meticulously recorded on a durable and comprehensible medium, affording parties involved a clear and reliable record of their intentions and obligations. Consequently, 'in writing' serves as a crucial jurisprudential tenet, offering a measure of certainty and accountability in legal proceedings and contractual relationships, while adhering to the principles of transparency and due process in the administration of justice.

73. In the case in hand, the respective statements of the plaintiff's advocate and the defendant's advocate of Title Suit No. 73 of 1955 were not recorded in any manner by the trial Court in regard in the terms of the compromise and accordingly, it was not possible to read it over to them and the learned Munsif, 3rd Court, Khulna was also not in a position to lawfully accepted the solenama but what happened as we have observed that without

fulfilling the conditions laid down in Order 23 Rule 3 of the Code, the learned Munsif had illegally passed the impugned compromise decree.

74. In the case of ***Gurpect Singh*** v. ***Chatur Bhuj Goel*** [1988 (1) SCC 270], the Supreme Court of India has observed as under:

> "According to the grammatical construction, the word 'or' makes the two conditions disjunctive. At first blush, the argument of the learned counsel appears to be plausible but that is of no avail. In our opinion, the present case clearly falls within the first part and not the second. We find no justification to confine the applicability of the first part of order XXIII, r. 3 of the Code to a compromise effected out of Court. Under the rule prior to the amendment, the agreement com promising the suit could be written or oral and necessarily the Court had to enquire whether or not such compromise had been effected. It was open to the Court to decide the matter by taking evidence in the usual way or upon affidavits. The whole object of the amendment by adding the words 'in writing and signed by the parties' is to prevent false and frivolous pleas that a suit had been adjusted wholly or in part by any lawful agreement or compromise, with a view to protract or delay the proceedings in the suit.
>
> Under r. 3 as it now stands, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them. To constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. When the parties enter into a compromise during the hearing of a suit or appeal, there is no reason why the requirement that the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with. The Court must therefore insist upon the parties to reduce the terms into writing."

75. Mutual assent simply means that there is an agreement reached by both parties on all aspects of the contract's terms and conditions. In summary, these requirements ensure that contracts are properly formed with clarity on obligations expected from each participant in business dealings involving procurement matters.

76. A compromise decree, in the realm of legal proceedings, represents a judicially sanctioned agreement between parties involved in a legal dispute. Such decrees often emerge as an amicable resolution to protracted litigation, allowing both parties to find common ground and reach a settlement. These decrees are typically the result of rigorous negotiations and are formalized with the approval of a court, ensuring that the terms and conditions are legally binding. The aim is to facilitate a fair and equitable solution that serves the best interests of all parties involved while avoiding the uncertainty and expense of a protracted legal battle. A compromise decree, when executed properly, can provide a sense of closure to the parties and help them move forward with their lives or business endeavors.

77. Therefore, considering the submission of the learned advocate of the respective parties and the case laws cited by them, I am of the view that parties have every right to file solenama to adjust the suit or appeal. The compromise should be reduced in writing and

signed by them. They must depose on oath before the Court supporting the terms laid down in the solenama and upon receiving the solenama the Court shall consider the deposition and scrutinize the record to find out whether the terms and conditions settled therein are fair and legal and if satisfied, would pass a decree based on the solenama. If the parties authorized their engaged lawyers to compromise the suit or appeal, in that case, written authority should be given by the respective parties to their appointed lawyers. In that case, the lawyers are empowered to file solenama on behalf of their clients. The statements of the lawyers should be recorded on oath by the Court concerned and it must be read over and explained to them and accepted by the lawyer to be correct. Then the Court accepts the same upon observing the legal formalities. But on going through the solenama [Exhibit No.1) as well as the compromise decree (Exhibit No. 1/1) passed in Title Suit No.73 of 1955, it appears that none of the conditions laid down in Order 23 Rule 3 of the Code had been followed by the learned Munsif, 3rd Court, Khulna. In the above circumstances, I am of the view that the compromise decree passed in Title Suit No.73 of 1955 is not a decree at all in the eye of the law. The learned Assistant Judge, Koyra, Khulna on meticulous findings on the evidence and materials on record has correctly decreed the suit but falling into error of law as well as facts the learned Additional District Judge, 4th Court, Khulna vide impugned judgment and decree dated 10.11.2015 allowed the appeal setting aside the judgment and decree passed by the learned Assistant Judge, Khulna in Title Suit No. 5 of 1999.

78. From the above discussion and taking into consideration of the facts and circumstances of the case, this Court is of the view that the submission put forward by the learned advocate of the defendant-opposite party is not sustainable in law and, as such, the impugned judgment and decree dated 10.11.15 passed by the learned Additional District Judge, 4th Court, Khulna is liable to be interferable by this Court.

79. In the result, the Rule is made absolute without any order as to costs.

80. The impugned judgment and decree dated 10.11.2015 (decree signed on 17.11.2015) passed by the learned Additional District Judge, 4th Court, Khulna in Title Appeal No. 85 of 2004 is set-aside. The judgment and decree dated 16.03.2004 (decree signed on 23.03.2004) passed by the learned Assistant Judge, Koyra, Khulna in Title Suit No. 05 of 1999 is hereby upheld.

81. The order of *stay* granted earlier by this Court on 29.11.2015 is re-called and vacated.

82. The Registrar General, Supreme Court of Bangladesh is directed to send a copy of this judgment to Mr. Nurul Alam Biplob, Additional District Judge, 4th Court, Khulna whereby he is posted now for the reason that he can learn the law.

83. Send down the L.C. Records along with a copy of this judgment to the Court concerned at once.